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American Bar Association Section of International Law and Practice Reports to the House of Delegates: I. Chemical and II. Law of the Sea Convention

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SECTION RECOMMENDATIONS AND REPORTS

American Bar Association Section of International Law and Practice Reports to the House of Delegates*

I. Chemical Weapons Convention**

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association urges the U.S. Senate to give its advice and consent as soon as possible to the ratification of the Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.

REPORT

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (the “Chemical Weapons Convention” or “CWC”) was opened for signature and signed by the United States at Paris on January 13, 1993. It was transmitted to the Senate for

*These Recommendations and Reports were adopted by the House of Delegates in August 1994.

**This Recommendation and Report was prepared by the Section’s Committee on Arms Control and Disarmament, chaired by Thomas Graham, Jr. Bonnie Jenkins, the committee’s vice-chair, was primarily responsible for preparing the report.

its advice and consent to ratification on November 23, 1993. To date, 156 countries have signed the Convention.

The Convention will enter into force 180 days after the deposit of the 65th instrument of ratification, but no earlier than two years after its opening for signature. Thus, 65 countries must ratify the CWC by July 17, 1994, in order for the CWC to be able to enter into force at the earliest possible date of January 13, 1995. The two year delay before the earliest possible entry into force of the Convention was intended to allow Signatory States time to undertake the necessary national legislative and procedural preparations and to provide time for the CWC Preparatory Commission, established pursuant to the CWC, to prepare for implementation of the Convention.

The Convention prohibits reservations to the Articles. However, the CWC allows reservations to the Annexes as long as they are compatible with the object and purpose of the Convention. This structure prevents States Parties from modifying their fundamental obligations, as some countries, including the United States, did with regard to the Geneva Protocol of 1925 when they attached reservations preserving the right to retaliate with chemical weapons. However, the Convention does allow some flexibility with regard to the specifics of their implementation of the Convention.

The Chemical Weapons Convention will ban the use, development, production, acquisition, stockpiling, retention, and direct or indirect transfer of chemical weapons. It will also prohibit preparation for using chemical weapons and assistance, encouragement or inducement of anyone else to engage in activities prohibited by the Convention.

The CWC mandates each State Party to pass penal legislation prohibiting individuals and businesses and other nongovernmental entities from engaging in activities on its territory or any other place under its jurisdiction that are prohibited to States Parties. Such penal legislation must also apply to the activities of each State Party's citizens, wherever the activities occur. The Chemical Weapons Convention also contains a number of provisions that require implementing legislation to give them effect within the United States. These include provisions on international inspections of U.S. facilities, declarations by U.S. chemical industry, and the establishment of a "National Authority" to serve as the liaison between the United States and the international organization established by the CWC.

The Chemical Weapons Convention will require States Parties to destroy their chemical weapons and chemical weapons production facilities under the observation of international inspectors; subject States Parties' citizens and businesses and other nongovernmental entities to its obligations; subject States Parties' chemical industry to declaration and routine inspections; and subject any facility or location in the territory or any other place under the jurisdiction or control of a State Party to international inspection to address other States Parties' compliance concerns.

The Convention requires all controlled chemicals to be declared within 30

days of the entry into force of the Convention for a State Party, declarations to be internationally confirmed, and all chemical weapons to be completely eliminated within 10 years after its entry into force (15 years in extraordinary cases), with storage and destruction monitored through on-site international inspection. The Convention also requires all chemical weapons production to cease immediately and all chemical weapons production facilities to be eliminated (or in exceptional cases of compelling need, and with the permission of the Conference of the States Parties, converted to peaceful purposes). Cessation of production, and destruction within 10 years after the entry into force of the Convention (or conversion and peaceful production), will be internationally monitored through on-site inspection.

The Convention contains two verification regimes to enhance the security of States Parties to the Convention and limit the possibility of clandestine chemical weapons production, storage, and use. The first regime provides for a routine monitoring regime involving declarations, initial visits, systematic inspections of declared chemical weapons storage, production and destruction facilities, and routine inspections of the relevant civilian chemical industry facilities. The second regime, challenge inspections, allows a State Party to have an international inspection conducted on any facility or location in the territory or any other place under the jurisdiction or control of another State Party in order to clarify and resolve questions of possible noncompliance. The Convention obligates the challenged State Party to accept the inspection and to make every reasonable effort to satisfy the compliance concern. At the same time, the Convention provides a system for the inspected State Party to manage access to a challenged site in a manner that allows for protection of its national security, proprietary, and constitutional concerns. In addition, the Convention contains requirements for the protection of confidential information obtained by organization to be established by the CWC.

The implementation of the CWC will be conducted by the Organization for the Prohibition of Chemical Weapons (OPCW). The OPCW will consist of the Conference of the States Parties, which will be the overall governing body composed of all States Parties, the 41-member Executive Council, and the Technical Secretariat, an international body responsible for conducting verification activities, including on-site inspections. The OPCW will provide a forum in and through which members can build regional and global stability and play a more responsible role in the international community.

As noted previously, the CWC also established a Preparatory Commission to prepare for implementation of the Convention. The CWC Preparatory Commission began work in February 1993 in The Hague, the site of the future headquarters of the OPCW. The Commission will continue until the CWC enters into force. Its work and recommendations will be approved by the Conference of the States Parties shortly after entry into force.

The Convention contains a number of provisions that make a major contribution

to U.S. nonproliferation objectives. In addition to verification of the destruction of chemical weapons, the Convention provides a regime for monitoring relevant civilian chemical industry facilities through declaration and inspection requirements. States Parties are also prohibited from providing any assistance to anyone to engage in activities, such as the acquisition of chemical weapons, prohibited by the Convention. Exports to non-States Parties of chemicals listed in the Convention are prohibited in some instances and subject to end-user assurances in others. Imports of some chemicals from non-States Parties are also banned.

In addition, the Convention represents a segment of a major effort by the United States and other states to deal with the proliferation of weapons of mass destruction. Chemical weapons have often been termed the "poor man's nuclear weapon" and as such, the Chemical Weapons Convention, once it enters into force, will play a significant role in helping to halt the proliferation of such weapons. Other steps being taken to combat proliferation include the strengthening and extension of the Treaty on Non-Proliferation in 1995 and the possible adoption of verification provisions for the Biological Weapons Convention.

The Chemical Weapons Convention is of major importance in providing a foundation for enhancing regional and global stability, a forum for promoting international cooperation and responsibility, and a system for resolution of national concerns. The Convention is in the best interest of the United States. Its provisions will significantly strengthen United States, allied and international security, and enhance global and regional stability.

Respectfully submitted,
James H. Carter
Chair
Section of International
Law and Practice

August 1994

II. Law of the Sea Convention*

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends that the United States become a party to the 1982 United Nations Convention on the Law of the Sea and to the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, dated July 29, 1994.

*This Recommendation and Report was developed by John E. Noyes, Louis B. Sohn, and Houston Putnam Lowry.

REPORT

For the United States and the world, widespread adoption of a codified rule of law for the oceans is of paramount importance. The 1982 Convention on the Law of the Sea, which has now been accepted by over 60 nations and will enter into force November 16, 1994, will provide a stable framework for the interaction of nations on oceans issues. Concerns of the United States and other major industrialized nations with certain technical and institutional features of Part XI of the Convention, relating to deep seabed mining, have been addressed in a July 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, which will be interpreted and applied together with Part XI as a single instrument. The United States signed the 1994 Agreement on July 29, 1994.

The 1982 United Nations Convention on the Law of the Sea defines rights and duties with respect to uses of the oceans. The Convention guarantees transit passage through straits, the right of overflight over straits, the right of sea lanes passage through archipelagic waters, and other navigational freedoms important to the United States. The Convention provides a comprehensive framework of rules and principles relating to the protection of the marine environment. The Convention also satisfies important United States interests by establishing wide limits to the continental shelf regime and defining the regime of the 200-mile exclusive economic zone. With respect to other issues as well—marine scientific research, management of fisheries and other marine resources, maritime jurisdiction and boundaries, and other lawful uses of the oceans—the Convention will be particularly important to nations such as the United States whose public and private interests benefit from a stable legal framework within which to conduct their activities.

Particularly in an era with new threats to United States security posed by the end of the Cold War and by the rise of new nations and regional powers, it is important to seek long-term stability of rules related to the oceans. Unilateral claims of coastal nations can undermine and change rules of the customary law of the sea. Unilateral assertions of extensive national jurisdiction over the oceans can disrupt the balance of rights and duties agreed upon in the 1982 Convention. The Convention provides treaty rules that are hard to change unilaterally.

The Convention contains institutional features that can help to promote compliance with Convention norms and thus to stabilize the law of the sea. The Convention includes provisions for obligatory third-party adjudication of many issues. The United States could choose to have a tribunal review and pronounce on whether another nation's actions were legal under the Convention. The presence of a comprehensive dispute settlement system also will help to deter violations and unreasonable unilateral interpretations of Convention norms. These dispute settlement mechanisms will not likely be available to the United States if it does not become a party to the Convention.

Although the United States was not among the 159 signatories of the 1982 Convention on the Law of the Sea, its concerns with the Convention have been tied only to certain technical and institutional features of the seabed mining regime of Part XI. With regard to other issues, the United States has supported the norms contained in the Convention. The President invoked the Convention and international law in 1983 when he proclaimed a United States exclusive economic zone extending 200 miles from the United States coastline and encompassing over 2,000,000 square miles. He also stated that "international law, as reflected in the applicable provisions of the 1982 Convention on the Law of the Sea" supported a broader jurisdiction over the territorial sea when, in 1988, he extended United States territorial waters from 3 to 12 miles. United States representatives to the United Nations have noted that the United Nations Convention on the Law of the Sea represents a major accomplishment in the development of the international law affecting the oceans. The Convention was negotiated with the support of the U.S. Executive Branch and the Congress through four Democratic and Republican presidential administrations.

The American Bar Association recognized the difficulties contained in the Convention's deep seabed mining regime in a 1983 report. The concerns included:

- Provisions that would actually deter future development of deep seabed minerals resources when such development should serve the interests of all countries;
- A decision-making process that would not give the United States or others a role that fairly reflects and protects their interest;
- Provisions that would allow amendments to enter into force for the United States without its approval;
- Stipulations relating to mandatory transfer of private technology and the possibility of national liberation movements sharing in benefits; and
- The absence of assured access and security of tenure for future qualified deep seabed miners to promote the development of these resources. (American Bar Association Section of International Law and Practice Report to the House of Delegates, August 1983, p. 5.)

The American Bar Association also, in 1990, emphasized the importance of a widely accepted Convention and urged that a high level working group be established to determine what changes affecting Part XI were needed in order to gain the support of the United States. (American Bar Association Section of International Law and Practice and Standing Committee on World Order Under Law Report to the House of Delegates, February 1990.)

The United States government has never disputed the desirability of an international agreement that retains other basic features of Part XI. Section 3 of the 1980 Deep Seabed Hard Mineral Resources Act, for example, stated that the United States "does not . . . assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any areas of resources in the deep seabed" and urged the Secretary of State to negotiate a comprehensive law of

the sea treaty to “give[] legal definition to the principle that the resources of the deep seabed are the common heritage of mankind.” A widely accepted international regime for the deep seabed can provide stable rules for future mining operations and can deter unilateral coastal state expansion into international common areas.

The difficulties of the United States and other industrialized nations with certain technical and institutional provisions of Part XI were discussed at a series of consultations that began in 1990, undertaken at the initiative of the United Nations Secretary-General. The Secretary-General’s consultations sought to develop a way to achieve widespread acceptance of the 1982 Convention by the time it entered into force. They led to the Agreement Relating to the Implementation of Part XI, which was adopted and opened for signature at the United Nations on July 29, 1994. The Agreement makes the following fundamental changes to the seabed mining regime of Part XI that are responsive to the concerns of industrialized nations:

- Improves the prospects for future development of deep seabed minerals resources, when such development becomes economically feasible, by (1) eliminating large annual fees miners would have to pay prior to commercial production, (2) eliminating production limitations (replacing such limitations with restrictions on the subsidization of seabed mining, based on the General Agreement on Tariffs and Trade), (3) subjecting the Enterprise, the mining arm of the International Seabed Authority, to the same obligations as other commercial mining enterprises, and (4) eliminating the requirement that parties fund the Enterprise’s mining operations;
- Provides the United States with a greater role in the decision-making process, including decisions concerning the sharing of benefits derived from seabed mining, by (1) guaranteeing it a seat in the Council of the Authority, (2) allowing industrialized nations acting in concert to block decisions in the Council when it proves impossible to arrive at a consensus, (3) ensuring that the Assembly of the Authority will be able to act only upon Council recommendations, and (4) allowing the United States to block decisions on important financial or budgetary matters in the Finance Committee;
- Ensures that future amendments to the seabed mining regime could not be adopted over United States objections;
- Eliminates any requirement that would compel the transfer of private technology, and requires the Enterprise and developing nations to “seek to obtain such technology on fair and reasonable commercial terms and conditions on the open market, or through joint venture arrangements”; and
- Promotes access to seabed mining by U.S.-licensed multinational consortia on terms “no less favorable than” terms given to entities whose mine site claims have already been registered by the Law of the Sea Preparatory Commission.

In recognition of the fact that deep seabed mining operations are not now commercially feasible, and are not expected to become so in the next several decades, the Agreement acknowledges the need to establish and run international institutions only on an evolutionary, cost-effective basis. Thus, for example, the Enterprise will not become operational until the Council so decides.

The 1994 Agreement Relating to the Implementation of Part XI includes procedural devices that seek to promote widespread acceptance of the 1982 Convention along with the new Agreement. Nations that in the future accept the 1982 Convention on the Law of the Sea must also accept the Agreement, which is to be interpreted and applied together with the Convention as a single instrument. Nations that have already ratified the Convention will be bound by the Agreement by signing it, unless they take affirmative steps to indicate their intent not to be bound. In order to enter into force, the Agreement must be accepted by 40 nations, including 7 developed nations. The Agreement will apply provisionally for up to four years if it has not entered into force by November 16, 1994, in order to give nations time to accept it.

The Section of International Law and Practice, in pursuance of Goal VIII and the establishment of a rule of law in relations among nations, strongly recommends that the United States become a party to the 1982 United Nations Convention on the Law of the Sea along with the 1994 Agreement Relating to the Implementation of Part XI.

Respectfully submitted,
James H. Carter
Chair
Section of International
Law and Practice

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