Resolution and Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea: A General Assessment – Comment

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The first month of 1995 is a good time for those interested in the law of the sea to meet and consider recent developments. This month is a watershed between the treaty negotiation activities in which we were so heavily involved during 1994 and the inplementation activities on which we are about to embark. The accomplishments of 1994, just described by David Anderson, should be a source of real satisfaction to the international community. The adoption of the Agreement Relating to the Implementation of Part XI and the subsequent entry into force of the Convention has moved the international community significantly closer to attaining the goal of a universally acceptable legal framework for governance of the world's oceans.

Moreover, the substantive content and legal structure of the 1994 Agreement, and the process by which it was negotiated and adopted, demonstrate the flexibility of the international community in recognizing, and acting on, its common interest in a seabed mining regime which is responsive to changed circumstances. The Agreement also reflects that action based on consensus, in finding effective means to accommodate the

varying interests of States, is a workable principle in the context of the law of the sea.

Beginning in 1995, the international community has the opportunity to show that what has been agreed to can work. It can demonstrate in practical terms, through its actions as States and as members of the International Seabed Authority, a continuing commitment both to effective implementation of the Agreement relating to Part XI, and to the Convention as a whole.

The United States, in common with many other States, is engaged in this effort. On July 29, 1994, the United States signed the Agreement subject to ratification, and on October 7, 1994, the President transmitted the Convention and the Agreement to the U.S. Senate for advice and consent to accession and ratification, respectively.

The change in the composition of the U.S. Congress, as a result of the recent elections, has led some to wonder whether Senate consent to ratification and accession is still a feasible goal. There is good reason to believe that it is. The first reason is that the 1982 Convention – aside from pre-Agreement Part XI – represents the widely acceptable international framework for ocean governance which has been a bipartisan oceans policy objective of the United States for several decades. The second is that the Agreement Regarding the Implementation of Part XI achieves what Congress has previously called for in regard to an international deep seabed mining regime.

Without moving too far from the subject of this panel, the first point, regarding the Convention as a whole merits some consideration. Although the recent focus of our attention has been on Part XI, the Senate decision on the Convention will ultimately rest upon consideration of a broad range of U.S. interests, only one of which is seabed mining. The United States is, after all, a major maritime State, a coastal State with one of the longest coastlines in the world, and a State with national security, trade and commerce, environmental and other interests which are inextricably linked to the sea.

Various Senators, members of both political parties, have differing interests in these matters. Some may represent U.S. states with long coastlines and busy ports. Other may be especially concerned about the Nation's national security, free trade, oil and gas or other commercial or environmental interests. It is therefore not sufficient to consider the issue of consent to accession and ratification as a matter to be resolved solely along party lines. Moreover, since a vote of two-thirds of the U.S. Senate (present and voting) is required for Senate consent to a treaty it was never

contemplated – even in the last Congress – that a favorable vote on the Convention could be other than a bipartisan conclusion that the Convention and Agreement best serve the interests of the United States.

The United States has long considered that participation in a widely acceptable international regime governing all uses of the oceans best serves its own interests, as well as those of the international community as a whole. This has been a bipartisan U.S. policy, shared by both the U.S. Executive and Legislative branches of government.

The policy was reflected in the active role played by the United States in the Third United Nations Conference on the Law of the Sea, which began its substantive work in 1974, during a U.S. Republican Administration. It was reiterated in the U.S. domestic deep seabed mining law (Deep Seabed Hard Mineral Resources Act of 1980, 30 U.S.C. 1401 et seq.), which was enacted by Congress in 1980, on a bipartisan basis, as an interim measure pending an acceptable treaty. This law stated as one of its findings that:

> ... it is in the national interest of the United States and other nations to encourage a widely acceptable Law of the Sea Treaty, which will provide a new legal order for the oceans covering a broad range of ocean interests, including exploration for and commercial recovery of hard mineral resources of the deep seabed ... (30 USC 1401 (a) (8)).

The United States decided not to sign the Convention in 1982, because of basic objections to Part XI. However, that decision was followed in 1983 by issuance of President Reagan's ocean policy statement, which stated U.S. objections to Part XI, but also reaffirmed the basic objective of a universally acceptable convention and indicated that the United States would accept and act in accordance with the 1982 Convention's balance of interests relating to other oceans uses. This policy has been reaffirmed by successive U.S. Administrations.

The need for a widely acceptable Convention has not diminished over time. In an era when we are moving toward a more global economy, with the increase in maritime activity which that implies; when new technologies, such as telecommunication developments – which require underseas cables or other ocean uses – are emerging even as we speak; and with the pressure of increasing use on the marine environment and its resources, the importance of participation in the Convention is underscored rather than diluted by the fact of its widespread acceptability.

Although many of the Convention's provisions have the status of customary international law, it is still in the best interests of the United States and other Nations to have an integrated, contractual legal

framework within which we can seek consistency in the practice of Nations, balance competing interests and address new issues as they arise. And they will arise – as has been demonstrated in the years since conclusion of the Convention in such areas as fisheries, navigation of straits, and protection of the marine environment. Attempting to resolve these issues unilaterally, or through the further development of customary law is likely to be increasingly costly in both economic and political terms. It is preferable for the United States, and other States as well, to take advantage of the certainty, and the mechanisms for peaceful settlement of disputes, provided by the Convention.

Turning to Part XI and the Agreement, the U.S. seabed mining law provides guidance on what Congress considered an acceptable international seabed mining regime. First, the law clearly accepts the general principle, stated in Part XI of the Convention and in the Agreement, that the resources of the deep seabed are the common heritage of mankind and it expresses the expectation that the principle would be legally defined by an international regime. The Findings section of the Act states the fact of the U.S. vote for the 1970 U.N. General Assembly Resolution embodying that principle, and expresses "... the expectation that this principle would be legally defined under the terms of a comprehensive international Law of the Sea Treaty yet to be agreed upon ...". (30 U.S.C. 1401 (a) (7)). The Act also contains a disclaimer of extraterritorial sovereignty over any areas or resources of the seabed beyond U.S. national jurisdiction.

Congress also included more specific guidance. The 1980 Act states that an acceptable international seabed mining regime should provide:

first, assured and nondiscriminatory access, under reasonable terms and conditions, for U.S. citizens; and

second, security of tenure by recognizing the rights of U.S. citizens who have undertaken mining activities under U.S. law to continue their operations under terms and conditions which do not impose significant new economic burdens with the effect of preventing continuation of such operations on a viable economic basis.

The Act provides that the totality of the provisions of the international agreement should determine the extent to which these criteria are met. This includes consideration of such factors as:

– the practical implications for the security of investments of any discretionary powers granted to an international regulatory body;

– the structures and decisionmaking procedures for such a body;

– the availability of impartial and effective procedures for the settlement of disputes; and

– any features which tend to discriminate against mining activities undertaken by U.S. citizens (30 U.S.C. 1441).

Stated most basically, these concerns are both economic and institutional. The primary interests are: (1) that U.S. seabed miners, who by 1980 had already invested millions of dollars of private capital in deep seabed mineral resource activity, be able to continue those activities on a viable economic basis and on an equal footing with other operators, and (2) that the institutions of the international regime facilitate, rather than impede, sound commercial development of deep seabed mineral resources.

David has described the provisions of the Agreement and how they respond to the concerns of the industrialized nations and to the common interest of the international community in addressing changed economic circumstances. The totality of these provisions, and relevant portions of Part XI, also address the Congressional objectives outlined above. From an economic perspective, some of the most significant changes include:

– provision for access by the three U.S.-licensed consortia to the international regime on the basis of Sponsoring State certification as to financial and technical qualifications and, in accordance with the principle of non-discrimination, on terms similar to and no less favorable than those accorded registered pioneers;

– security of tenure in the form of a fixed 15-year exploration term (with provision for extension based on economic considerations), combined with a priority of right for an exploitation authorization in the same area, and restrictions on contract modification without the consent of both the Authority and the operator;

– elimination of the annual fee prior to commercial production and the replacement of previous economic rent provisions with provision for a future system based on principles of fairness, ease of administration and avoidance of competitive advantage between land and sea based producers;

– elimination of production controls in favor of restrictions on subsidization based on GATT/WTO;

– elimination of the requirement that operators transfer seabed mining technology and the strengthening of the provision for the protection of intellectual property rights; and

– restructuring of the functioning and funding of the Enterprise, including the requirement that any Enterprise operation be under contract with the Authority, the same as commercial operators, and the linkage of independent Enterprise functioning to operation in accordance with sound commercial principles.

The changes to the functioning of the institutions of the regime are equally relevant because of continuing concerns that these institutions would be so unwieldy, expensive and non-technical in their orientation as to raise the question whether the basic objective of realizing the benefits of development of the resources of the seabed was feasible. Important changes from this perspective include:

– the adoption of an incremental approach to the functioning of institutions and to development of a commercial recovery regime, in recognition that commercial activity is not likely to occur in the near term;

– the increased reliance on the principle of non-discrimination and on technical considerations in decisionmaking, including establishment of the Finance Committee;

– the restructuring of the decisionmaking mechanisms in the Council to give a stronger role to groups of States with special economic interests in decisions, in the absence of consensus;

– the provision that decisions of the Assembly be based on recommendations of the Council for subjects within its competence, including rulemaking; and

– the adoption of more market-based principles to govern future development of the commercial exploitation regime, as well as incentives for timely rulemaking, so as not to delay development activities.

With regard to dispute settlement, it is relevant that the Convention contains special provisions which give operators standing to initiate proceedings in the Tribunal, or to submit to commercial arbitration, disputes regarding the interpretation or application of a contract, or acts or omissions of a party to a contract.

Finally, the Agreement strengthens the provisions relating to protection of the marine environment by requiring applicants to submit both an environmental assessment and an environmental monitoring plan. The U.S. Act applies similar requirements to U.S. miners and recognizes effective environmental protection as an objective of a future international regime (30 U.S.C. 1402). U.S. licensees, consequently, have already prepared environmental impact statements and are subject to monitoring requirements, pursuant to U.S. law.

Now that the Agreement has been adopted and the members of the International Seabed Authority have held a first meeting, attention will increasingly focus on the implementation tasks ahead. The character of the institutions of the Authority, and the decisions it takes in this initial stage of implementation, are the visible means by which the international community will judge the potential success of the international regime

and also by which potential investors will assess the commitment of members of the Authority to carrying out the principles and objectives of the Agreement.

Implementation should thus be carried out with a continuing eye on the basic purpose of Part XI and the Agreement, which is to facilitate commercial development of the mineral resources of the deep seabed, consistent with environmental considerations, so that the international community can reap the benefits of these resources. There is some merit to the argument that, were the United States not to become Party to the Convention and Agreement, U.S. entities would be likely to face increasing difficulty raising necessary venture capital to continue activities under domestic law, because of the uncertainties concerning the legal relationship of a U.S. authorization to the Convention regime. However, there is also merit to the point that if the Authority, in practice, is not itself cost-effective, is not expeditious and even-handed in its administration, or if it imposes requirements on operators which are not necessary, clear, and technically-based, it is likely to raise similar uncertainties regarding investment. Despite the significant improvements made by the Agreement, this remains a continuing concern of industry.

It is, however, a concern which can be addressed by effective implementation within the framework of the Agreement and Part XI. The recent actions demonstrating restraint relating to the budget of the Authority, and by the States' parties in relation to the Tribunal, have been strong first steps.

The next clear opportunity to bring to the Authority the same spirit of consensus and commitment as was brought to negotiation of the Agreement is likely to be the election of the Council. The composition and actions of the Council will be extremely important to the successful functioning of the international regime. Considerable planning and skill will be necessary for groups of States to reach agreement among themselves as to which States will represent their interests in the Council. On this issue, it is most important, especially since deep seabed mining is not imminent, to proceed carefully and deliberately in order to assure that the precedents which are set regarding these most significant provisions of the Agreement serve the Authority well over time.

Finally, during 1995, planning and other implementation activity may begin with regard to other subsidiary organs, such as the Legal and Technical Commission and the Finance Committee, and on the future budget and activities of the Authority. Here again is an opportunity to strengthen the role and credibility of the Authority as an institution with techni-

cal expertise in regard to commercial mining, even at these initial stages. This can be done in part by building on the legacy of the PrepCom, which successfully registered a number of pioneer investors. This objective can also be furthered by assuring that the tasks planned for the Secretariat of the Authority relate directly to necessary technical and informational needs regarding deep seabed mining, and that the personnel of the Secretariat are technically equipped to carry out those responsibilities effectively.