

**WRITTEN STATEMENT OF**

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**BEFORE THE  
SENATE ARMED SERVICES COMMITTEE  
ON APRIL 8, 2004, CONCERNING**

**ACCESSION TO THE 1982 LAW OF THE SEA CONVENTION AND  
RATIFICATION OF THE 1994 AGREEMENT AMENDING PART XI OF THE  
LAW OF THE SEA CONVENTION**

[Senate Treaty Document 103-39; Senate Executive Report 108-10]

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify on the 1982 United Nations Convention on the Law of the Sea (“the Convention”), which, with the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (“the 1994 Agreement”), was reported favorably by the Senate Foreign Relations Committee on March 11, 2004. In my testimony before that Committee on October 21, 2003, I discussed the national security, economic, resource, and environmental aspects of the Convention and how they advance U.S. interests. This testimony focuses on the national security aspects of the Convention. It addresses the questions specifically posed by this Committee and responds to certain misunderstandings that have arisen concerning the Convention.

**BACKGROUND:**

The achievement of a widely accepted and comprehensive law of the sea convention -- to which the United States can become a party -- has been a consistent

objective of successive U.S. administrations for the last thirty years. The United States is already a party to four 1958 conventions regarding various aspects of the law of the sea. While a step forward at the time as a partial codification of the law of the sea, those conventions left some unfinished business; for example, they did not set forth the outer limit of the territorial sea, an issue of critical importance to U.S. freedom of navigation. The United States played a prominent role in the negotiating session that culminated in the 1982 Convention, which sets forth a comprehensive framework governing uses of the oceans that is strongly in the U.S. national security interest.

When the text of the Convention was concluded in 1982, the United States recognized that its provisions supported U.S. interests, except for Part XI on deep seabed mining. In 1983, President Reagan announced in his Ocean Policy Statement that the United States accepted, and would act in accordance with, the Convention's balance of interests relating to traditional uses of the oceans. He instructed the Government to abide by, or, as the case may be, enjoy the rights accorded by, the provisions of the Convention other than those in Part XI.

Part XI has now been fixed, in a legally binding manner, to address the concerns raised by President Reagan or successive Administrations. We also worked closely with the Senate to ensure that the proposed Resolution of Advice and Consent satisfies the concerns and issues identified by the Administration, including those relating to U.S. military interests. We urge the Senate to give its advice and consent to this Convention, to allow us to take full advantage of the many benefits it offers.

NAVIGATIONAL ASPECTS:

Joining the Convention will advance the interests of the U.S. military. As the world's leading maritime power, the United States benefits more than any other nation from the navigational provisions of the Convention. Those provisions, which establish international consensus on the extent of jurisdiction that States may exercise off their coasts, preserve and elaborate the rights of the U.S. military to use the world's oceans to meet national security requirements. They achieve this, among other things, by stabilizing the outer limit of the territorial sea at 12 nautical miles; by setting forth the navigation regime of innocent passage for all ships in the territorial sea; by protecting the right of passage for all ships and aircraft through, under, and over straits used for international navigation, as well as archipelagoes; by reaffirming the traditional freedoms of navigation and overflight in the exclusive economic zone and the high seas beyond; and by providing for the laying and maintenance of submarine cables and pipelines. U.S. Armed Forces rely on these navigation and overflight rights daily, and their protection is of paramount importance to U.S. national security.

DISPUTE SETTLEMENT:

The Convention establishes a dispute settlement system to promote compliance with its provisions and the peaceful settlement of disputes. These procedures are flexible, providing options both as to the appropriate means for resolution of disputes and as to subject matter. In terms of forum, a State is able to choose, by written declaration, one or more means for the settlement of disputes under the Convention. The Administration is pleased that its recommendation that the United States elect arbitration under Annex VII and special arbitration under Annex VIII -- rather than the International Court of Justice

or the International Tribunal for the Law of the Sea -- is included in the proposed Resolution of Advice and Consent.

In terms of subject matter, the system provides Parties with means of excluding matters of vital national concern from the dispute settlement mechanisms. Specifically, the Convention permits a State, through a declaration, to opt out of dispute settlement procedures with respect to one or more enumerated categories of disputes, including disputes concerning military activities and certain law enforcement activities. The Administration is similarly pleased that the proposed Resolution of Advice and Consent follows its recommendation that the United States elect to exclude all optional categories of disputes from dispute settlement mechanisms.

A concern raised by Administration witnesses last fall regarding resolution of disputes concerning military activities has been satisfactorily addressed by the proposed Resolution. As I testified before the Foreign Relations Committee, the ability of a Party to exclude disputes concerning military activities from dispute settlement has long been of importance to the United States. The U.S. negotiators of the Convention sought and achieved language that creates a very broad exception, successfully defeating attempts by certain other countries to narrow its scope. The United States has consistently viewed this exception as a key element of the dispute settlement package, which carefully balances comprehensiveness with protection of vital national interests.

This Administration reviewed whether the U.S. declaration on dispute settlement should in some way particularly highlight the military activities exception, given both its importance and the possibility, however remote, that another State Party might seek dispute settlement concerning a U.S. military activity, notwithstanding our declaration invoking the

exception. As a result, the Administration recommended, and the proposed Resolution includes, a statement that our consent to accession to the Convention is conditioned on the understanding that each State Party has the exclusive right to determine whether its activities are or were “military activities” and that such determinations are not subject to review. Disputes concerning military activities, including intelligence activities, would not be subject to dispute settlement under the Convention as a matter of law and U.S. policy.

INTELLIGENCE ACTIVITIES:

The question has been raised whether the Convention (in particular articles 19 and 20) prohibits intelligence activities or submerged transit in the territorial sea of other States. It does not. The Convention’s provisions on innocent passage are very similar to article 14 in the 1958 Convention on the Territorial Sea and the Contiguous Zone, to which the United States is a party. (The 1982 Convention is in fact more favorable than the 1958 Convention both because the list of non-innocent activities is exhaustive and because it generally uses objective, rather than subjective, criteria in the listing of activities.) A ship does not, of course, enjoy the right of innocent passage if, in the case of a submarine, it navigates submerged or if, in the case of any ship, it engages in an act in the territorial sea aimed at collecting information to the prejudice of the defense or security of the coastal State, but such activities are not prohibited by the Convention. In this respect, the Convention makes no change in the situation that has existed for many years and under which we operate today.

PROLIFERATION SECURITY INITIATIVE:

I would also like to address the relationship between the Convention and the President’s Proliferation Security Initiative, an activity involving the United States and

several other countries (all of which are parties to the Convention). The Convention will not affect our efforts under the PSI to interdict vessels suspected of engaging in the proliferation of weapons of mass destruction. The PSI requires participating countries to act consistent with national legal authorities and “relevant international law and frameworks,” which includes the law reflected in the 1982 Law of the Sea Convention. The Convention’s navigation provisions derive from the 1958 law of the sea conventions, to which the United States is a party, and also reflect customary international law accepted by the United States. As such, the Convention will not affect applicable maritime law or policy regarding interdiction of weapons of mass destruction. Like the 1958 conventions, the Convention recognizes numerous legal bases for taking enforcement action against vessels and aircraft suspected of engaging in proliferation of weapons of mass destruction, for example, exclusive port and coastal State jurisdiction in internal waters and national airspace; coastal State jurisdiction in the territorial sea and contiguous zone; exclusive flag State jurisdiction over vessels on the high seas (which the flag State may, either by general agreement in advance or approval in response to a specific request, waive in favor of other States); and universal jurisdiction over stateless vessels. Further, nothing in the Convention impairs the inherent right of individual or collective self-defense (a point which is reaffirmed in the proposed Resolution of Advice and Consent).

REASONS TO JOIN:

As a non-Party to the Convention, the United States has actively sought to achieve global acceptance of, and adherence to, the Convention’s provisions, particularly in relation to freedom of navigation. As noted, President Reagan’s 1983 Oceans Policy

Statement directed the United States to abide by, and enjoy the rights accorded by, the non-deep seabed provisions of the Convention. Abroad, the United States has worked both diplomatically and operationally to promote the provisions of the Convention as reflective of customary international law.

While we have been able to gain certain benefits of the Convention from this approach, formal U.S. adherence to the Convention would have further national security advantages:

- The United States would be in a stronger position invoking a treaty's provisions to which it is party, for instance in a bilateral disagreement where the other country does not understand or accept them.
- While we have been able to rely on diplomatic and operational challenges to excessive maritime claims, it is desirable to establish additional methods of resolving conflict.
- The Convention is being implemented in various forums, both those established by the Convention and certain others (such as the International Maritime Organization or IMO). While the Convention's institutions were not particularly active during the past decade since the Convention entered into force, they are now entering a more active phase and are elaborating and interpreting various provisions. The United States would be in a stronger position to defend its national security and other interests in these forums if it were a party to the Convention.
- Becoming a party to the Convention would permit the United States to nominate members for both the Law of the Sea Tribunal and the Continental Shelf Commission. Having U.S. members on those bodies would help ensure that the

Convention is being interpreted and applied in a manner consistent with U.S. national security interests.

- Becoming a party to the Convention would strengthen our ability to deflect potential proposals that would be inconsistent with U.S. national security interests, including those affecting freedom of navigation.

Beyond those affirmative reasons for joining the Convention, there are downside risks of not acceding to the Convention. U.S. mobility and access have been preserved and enjoyed over the past twenty years largely due to the Convention's stable, widely accepted legal framework. It would be risky to assume that it is possible to preserve indefinitely the stable situation that the United States currently enjoys. Customary international law may be changed by the practice of States over time and therefore does not offer the future stability that comes with being a party to the Convention.

CLARIFICATIONS OF CERTAIN MISUNDERSTANDINGS:

I would like to clarify certain misunderstandings that have arisen recently regarding the Convention, including national security aspects. I will address them in turn.

President Reagan thought the treaty was irremediably defective.

- President Reagan expressed concerns only about Part XI's deep seabed mining regime.
- In fact, he believed that Part XI could be fixed and specifically identified the elements in need of revision.
- The regime has been fixed in a legally binding manner that addresses each of the U.S. objections to the earlier regime.
- The rest of the treaty was considered so favorable to U.S. interests that, in his 1983 Ocean Policy Statement, President Reagan ordered the Government to abide by and exercise the rights accorded by the non-deep seabed provisions of the Convention.



U.S. adherence to the Convention is not necessary because navigational freedoms are not threatened (and the only guarantee of free passage on the seas is the power of the U.S. Navy).

- It is not true that our navigational freedoms are not threatened. There are more than one hundred illegal, excessive claims affecting vital navigational and overflight rights and freedoms.
- The United States has utilized diplomatic and operational challenges to resist the excessive maritime claims of other countries that interfere with U.S. navigational rights under customary international law as reflected in the Convention. But these operations entail a certain amount of risk – e.g., the Black Sea bumping incident with the former Soviet Union in 1988.
- Being a party to the Convention would significantly enhance our efforts to roll back these claims by, among other things, putting the United States in a far stronger position to assert our rights and affording us additional methods of resolving conflict.

The Convention was drafted before – and without regard to – the war on terror and what the United States must do to wage it successfully.

- It is true that the Convention was drafted before the war on terror. However, the Convention enhances, rather than undermines, our ability to successfully wage the war on terror.
- Maximum maritime naval and air mobility that is assured by the Convention is essential for our military forces to operate effectively. The Convention provides the necessary stability and framework for our forces, weapons, and materiel to get to the fight without hindrance – and ensures that our forces will not be hindered in the future.
- Thus, the Convention supports our war on terrorism by providing important stability for navigational freedoms and overflight. It preserves the right of the U.S. military to use the world's oceans to meet national security requirements. It is essential that key sea and air lanes remain open as an international legal right and not be contingent upon approval from nations along the routes. A stable legal regime for the world's oceans will support global mobility for our Armed Forces.

Obligatory technology transfers will equip actual or potential adversaries with sensitive and militarily useful equipment and know-how (such as anti-submarine warfare technology).

- No technology transfers are required by the Convention. Mandatory technology transfers were eliminated by Section 5 of the Annex to the Agreement amending Part XI of the Convention.

- Article 302 of the Convention explicitly provides that nothing in the Convention requires a party to disclose information the disclosure of which is contrary to the essential interests of its security.

As a nonparty, the U.S. is allowed to search any ship that enters our EEZ to determine whether it could harm the United States or pollute the marine environment. Under the Convention, the U.S. Coast Guard or others would not be able to search any ship until the United Nations is notified and approves the right to search the ship.

- Under the Convention, the UN has no role in deciding when and where a foreign ship may be boarded.
- Under applicable treaty law – the 1958 conventions on the law of the sea – as well as customary international law, no nation has the right to arbitrarily search any ship that enters its EEZ to determine whether it could harm that national or pollute its marine environment. Nor would we want countries to have such a blanket “right,” because it would fundamentally undermine the freedom of navigation that benefits the United States more than any other nation.
- Thus, the description of both the status quo and the Convention’s provisions is incorrect. The Convention makes no change in our existing ability or authority to search ships entering our EEZ with regard to security or protection of the environment.

Other Parties will reject the U.S. “military activities” declaration as a reservation.

- The U.S. declaration is consistent with the Convention and is not a reservation.

The 1994 Agreement doesn’t even pretend to amend the Convention; it merely establishes controlling interpretive provisions.

- The Convention could only have been formally “amended” if it had already entered into force. We negotiated the 1994 Agreement as a separate agreement in order to ensure that the Convention did not enter into force with Part XI in its flawed state. The 1994 Agreement made explicit, legally binding changes to the Convention and has the same legal effect as if it were an amendment to the Convention itself.
- It would not have been in our interest to wait until the Convention entered into force before fixing Part XI concerns, as it would have been more cumbersome to get the changes that we sought.

The problems identified by President Reagan in 1983 were not remedied by the 1994 Agreement relating to deep seabed mining.

- Each objection has been addressed.

- Among other things, the 1994 Agreement:
  - provides for access by U.S. industry to deep seabed minerals on the basis of non-discriminatory and reasonable terms and conditions;
  - overhauls the decision-making rules to accord the United States critical influence, including veto power over the most important future decisions that would affect U.S. interests and, in other cases, requires supermajorities that will enable us to protect our interests by putting together small blocking minorities;
  - restructures the regime to comport with free-market principles, including the elimination of the earlier mandatory technology transfer provisions and all production controls.

The Convention gives the UN its first opportunity to levy taxes.

- The Convention does not provide for or authorize taxation of individuals or corporations. It does include revenue sharing provisions for oil/gas activities on the continental shelf beyond 200 miles and administrative fees for deep seabed mining operations. The amounts involved are modest in relation to the total economic benefits, and none of the revenues would go to the United Nations or be subject to its control. U.S. consent would be required for any expenditure of such revenues. With respect to deep seabed mining, because the United States is a non-party, U.S. companies currently lack the practical ability to engage in such mining under U.S. authority. Becoming a Party will give our firms such ability and will open up new revenue opportunities for them when deep seabed mining becomes economically viable. The alternative is no deep seabed mining for U.S. firms, except through other nations under the Convention. These minimal costs are worth it.

The Convention mandates another tribunal to adjudicate disputes.

- The Convention established the International Tribunal for the Law of the Sea. However, Parties are free to choose other methods of dispute settlement. The United States would choose two forms of arbitration rather than the Tribunal.
- The United States would be subject to the Sea-bed Disputes Chamber, should deep seabed mining ever take place under the regime established by the Convention. The proposed Resolution of Advice and Consent makes clear that the Sea-bed Disputes Chamber's decisions "shall be enforceable in the territory of the United States only in accordance with procedures established by implementing legislation and that such procedures shall be subject to such legal and factual review as is constitutionally required and without precedential effect in any court of the United States." The Chamber's authority extends only to disputes involving the mining of minerals from

the deep seabed; no other activities, including operations on the surface of the oceans, are subject to it.

U.S. adherence will entail history's biggest voluntary transfer of wealth and surrender of sovereignty.

- Under the Convention as amended by the 1994 Agreement, there is no transfer of wealth and no surrender of sovereignty.
- In fact, the Convention supports the sovereignty and sovereign rights of the United States over extensive maritime territory and natural resources off its coast, including a broad continental shelf that in many areas extends well beyond the 200-nautical mile limit, and would give us additional capacity to defend those claims against others.
- The mandatory technology transfer provisions of the original Convention, an element of the Convention that the United States objected to, were eliminated in the 1994 Agreement.

The International Seabed Authority has the power to regulate seven-tenths of the earth's surface, impose international taxes, etc.

- The Convention addresses seven-tenths of the earth's surface. However, the International Seabed Authority (ISA) does not.
- The authority of the ISA is limited to administering mining of minerals in areas of the deep seabed beyond national jurisdiction, generally more than 200 miles from the shore of any country. At present, and in the foreseeable future, such deep seabed mining is economically unfeasible. The ISA has no other role and has no general regulatory authority over the uses of the oceans, including freedom of navigation and overflight.
- The ISA has no authority or ability to levy taxes.

The United States might end up without a vote in the ISA.

- The Council is the main decision-making body of the ISA. The United States would have a permanent seat on the Council, by virtue of its being the State with the largest economy in terms of gross domestic product on the date of entry into force of the Convention, November 16, 1994. (1994 Agreement, Annex Section 3.15(a)) This would give us a uniquely influential role on the Council, the body that matters most.

The PRC asserts that the Convention entitles it to exclusive economic control of the waters within a 200 nautical-mile radius of its artificial islands - including waters transited by the vast majority of Japanese and American oil tankers en route to and from the Persian Gulf.

- We are not aware of any claims by China to a 200-mile economic zone around its artificial islands.
- Any claim that artificial islands generate a territorial sea or EEZ has no basis in the Convention.
- The Convention specifically provides that artificial islands do not have the status of islands and have no territorial sea or EEZ of their own. Sovereignty over certain Spratly Islands (which do legitimately generate a territorial sea and EEZ) is disputed among Brunei, China, Malaysia, the Philippines, and Vietnam. China has consistently maintained that it respects the high seas freedoms of navigation through the waters of the South China Sea.

CONCLUSION:

Mr. Chairman, it is in the U.S. interest to join the Convention because of the national security benefits to the United States, even aside from the economic, resource, foreign policy, and environmental benefits. Among other things, U.S. adherence would promote the stability of the legal regime of the oceans, which is vital to U.S. global mobility and national security. The Administration recommends that the Senate give its advice and consent to accession to the Convention and ratification of the Agreement, on the basis of the proposed Resolution of Advice and Consent. Thank you.