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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Mr. Chairman, representative, friends, first of all I would like to thank the Max Planck Institute for having invited us here to Heidelberg to once again examine a subject matter which many of us have lived for many many years. I seem to see many of the old faces time and time again. There is a certain evergreen nature in terms of our negotiating process and it is a theme which will continue to apply to the Implementation Agreement itself.

This is the first occasion I have had the privilege of visiting Heidelberg. My only association to it is through the Student Prince and I seem to recall that the dream of achieving idealism was somewhat frustrated, although it remained in the hearts of many. I think that also strikes a common cord in relation to many matters relating to the Law of the Sea Convention itself. And that tells me particularly that we ought not to be deceived by the failure of the Implementation Agreement to achieve everything. The best is the enemy of the good. We are really in an evolving process because the Law of the Sea Convention by its very nature must serve all times and all generations. And that is the lesson of the Implementation Agreement that it must have the dynamism and the capacity to adjust to contemporary conditions and to be able to maintain its relevance so that it may serve all times and all ages. As I listened to David Anderson, I seem to recall that he has indeed covered the issue rather extensively, the entire area in relation to the contents of the Resolution itself as well as the Implementation Agreement. I will not therefore dwell over the whole area extensively again, except to pick up some of the

important themes which emerged from those negotiations. The way in which this Agreement has been drafted, has been the product of a great degree of collaboration.

At times we believed, perhaps we feared that it was not at all changeable. But there was always a fundamental fund of good will which prevailed among us, which showed us that the need to preserve the integrity of the Convention as a whole and to enable those who believed that it represented a triumph in terms of the ability to provide for a regime covering more than two-thirds of the planet was something which should not deter us from addressing the concerns of industrialized countries, based largely on ideological grounds, relating to Part XI.

One of the things I have learned about international relations is that perceptions perhaps are more important than realities. We cannot simply disregard feelings which we may not share but which in fact are deeply held by others. And because we were convinced that it was possible for us to be able to achieve the paramount objectives of the Convention we are not to be fearful of opening up a dialogue designed to ensure that the fundamental framework remained intact even if the internal arrangements themselves are adjusted to meet the concerns of others. And so it was that in fact when on the 10th of December 1982 we were able to adopt the Law of the Sea Convention we did so with rather mixed feelings. It had taken us from 1973 indeed before the Sea-Bed Committee was able to flesh out a comprehensive Convention on the Law of the Sea. By 1980 we all believed that there was universal consensus. My friend Bernie Oxman, who I see here, proclaimed at that date, I believe, that the end was in sight. He had not taken into account the possibility of what electoral successes might bring about in the United States: changing administration resulted in a U-turn of significant proportions. The election of President Reagan resulted in a need for re-examination of the Convention itself. It took us another two years to look intensively at the concerns that had been expressed, and indeed, we made attempts to make concessions which we believed would accomodate the United States. Alas, that was not to be for when the 10th day of December came in Montego Bay, the United States which actively participated and indeed which was one of the significant beneficiaries of this Convention, decided that it would not acquiesce.

David Anderson said that in Montego Bay many of the industrialized countries expressed the view that they had reservations about Part XI. There were no reservations in my recollection which would have forbidden them to have become parties to the Convention except for the

fact that the United States itself was not itself a party at that stage. My own feeling really was that the solidarity which was demonstrated in large measure by the industrialized countries was a new feature which was emerging. We often spoke about the solidarity of the developing countries; but it seemed to me that a new ethos was emerging in which in fact we saw certainly in the 1980's the development of a solidarity among the western countries.

We spoke about significant political and economic changes to which references have been made in the Implementation Agreement. And I think it was that which compelled all of us to re-examine whether it was necessary to look at Part XI in greater detail to ensure that indeed there would be universality in participation in the Convention and to ensure that indeed the Convention which was negotiated as a package would maintain its essential integrity and continued to be a package. And so one of the fundamental objectives of the Resolution and the Implementation Agreement is a search for universality. It was recognized that the Convention which was designed to serve mankind as a whole could not serve mankind as a whole if one or more of the important constituencies of mankind was dissatisfied with it. Universality was therefore necessary in order to bring stability in the oceans as such. It was necessary in order to maintain the integrity of the regime package. It was necessary in order to maintain full participation in the continued elaboration of the regime in its implementation in all its aspects. It was necessary in order to maintain that degree of co-operation both between developed and developing countries and amongst themselves, so that the integrity of the Convention as a whole could be preserved. And that search for universality was shared. It was not simply a search which was motivated from developing countries; it was a common cause also among the industrialized countries. Therefore, when the group of 77 declared in 1989 that we were all prepared to open a dialogue without preconditions designed to ensure that there would be universal participation in the Convention it was in recognition of the fact that it was more important to preserve the fundamental elements of the Law of the Sea Convention not simply in respect of Part XI but in all its aspects. We found ourselves in a situation in which it was necessary to preserve a convention which was overwhelmingly supported by the international community as a whole but which contained certain elements with which a minority had problems. In another place, I think I said, it was important not to throw the baby with the bathwater. That was important. So the declaration by Mr. Mumba Kapumba in 1989 must be seen in that context. It was an olive branch

which we extended to the industrialized countries. But it was also an olive branch which was waved on the belief that it was in the mutual interest of all States to be able to find this necessary accomodation. We knew also that a convention of this kind had to be adaptable. It had to be adaptable to adjust itself to changing economic, political and other circumstances. How then would it be possible to do that? To do that in a situation in which many States have already ratified the Convention, including my own. How could we do that whilst at the same time preserving and not re-opening some of the delicate compromises, the mini packages which have been worked out within the framework of the Convention as a whole? How to do that and to preserve intact the fundamental framework of Part XI itself which consecrated the area beyond the limits of national jurisdiction as the common heritage of all mankind?

That itself presented a very formidable challenge. But the very fact that the invitation for a dialogue for universal participation was made without preconditions was simply saying no more than we needed to find solutions which would ensure that there would be guaranteed preservation of these fundamental elements.

The consultations undertaken by the Secretary General were significant because they were designed to secure universal participation. There are many who questioned whether the way in which they began in particular by being accessible only to a selected group of persons would indeed produce the sort of results which would secure universal participation. I happened to be among that selected group and many of my colleagues and friends often questioned the wisdom of that participation; because they believed that somehow we could be driven to agree to certain adjustments to be recommended to a larger constituency; adjustments which by their very nature might affect some of the sacred principles which they themselves respected. But I think, for those who participated in the early days they accepted a rather heavy responsibility. In a sense they regarded themselves as auditors of the Convention principles and its guardians. And on many occasions there were many proposals which in one's view and simply from a purely national interest point of view, one might have taken a certain position. But we had to look at it on a much wider basis. One had to ensure that any proposal was something which at the end of the day could be accepted by the universal community as a whole. And that is why it soon became important that in the subsequent phases of the negotiations the selective participation had to become open ended. Those of us who have taken part in the Law of the Sea Conference know what that means. It means essentially that it is open to all States to participate.

We also know that only the very interested will attend. So that in fact although the invitation was indeed open quite often one finds that the limited participation is still the order of the day. That is the reality. Hence, the responsibility will continue to lay on those who participated to ensure that all legitimate interests would receive protection.

One of the questions which arose in terms of the consultations and in terms of the Agreement and Resolution was what should be the nature of this document, agreement, call it what you will, which would incorporate the results of this consultation and achieve this ultimate goal of universality. As David Anderson had indicated, many approaches were suggested. Some suggested that it was only necessary to have an Interpretative Agreement. Others suggested the need for a Formal Protocol amending the Law of the Sea Convention; others suggested that we needed to have some initial start with the prospects of a Fourth United Nations Conference on the Law of the Sea. One had to deal with the reality nonetheless since there were many States that had ratified the Convention. For those States in particular it will be extraordinarily difficult in so short a period of time to go back to their Parliaments and to the Executives to once more recommence the ratification procedures. The difficulties which that could bring, far from there being assurances of universality it could have the effect of re-opening the Convention and even losing the benefits of the ratifications which have already taken place. That was a danger; many of us saw that what we were really embarked upon was the process of the implementation of the Convention; that the basic fundamental elements of the Convention were in place; that as far as Part XI was concerned the basic structures were in place and what gave rise to difficulties was the manner of the implementation of Part XI of the Convention. The concept of the common heritage of mankind was not questioned and the need to have some institutional framework to organize and regulate the activities in the International Seabed Area was not seen as the question. But the manner in which decisions within the institutional framework were taken was a matter of concern; the manner in which the Council would be composed was a matter of concern; the manner in which there could be protection of the land based interest production policies and so on, and compensation fund were matters of concern. The question as to whether or not a review conference could impose the solution against the will of States were matters of concern. But the fundamental elements to be found in the Convention in Part XI relating to the character of the common heritage of mankind, relating to the overall institutional framework, all those were not really

seen as obstacles to universality. It was like a building, like a structure within it that has internal compartments. Those internal compartments provided that they did not in any way shake the fundamental structure itself. They could be adjusted from time to time to meet new occupants, to change to meet new circumstances, not in any way however undermining the fundamental structure itself. It is within that framework, that the Implementation Agreement was conceived. In that framework it was conceived as not really formally amending the Convention. On the other hand, for States which had fundamental concerns the question was how to guarantee that, whatever were the results of the consultations, there should be some form of binding agreement which States will have to apply. So that when States expressed their consent to be bound to the Convention as applied and implemented by the agreement, that agreement would be binding on all States. That raises the kind of issue which has quite often been raised as to whether the Implementation Agreement is therefore an amendment to the Convention itself; often that thin line between implementation and amendment is imperceptible. I would say, when one examines the nature of the Implementation Agreement there are many of its elements which in fact could be implemented without any form of binding amendment as such. But there are indeed other aspects and in particular those aspects that relate to decision-making, in which one would say that strictly speaking, that by the means of the Implementation Agreement there has been a process of amendment. The reality is that if the international community as a whole, having regard to its perception of the circumstances all collectively agree that this is the manner in which the institutional machinery should operate, then in those circumstances that collective will of the international community as a whole would be able to achieve the same results by virtue of the Implementation Agreement.

In terms of the manner in which the Implementation Agreement and the Resolution is couched as David Anderson had said, the Agreement and the Convention have to be ratified together as a single instrument; and they have to be interpreted together as a single instrument. It follows from that that in terms of future ratification no one can ratify the Convention without at the same time ratifying the Agreement. The concept of the unitary nature of the Convention and the Agreement is fundamental. It is fundamental also because the Convention was negotiated as a package and the integrity of the package can only be preserved if the Agreement and the Convention are regarded as a single instrument. If we do not do that we open the way for the Fourth United Nations Conference

on the Law of the Sea. The world is not yet ready for that. This is a kind of creativity which was unleashed in the negotiations and made it possible to be able to devise something which would enable universal participation to take place. On the one hand, it satisfied the desires of many industrialized countries in particular to have an agreement which would have some binding force. It satisfied the desires of all countries, particularly the developing countries, to have an agreement which would be an integral part of the Convention as a whole so as to preserve the integrity of the package; and it had the advantage also of ensuring that those States which had already ratified the Convention would not have an obligation to go back to their Parliaments to secure anew another ratification and with the prospect of re-opening the entire package system. That is why in terms of the mechanisms for dealing with the fundamental question of consent to be bound which is to be found in the Agreement itself we find that there are a number of choices which have been available. Consent to be bound, as David Anderson indicated, may be by signature, subject to ratification or signature as such or signature subject to a simplified procedure which was applicable to those countries like my own, which have already ratified the Convention, or by accession. That simplified procedure which has often been characterized as tacid consent is a recognition of the fact that in many countries where, for example, ratification is an executive act and not a legislative act, and for those States which have already ratified the Convention, unless they object, after twelve months they are deemed to have consented, if they had voted in favour of the Resolution to which the Implementation Agreement is annexed. States are provided with such an opportunity unless they indicate they do not wish to be bound in this way. I have no doubt that many States, and they will be developing States, will use this as a methodology for becoming parties to the Implementation Agreement. This methodology is important because it opens the way to rapidly secure universality of participation in both the Agreement as well as in the Convention itself.

There is a certain aspect of the Agreement which attempts to address some of the insecurities which arise from the fact that the Agreement should be of a binding nature, the Agreement and the Convention should be seen as a single instrument and the integrity of the package should be preserved. There is a term in this Agreement which indicates that the provisions of the Agreement and Part XI shall be interpreted and applied together as a single instrument. In the event of any inconsistency between the Agreement and Part XI the provisions of the Agreement shall prevail. But the supremacy of the Agreement does not arise merely from a literal

reading of the Agreement. There is an obligation to make all efforts to reconcile the Agreement with the provisions of the Convention. It is only in cases where on any proper interpretation reconciliation is not possible that the supremacy of the Agreement will prevail. I give one illustration. That arises in the relationship between the Assembly and the Council. When we come to look at the Council I think the great question of separation of powers will put the extent of the supremacy of the Agreement in very sharp focus. What is provided for in the Implementation Agreement in relation to the Council is that in those areas in which there is concurrent jurisdiction between the Assembly and the Council, and in particular in relation to matters of an administrative or financial nature, the Assembly is required to take its decisions b a s e d upon the recommendation of the Council. Where the Assembly does not accept the recommendation of the Council the matter can be referred back to the Council. Is not this likely to create an impasse; how many references are to take place before there is a resolution of that matter? I find the answer in Art. 160 of the Convention. It provides, and it is not amended by this Agreement that the Assembly as the sole organ of the authority consisting of all the members shall be considered the s u p r e m e o r g a n of the authority to which the other organs shall be accountable as specifically provided for in the Convention. I think, what that says essentially is, that the fundamental rules are co-operation and collaboration. There must be the need for the Council to make its recommendations. But at the end of the day, if there cannot be any resolution, the supreme organ must be able to take a decision. You cannot paralyse an institutional framework simply on the basis that you cannot resolve your problems at the end of the day. All efforts at arriving at the resolution must be exhausted. But at the end of the day that resolution must take place. There is also a ring of a Uniting for Peace Resolution in this provision. There is a need for co-oporation between the Assembly and the Council.

Another important matter dealt with in the Agreement is a provision for provisional application of the Agreement. That was one of the fundamental instruments devised to ensure early participation and universal participation. Because the provisions contained in the Implementation Agreement, designed as they were particularly to address the concerns of industrialized countries, would not be of great practical value if the early participation of these countries was not assured and we had to wait for the industrialized countries to go through the ratification procedures. Therefore it was important that when the Convention was to come into force on the 16th of November 1994 that at that very moment of time the

possibility should exist for industrialized countries to participate fully. Indeed, many participated fully in the Preparatory Committee as observers. But, as David Anderson said, they were more than observers. In fact, they fully participated. There were no votes in the Preparatory Commission. So too, it is provided now that the Implementation Agreement and Part XI would be applied provisionally by States and that by that provisional application it will be possible to guarantee the contributions which will be made by those countries, particularly industrialized countries, for the support of the institutions provided for in Part XI and in particular the International Seabed Authority itself.

There is one issue which arises on provisional application and that relates to the States which ratified the Convention and who have decided that they will not provisionally apply it. The Brazilian question arises. What is going to happen in relation to those States? What regime do they apply? They have ratified the Convention and the Convention is in force; will they be required to apply the provisions of the Implementation Agreement? I hope it is not a problem. I believe that those States which had their reservations about applying provisionally indicated that those reservations were for constitutional reasons, and in particular the need for them to go through a certain constitutional procedure. But the fact is, one of the things we desperately tried to avoid was to have parallel regimes. The possibility of a parallel regime, at least as a theoretical question, arises because for States which have ratified the Convention and which do not apply either provisionally or definitively the Agreement and the Convention as an integrated package one could say that theoretically at least the provisions which are applicable to them as between parties which have ratified the Convention are the provisions of the Convention only. But it would lead to a parallel regime and would really weaken the system and this would not be an acceptable position, really.

I now therefore would like to deal very quickly with one or two things relating to the substantial elements. Firstly, that in terms of the costs of State Parties I only make one observation. I believe we have been able to provide solutions by an evolutionary approach to Part XI to deal with the question of the costs which will arise at a time when deep-seabed mining is not to take place for some considerable period of time. Therefore it has been agreed that form will follow function and that the institutions of the Authority and the degree of its functioning would take place over time to meet circumstances as such. I have often expressed the view that there is a danger that unless we accept that the Authority must be endowed with the resources and the capacity to carry out its particular functions at any

moment of time there is a danger of the paralysis of the Authority. I believe that unless those for whom the Implementation Agreement was designed are fully committed to ensure that those resources are available there will be a threat to the functioning of the Authority. The very fact that in ten years we faced fundamental changes of a political and economic nature must place us on our guard to be able to adjust to the changing circumstances which are inevitable in the international community. The institutional machinery of the Authority must be able to expand and adjust to deal with changing circumstances. Those changing circumstances will not have cristallized in 1994 or 1995. The circumstances will have to be watched and they will indeed change from time to time. Secondly, in terms of changing circumstances, although there has been a reference both in the Resolution and in the Agreement to political and economic changes including increasing reliance on market-oriented approaches, I know it is rather interesting, whereas in the Resolution the language in relation to that matter is, "Recognizing that political and economic changes, including in particular a growing reliance on market principles, have necessitated the re-evaluation of some aspects of the regime of the area and its resources", in the Agreement the language is "Noting the political and economic changes including market-oriented approaches affecting the implementation of Part XI". It is not without significance that the language of the Agreement has become somewhat fuzzy. Because the compromise is that the Agreement notes a fact while the Resolution itself is a little bolder in indicating what has necessitated the adjustments or the changes. What I think is important is a recognition that changing circumstances can and do require changes from time to time. I think, however, it would be quite illegitimate to draw from that the conclusion that the Convention or the Resolution or the Agreement has enshrined a market principle as a fundamental feature of the common heritage of mankind. It has simply indicated that at a certain moment of time that approach is to be found. If in 50 years or 100 years fundamental thinking has changed to render more relevant another kind of approach, the common heritage of mankind cannot be held hostage to so-called market approaches simply because the Implementation Agreement which would frustrate the realization of the common heritage of mankind. That is why the manner in which it is provided for is largely to be found in the preamble of provisions in recitals of some kind. Reciting historical facts, reciting what has taken place at a moment of history, does not enslave us to the past. It is not legitimate,

and it would be a matter of indefensible conceit to believe that this generation has the right to enshrine for all generations the manner of the implementation of the Convention. In much the same way that we recognized, as we did in the last several years, the need to make these internal adjustments so, too, we must recognize the capability of the Convention and its institutions to adjust to the changing circumstances of the future. That is in my view one of the fundamental lessons of the Implementation Agreement.

Two further observations. In terms of the Enterprise David Anderson has indicated that it was necessary to make some adjustments in order to deal with the realities of the Enterprise. Firstly, deep-seabed mining has been postponed for some time and in consequence it was not necessary to establish a full blown Enterprise at the inception. But the Agreement itself stipulates the early functions of the Enterprise in some considerable detail and it does in fact provide for the appointment of an interim Director General. And what it does also, it identifies the time at which by reference to objective criteria the Enterprise will have an independent functioning. Those objective criteria are, firstly, when an application is made for a joint venture with the Enterprise which is found to be commercially sound. Or secondly, when an application for a plan of work for exploitation has been approved. True it is that the Council must make a determination. But the Council cannot make a determination inconsistent with those objective criteria.

In terms of decision-making which perhaps was the most difficult of the areas, let me say that the chamber voting system which has been introduced by the Implementation Agreement is one of the creative ways of attempting to ensure that we enter into a new era of international cooporation. Indeed, in this new era which seeks to administer the common heritage of mankind I think there is no room for real polarization nor is there room for differences of fundamental ideology which would frustrate the realization of the common heritage of mankind. The provisions therefore allow for Council decisions to be taken firstly by exhausting all possible means of consensus in matters of substance and secondly to reserve for the possibility that unless there was indeed a majority in each of the four chambers a decision could not be taken. That is something which will create what I might call a balance of terror. I have a feeling that the greatest struggle which we had in the negotiation was to recognize that if there was to be a collective veto to be exercised in the chambers which were designed to protect the common heritage of all mankind, developing countries also had a right to that veto. Although I spoke of terror it must

be recognized that that balance of terror is not equal in all chambers. In many of the chambers there are only four members so that three members can determine that issue. In the chambers of developing countries there would be significantly more than four and the number could be around twenty-two, so that eleven developing countries would be required to cast a negative vote. I have a feeling, however, that it is unlikely that you will find within the chambers that sort of solidarity of views. It is more likely that States will be competing then whether or not they are the primary producers, main exporters or consumers or investors. If you look around the world they seem to be on a competitive path so that I have the feeling it is unlikely that you will find when issues arise that identity of views within the chambers. And so I believe the balance of terror would be rare.

I believe I have spent more time than I would be allotted. I would simply like to end by saying this that we must view the Resolution and the Implementation Agreement as providing us with a real opportunity for universal participation. The lesson of this Agreement is that it provides for the capacity for adjustments to take place, to meet contemporary conditions. And the lesson of the Implementation Agreement is that the common heritage of mankind is evergreen and the adjustments within it must equally be evergreen. That the ability therefore to make adjustments which do not affect the fundamental structure allows the international community to deepen the sense of co-operation which will take place without in fact affecting the structures themselves. I agree with David Anderson that by this rather creative measure we would have saved the Law of the Sea Convention itself.