Chapter 19

Mechanisms for Adjusting Part XI and the Implementation Agreement*

I Introduction

During the course of the Secretary-General’s consultations, held between 1990 and 1994, the basic issue was the fate of Part XI. Would it be kept, changed or rejected? The question of the best mechanism(s) or procedure(s) for adjusting Part XI was regularly discussed. At different stages in the consultations, the following mechanisms were suggested:

1. To deal with the outstanding “hard core” issues in a comprehensive manner with a view to resolving all of them in a legally effective way.
2. To deal with some of the issues at the present stage and to postpone consideration of the others to a future Conference.
3. To postpone consideration of all outstanding issues to a future conference to be held when mining is about to begin (sometimes described as a “freeze” on Part XI and coupled with a “trigger mechanism” for beginning the conference). During the period of postponement, the Preparatory Commission would continue in existence.
4. To adopt some agreed interpretations or understandings about the meaning of provisions in Part XI and how they were to be applied.

* This chapter, the text of a paper read in May 1994, was first published in M.H. Nordquist and J.N. Moore (eds.), Entry into Force of the Law of the Sea Convention (1995), 89-97. The paper has been slightly edited.
(5) To permit industrialized States and other States which have not ratified the Convention to proceed to ratify or accede to the Convention subject to the qualification or reservation that they would not accept Part XI but would agree to attend a conference when mining was about to begin in order to decide upon the mining regime which should apply.

(6) To await the entry into force of the Convention and then allow the States Parties either to have recourse to articles 314 and 316 concerning its amendment, or to take legally binding decisions about the implementation of the Convention.

In more analytical terms, there were three options for tackling the substance: deal with all issues at that time; deal with some at that time and some in the future; deal with none at that time and agree to hold a Conference in the future. There were also three options for the form: a treaty (amending, interpreting or implementing Part XI); a procedural decision (calling a conference); or invoking articles 314 and 316 of the Convention. There was general agreement that form must follow substance.

This paper reviews the advantages and disadvantages of the various mechanisms. It shows how the proposed Agreement relating to the Implementation of Part XI combines several of the above ideas, but corresponds to no single one of them. The paper assesses the legal effects of the particular mechanisms which have been included in the Agreement.

II Some Key Discussions of Mechanisms

The question of the mechanisms for adjusting Part XI has been addressed at several stages during the course of the consultations. Different views were expressed about the nature of the problems and especially about the way to solve them. Four important debates may be singled out.

A At the very outset in 1990, a list of “hard core” issues was drawn up. The issues were:

(1) costs to States Parties;
(2) the Enterprise;
(3) decision-making;
(4) the review conference;
(5) transfer of technology;
(6) production limitation;
(7) compensation fund;
(8) financial terms of contracts;
(9) the environment.

Agreement on a list of problems was a first step. Subsequently, the environment was dropped on the grounds that, whilst it was agreed to be an important matter, it was not an obstacle to the ratification of the Convention by industrialized States. It was agreed that the topic would continue to be addressed in the proper forum at the appropriate time. Other topics, not on the list, have included the position of the regis-