

**WRITTEN STATEMENT OF**

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**BEFORE THE  
SENATE SELECT COMMITTEE ON INTELLIGENCE  
ON JUNE 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. Administration witnesses have previously testified before that Committee, the Senate Armed Services Committee, the Senate Environment and Public Works Committee, and the House International Relations Committee in support of U.S. accession to the Convention and reviewed the benefits of becoming a party from a national security, economic, resource, and environmental point of view. This testimony focuses on the intelligence-related issues posed by this Committee. (I have attached to this testimony the more general testimony given by Assistant Secretary John Turner and myself before those Committees and ask that it be made part of the record.)

I must say at the outset that I have been puzzled by recent criticisms of the Convention, particularly the notion that the Convention is not in our national security or

military interest. I have been familiar with the Convention for more than twenty years, including during my tenure as General Counsel of DOD in 1982, when we rightly rejected the deep seabed chapter of the treaty, and later as Deputy Secretary of Defense. In all that time I never heard it suggested by any Chief of Naval Operations or Chairman of the Joint Chiefs of Staff that there would be any adverse impact on the United States from a national security point of view as a party to the Law of the Sea Convention. And the current Chief of Naval Operations and Chairman of the Joint Chiefs of Staff both strongly support accession.

#### BACKGROUND:

Before turning to intelligence issues, I would note that 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 several 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. It sets forth a comprehensive framework governing uses of the oceans that is strongly in the U.S. interest, including by providing for U.S. global mobility through freedom of navigation and overflight.

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 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 and successive Administrations. We urge the Senate to give its advice and consent to this Convention, on the basis of the proposed Resolution of Advice and Consent, to allow us to take full advantage of the many benefits it offers.

#### INTELLIGENCE ISSUES

Turning to intelligence issues in particular, I would note at the outset that the concerns that have been raised about U.S. accession to the Convention appear to involve two basic issues:

- whether, as a matter of substance, the Convention prohibits or regulates intelligence activities in some way; and
- whether a potential challenge to intelligence activities of a Party would be subject to the Convention's dispute settlement procedures.

The Convention does not prohibit or regulate intelligence activities. And 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. As such, joining the Convention would not affect the conduct of intelligence activities in any way, while supporting U.S. national security, economic, and environmental interests.

I will now turn to the issues raised in the letters of invitations to the witnesses on this panel, grouped by subject matter.

With respect to whether articles 19 and 20 of the Convention would have any impact on U.S. intelligence collection, the answer is no. 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, under this Convention any more than under the 1958 Convention, enjoy the right of innocent passage in the territorial sea if, in the case of a submarine, it navigates submerged or if, in the case of any ship, it engages in an act aimed at collecting information to the prejudice of the defense or security of the coastal State; however, such activities are not prohibited or otherwise affected by the Convention. In this respect, the Convention makes no change in the situation or legal regime that has existed for many years and under which we operate today. As to whether our understanding of these provisions' effect (or lack of effect) on intelligence collection is shared by other States, we are not aware of any State's taking the position, either under this Convention or under the 1958 Convention, that the provisions setting forth the conditions for the enjoyment of the right of innocent passage prohibit or otherwise regulate intelligence collection or submerged transit of submarines.

Concerning whether any current Convention party restricts intelligence collection activities in its exclusive economic zone and the potential impact of U.S. ratification in relation to such a party, the Convention does not prohibit, regulate, or authorize the coastal State to regulate intelligence activities in the EEZ. On the contrary, high seas freedoms of navigation and overflight are ensured, including the right to engage in intelligence

activities. Certain Parties have published regulations purporting to prohibit military activities in general (which are presumably intended to cover intelligence activities) in their EEZs, including Bangladesh, Brazil, Cape Verde, China, India, Malaysia, the Maldives, Mauritius, Pakistan, and Uruguay. If the United States were to become a party to the Convention, while I could not speculate as to whether this would end or affect Chinese or other challenges to intelligence activities, we would be in a stronger position to protest such unlawful assertions of coastal State jurisdiction.

Turning to whether U.S. intelligence operations could be affected by compulsory dispute resolution under the Convention, the Convention expressly permits parties to exclude matters of vital national concern from dispute settlement. Specifically, it permits a State through a declaration to opt out of dispute settlement procedures with respect to disputes concerning military activities. The proposed Senate resolution of advice and consent not only contains such a declaration but also makes clear that a party has the exclusive right to determine whether its activities are or were "military activities" and that such determinations are not subject to review. Thus, 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.

Concerning the question whether the Intelligence Community is now operating under any treaty "that combines a treatment of intelligence activity with United Nations compulsory dispute resolution procedures," the answer is no. And, for reasons already stated, neither would this Convention be such a treaty. It does not prohibit or regulate intelligence activity; further, the dispute settlement procedures (which, I would also note, are not "United Nations" procedures, but autonomous procedures established by treaty)

would not apply to any dispute concerning military activities, including intelligence activities.

Concerning the question whether executive branch priorities already have an impact on intelligence collection activities and the implications of U.S. accession, review from a foreign policy point of view does not include the Law of the Sea Convention, because it does not affect or impair those activities. No change is expected if the United States accedes to the Convention, noting that we have been operating for decades under the 1958 conventions and customary international law, as reflected in the 1982 Convention.

Regarding the safety of U.S. intelligence collection personnel, U.S. accession to the Convention would not change the current situation that vessels not entitled to the right of innocent passage are subject to appropriate coastal State action if detected. If anything, as Admiral Clark testified before the Senate Armed Services Committee, U.S. accession will help protect U.S. personnel "so that our people know when they're operating in defense of this nation far from our shores that they have the backing and that they have the authority of widely recognized and accepted law to look to, rather than depending only upon the threat or the use of force."

Turning to the package of declarations and understandings set forth in the proposed Resolution of advice and consent, we worked closely with the Senate to ensure that such declarations and understandings satisfied the concerns and issues identified by the Administration, including highlighting the importance of the exclusion from dispute settlement of disputes concerning military activities, which includes intelligence activities. And we urge Senate advice and consent on the basis of that Resolution.

PROLIFERATION SECURITY INITIATIVE:

I would also like to take this opportunity to address the relationship between the Convention and the President's Proliferation Security Initiative, an activity involving the United States and several other countries. 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 control in the 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.

CONCLUSION:

Mr. Chairman, thank you for the opportunity to appear today in support of U.S. accession to the Law of the Sea Convention. In my view, the United States should lock in the favorable provisions, including especially those relating to freedom of navigation and national security, that we achieved in negotiating the Convention and Agreement. Joining the Convention will not have any adverse effect on our intelligence operations or activities. The members of this Committee should join the unanimous Foreign Relations Committee and support U.S. accession.