

Why Did the United States Reject the Convention?

When the Reagan administration began in 1981, most of the U.S. diplomats who had been conducting negotiations at the Third U.N. Law of the Sea Conference were reassigned, and a year-long review of the Draft Convention was undertaken. Two sessions of the Conference were held that year, but no serious negotiations took place, because the United States refused to participate in substantive discussions.

In early 1982, President Reagan said the United States would return to the Conference, but would insist on specific changes before it would accept the Convention. His statement of January 29, 1982, and Ambassador James L. Malone's longer statement of February 23, 1982, explain the position of the United States (from U.S. Department of State Bureau of Public Affairs, Current Policy No. 371):

Following are statements by President Reagan on January 29, 1982, and by Ambassador James L. Malone, Special Representative of the President for the Third U.N. Conference on Law of the Sea, before the House Merchant Marine and Fisheries Committee on February 23, 1982.

PRESIDENT'S STATEMENT, JAN. 29, 1982

The world's oceans are vital to the United States and other nations in diverse ways. They represent waterways and airways essential to preserving the peace and to trade and commerce; are major sources for meeting increasing world food and energy demands and promise further resource potential. They are a frontier for expanding scientific research and knowledge, a fundamental part of the global environment balance, and a great source of beauty, awe, and pleasure for mankind.

Developing international agreement for this vast ocean space, covering over half of the Earth's surface, has been a major challenge confronting the international community. Since 1973 scores of nations have been actively engaged in the arduous task of developing a comprehensive treaty for the world's oceans at the Third U.N. Conference on Law of the Sea. The United States has been a major participant in this process.

Serious questions had been raised in the United States about parts of the draft convention and, last March, I announced that my Administration

would undertake a thorough review of the current draft and the degree to which it met U.S. interests in the navigation, overflight, fisheries, environmental, deep seabed mining, and other areas covered by that convention. We recognize that the last two sessions of the conference have been difficult, pending the completion of our review. At the same time, we consider it important that a Law of the Sea treaty be such that the United States can join in and support it. Our review has concluded that while most provisions of the draft convention are acceptable and consistent with U.S. interests, some major elements of the deep seabed mining regime are not acceptable.

I am announcing today that the United States will return to those negotiations and work with other countries to achieve an acceptable treaty. In the deep seabed mining area, we will seek changes necessary to correct those unacceptable elements and to achieve the goal of a treaty that:

- Will not deter development of any deep seabed mineral resources to meet national and world demand;
- Will assure national access to these resources by current and future qualified entities to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the international Authority, and to promote the economic development of the resources;
- Will provide a decisionmaking role in the deep seabed regime that fairly reflects and effectively protects the

political and economic interests and financial contributions of participating states;

- Will not allow for amendments to come into force without approval of the participating states, including in our case the advice and consent of the Senate;

- Will not set other undesirable precedents for international organizations; and

- Will be likely to receive the advice and consent of the Senate. In this regard, the convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.

The United States remains committed to the multilateral treaty process for reaching agreement on law of the sea. If working together at the conference we can find ways to fulfill these key objectives, my Administration will support ratification.

I have instructed the Secretary of State and my Special Representative for the Law of the Sea Conference, in coordination with other responsible agencies, to embark immediately on the necessary consultations with other countries and to undertake further preparations for our participation in the conference.

**AMBASSADOR MALONE,
FEB. 23, 1982**

I am pleased to appear before this committee today to brief you on the President's recent decision to resume U.S. participation in the Law of the Sea Conference. With your permission, I will introduce the full text of the President's statement for the record.

In his public statement, the President made clear several points, which I would like to reiterate.

- It is important that a Law of the Sea treaty be fashioned so that the United States can join in and support it.

- Major elements of the deep seabed mining regime are not acceptable to the United States.

- We have six broad objectives with regard to the deep seabed mining regime, and we will be seeking changes in the draft treaty in order to achieve them.

- The United States remains committed to the multilateral treaty process and will support ratification if our six objectives are fulfilled.

We are now consulting with our principal allies, the Soviet Union, the

leadership of the conference, and influential delegates from the conference, including the leadership of the Group of 77.

Beginning tomorrow, we will participate in a formal intersessional meeting of the conference. That will be an important opportunity to explore potential solutions to the problems we have raised with Part XI of the draft convention. During the first week of March, we will assess the results of our consultations and the intersessional meeting, determining whether we believe it is possible to negotiate satisfactory changes to the draft convention which meet the President's objectives. The assessment will describe what the U.S. delegation believes to be an achievable package of improvements in Part XI. This assessment will be reviewed carefully before we proceed further.

During the February informal consultations, we have explained our problems with the draft convention in a clear and precise way. We have discussed those potential solutions which we believe would meet our national interests and make the treaty acceptable to the U.S. I will make available a compendium of the approaches to problems in Part XI which we are placing before the conference leaders in order to evaluate the prospects for successfully negotiating changes that satisfy the President's objectives. Let me turn now to those objectives.

The President stated that we will seek changes necessary to correct unacceptable elements of the draft treaty and to achieve our six objectives.

First, the treaty must not deter development of any deep seabed mineral resources to meet national and world demand.

The United States believes that its interests, those of its allies, and, indeed, the interests of the vast majority of nations will best be served by developing the resources of the deep seabed as market conditions warrant. We have a consumer-oriented philosophy. The draft treaty, in our judgment, reflects a protectionist bias which would deter the development of deep seabed mineral resources, including manganese nodules and any other deep seabed minerals such as the polymetallic sulphide deposits which have received considerable publicity recently.

Many different provisions of the draft treaty discourage development of seabed resources. Chief among them are:

- The production policies of the Authority which place other priorities

ahead of economically efficient resource development;

- The production ceiling which limits the availability of minerals for global consumption;

- The limit on the number of mining operations which could be conducted by any one country, thus potentially limiting our ability to supply U.S. consumption needs from the seabed; and

- Broad areas of administrative and regulatory discretion which, if implemented in accordance with the Authority's production policies, would deter seabed mineral development.

To meet the President's first objective, these and other related areas of Part XI would require change and improvement.

Second, the treaty must assure national access to those resources by current and future qualified entities to enhance U.S. security of supply, avoid monopolization of the resources by the operating arm of the international Authority, and promote the economic development of the resources.

The draft treaty provides no assurance that qualified private applicants sponsored by the U.S. Government will be awarded contracts. It is our strong view that all qualified applicants should be granted contracts and that the decision whether to grant a contract should be tied exclusively to the question of whether an applicant has satisfied objective qualification standards. We believe that when a sovereign state sponsors an applicant and certifies that the applicant meets the treaty's qualification standards, the Authority should accept such a certification unless a consensus of objective technical experts votes that the applicant's qualifications were falsely or improperly certified.

The draft convention also should make specific provision for the rights of private companies that have made pioneer investments in deep seabed mining. We are all aware that a few companies have devoted substantial resources to prospecting for deep seabed minerals and developing new technologies for their extraction. We recognize that there are different views as to the rights which pioneer investors have acquired, but practicality should guide us in this matter. Deep seabed mineral resources will not be made available for the benefit of mankind without the continuing efforts of pioneer miners. I am confident, therefore, that the conference can find ways and means to accommodate their special circumstances.

In addition, the draft treaty creates a system of privileges which discriminates against the private side of the parallel system. Rational private companies would, therefore, have little option but to enter joint ventures or other similar ventures either with the operating arm of the Authority, the Enterprise, or with developing countries. Not only would this deny the United States access to deep seabed minerals through its private companies because the private access system would be uncompetitive but, under some scenarios, the Enterprise could establish a monopoly over deep seabed mineral resources.

To meet the President's second objective, therefore, qualified applicants should be granted contracts, the legal and commercial position of pioneer operators should be accommodated, and the parallel system should be designed to permit private miners to operate independently.

Third, the treaty must provide a decisionmaking role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states.

The United States has a strong interest in an effective and fair Law of the Sea treaty which includes a viable seabed mining regime. As the largest potential consumer of seabed minerals, as a country whose private firms could invest substantial amounts in seabed mining, and as potentially the largest contributor to the Seabed Authority and to the financing of the Enterprise, our political and economic interests in any new international organization are far-reaching. The decisionmaking system in the Seabed Authority must reflect these realities. For example, a treaty which makes American access to natural resources of the seabed dependent on the voting power either of its competition or of those countries which do not wish to see these resources produced would not meet the President's objectives.

Similarly, the President's objectives would not be satisfied if minerals other than manganese nodules could be developed only after a decision was taken to promulgate rules and regulations to allow the exploitation of such minerals. In our judgment, the development of other seabed resources should proceed without restraint pending the development of rules and regulations.

We must be candid—many countries do not wish to see new sources of minerals produced from the seabed because they believe that such production will jeopardize their own competitive position in the world markets. We do not criticize them for holding this view but do expect them to understand that the U.S. national interest is not consistent with impediments to the production of seabed minerals. A seabed mining regime which deters production is antithetical to the interests of all nations in the economically efficient development of resources.

A way must be found to assure that any nation like the United States, having a vital stake in the Authority's decisions, has influence sufficient to protect its interests. The decisionmaking system should provide that, on issues of highest importance to a nation, that nation will have affirmative influence on the outcome. Conversely, nations with major economic interests should be secure in the knowledge that they can prevent decisions adverse to their interests. We will make detailed proposals to the conference on ways to achieve these objectives.

Fourth, the treaty must not allow for amendments to come into force without approval of the participating states, including in our case the advice and consent of the Senate.

The draft treaty now permits two-thirds of the states parties acting at the review conference to adopt amendments to Part XI of the treaty which would be binding on all states parties without regard to their concurrence. It has been argued that a state which objects to an amendment has the option to withdraw from the treaty if the amendment is imposed without its consent. This proposal is obviously not acceptable when dealing with major economic interests of countries which have invested significant capital in the development of deep seabed mining in an international treaty regime. We believe there are ways to solve this problem, and we will be exploring them during the negotiations.

Fifth, the treaty must not set other undesirable precedents for international organizations.

Most, if not all, of the adverse precedents which would be established by the draft treaty could be avoided by achieving the six objectives set out by the President. Our negotiating efforts, however, should not result in offsetting

or replacing one undesirable precedent with another. Our task in returning to the negotiating table is to satisfy all of the President's objectives. The job would not be complete if, for example, adverse precedents related to artificial production limits and protection of land-based minerals are avoided at the price of acquiescence on other issues of principle such as the mandatory transfer of technology. In solving problems in the draft treaty, we will be alert to the possibility that a particular solution may be viable in the context of the Law of the Sea treaty but inappropriate as a precedent for some future negotiation. As we proceed to seek solutions to problems in the Law of the Sea negotiations, we will be mindful of the broadest national interests and the relationship of these negotiations to U.S. participation in other global institutions.

Sixth, the treaty must be likely to receive the advice and consent of the Senate. In this regard, the convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.

The comprehensive policy review process was initiated because this Administration recognized that the Senate could not and would not give its consent to the emerging draft treaty on the Law of the Sea. It is, however, our judgment that, if the President's objectives as outlined are satisfied, the Senate would approve the Law of the Sea treaty. It would be necessary, of course, to demonstrate concretely how any renegotiated treaty texts have solved the problems raised by Members of the Congress and the public which led to the review and how they have met the President's objectives.

In this regard, there are certain issues to which special attention must be called. The President highlighted these in his sixth objective. The mandatory transfer of private technology and participation by and funding for national liberation movements create commercial and political difficulty of such consequence that they must be singled out as issues requiring effective solutions. These solutions will have to be clearly defensible as total solutions to the problem.

There is a deeply held view in our Congress that one of America's greatest assets is its capacity for innovation and invention and its ability to produce advanced technology. It is understandable, therefore, that a treaty would be unacceptable to many Americans if it required the United States or, more particularly, private companies to transfer that asset in a forced sale. That is why the problem must be solved.

I would like to emphasize the President's statement that, if his objectives are successfully met, he will support the ratification of this treaty. We will work with all Members of Congress, particu-

larly those who have shown a special interest in this subject, in order to insure that they will be given an opportunity to give us their advice in advance of any commitments we make. We will encourage Members of Congress to participate actively in the work of our delegation and to keep abreast of developments at the conference. We will continue to work with members of the advisory committee and other interested Americans. We will do everything possible to avoid a situation in which we agree to draft treaty provisions which will later face political opposition.

What we want to do now is return to the bargaining table with a clear and firm position that meets our national interests. We believe there is a reservoir of goodwill at the conference, and we will work cooperatively and diligently at the conference to seek a result acceptable to all.

During the spring 1982 session, intense negotiations were held in an effort to bridge the gap between the United States and the nations of the developing world. The United States was given a virtually guaranteed seat on the governing body of the International Sea-Bed Authority (Article 161(1)(a), DS-105) and a resolution was passed protecting the investments already made by the mining consortia interested in deep seabed mining and guaranteeing to them access to the polymetallic nodules of the deep seabed.

These actions did not, however, satisfy the Reagan administration, and on April 30, 1982, the U.S. Ambassador to the Conference insisted that a vote be taken on the Convention as a whole. 130 nations voted for the Convention, 4 voted against (Israel, Turkey, the United States, and Venezuela), and 17 abstained. The abstaining nations included the Eastern European nations, who thought the United States had been given too much in the spring 1982 negotiating session, and several Western European nations.

On July 9, 1982, President Reagan announced that the United States would not sign the Convention, citing the following problems as forming the basis for this decision:

- Provisions that would actually deter future development of deep seabed mineral resources, when such development should serve the interest of all countries;
- A decisionmaking process that would not give the United States or others a role that fairly reflects and protects their interests;
- Provisions that would allow amendments to enter into force for the United States without its approval: this is clearly incompatible with the U.S. approach to such treaties;
- Stipulations relating to mandatory transfer of private technology and the possibility of national liberation movements sharing in benefits; and
- The absence of assured access for future qualified deep seabed miners to promote the development of these resources.

(Statement of President Ronald Reagan, July 9, 1982, reprinted in U.S. State Department Bureau of Public Affairs Current Policy No. 416) Articles that explain the dynamics of how the decision not to sign was reached include Ratiner, The Law of the Sea: A Crossroads for American Foreign Policy, 60 Foreign Affairs 5:1006 (1982), and Nossiter, Underwater Treaty: The Fascinating Story of How the Law of the Sea was Sunk, Barron's 10 (July 26, 1982).

Some of the legal issues involved in this controversy are discussed in Van Dyke and Yuen, "Common Heritage" v. "Freedom of the High Seas": Which Governs the Seabed? 19 San Diego L. Rev. 493-551 (1982), and in E. Miles and S. Allen (eds.), The Law of the Sea and Ocean Development Issues in the Pacific Basin, 15 L. Sea Inst. Proc. 206-76 (1981); and Van Dyke and Teichmann, Transfer of Seabed Mining Technology: A Stumbling Block to U.S. Ratification of the Law of the Sea Convention? 13 Ocean Dev. and Int'l L. 427-55 (1984) and in D. Johnston and N. Letalik (eds.), The Law of the Sea and Ocean Industry: New Opportunities and Restraints, 16 L. Sea Inst. Proc. 518-54. See also The United States Position on the Law of the Sea (panel discussion) in Johnston and Letalik, supra, 16 L. Sea Inst. Proc. 103-26 (1982).

On December 10, 1982, the Law of the Sea Convention was opened for signature, with 119 nations signing immediately. A number of nations have signed subsequently and as of September 1, 1984, ten nations had ratified. (60 ratifications are needed for the Convention to come into force, Article 308). Among the nations that had not signed as of September 1, 1984, were Belgium, The Federal Republic of Germany, Italy, the United Kingdom, and the United States. (December 9, 1984 is the last date on which a nation can sign the Convention, Article 305(2); accessions to the Convention are still possible after that date, Article 307).

On March 10, 1983, President Reagan issued a Proclamation establishing an exclusive economic zone for the United States and an Oceans Policy Statement announcing U.S. policy on related oceans issues:

EXCLUSIVE ECONOMIC ZONE OF
THE UNITED STATES OF AMERICA

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS the Government of the United States of America desires to facilitate the wise development and use of the oceans consistent with international law;

WHEREAS international law recognizes that, in a zone beyond its territory and adjacent to its territorial sea,

known as the Exclusive Economic Zone, a coastal State may assert certain sovereign rights over natural resources and related jurisdiction; and

WHEREAS the establishment of an Exclusive Economic Zone by the United States will advance the development of ocean resources and promote the protection of the marine environment, while not affecting other lawful uses of the zone, including the freedoms of navigation and overflight, by other States;

NOW, THEREFORE, I, RONALD REAGAN, by the authority vested in me as President by the Constitution and laws of the United States of America, do hereby proclaim the sovereign rights and jurisdiction of the United States of America and confirm also the rights and freedoms of all States within an Exclusive Economic Zone, as described herein.

The Exclusive Economic Zone of the United States is a zone contiguous to the territorial sea, including zones contiguous to the territorial sea of the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands (to the extent consistent with the Covenant and the United Nations Trusteeship Agreement), and United States overseas territories and possessions. The Exclusive Economic Zone extends to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured. In cases where the maritime boundary with a neighboring State remains to be determined, the boundary of the Exclusive Economic Zone shall be determined by the United States and other State concerned in accordance with equitable principles.

Within the Exclusive Economic Zone, the United States has, to the extent permitted by international law, (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and (b) jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes, and the protection and preservation of the marine environment.

This Proclamation does not change existing United States policies concerning the continental shelf, marine mammals and fisheries, including highly migratory species of tuna which are not subject to United States jurisdiction and require international agreements for effective management.

The United States will exercise these sovereign rights and jurisdiction in accordance with the rules of international law.

Without prejudice to the sovereign rights and jurisdiction of the United States, the Exclusive Economic Zone remains an area beyond the territory and territorial sea of the United States in which all States enjoy the high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea.

IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of March, in the year of our Lord nineteen hundred and eighty-three, and of the Independence of the United States of America the two hundred and seventh.

RONALD REAGAN

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OCEANS POLICY

STATEMENT BY THE PRESIDENT

The United States has long been a leader in developing customary and conventional law of the sea. Our objectives have consistently been to provide a legal order that will, among other things, facilitate peaceful, international uses of the oceans and provide for equitable and effective management and conservation of marine resources. The United States also recognizes that all nations have an interest in these issues.

Last July I announced that the United States will not sign the United Nations Law of the Sea Convention that was opened for signature on December 10. We have taken this step because several major problems in the Convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries.

The United States does not stand alone in those concerns. Some important allies and friends have not signed the Convention. Even some signatory States have raised concerns about these problems.

However, the Convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all States.

Today I am announcing three decisions to promote and protect the oceans interests of the United States in a manner consistent with those fair and balanced results in the Convention and international law.

First, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans -- such as navigation and overflight. In this respect, the United States will recognize the rights of other States in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal States.

Second, the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Convention. The United States will

not, however, acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

Third, I am proclaiming today an Exclusive Economic Zone in which the United States will exercise sovereign rights in living and non-living resources within 200 nautical miles of its coast. This will provide United States jurisdiction for mineral resources out to 200 nautical miles that are not on the continental shelf. Recently discovered deposits there could be an important future source of strategic minerals.

Within this Zone all nations will continue to enjoy the high seas rights and freedoms that are not resource-related, including the freedoms of navigation and overflight. My Proclamation does not change existing United States policies concerning the continental shelf, marine mammals and fisheries, including highly migratory species of tuna which are not subject to United States jurisdiction. The United States will continue efforts to achieve international agreements for the effective management of these species. The Proclamation also reinforces this government's policy of promoting the United States fishing industry.

While international law provides for a right of jurisdiction over marine scientific research within such a zone, the Proclamation does not assert this right. I have elected not to do so because of the United States interest in encouraging marine scientific research and avoiding any unnecessary burdens. The United States will nevertheless recognize the right of other coastal States to exercise jurisdiction over marine scientific research within 200 nautical miles of their coasts, if that jurisdiction is exercised reasonably in a manner consistent with international law.

The Exclusive Economic Zone established today will also enable the United States to take limited additional steps to protect the marine environment. In this connection, the United States will continue to work through the International Maritime Organization and other appropriate international organizations to develop uniform international measures for the protection of the marine environment while imposing no unreasonable burdens on commercial shipping.

The policy decisions I am announcing today will not affect the application of existing United States law concerning the high seas or existing authorities of any United States government agency.

In addition to the above policy steps, the United States will continue to work with other countries to develop a regime, free of unnecessary political and economic restraints, for mining deep seabed minerals beyond national jurisdiction. Deep seabed mining remains a lawful exercise of the freedom of the high seas open to all nations. The United States will continue to allow its firms to explore for and, when the market permits, exploit these resources.

The Administration looks forward to working with the Congress on legislation to implement these new policies.

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