Testimony of Fred Smith
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Before the U.S. Senate Foreign Relations Committee
On the
Law of the Sea Treaty
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Thank you, Chairman Biden and members of this Committee for your invitation to testify on the Law of the Sea Treaty. I am Fred Smith and head the Competitive Enterprise Institute (CEI), a free-market public policy group that has focused for the last two decades plus on regulatory issues. It is to LOST's regulatory litigation features -- to intellectually foolish, politically irresponsible and morally wrong that I speak today. I ask that my written testimony along with two recent policy papers by Doug Bandow, part of the Reagan team that rejected this treaty long ago, [*The Law of the Sea Treaty: Impeding American Entrepreneurship and Investment by Doug Bandow, September 2007*] and Jeremy Rabkin, now a professor at George Mason University and scholar at the American Enterprise Institute – be included in the record [*The Law of the Sea Treaty: A Bad Deal for America by Jeremy Rabkin June 2006*].

On this Committee, you'll heard much of how LOST was indeed an initially poorly crafted document, but that over the last three decades, its *been fixed*, that elements of the treaty remain troublesome but *it's the best we can get,* that we must accept the bad to get the good, that the risks are acceptable. ***These points are all wrong – that they have been given any credence reflects merely the fact that repeat a lie often enough and it gains acceptance***. The Senate of the United States is the world's greatest deliberative body but this hasty effort to rush through a fatally flawed treaty does you no credit.

You've been assured by some venerable scholars who've sought for decades to put lipstick on this pig – and you seem too eager to accept their reassurances. One should never be surprised that people who've worked on a project for much of their lives wish it to succeed. But, this treaty has *not been fixed – indeed, given the archaic collectivist premises that remain at its core – it cannot be fixed.* We should give its proponents our thanks for doing their best but you would be irresponsible to allow their *Bridge on the River Kwai* shortcoming to lead us into ratifying this destructive treaty.

The Treaty is a weird mixture of the codification of some long established and widely accepted navigational rules for the oceans with an outdated and counter-productive collectivist scheme to make the oceans the funding source for an UN-organized wealth redistribution plan. The Treaty would create a socialist entity to develop the oceans viewed as "the common heritage of mankind." The entity (the "Authority" and other bizarre language no longer heard even in North Korea) would gain its resources and knowledge by forcing private firms – likely US – to "share" with "all mankind." That "what's yours is mine" aspect of LOST will limit mankind's ability ever to benefit from the potential resources of this vast area.

This redistributionist, collectivist language, I've suggested, is archaic and this is not surprising. The treaty was drafted during the height of the G-77 – when many saw world poverty as the result of the west's wealth. People in Africa, Asia, and South America were poor because we were rich; make us poorer and they will become richer! In that era, only foreign aid and other wealth redistribution schemes were viewed as offering any hope of alleviating world poverty. LOST was typical of the flawed policy prescriptions of that era. But the world has learned much over the last decades. Most now recognize that Foreign Aid, while occasionally useful in emergency relief situations, can too often stifle the entrepreneurial forces and political reforms which offer the only hope for sustainable economic growth. The work of Lord Peter Bauer, recipient of the Cato Institute Friedman Prize, showed that too often foreign aid is simply the transfer of wealth from the poor in the rich world to the rich in the poor world, that such wealth transfer programs hurt, rather than helped the poor. LOST was crafted in this era and it shows. Even the World Bank and its other international institutions increasingly recognize that the key to addressing poverty is for the affected nation states to move toward economic freedom, private property, a predictable rule of law, a reduction in domestic violence. To enshrine collective political management of the oceans does nothing to advance this cause.

This treaty would relegate two-thirds of the world's potential resources to perpetual status as common property resources—"the common heritage of all mankind." But as Garrett Hardin noted long ago in his article, *The Tragedy of the Commons,* policies that relegate resources to be managed by all, are all too likely to have tragic results. Some nation states – the United States, the United Kingdom and Norway, even China – have made dramatic steps in moving land-based technology down to the sea. Other nations like New Zealand and Iceland have done much to extend property rights into the fisheries area. These pioneering efforts to extend the institutions that have made so much of the earth's land productive and beneficial to mankind to this most complex and costly world have been encouraged by the hope that they will profit, that the knowledge they acquire will be theirs to make future steps more efficient, that any profits they make will be retained. These positive trends will be weakened or destroyed if LOST is ratified.

Note that the United States has long recognized that ownership of the surface can – and in fact should sometimes – be severed from ownership of subsurface resources. That creative extension and adaptation of traditional private property encouraged exploration and development of the resources beneath the earth's surface. This creative extension of property rights made possible the rapid development of oil, coal and other mineral resources in the US.

An analogous separation of the ocean resource into navigational rights and ocean floor rights poses no serious difficulties. This would allow us to achieve the useful, if redundant, gains promised in the navigational area, without hindering the creative and ongoing institutional innovations. Innovation is rare when resources are relegated to "common property" status. Indeed, as the materials supplied to this Committee make clear, the development goals of this treaty could far more effectively be advanced – without the risks of over-regulation and over-litigation – by simply creating a claims

office to allow ocean floor rights to be catalogued and titled. Private property would do far more than UN bureaucracies to encourage the development of the ocean's resources in mankind's interest.

The Law of the Sea Treaty mandates global redistribution of resources and technology, creates a monopolistic public mining entity, and restricts competition—just the sort of statist panaceas that were discredited by the collapse of Soviet communism and that have been largely abandoned everywhere.

Far from being a market-oriented system, as claimed by some conservatives who have been co-opted by treaty enthusiasts on this issue, the treaty will forever discourage widespread exploration and production.

The treaty's purported benefits are illusory; the treaty's features would impose heavy costs on America and the world.

LOST is a heavily regulatory bill, creating a body charged with protecting the seas. But, everything eventually flows into the seas. Thus, the UN gains the power to look upstream and into the skies to ensure that everything that has – or might have – impact on the seas be scrutinized and disciplined. The unintended consequences of this regulatory overreach cannot be under-estimated; its potential for damage is massive. This Committee has not done "due diligence" on this topic. And, for the complacent, note that the proponents of this bill – environmental alarmists and legal enthusiasts – are adept at converting hortatory language into legal prohibitions. Did anyone expect the Endangered Species Act to become a national land use planning act? Did anyone expect Superfund to become one of the most costly green pork barrel measures in history or that the Clean Water Act would compel the Corps of Engineers to ban development throughout any area that might have been or might become at some time a "wetland?"

The treaty's regulatory approach would be guided by the precautionary principle, the serious application of which would halt economic development, since it is impossible to prove a negative—that a new process or technology involves no risk.

Indeed, it is the precautionary principle that has burdened Europe with a regulatory yoke only a bureaucrat could love. As *The Economist* noted last week:

> The European model rests more on the "precautionary principle", which underpins most environmental and health directives. This calls for pre-emptive action if scientists spot a credible hazard, even before the level of risk can be measured. Such a principle sparks many transatlantic disputes: over genetically modified organisms or climate change, for example…
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> Some Eurocrats suggest that the philosophical gap reflects the American constitutional tradition that everything is allowed unless it is forbidden, against the Napoleonic tradition codifying what the state allows and banning everything else.

Regulatory Bonapartism may appeal to some Europeans, but it is not a model to which America should ever subject itself.

The U.N.'s Division for Ocean Affairs and the Law of the Sea boldly announced that the LOST "is not…a static instrument, but rather a dynamic and evolving body of law that must be vigorously safeguarded and its implementation aggressively advanced."

The proponents of this bill know full well that it will empower their special interests to gain massive power over the economic hopes of peoples throughout the world. Development is unlikely under the clumsy management of the UN bureaucracy. Moreover, the treaty by empowering environmental elites to raise significant new legal objections against agriculture, manufacturing, transportation and even technology will gain new abilities to stop or slow economic development. Ratifying LOST would be to open not one but a myriad of Pandora's boxes – exacerbating the problems of an already overly litigious society, an America that already finds it difficult to site and build anything. We do not build a better future by empowering the forces of stasis. The NIMBY problems that America now faces may fade as LOST moves us toward NOPE policies.

The problems of LOST have not been fixed. And, indeed, proponents do not really believe that they have been. They simply argue that "this is the best that we can do."(Indeed, the State Department acknowledges that the 1994 "Agreement retains the institutional outlines of Part XI"—that is, only some of the details have changed. The structure and underlying principles remain the same.) Thus, to adopt this flawed and largely unchanged treaty would be foolish. It was foolish when Reagan rejected the treaty almost twenty five years ago, a time when Russia was still a super-power, when the world was convinced that collectivist development was superior to free markets, when the West was viewed as a dying dream. It is vastly more foolish today when even the most dedicated Marxist sees private property and the market as the path to prosperity. We do the world no favor by allowing this textual and legal dinosaur to stand in the path of mankind's future.

Some treaty advocates argue that it would help ensure passage for American shipping. This point is moot. Irrespective of any treaty text, only the U.S. Navy can guarantee free ocean transit in situations where nations have both the incentive and ability to interfere. That remains true under the U.S.'s status as a non-party to the treaty. Were we to ratify LOST, the Law of the Sea Tribunal might declare such action unlawful.

As noted, the treaty's best provisions— those covering navigation—largely codify existing customary international law. Its worst provisions—those creating the seabed regulatory regime—would discourage future minerals production as well as punish entrepreneurship in related fields involving technology, software, and intellectual property that have an ocean application. Since technology often has multiple uses, it would also slow innovation generally.

In addition to the Tribunal's likelihood to be used against U.S. interests, the primary argument against ratification is the treaty's bizarre regulatory regime governing seabed mining of deep ocean resources like the minerals cobalt and manganese. This system is unique in its Byzantine complexity.

Some modest improvements made in 1994 have been made, but its collectivist biases remain dominant. The treaty is a disastrous throwback to the era when socialism was seen as the wave of the future. Ratifying it would be even more foolish today, in a world of exploding economic opportunities and technological possibilities.

The Law of the Sea Treaty would give governments that may not have the best interests of the United States in mind an important say over American firms' work in the field of resource extraction, an industry that is only gaining in importance in the current world of rising commodity prices, global growth, and reliance upon unstable regions.

Seabed mining requires no international bureaucracy, but simply a system for recording seabed claims and resolving conflicts.

Unfortunately, President Ronald Reagan's successors took the treaty as a given, and have attempted to ameliorate its most onerous provisions without questioning its necessity.

Under the Law of the Sea Treaty, taxpayers in industrialized countries will pay for the privilege of being regulated by a Third World-dominated body. The treaty effectively treats the ocean's unowned seabed resources as property of the United Nations.

American and other global mining firms would be targeted by misguided anti-trust regulators, in ways that would cripple their growth and creativity. The EU and other developing nations would use these and other regulations to harm US and other economic interests. LOST would empower an inefficient international bureaucracy and incompetent—and often kleptocratic—Third World officials Wealth that is never created cannot help the world's poor.

Western governments would be required to enforce payment of fees and royalties, subsidize the U.N.'s mining operation, and provide resources for redistribution to Third World entities and likely anti-globalization NGOs.

Ironically, although LOST purports to develop seabed resources, it also offers land-based mining interests protection against competition from seabed mining! It stipulates that fees "shall be within the range of those prevailing in respect of land-based mining of the same or similar minerals." Because seabed mining is more expensive and riskier than land-based mining, this could force seabed producers into insolvency. This would discourage resource exploration and production. This provision historically was promoted by the three Zs – Zaire, Zambia, and Zimbabwe. Does anyone believe Zimbabwe is the ideal nation to create a more prosperous future?

If there were to be a mining treaty—a dubious proposition to begin with—then the proper "fix" would be to junk the treaty's Part XI, which contains the seabed mining provisions, thus severing seabed mining from the rest of the treaty. A separate agreement among those few nations having capacity in this complex technology area might be useful. But that treaty would not resemble LOST.

The voting system hasn't been fixed, either. According to the revised treaty, the United States would be guaranteed a seat on the Council but no veto. This is not a Security Council Style treaty.

Nor is there any obvious limit to America's potential fiscal liability. The U.S. is expected to provide the largest share of the budget for the International Seabed Authority, the governing body set up by the treaty, starting at 25 percent.

Another failed fix involves technology transfer. Section 5, paragraph 1(b) of the revised text replaces the mandatory technology transfer requirement with a duty of sponsoring states to facilitate the acquisition of mining technology "if the Enterprise or developing States are unable to obtain" equipment commercially. Mandatory transfers and licensing of costly private intellectual property is no way to encourage innovation.

Concluding Remarks:

The treaty has become a solution in search of a problem.

Today, it is hard to imagine any entrepreneur investing capital sufficient to create a viable deep seabed mining operation. The underwater environment is forbidding, in ways potentially as challenging as space. The great depths, incredible pressure, and uneven seabed already make the creation of a workable, let alone an economical, mining operation extremely difficult. The Law of the Sea Treaty would only make it more so.

Losing access to the ocean floor's plentiful resources could be costly, especially in the future as land-based supplies wane. Equally significant would be the cost of discouraging the development of technologies to explore and develop the seabed.

The Law of the Sea Treaty retains its coercive, collectivist philosophical underpinnings. It will have a negative impact on entrepreneurship even if no mining ever occurs. The worst principle is the declaration that all seabed resources are mankind's "common heritage" under the control of a majority of the world's nation states. American ratification would help validate some of these discredited collectivist principles.

Moreover, the treaty could set a bad regulatory precedent for the commercial development of space. Subjecting private space exploration and development to a similar regulatory system would discourage private ventures.

By punishing entrepreneurship directed at transforming the great "frontiers" of the oceans and space, the Law of the Sea Treaty threatens potentially enormous losses well into the future.

A quarter of a century ago, President Reagan's refusal to sign the Law of the Sea Treaty left some critics predicting chaos and combat on the high seas. Yet we have witnessed not one incident as a result of the failure to implement the treaty.
Biasing the process against economic development globally would have profound impacts on all peoples, and especially those in the poorest lands who most need the results of economic growth, international investment and trade, and globalization.

A secure economic environment would be particularly important for entrepreneurs entering high-risk investment fields, notably underwater and in space, where the viability of the very process, let alone the security of the expected profit, would be in doubt.

Contrary to the claims of treaty supporters, the 1994 revisions did not "fix" the agreement. LOST remains captive to its collectivist and redistributionist origins, it would still establish an unjust and unworkable seabed mining regime.

Arthur Clark, the famed author, once wrote a futurist book called *The Deep Range* which dealt with one scenario for the development of the oceans in the 21st Century. In his book, the oceans had largely been privatized with sonic underwater fences separating one "pasturage" from another. It was a productive world. Efforts are now underway to realize that creative institutional extension today and this offers a far more effective way of realizing the hopes of LOST's proponents. It is indeed important that we no longer neglect the critical but now largely barren two-thirds of our planet. But that admirable goal should lead us to act hastily, to sacrifice a vastly superior approach simply to join a deeply flawed global consensus. America, following Reagan's lead, should once again \ tell LOST proponents to get lost.

Thank you for your time and I look forward to your questions.