TESTIMONY OF

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BEFORE THE
SENATE COMMITTEE ON FOREIGN RELATIONS

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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]

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") and 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"). My colleague, Assistant Secretary John Turner, has given you an overview of the important reasons for the United States to become a party to this Convention. Please allow me to provide additional detail on the Convention and the Agreement.

I.

THE CONVENTION

The Convention sets forth a comprehensive framework governing uses of the oceans. It was adopted by the Third United Nations Conference on the Law of the Sea,

which met between 1973 and 1982 to adopt a treaty regulating all matters relating to the law of the sea.

The Convention establishes international consensus on the extent of jurisdiction that States may exercise off their coasts and allocates rights and duties among States in all marine areas. It provides for a territorial sea of a maximum breadth of 12 nautical miles, within which the coastal State may generally exercise plenary authority as a function of its sovereignty. The Convention also establishes a contiguous zone of up to 24 nautical miles from coastal baselines, in which the coastal State may exercise limited control necessary to prevent or punish infringements of its customs, fiscal, immigration, and sanitary laws and regulations that occur within its territory or territorial sea. It also gives the coastal State sovereign rights for the purpose of exploring and exploiting, conserving and managing natural resources, whether living (e.g., fisheries) or non-living (e.g., oil and gas), in an exclusive economic zone (EEZ) that may extend to 200 nautical miles from the coast. In addition, the Convention accords the coastal State sovereign rights over the continental shelf both within and beyond the EEZ where the geological margin so extends.

The Convention carefully balances the interests of States in controlling activities off their own coasts with those of all States in protecting the freedom to use ocean spaces without undue interference. It specifically preserves and elaborates the rights of military and commercial navigation and overflight in areas under coastal State jurisdiction and on the high seas beyond. It protects the right of passage for all ships and aircraft through, under, and over straits used for international navigation and archipelagos. It protects the high seas freedoms of navigation, overflight, and the laying and maintenance of submarine

cables and pipelines, as well as other internationally lawful uses of the sea related to those freedoms, consistent with the other provisions of the Convention.

In recognizing the sovereign rights and management authority of coastal States over living resources within their EEZs, the Convention brings most fisheries under the jurisdiction of coastal States. (Some 90 percent of living marine resources are harvested within 200 nautical miles of the coast.) The Convention imposes on coastal States a duty to conserve these resources and also imposes obligations upon all States to cooperate in the conservation of fisheries populations on the high seas and of populations that are found both on the high seas and within the EEZ (highly migratory stocks, such as tuna, as well as "straddling stocks"). In addition, it contains specific measures for the conservation of anadromous species, such as salmon, and for marine mammals, such as whales. These provisions of the Convention give the United States the right to regulate fisheries in the largest EEZ in the world, an area significantly greater than U.S. land territory, which contains some of the most resource-rich waters on the planet.

With respect to non-living natural resources, the Convention recognizes the coastal State’s sovereign rights over the exploration and development of mineral resources, including oil and gas, found in the seabed and subsoil of the continental shelf, out to 200 nautical miles and beyond, to the outer edge of the geological continental margin. It lays down specific criteria and procedures for determining the outer limit of the margin. The United States has large areas of continental shelf seaward of 200 nautical miles in the Atlantic Ocean, the Gulf of Mexico, and the Arctic Ocean north of Alaska. In the Arctic, our shelf could run as far as 600 miles to the north.

For the non-living resources of the seabed beyond the limits of national jurisdiction (i.e., beyond the EEZ or continental margin, whichever is farther seaward), the Convention establishes an international regime to govern exploration and exploitation of such resources. It defines the general conditions for access to deep seabed minerals by commercial entities and provides for the establishment of an international organization, the International Seabed Authority, to oversee such development. The 1982 Convention's provisions on deep seabed mining, as will be discussed shortly, have been fundamentally amended by the 1994 Agreement.

The Convention sets forth a comprehensive legal framework and basic obligations for protecting the marine environment from all sources of pollution: from vessels, from dumping, from seabed activities, and from land-based activities. This framework also allocates regulatory and enforcement competence to balance the interests of coastal States in protection of the marine environment and its natural resources with the rights and freedoms of navigation.

The essential role of marine scientific research in understanding and managing the oceans is also secured. The Convention affirms the right of all States to conduct marine scientific research and sets forth obligations to promote and cooperate in such research. It confirms the right of coastal States to require consent for such research undertaken in marine areas under their jurisdiction. These rights are balanced by specific criteria to ensure that coastal States exercise the consent authority in a predictable and reasonable fashion to promote maximum access for research activities. More U.S. scientists conduct marine scientific research in foreign waters than scientists from almost all other countries combined.

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 as to the appropriate means and forums for resolution of disputes. They are also comprehensive, in subjecting the bulk of the Convention's provisions to enforcement through mechanisms that are binding under international law. Importantly, the system also provides Parties with means of excluding matters of vital national concern from the dispute settlement mechanisms (e.g., disputes concerning maritime boundaries, military activities, and EEZ fisheries management). A State is able to choose, by written declaration, one or more means for the settlement of disputes under the Convention. The Administration recommends that the United States elect arbitration under Annex VII and special arbitration under Annex VIII.

Subject to limited exceptions, the Convention excludes from dispute settlement mechanisms disputes relating to the sovereign rights of coastal States with respect to the living resources in their EEZs. In addition, 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, namely disputes regarding maritime boundaries between neighboring States, disputes concerning military activities and certain law enforcement activities, and disputes in respect of which the United Nations Security Council is exercising the functions assigned to it by the Charter of the United Nations. The Administration recommends that the United States elect to exclude all three of these categories of disputes from dispute settlement mechanisms.

I would like to discuss a particularly important issue that arises with respect to the category of disputes concerning military activities. The military activities exception has

long been of importance to the United States. The U.S. negotiators of the Convention sought and achieved language reflecting a very broad exception, successfully defeating attempts by certain other countries to narrow its scope. The U.S. has consistently viewed this exception as a key element of the dispute settlement package, which carefully balances comprehensiveness with protection of vital national interests.

Over the past year, the Administration reexamined the Convention's dispute settlement provisions to ensure that they continue to meet U.S. national security needs. Now, more than ever, it is critical that U.S. military activities, such as military surveys and reconnaissance flights over EEZs, are not inappropriately subject to international dispute resolution procedures, which could have a major impact on our military operations and national security interests.

As part of our review of this serious issue, we considered 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. We have concluded that each State Party has the right to determine whether its activities are military activities and that such determination is not reviewable. We also concluded that it was very important to highlight our understanding of the operation of this exception. As such, the Administration recommends that the U.S. declare that its consent to accession to the Convention is conditioned upon the understanding that each Party has the exclusive right to determine which of its activities are "military activities" and that such determination is not subject to

review. We will provide the Committee with language for the dispute settlement declaration.

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 past thirty years. As I noted before, the United States decided not to sign the Convention upon its adoption in 1982 because of serious defects in the regime it would have established for managing the development of seabed mineral resources beyond national jurisdiction. While the other parts of the Convention were judged to advance basic U.S. ocean policy interests, the United States and other industrialized countries determined the deep seabed regime of Part XI to be inadequate and in need of reform before they would ever consider becoming party to the Convention.

THE 1994 AGREEMENT

As a result of the important international political and economic changes of the late 1980s and early 1990s -- including the end of the Cold War and growing reliance on free market principles -- widespread recognition emerged, not limited to industrialized nations, that the collectivist approach of the seabed mining regime of the Convention required basic change. Thus, informal negotiations were launched in 1990 during the first Bush Administration, under the auspices of the United Nations Secretary-General. An agreement was adopted in July 1994.

The Agreement, signed by the United States on July 28, 1994, contains legally binding changes to that part of the LOS Convention dealing with mining of the deep seabed

beyond the limits of national jurisdiction (Part XI). It is to be applied and interpreted together with the Convention as a single instrument.

The legally binding changes set forth in the 1994 Agreement overcome each one of the objections of the United States to Part XI of the Convention and meet our goal of guaranteed access by the U.S. industry to deep seabed minerals on the basis of reasonable terms and conditions. All other major industrialized nations have now signed the Agreement and most have become party to the Convention and the Agreement as a package.

The Agreement overhauls the decision-making procedures of Part XI to accord the United States, and others with major economic interests at stake, decisive influence over future decisions on possible deep seabed mining. The Agreement guarantees a seat for the United States on the critical decision-making body and requires financial decisions to be based on a consensus of major contributors.

The Agreement restructures the deep seabed mining regime along free market principles. It scales back the structure of the organization to administer the mining regime and links the activation and operation of institutions to the actual development of concrete interest in seabed mining. A future decision, which the United States and a few of its allies could block, is required before the organization's potential operating arm (the Enterprise) may be activated, and any activities on its part are subject to the same Convention requirements as other commercial enterprises. States have no obligation to finance the Enterprise, and subsidies inconsistent with GATT/WTO are prohibited. Equally important, the Agreement eliminates all requirements for mandatory transfer of technology and production controls that were contained in the original version of Part XI.

The Agreement provides for grandfathering the seabed mine site claims established on the basis of the exploration work already conducted by companies holding U.S. licenses on the basis of arrangements "similar to and no less favorable than" the best terms granted to previous claimants. It also strengthens the provisions requiring consideration of the potential environmental impacts of deep seabed mining.

The Agreement entered into force on November 16, 1998.

STATUS OF THE CONVENTION AND THE AGREEMENT

One hundred and fifty-two States signed the Convention during the two years it was open for signature between 1982 and 1984. The Convention entered into force on November 16, 1994, one year after the sixtieth nation consented to be bound by it. As of today, there are 143 Parties to the Convention, including virtually all of our NATO and OECD allies, as well as Russia and China.

The 1994 Agreement was concluded on July 28, 1994, and was signed by 99 nations, including the United States. As of today, 115 States and the European Community have consented to be bound by the Agreement.

II.

I would like now to address some perceived disadvantages of U.S. adherence to the Convention.

First, it might be argued that the United States should not join the Convention because, as a party, we would be required to make financial contributions to run the Convention's institutions. However, payments to the Convention's institutions are modest. For the 2003-2004 biennial budget, the U.S. assessment for the International Seabed Authority would be a little over $1 million. The U.S. assessment for the

International Tribunal for the Law of the Sea for 2004 would be a little less than $2 million (24% of the total budget) and 22% of the total for the 2005-2006 budget years. We do not anticipate the budget for either institution to increase substantially in later years.

Second, some would argue that we should not be joining and participating in a new bureaucracy for deep seabed mining. The International Seabed Authority has, however, now been restructured in ways that meet the objections raised by the United States and others. The United States has a guaranteed seat on the 36-member Council, an effective veto (in combination with two other consumer States) in the Council, and an absolute veto in the Finance Committee with respect to any decision with financial or budgetary implications. Moreover, as a practical matter, U.S.-based companies will not be able to engage in mining the deep seabed, without operating through another State Party, unless we are party to the Convention.

Third, it might be argued that the United States should not join the Convention because we would have to pay a contribution based on a percentage of oil/gas production beyond 200 miles from shore. However, the revenue-sharing provisions of the Convention are reasonable. The United States has one of the broadest shelves in the world. Roughly 14% of our shelf is beyond 200 miles, and off Alaska it extends north to 600 miles. The revenue-sharing provision was instrumental in achieving guaranteed U.S. rights to these large areas. It is important to note that this revenue-sharing obligation does not apply to areas within 200 nautical miles and thus does not affect current revenues produced from the U.S. Outer Continental Shelf. Most important, this provision was developed by the United States in close cooperation with representatives of the U.S.

oil and gas industry. The industry supports this provision. Finally, with a guaranteed seat on the Finance Committee of the International Seabed Authority, we would have an absolute veto over the distribution of all revenues generated from this revenue-sharing provision.

Finally, as to whether it is sufficient to continue to rely only on customary international law, the distinct advantages of joining the Convention include the following:

- U.S. accession would enhance the authoritative force of the Convention, likely inspire other States to join, and promote its provisions as **the** governing rules of international law relating to the oceans.
- 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 continues to be implemented in various forums, both within the Convention and outside the Convention (such as at the International Maritime Organization or IMO). The United States would be in a stronger position defending its military interests 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. interests.

- Becoming a party to the Convention would strengthen our ability to deflect potential proposals that would be inconsistent with U.S. interests, including 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 *ad infinitum* 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.

Having elaborated the basic elements of the Convention and Agreement and the advantages of U.S. accession, allow me to raise two final serious issues.

Because the global context for the Convention is rapidly and continually changing, a way needs to be found to ensure that the Convention continues to serve U.S. interests over time. We must ensure that, in obtaining the stability that comes with joining the Convention, we nonetheless retain sufficient flexibility to protect U.S. interests. After U.S. accession, the Executive Branch will conduct biennial reviews of how the Convention is being implemented and will seek to identify any changes in U.S. and/or international implementation that may be required to improve implementation and to better adapt the Convention to changes in the global environment. After ten years, the Executive Branch will conduct a more comprehensive evaluation to determine whether

the Convention continues to serve U.S. interests. The results of these reviews will be shared with the Senate. (Another option that we considered is that of a sunset provision, i.e., limiting the length of time that the United States is a party to the Convention, which has disadvantages as well as advantages.) Needless to say, the United States could, of course, withdraw from the Convention if U.S. interests were seriously threatened.

In addition, I would like to note that the Convention includes simplified procedures for the adoption and entry into force of certain Convention amendments and implementation and enforcement measures that raise potential constitutional issues. We intend to sort these and other legal and policy issues out with the Senate, confident that they can be satisfactorily resolved.

Let me join with Assistant Secretary Turner in underscoring that becoming a party to the Convention, as modified by the 1994 Agreement, represents the highest priority of United States international oceans policy – a bipartisan priority – and to this end the Administration recommends that the Senate give its advice and consent to accession to the Convention and ratification of the Agreement.

Thank you very much.