

Why Reagan Would Still Oppose the Law of the Sea Treaty

Some supporters of the U.N. Convention on the Law of the Sea (UNCLOS) insist that while President Ronald Reagan rejected the treaty in 1982, the measure was "fixed" by subsequent negotiations and a side agreement in 1994. Senator Richard Lugar, a supporter of UNCLOS, insists that, "President Reagan refused to sign it because of technology transfer provisions and other problems in the section on deep-seabed mining. Later, a hard-fought renegotiation led to changes that met all of President Reagan's demands." However, the evidence demonstrates that Lugar is just plain wrong.

James L. Malone, speaking as Reagan's special representative for Law of the Sea negotiations, delivered testimony in 1995 still rejecting UNCLOS as badly flawed. It is not true that Reagan rejected the treaty only because of the controversial seabed mining provisions, he said. Rather, "The collectivist and redistributionist provisions of the treaty were at the core of the U.S. refusal to sign," Malone asserted.

While recognizing the work of those who negotiated the pact, Malone said that:

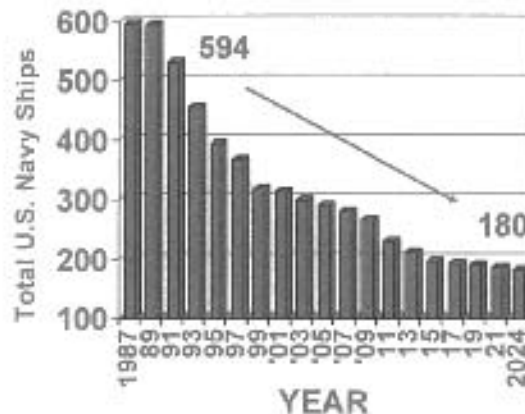
- UNCLOS is "potentially hostile to American interests" and "sets up yet another complex and troublesome U.N. bureaucracy to administer the oceans."
- Its provisions give Third World countries "preferential treatment at the expense of American interests and force U.S. mining firms to share their profits and provide free mine sites to a new U.N. agency."
- The seabed mining provisions were "inadequately corrected" and the "collectivist ideologies of a new repudiated system of global central planning" are "still imbedded in the treaty..."
- The "bankrupt" concepts of the New International Economic Order are still "maintained" in the treaty.
- The U.N. bureaucracy created by the treaty will inevitably "grow" over the years.
- The designation of international waters as the "common heritage of mankind" reflects the "collectivist structure" of the treaty.
- The "dispute resolution" provisions of the treaty are defective.

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- Ultimately, it is the U.S. Navy, not a treaty, "that will guarantee American interests." The U.S. has "protected its navigational interests for over 200 years without a comprehensive law of the sea treaty."

America's Survival, Inc. (ASI) President Cliff Kincaid was in contact with Malone into 1996, as he continued to warn against acceptance of the pact. He passed away several years ago. Malone told Kincaid in correspondence that he was very concerned about the looming issue of "global taxation" and, in an article in the November/December 1995 issue of *Mining Voice*, the magazine of the National Mining Association, referred to how radical environmentalists were anticipating "new taxes" for organizations like the U.N. coming from ocean fishing and transportation and seabed mining. In that article, he warned about the "anti-capitalist, socialist underpinnings" of UNCLOS and other U.N. initiatives.

Malone effectively rebutted Department of Defense claims that the treaty was necessary to protect U.S. navigational rights. "Ultimately," he said, "the global protection of U.S. navigational rights depends upon the perceived capability and will of the United States to protect those rights." But does the U.S. still have the perceived capability and will to protect those rights? Since Malone's testimony, we have witnessed a dramatic decline in the number of Navy ships.



Making a pitch for UNCLOS at the American Enterprise Institute on July 17, 2007, Susan Biniarz of the State Department let the truth slip out. "We don't have the capacity to be challenging every maritime claim throughout the world solely through the use of naval power. And [we] certainly can't use the Navy to meet all the economic interests," she said. But can the U.S. remain a superpower by passing a treaty and hiring more lawyers to defend America before international panels and tribunals? Is this Reagan's "Peace through Strength" position?

ASI presents Malone's 1995 testimony in the pages that follow, so that there can be no doubt as to how both he and President Reagan felt about the treaty.

“Observations of James L. Malone,
former Special Representative of the President
for the Law of the Sea”

Nineteenth Annual Conference
“Toward Senate Consideration of the 1982
Law of the Sea Convention”

June 30, 1995

Russell Senate Office Building
Washington, D.C.

Sponsored by the
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University of Virginia School of Law

While we are celebrating at this Conference the signal contributions that Ambassador John R. Stevenson, my first predecessor as U.S. Law of the Sea negotiator, made to the formulation of the LOS Convention, especially its navigation provisions; I want to say a brief word about our host John Norton Moore. If it had not been for the superb work of John, as Deputy U.S. Special Representative in those days of the mid-1970s, the now essentially universally accepted formulation of the Convention's navigation provisions would never have been achieved. Truly much praise is due John Moore for his exceptional achievements. Also, we must not forget that in the years since, John's Center for Oceans Law and Policy at the University of Virginia has been the great depository of the Convention's negotiating history, comment, and published record of almost a decade of work.

I want to thank John Moore for this opportunity to offer my observations as President Reagan's Special Representative for the Law of the Sea negotiations at this

point in the process of Senate consideration of the 1982 Law of the Sea Convention (LOS Convention) and the revised Agreement Relating to the Implementation of Part XI. I am honored to be part of this meeting.

In signing the Agreement relating to Part XI on July 29, 1994, and transmitting it together with the Convention to the Senate for advice and consent to ratification and accession, the Clinton administration is moving forward with a treaty and renegotiated seabed mining agreement that in my view still contain many provisions that, on balance, may not be in the overall interest of the U.S. While the administration claims that the revised treaty builds on a market-based approach to exploiting seabed resources, eliminates objectionable seabed mining provisions, and supports American interests, this is not clear from the resulting documents.

Clearly important improvements have been made, but the treaty still potentially hinders seabed development and remains potentially hostile to American interests. It sets up yet another complex and troublesome U.N. bureaucracy to administer the oceans. Its provisions still give Third World countries preferential treatment at the expense of American interests and force U.S. mining firms to share their profits and provide free mine sites to a new U.N. agency.

Further, the treaty's institutional structure remains true to its collectivist and redistributionist origins. As I observed in 1984, "[t]he...Treaty's provisions establishing the deep seabed mining regime were intentionally designed to promote a new world order-

-a form of global collectivism known as the New International Economic Order (NIEO)-- that seeks ultimately the redistribution of the world's wealth through a complex system of manipulative central economic planning and bureaucratic coercion. The treaty's provisions are predicated on a distorted interpretation of the noble concept of the Earth's vast oceans as the 'common heritage of mankind'." This remains the case today.

All the provisions from the past that make such an outcome possible, indeed likely, still stand. It is not true as argued by some, and frequently mentioned, that the U.S. rejected the Convention in 1982 solely because of technical difficulties with Part XI. The collectivist and redistributionist provisions of the treaty were at the core of the U.S. refusal to sign.

Today, not only are the seabed mining provisions inadequately corrected, and the collectivist ideologies of a now repudiated system of global central planning still imbedded in the treaty, new and potentially serious concerns have arisen.

As many senior administration officials have frequently made clear, the administration sees the Convention as furthering U.S. ocean environmental concerns. Yet, accession to the Convention may make the use of U.S. laws that utilize unilateral sanctions to protect key U.S. environmental and fisheries interests difficult or impossible should the U.S. become a party to the Convention. I will discuss this problem in a moment.

The Convention's provisions on navigation and other non-seabed matters are, of course, basically noncontroversial and for the most part codifications of existing customary international law. With respect to key questions of naval and commercial maritime transit, few countries have the interest or capability to interfere with American ships. With the exception of some minor incidents, such as the 1988 Black Sea bumping, not once during the last ten years has an American vessel been denied freedom of navigation.

Ultimately it is the U.S. Navy that will guarantee American interests. It has always been true that any coastal country with strong enough incentives could move to assert jurisdiction adverse to navigational rights--treaty or no treaty. The Convention will only provide marginally increased disincentives to such actions as compared to the present situation under customary law. Indeed, some treaty advocates concerned with navigational rights argue that strong U.S. unilateral statements about the sanctity of the Convention's navigational provisions should accompany U.S. accession. Apparently they feel that being a party is not quite enough. More is needed.

Perhaps I can sum up the reasons why I view it not to be in America's best interest to become a party to the LOS Convention, in its current form, at this time.

First, the Convention, with the revised Part XI Agreement, continues to place severe restrictions and uncertainties on U.S. mining companies that would be prohibitive to private investments and fails to assure access, security of tenure, and stability of

economic conditions controlled by regulations and procedures. In other words, a regime that can attract investment to ocean mining.

The International Seabed Authority will still require U.S. mining consortia to subsidize mining efforts of its mining arm, the Enterprise, or of developing countries, and companies will continue to owe a \$250,000 application fee and an undetermined level of royalties and profit sharing. Each firm must continue to survey and provide, free of charge, a mine site for the Enterprise for each site a private company proposes to develop. Anti-monopoly and anti-density provisions still apply unrealistically to American mining firms and revised Part XI provisions establish a new "economic assistance fund" to aid land-based minerals producers.

Surplus funds will still be distributed "taking into particular consideration the interests and needs of the developing states and peoples who have not attained full independence or other self-governing status." While the U.S. could block unwarranted payments there will be strong pressures to be "flexible" and "reasonable" on such matters.

Since the Part XI revisions leave the fundamental ideology and policies of the original Part XI in tact, the bankrupt concepts of the NIEO are maintained. There is no assured access to qualified mining applicants because of ambiguities, and a high risk of unreasonable fees on private investors continue to exist. The broad discretionary powers of the Authority will make it the first international organization with regulatory powers

over resources and taxing powers over private persons. And it will be partially controlled by countries whose land-based mining interests are hostile to seabed mining.

The mandate for renegotiation could and should have been much broader. But the U.S. did not demand this and the U.N. Secretary General's "Boat Paper" negotiations proceeded accordingly. Consequently, even though the Clinton administration urges a tight, efficient and responsive seabed bureaucracy that will only grow as conditions warrant, virtually all previous experience with similar U.N. bureaucracies point in the opposite direction.

Additionally, there will be large up-front training obligations. An open-ended mandate exists that could require western firms to help equip and train their competition. United States licensees have the obligation to facilitate the acquisition of mining technology "if the Enterprise or developing states are unable to obtain" equipment commercially. Thus, while the mandatory technology transfer requirement has been deleted, it may well be that industrialized states, and private miners, will be responsible for subsidizing the Enterprise or developing countries in the acquisition of technology.

With improved chambered voting arrangements, the United States and its allies could block unacceptable proposals in the Council, but there is great risk that this might not come about.

Seabed mining is a lengthy and expensive process, taking from 20 to 30 years and over \$1.5 billion, according to estimates now several years old, before profit is realized. U.S. companies will not take this risk under the conditions imposed by the amended seabed provisions. Indeed, on March 15, 1994, the seabed mining industry stated: "It is the view of the United States mining firms that, if the present course [of negotiations] is maintained, there will be no private investment in ocean mining exploration or production under the Convention." The course was maintained. Perhaps, as some contend, the U.S. mining industry is moribund, if not dead. Only three of the old four consortia remain in a quiescent state. But, they are in a state of watchful waiting, not terminal illness.

Second, the amended Part XI provisions continue to provide a structure to transfer wealth from industrialized nations to the Third World. In addition to the "economic assistance fund," Article 150, which is hostile to seabed mining, remains in the text. It provides, among other things, that the International Seabed Authority is to insure "the protection of developing countries from adverse effects on their economies or on their export earnings resulting from a reduction in the price of an affected mineral, or in the volume of exports of that mineral, to the extent that such reduction is caused by activities in the Area." The potential for production controls still lurks.

Should anyone conclude that although the collectivist structure of the Convention's seabed mining provisions still remain, there is no real threat of that potential ever in the future becoming reality should weigh the statements of two long-time Law of the Sea participants from the Third World. These statements were made at the inaugural

meeting of the International Seabed Authority, in Kingston, Jamaica, following entry into force of the Convention on November 16, 1994.

Mr. Joseph S. Warioba, the representative of Tanzania, stated significantly, "whatever our differences in the interpretation of the Convention, including the implementation agreement, we all agree that the international seabed is the common heritage of mankind, it is not subject to claim of sovereignty or sovereign rights and it will be administered internationally for the benefit of all mankind. All operating principles and procedures will in the final analysis be judged on the basis of to what extent they confer benefits to mankind as a whole."

Jamaica's representative, Ambassador Kenneth Rattray, pointed out that we should "...recall that the common heritage area is not subject to appropriation, is reserved exclusively for peaceful purposes and is to be developed, and the benefits distributed, with special regard to the interests and needs of developing countries. The Implementation Agreement must therefore be seen in this context and must have the capacity to adjust itself so as to address creatively the ongoing and contemporary needs of mankind as a whole. That will be an important part of the mission of the International Seabed Authority."

Third, the treaty establishes an unnecessary, and potentially huge bureaucracy, to govern the world's oceans. The United States would be expected to pay the largest share of the Authority's budget--25%. This bureaucracy would be heavily weighted toward

countries with interests very different than those of the United States and the chambered voting arrangements would offer the U.S. only limited veto power to support its positions. The U.S. veto is weak because it depends on our ability to get our allies to go along, but allies may have other interests. This has already become clear on certain financial questions.

The regime's structural arrangements place central planning ahead of free market interests in determining influence over world resources; and yet the collapse of socialist central planning throughout the world makes this a step in the wrong direction.

Although the Clinton administration's no doubt genuine assertions that the new agreement provides for "reducing the size and costs of the regime's institutions" and that "all organs and subsidiary bodies to be established under the Convention and this Agreement shall be cost-effective," institutional incentives toward extravagance still exist. The potentially burdensome and cumbersome structural organization is still in place. Indeed, it was a concern over bloated budgets that was a major factor in Russia's abstention on Resolution 48/263 at the U.N. in July, 1994, adopting the revised Seabed Agreement. The Russians believe that "general guidelines such as necessity to promote cost-effectiveness cannot be seriously regarded as a reliable disincentive." And the revised Part XI is just that "general guidelines" and principles not specific provisions and detailed requirements. As a case in point, even before the Convention went into force in November 1994, a strong push was moving forward to establish high-paying positions in the Authority, which are not required.

Fourth, as already noted, becoming a party to the treaty may force the United States to relinquish its policy of using sanctions as a fundamental way to support U.S. fisheries and marine conservation policy.

A number of domestic statutes have embargo provisions barring the importation of fisheries products from countries refusing to comply with U.S. environmental standards for protecting marine living resources. Although, the LOS Convention does not have provisions that specifically regulate trade or trade measures, the use of trade sanctions to effectively coerce other State Parties to protect living marine resources within their Exclusive Economic Zones (EEZs) where the Convention gives them the "sovereign right to exploit their natural resources pursuant to their environmental policies in accordance with their duty to protect and preserve the marine environment," may well violate their rights.

The Convention creates no affirmative duty to protect threatened or endangered marine mammals unless the danger is caused by pollution of the marine environment. Consequently, while diplomatic efforts and other means of persuasion seeking to protect marine mammals may be appropriate, sanctions, which enforce one Party's views on another Party, are another question. This may well be impermissible under the Convention.

Also, as Senator Ted Stevens of Alaska told us last night, he sees the possibility, under the Convention's mandatory dispute settlement provisions, that the U.S. may not in

the future be able to use sanctions to protect high seas drift net and Bering Sea doughnut hole conservation measures, and we would have no appeal. I agree.

Further, aside from the question of unilateral sanctions, the incentive to ratify of some countries who have been long-time supporters of the Convention, may have been dampened recently by the realization that unilateral actions by a State Party may be precluded. The recent fisheries dispute between Canada and Spain (European Union) is a case in point.

Fifth, administration officials, the Department of Defense, and many nongovernmental experts on the law of the sea argue that navigational rights will be made much more secure by a widely approved Convention. It is argued that the Convention will tend to give better protection against sudden changes in international political and economic views of coastal states that could lead to unilateral restrictions on navigation, called by many "creeping jurisdiction." Consequently, we would be less likely to have to assert naval power against coastal states, friendly and unfriendly, to exercise navigational rights. Also, the greater certainty and detail of the Convention, as against customary law, would make operational planning easier and less risky.

These arguments, of course, neglect the fact that the United States has not been effectively challenged in the assertion of its navigational rights. The U.S. has protected its navigational interests for over 200 years without a comprehensive law of the sea treaty.

The phenomenon of "creeping jurisdiction" of coastal states depends more upon the strength of coastal states' interests in asserting such jurisdiction than it does on marginal disincentives the Convention would provide over the current situation that exists under customary law. As has always been clear, no treaty or other agreement will conclusively prevent a coastal state from asserting rights inimical to the United States if the incentive to do so is strong enough.

Ultimately, the global protection of U.S. navigational rights depends upon the perceived capability and will of the United States to protect those rights. For many years, the Department of Defense has followed a vigorous program of assertion of navigational rights which it will continue in the future with or without the United States as a party to the Convention.

On a related matter, the Navy's concern with vigorous efforts by some environmental groups and countries to establish sensitive zones on the high seas, and within EEZs, that would impede freedom of navigation, will not be effectively addressed by becoming a party to the Convention. Such efforts largely driven by domestic groups are already contrary to existing customary law. The problem needs to be resolved, but Convention membership will not help much.

Sixth, the Convention does not provide adequate means for dispute resolution by U.S. seabed mining companies. While the Convention establishes its own judicial processes--the International Tribunal for the Law of the Sea, the International Court of

Justice and special arbitral tribunals--to hear disputes over claims, fees, and regulations, it does not provide miners with judicial and administrative due process since access to dispute settlement, except in some contractual matters, is dependent on the miner's sponsoring State acting in its behalf. While private mining investors will be directly regulated by an international organization, they will have no direct access to dispute settlement on regulatory matters. This means that U.S. companies would depend largely upon the U.S. State Department to advocate their interests, even though the State Department may have other treaty interests contrary to the support of a particular American mining claim.

Finally, not only do the Convention and Agreement continue to incorporate collectivist provisions fundamentally inconsistent with American values and free market practices, if the U.S. becomes a Party, there would be no U.S. private mining, when the economics become appropriate. This would relinquish the stage to countries, mostly Third World, that have government funding. The goal which has long been pursued to give the U.S. future access to strategic seabed resources, through private investment, would be lost.

Application of the rule of law to all ocean uses is a fundamentally important objective, and President Reagan's 1983 Statement on Oceans Policy indicated the U.S. accepts and acts in accordance with the LOS Convention's balance of interests relating to traditional uses of the oceans. We have heard, over the last two days, that strong assertion of the 1983 ocean policy continues, and will continue in the future. Thus, there

should be no compulsion and rush to redeem a long-standing commitment to the rule of law on the oceans that requires acceptance of an LOS Convention that is still a flawed treaty.

Thank you.