

# Substantive Changes in a Multilateral Treaty Before its Entry into Force: The Case of the 1982 United Nations Convention on the Law of the Sea

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## The Problem

The 1982 United Nations Convention on the Law of the Sea was not adopted by consensus but by recorded vote.<sup>1</sup> The result was 130 in favour, 4 against with 18 abstentions.<sup>2</sup> The Convention which attracted 159 signatures, the highest number of signatures for any multilateral treaty,<sup>3</sup> is not yet in force.<sup>4</sup> By 31 May 1993, the Convention had received two accessions and 54 ratifications, 51 of which came from developing countries in Africa, Asia and Latin America.<sup>5</sup>

The work of the 'Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea' (PrepCom),<sup>6</sup> which commenced in 1983, as well as the deliberations and resolutions of the UN General Assembly on the law of the sea since 1982

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- 1 Rule 39 of the Rules of Procedure of the Third United Nations Conference on the Law of the Sea. UN Doc. A/CONF.62/30/Rev.3; Official Records UNCLLOS III, vol. I, 54, 176; vol. IV, 3; vol. XIII, 4.
- 2 UN Doc. A/CONF.62/SR.182, 3 June 1982 in R. Platzöder, *Third United Nations Conference on the Law of the Sea: Documents* (1988), 138-139.
- 3 Report of the Secretary-General on Progress made in the Implementation of the Comprehensive Legal Regime Embodied in the United Nations Convention on the Law of the Sea, A/47/512, 5 November 1992; Developments relating to the United Nations Convention on the Law of the Sea, Report of the Secretary-General on the Law of the Sea, A/47/623, 24 November 1992, 7 et seq.
- 4 The Convention enters into force 12 months after the deposit of the 60th instrument of ratification or accession (Article 308, paragraph 1).
- 5 The three ratifications which fell outside these groups came from Iceland, Malta and Yugoslavia. Ratifications were received from: Fiji (1982); Zambia, Mexico, Jamaica, Namibia, Ghana, Bahamas, Belize, Egypt (1983); Cote d'Ivoire, Philippines, Gambia, Cuba, Senegal (1984); Sudan, Saint Lucia, Togo, Tunisia, Bahrain, Iceland, Mali, Iraq, Guinea, Tanzania, Cameroon (1985); Indonesia, Trinidad & Tobago, Kuwait, Yugoslavia, Nigeria, Paraguay (1986); Yemen, Cape Verde, Sao Tome & Principe (1987); Cyprus, Brazil (1988); Antigua & Barbuda, Zaire, Kenya, Somalia, Oman (1989); Dominica (1991); Costa Rica, Uruguay (1992); Saint Kitts & Nevis, Zimbabwe, Malta (1993). Accessions: Micronesia, Marshall Islands (1991). *Law of the Sea Bulletin*, No. 23, June 1993, 3.
- 6 R. Platzöder, *The Law of the Sea Documents: 1983-1992* (1989) vol. 15 et seq.

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have shown<sup>7</sup> that the Convention is not universally acceptable. A number of industrialized countries uphold the position that the deep seabed regime of the Convention contains considerable deficiencies and flaws which require rectification, modification or even amendment.<sup>8</sup> Among them are the major contributors to the UN budget. The 56 States having ratified or acceded to the Convention represent less than 4.5% of the costs of the Convention. Consequently, the Convention, if not changed, will lack proper funding. In addition, the establishment of the three new institutions (Authority, Tribunal and Commission on the Limits of the Continental Shelf) requires participation of States from all regions.<sup>9</sup> It was not until 1989 that these problems were generally admitted. A specific clause was introduced by the UN Resolution on the Law of the Sea of that year, which invited 'all States to make renewed efforts to facilitate universal participation in the Convention'.<sup>10</sup> The term 'universal participation' was agreed upon after a long debate.

The States which insist on substantive changes to the Convention would have preferred the term 'universally or generally accepted Convention'. Others did not want to take sides, and felt that the best term to describe their common objective was 'universality of the Convention'. In the 1992 Report on the Law of the Sea of the Secretary-General there is a section entitled 'Question of the Universality of the Convention on the Law of the Sea'.<sup>11</sup> It is stated, that 'since the overwhelming majority of ratifications are from developing countries, the long-standing intent of the international community to achieve a universally accepted Convention takes on a new meaning'. Thus, the Secretary-General shares at least some sympathy with those States which argue that the Convention was not universally acceptable when adopted, and should be changed before its entry into force. However, the Secretary-General is using the term 'universal participation' when reporting on his 'initiative of convening informal consultations aimed at achieving universal participation in the Convention'.

Since 1990, eleven sessions of informal consultations, also referred to as the Dialogue, have been held and their results were summarized in so-called 'information notes'.<sup>12</sup> Unfortunately, these efforts have not yet produced a solution for several reasons. First, the United States never

- 7 All General Assembly resolutions on the law of the sea from 1982 to 1992 were adopted by recorded vote. On all but one occasion the United States cast a negative vote. The Federal Republic of Germany and the United Kingdom abstained consistently, and were joined by the United States in 1992, A/47/PV.84, 8 January 1993, 108; see statement by United Kingdom speaking on behalf of the European Community and its Member States and statement by the United States at the occasion of the 10th anniversary of the Convention, A/47/PV.83, 6 January 1993, 26, 66.
- 8 Declarations made upon signature of the Convention by Belgium, France, Italy, Luxembourg and by the European Economic Community contain statements concerning the deep seabed regime which come close to a reservation. See R. Platzöder and H. Grunenberg, *Internationales Seerecht* (1990) 502 et seq. The Federal Republic of Germany and the United Kingdom did not sign the Convention and share this position. See, for example, Letter dated 19 March 1985 from the Chairman of the Delegation of the Federal Republic of Germany addressed to the Chairman of the Preparatory Commission, LOS/PCN/57, 20 March 1985, and Letter dated 4 November 1985 from the Chairman of the Delegation of the United Kingdom of Great Britain and Northern Ireland addressed to the Chairman of the Preparatory Commission, LOS/PCN/74, 9 January 1986. See R. Platzöder, *supra* note 6, vol. I at 305 and 337.
- 9 For the Authority see Article 161, paragraph 1 (e); Article 163, paragraph 4; for the Tribunal see Annex VI, Article 2, paragraph 2; Continental Shelf Commission Annex II, Article 2, paragraph 1.
- 10 UN Res. 44/26, 20 November 1989; UN Res. 45/145, 14 December 1991; UN Res. 46/78, 12 December 1991; UN Res. 47/65, 11 December 1992.
- 11 UN Doc. A/47/623, 24 November 1992, 11.
- 12 The informal consultations conducted by the Secretary-General in 1990 and 1991 in a summary of 31 January 1992, followed by information notes of 26 May 1992, 10 December 1992, 8 April 1993, and 4 June 1993.

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participated in PrepCom and did not actively participate in the consultations until very recently. Second, among the developing countries there is a great deal of hope that the Convention will enter into force as adopted in 1982, so that the Convention could only be changed in accordance with its amendment procedures. Third, there are hardly any precedents concerning the problem of changing a multilateral treaty before its entry into force.

The last round of the Dialogue took place in New York from 2 to 6 August 1993, which will be followed by an additional meeting from 8 to 12 November 1993, also in New York.

The United States informed the Secretary-General and the participants of the 10th session on 27 and 28 April 1993, that the Clinton administration will take a more active role in the search for a 'widely acceptable Convention'.<sup>13</sup> At the same time it was said that it would be incorrect to see a fundamental shift in the US policy regarding specific objections towards the deep seabed regime of the Convention, and that a solution to the outstanding problems would require substantial changes, and a legally binding instrument to give effect to them.

As to the time period in which such instrument will have to be negotiated, the following can be said: as long as the requirement of 60 ratifications or accessions<sup>14</sup> is not met, there is no doubt that an extra-treaty solution is possible. Further, the mandate for the informal consultations conducted by the Secretary-General is unquestionable. But the Convention will enter into force automatically 12 months after the 60th instrument of ratification or accession will have been deposited with the Secretary-General,<sup>15</sup> and consequently the mandate for the Dialogue will no longer have any sound basis. If such a situation arises, additional problems will have to be dealt with.

### The Preparatory Commission

The PrepCom was established by Resolution I of the Third United Nations Conference on the Law of the Sea.<sup>16</sup> All States and other entities entitled to become party to the Convention – for example, the European Community – may participate in the work of PrepCom. However, only those which have signed or acceded to the Convention are entitled to participate in the taking of decisions.<sup>17</sup> The mandate of the PrepCom is defined as follows:

to take all possible measures to ensure the entry into effective operation without undue delay of the Authority and the Tribunal and to make the necessary arrangements for the commencement of their functions.<sup>18</sup>

13 Statement by Ambassador Madeleine Albright in *Oceans Policy News*, a publication of the Council on Ocean Law, Washington DC, vol. X, February (1993) 2.

14 Article 308, paragraph 1.

15 Articles 306 and 307.

16 Resolution I – Establishment of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea. Annex I of the Final Act of the Third United Nations Conference on the Law of the Sea. See R. Platzöder and H. Grunenberg, *supra* note 8 at 490.

17 Rule 2 and Rule 3, paragraph 2, of the Rules of Procedure of PrepCom. See R. Platzöder and H. Grunenberg, *ibid.* at 543.

18 Preamble, paragraph 2, of Resolution I, *supra* note 17.

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Under Resolution II,<sup>19</sup> the PrepCom is given an additional mandate concerning the so-called 'pioneer activities'. In the interim phase between the establishment of PrepCom in 1983 and the entry into force of the Convention, the Commission performs certain functions such as registration of pioneer investors in deep seabed activities, allocation of mine sites to them and supervision of their activities.

At the outset of the deliberations in PrepCom, the Member States of the European Community as well as other industrialized States (Australia, Canada, Japan) began to explore ways and means to rectify the Convention. The most obvious opportunity was seen through the adoption of an appropriate Mining Code, which would constitute the rules, regulations and procedures for exploration and exploitation of the deep seabed. In 1992, after 10 years of negotiations, the final examination of all parts of a draft Mining Code, amounting to 157 provisions, were concluded.<sup>20</sup> This draft, however, follows very closely the provisions of the Convention and cannot be seen as an interpretative instrument for the purpose of solving problems related to the universal acceptability of the Convention.

The deliberations on the issue of developing 'land-based producer States likely to be affected by deep seabed production' and on the 'Enterprise', the operating arm of the Authority,<sup>21</sup> were equally conservative. Another chance for progressive development of the deep seabed regime of the Convention was offered in Article 158, paragraph 3, which provided for the establishment of such subsidiary organs of the Authority as may be found necessary. In this context, a Finance Committee to assist and advise the Authority was proposed by Member States of the European Community and Japan in 1984.<sup>22</sup> It was suggested that this Committee should consist of 15 experts, provided that eight of them were elected from candidates nominated by the 15 States with the highest contributions to the administrative budget of the Authority. Although the idea to establish a Finance Committee was found generally acceptable, the idea to introduce a new category of States to the deep seabed regime consisting of the major financial contributors, and to reserve for them the majority of seats, was watered down to the following formulation:

In the election of the members of the Finance Committee, due account shall be taken of the need for equitable geographical distribution and the representation of special interests including, until the Authority shall have sufficient income from sources other than the contributions of States Parties to meet its administrative expenses, the representation of States Parties with the highest contribution to the administrative budget of the Authority.<sup>23</sup>

In the discussions on the financial implications for States Parties to the Convention with regard to the Authority, a general approach was agreed upon, namely, 'the necessity for economy, and

- 19 Resolution II – Governing Preparatory Investment in Pioneer Activities relating to Polymetallic Nodules, Annex II of the Final Act of the Third United Nations Conference on the Law of the Sea. See R. Platzöder and H. Grunenberg, *supra* note 8 at 492.
- 20 Draft final report of Special Commission 3 LOS/PCN/SCN.3/1992/CRP.17, 22 July 1992. See R. Platzöder, *supra* note 6, vol. XV at 201; Draft provisional report of Special Commission 1 LOS/PCN/SCN.1/1992/CRP.22, 20 August 1992. In R. Platzöder, *supra* note 6, vol. XV, at 13.
- 21 Draft provisional final report of Special Commission 2 LOS/PCN/SCN.2/1992/CRP.6, 17 August 1992. See R. Platzöder, *ibid.*, vol. XV at 53.
- 22 Draft Rule on a Finance Committee – Proposal by Belgium, France, the Federal Republic of Germany, Italy, Japan, the Netherlands and United Kingdom LOS/PCN/WP.21, 14 August 1984. See R. Platzöder, *ibid.*, vol. III at 174.
- 23 The Finance Committee – Working paper by the Secretariat LOS/PCN/WP.45/Rev.1, 20 August 1991, See R. Platzöder, *ibid.*, vol. XII, at 491.

for minimizing the financial burden of States Parties'.<sup>24</sup> However, the UN Secretariat proposed two models, a 'self-administered' and a 'United Nations-linked' Authority. In the case of the latter, substantial costs would have to be borne by all members of the United Nations whether parties to the Convention or not.

Against this background, the conclusion is sad and simple: the various possibilities offered by the Convention were not used to make it more attractive to those States which had already invested in research, prospecting and exploration of the deep seabed. A somewhat convincing argument was put forward to the effect that negotiations on substantive changes should include the United States. Otherwise, it was feared that compromises agreed upon in PrepCom might not satisfy Washington, and more concessions would have to be made at a later stage or in a different forum.

In addition to the mandate in Resolution I, the PrepCom was entrusted with the task of implementing Resolution II containing the regime for the protection of pioneer investments in deep seabed activities while the Convention is not in force.

In performing such functions, the PrepCom was faced with a number of difficult issues. There was, first of all, the question of overlapping claims to deep seabed areas. Resolution II requires that applicants for pioneer investor status must ensure that their claims are free of overlaps. In 1983 and 1984, the Soviet Union, India, France and Japan submitted applications for registration, and a series of problems surfaced. Not only did the French, Japanese and Soviet claims overlap, but claims were also made by so-called 'potential applicants' that had no intention of applying for registration.<sup>25</sup> Another problem was that the overlaps were so extensive that the chances for the Enterprise to mine were diminished. All these problems were sorted out by four understandings adopted by PrepCom<sup>26</sup> and several multilateral agreements concluded outside.

PrepCom registered six pioneer investors, China, France, India, Japan, the Soviet Union, and the Eastern European consortium 'Interoceanmetal' which was added to the list contained in Resolution II by the New York Understanding of 1986.

Resolution II specifies five obligations for such pioneer investors: (1) to carry out exploration; (2) to provide training for personnel designated by the Commission; (3) to transfer technology; (4) to make funds available to the Enterprise; and (5) to report periodically to the Commission. Again by means of understandings, these obligations were reduced,<sup>27</sup> and the obligation to become party to the Convention and to apply for approval of a plan of work for exploration and exploitation within six months of the entry into force of the Convention was modified.<sup>28</sup>

All understandings agreed upon by PrepCom are considered decisions in accordance with Article 308, paragraph 5, which the future Authority and its organs shall respect. It follows that the implementation of Resolution II was conducted in a quite satisfactory manner and produced results containing a number of important and substantive changes to the deep seabed regime of the Convention. These encouraging activities by PrepCom as well as the related efforts outside

24 Administrative Arrangements, Structure and Financial Implications of the International Sea-Bed Authority – Background paper by the Secretariat LOS/PCN/WP.51, 10 August 1990. See R. Platzöder *ibid.*, vol. XI at 164.

25 Draft Provisional Final Report of the Plenary LOS/PCN/WP.52, 5 February 1993, at 8.

26 The Geneva Understanding 1984, the Arusha Understanding 1986, the New York Understanding 1986, and the Kingston Understanding 1987. See R. Platzöder and H. Grunenberg, *supra* note 8 at 559 et seq.

27 Understandings on the Fulfilment of Obligations by the Registered Pioneer Investors and their Certifying States LOS/PCN/L.87, 30 August 1990; LOS/PCN/L.102, 12 March 1992. See R. Platzöder, *supra* note 6, vol. XI, at 112; vol. XIV, at 100.

28 LOS/PCN/L.87, 30 August 1990, paragraph 12. See R. Platzöder, *ibid.*, vol. XI, at 112.

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the UN provide promising indications that, in the end, a universally, generally or widely acceptable Convention will eventually be put in place.

As for the future work of PrepCom, its 11th session took place from 22 March to April 2 1993, and it was decided that:

- (a) no more meetings would be held in 1993;
- (b) provision should be made for a two-week annual session until the entry into force of the Convention;
- (c) the necessity for actually convening such annual sessions will be decided by the Chairman of the PrepCom in consultation with the Chairmen of the Special Commissions of PrepCom, regional groups and interest groups;
- (d) the General Committee, acting on behalf of PrepCom as its executive organ for the implementation of Resolution II will meet for two to three days annually and will continue the monitoring of the implementation of the obligations of the registered pioneer investors.<sup>29</sup>

### Efforts to Save the Convention

Shortly after the adoption of the Convention on 30 April 1982, the idea arose to reconsider the deep seabed regime and to find a universally acceptable solution. Speaking strictly in terms of procedure, such an undertaking would not have been too difficult. The Conference decided on 30 April 1982 to hold a meeting of the Drafting Committee from 12 July to 13 August 1982 in Geneva, followed by a plenary meeting from 22 to 24 September 1982 in New York to adopt the proposals of the Drafting Committee and to deal with some other business concerning the conclusion of the Conference.<sup>30</sup> The final session of the Conference was held from 5 to 10 December 1982 in Montego Bay (Jamaica).

There was ample time and opportunity to make use of the Conference itself. To this end, quite a few activities were undertaken behind the scene to convince States to resume negotiations on the deep seabed regime. For example, the five-week meeting of the Drafting Committee and its six language groups in Geneva would have offered an ideal opportunity for informal talks. But on 9 July 1982, President Reagan announced that the United States would not sign the Convention because of problems concerning the deep seabed regime.<sup>31</sup> The decision by the Reagan administration to refrain from participating in 'rescue-operations' for the Convention and PrepCom activities was heavily criticized by the community of law of the sea academics as well as by statesmen and diplomats all over the world.

However, little is known about the real issues at stake from the perspective of major maritime powers. The vice-chairman of the delegation of the former Soviet Union to the Conference, Ambassador Igor Kolossovsky, admitted at least that the climate of the Cold War was particularly harmful to the work on the deep seabed regime.<sup>32</sup> During the early years of PrepCom it became quite obvious that the Soviet Union pursued a confrontational policy

29 Statement of the Chairman of the Preparatory Commission LOS/PCN/L.113, 31 March 1993.

30 UN Doc. A/CONF.62/SR.182, 3 June 1982; UN Doc. A/CONF.62/SR.183, 24 September 1982; UN Doc. A/CONF.62/PV.185, 26 January 1983. See R. Platzöder, *supra* note 2, vol. XVIII, at 168, 176, 200 et seq.

31 Charney 'The United States and the Revision of the 1982 Convention on the Law of the Sea', 23 *Ocean Development and International Law*, (1992) No. 4, 286.

32 Kolossovsky 'Prospects for Universality of the UN Convention on the Law of the Sea' in 17 *Marine Policy*, January (1993), 6.

towards the major Western countries on that issue.<sup>33</sup> In retrospect, one may conclude today that at the dawn of Glasnost and Perestroika the extreme ideologists once again dominated over the more pragmatic thinkers. This situation began to change only in 1986 when a series of practical problems had to be solved prior to the registration of mine sites by PrepCom. This development was instrumental in launching discussions and activities by various institutions and individuals to encourage renewed efforts to save the Convention.

The Law of the Sea Institute at the University of Hawaii was one of the academic fora where some of the issues here discussed were canvassed.<sup>34</sup>

In 1989, Sarya N. Nandan, then UN Under-Secretary-General for the Law of the Sea was invited to the Annual Conference of the Law of the Sea Institute and was given the opportunity to elaborate his ideas. He stressed that the time was ripe to resolve the disagreement that existed with a few of provisions of the deep seabed regime. In his view, only six issues would hamper the general acceptance of the Convention: (1) the obligation to sell technology;<sup>35</sup> (2) the production policy and access to deep seabed mining;<sup>36</sup> (3) the seat in the Council for the United States;<sup>37</sup> (4) decision-making procedures;<sup>38</sup> (5) the Review Conference;<sup>39</sup> (6) financial implications. Nandan made the point that

it would be an absurd situation if the Convention should come into force on the strength of small States while larger States sit back and use the Convention as a reference point for their protests against the actions or omissions of others.

He added that:

it must be recalled that the Convention is one integral instrument and cannot be divided for the sake of convenience into two parts – the deep seabed mining provisions on the one hand and the non-seabed provisions on the other. This artificial division can only result in the abuse of the concept of customary international law and at the same time delay search for solutions to the provisions of the Convention that have not received general acceptance.<sup>40</sup>

At this point, Nandan did not make specific proposals on how to 'save' the Convention. His primary concern was to provide incentives for the United States to return to a dialogue with other States in order to help resolve its problems with the Convention.

In 1990, the Law of the Sea Institute invited the Chairman of the PrepCom, Jose Luis Jesus, to address the question of universal acceptance of the Convention and the question of format for

33 The Soviet Union together with the other Eastern European States and the developing countries initiated declarations of PrepCom in 1985 and 1986, that claims, agreements and actions with regard to the deep seabed outside the Convention and PrepCom are 'wholly illegal'. In the 1986 Declaration, the issuance of deep seabed licences by the Federal Republic of Germany and United Kingdom is mentioned LOS/PCN/72, 2 September 1986 and LOS/PCN/78, 21 April 1986.

34 D.M. Johnston and N.G. Letalik (eds). *The Law of the Sea and Ocean Industry: New Opportunities and Restraints. Proceedings of the Sixteenth Annual Conference* (1983), 103-128; J. M. van Dyke (ed.), *Consensus and Confrontation: the United States and the Law of the Sea Convention. Proceedings of a Workshop* (1985) 504-549.

35 Annex III, Article 5.

36 Article 151.

37 Article 161.

38 Article 162.

39 Article 155.

40 A. H.A. Soons (ed.) *Implementation of the Law of the Sea Convention through International Institutions. Proceedings of the Twenty-Third Annual Conference* (1990) 179-184.

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the decisions to be taken. Ambassador Jesus suggested substantive changes to be incorporated into a 'visible legal instrument' such as a Protocol instead of formally changing the text of the Convention itself. Such an agreement would amount to a 'universal interpretation' and would enter into force through a simplified procedure that could either be adoption, or adoption followed by signature. The idea was to circumvent formal amendments which would require ratification and accession, and thereby delay the entry into force of changes for years. Jesus envisaged a legal instrument consistent with the Convention by referring to Article 311, paragraph 3, which stipulates that States Parties to the Convention may conclude agreements suspending the operation of provisions of the Convention.<sup>41</sup>

In 1991, the question of the role for PrepCom *vis-à-vis* the Dialogue<sup>42</sup> was discussed. When it became certain that the United States would not join PrepCom, a different forum had to be found for dealing with the problem of universal acceptability of the Convention. Before the informal consultations were opened in 1992 to all interested States, a linkage between the Dialogue and PrepCom was considered mainly for three reasons. First, to overcome frustration among the majority of States that only a selected group of States was invited to join the Secretary-General in his efforts. Second, to acknowledge the work done by PrepCom in relation to the 'hard core issues' of the deep seabed regime; and third, to preserve PrepCom as a back-up forum should the Dialogue fail, or as a venue for discussion and adoption of its results. No linkage was established. PrepCom was urged to conclude its work, and it could be argued that the activities outside PrepCom sucked the blood out of it. But the point could also be made that PrepCom dug its own grave because there was too little chance that the principal concerns of industrialized countries which went beyond the solving of practical problems could be accommodated.

Another very active forum is the Panel on the Law of Ocean Uses.<sup>43</sup> The members of the Panel are in agreement that the United States should have signed the Convention and should have taken the lead in removing the obstacles to widespread ratification of the Convention. The Panel put a great deal of effort into defining the fundamental US interests in the Convention (i.e., security matters, economic and environmental concerns, dispute settlement), and advocated that the Convention could be changed to make it acceptable to the United States. Furthermore, the Panel expressed its views on the changed international political context as it relates to the Convention on the Law of the Sea. It concluded that the end of the Cold War, the new interest among developing countries on responding to market forces and in formulating economic policies, including the realization of a viable regime for mining the deep seabed, as well as environmental issues, offered a chance to take a fresh look at the Convention. The Panel primarily focussed on a 're-engagement' of the United States and provided a forum for those who advocate that the US Government should assume a more visible leadership role in the Dialogue.<sup>44</sup> The Council on Ocean Law and the American Society of International Law jointly sponsored a meeting entitled 'Ocean Policy Issues 1993' in Washington, on 18 February 1993,

41 T. Kuribayashi and E. L. Miles (eds), *The Law of the Sea in the 1990s: A Framework for Further International Cooperation. Proceedings of the Twenty-Fourth Conference* (1992) 497-509.

42 W.L. Schachte, 'The Value of the 1982 UN Convention on the Law of the Sea - Preserving our Freedoms and Protecting the Environment', in A. Couper and E. Gold (eds), *The Marine Environment and Sustainable Development: Law, Policy, and Science. Proceedings of the Twenty-Fifth Annual Conference* (1993) 93-114; R. Platzöder, 'PrepCom Update', *ibid.*, 293-299.

43 The Panel is an independent group of ocean law and policy specialists sponsored by the Washington-based Council on Ocean Law and chaired by Professor Louis Henkin of Columbia University. The Council on Ocean Law was founded in 1980, and enjoys observer status at PrepCom.

44 W.L. Schachte, 'National Security Interests in the 1982 UN Convention on the Law of the Sea', in Council on Ocean Law, *Special Report*, Washington, D.C., February (1993), 4.



where Professor Louis Henkin expressed the view that the obstacles to ratification by the United States could be overcome, if there exists sufficient will. At that meeting, Curtis Bohlen, Assistant Secretary of State, stressed that a US 'commitment to a universally accepted Law of the Sea Convention remains a fundamental tenet for our oceans and law of the sea policy'. However, he added a note of caution on the Dialogue by saying that the effort to find solutions to the deep seabed regime of the Convention will produce no quick fixes or guarantees of success.<sup>45</sup> Given the fact that the United States is not only the major maritime power, but had left the law of the sea negotiations in 1982 under quite dramatic circumstances, it cannot be expected that the Clinton administration could easily agree to anything less than substantive changes to the Convention.

The International Ocean Institute<sup>46</sup> enjoys observer status at PrepCom, and has worked vigorously for the entry into force of the Convention as adopted in 1982. It cooperates closely with the Asian-African Legal Consultative Committee, another non-governmental observer in PrepCom. It is believed that the Group of 77 will have much better options for reconsidering the deep seabed regime once the Convention is in force. The idea is that the deep seabed regime will have become international law, and will also affect non-parties to the Convention. This position is not new. Since the adoption of the 'Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction' by the UN General Assembly in 1970,<sup>47</sup> the international law community has been quarrelling over the legal status of the principle of the common heritage of mankind before and after the entry into force of the Convention. However, the chairman of the International Ocean Institute, Elisabeth Mann Borgese, is promoting a pragmatic approach. She sees the Convention as an unfinished process, and proposes to transform PrepCom into an Interim Authority.<sup>48</sup> She shares the optimism with others that the deep seabed regime of the Convention could be adapted and developed step-by-step.

The 'Resolution of Reith' emerged from a gathering in a picturesque Tyrolean village where a few old hands meet every so often to discuss rising issues of international law. After much heated debate, the group reached the conclusion that only a pragmatic approach would have a high probability of success, if it were short and simple. Otherwise, any attempt to make the Convention universally acceptable would raise more problems than it would solve. The concept developed by the group is based on four considerations. First, the deep seabed regime should be frozen with the exception of the principles as laid down in Articles 136 to 149. Second, an interim arrangement for the period between the entry into force of the Convention and the beginning of commercial production of deep seabed minerals should be approved by the UN General Assembly and become effective for all States at the same time. Third, once the economic viability and environmental soundness of deep seabed production has been determined by a group of experts, the 'frozen' provisions of the Convention should be adapted in a universally acceptable manner. Fourth, a resolution by the Preparatory Commission was chosen as the format of the envisaged legal instrument to modify the Convention. The interim arrangement should be attached to the resolution as an annex. The resolution and its annex would have to be regarded as an instrument related to the Convention in conformity with Article

45 *Oceans Policy News*, a publication of the Council on Ocean Law, vol. X, February (1993), at 2.

46 The International Ocean Institute (Malta), founded in 1972, conducts operations all over the world. Its work is devoted to promoting education, training and research, to enhance the peaceful uses of ocean space and its resources, their management and regulation as well as the protection and conservation of the marine environment.

47 UN Res. 2749 (XXV), 17 December 1970.

48 Mann Borgese, 'Une Autorité des Fonds Marins existe: Des solutions pour les océans' *Newsletter of the North-South Institute*, Ottawa, Spring 1993, 3.

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31, paragraph 2, of the Vienna Convention on the Law of Treaties. The 'Resolution of Reith' was made available to interested persons involved in the law of the sea community.

Finally, the Institute of International Law at the University of Kiel organized a symposium in 1990 on the topic 'The Continuing Search for a Universally Accepted Regime'.<sup>49</sup> A round-table discussion was devoted to the question of 'The Choice of the Right Format'. Some voices spoke against amending the deep seabed regime; it was stated that those provisions of the Convention were non-implementable for some time because no commercial recovery of deep seabed minerals would take place in the immediate future. It was also argued that there was little chance of reaching an agreement to confine amendments to the deep seabed regime. It was contended that States would suggest to amend other parts of the Convention, such as the provisions on the exclusive economic zone. With regard to strategy, an opinion was expressed to the effect that one should first discuss substance and then format. Others felt that problems of substance can sometimes be overcome by procedural devices. It was also said that a comeback of the United States could be facilitated by suggesting a proper format. Then, a 'gentleman's agreement' was proposed to waive or suspend those provisions which were not relevant at present, and to implement only those which were supported by consent.

### The Informal Consultations

At the end of the 7th session of PrepCom, France, on behalf of the European Community and its Member States, stated in a meeting of the Plenary that

the Commission's work had been characterized by a spirit of openness which augured well for the achievement of universality. Although the Convention had not yet entered into force, it provided an indispensable reference point and promoted a harmonization of international law. But lack of total acceptance entailed a risk that divergent practices might emerge. It was, therefore, important to achieve universality through the opening of a dialogue.

This initiative was supported by all regional and interest groups.<sup>50</sup>

In 1990, the UN Secretary-General invited 18 Permanent Representatives to the UN Headquarters in New York to participate in a meeting; among them was the United States ambassador. The meeting was short and frosty, but no objections were raised to convening again in the future. In the course of a first series of six meetings in 1990 and 1991, nine critical areas of the Convention were identified: (1) the costs of the Convention; (2) the Enterprise; (3) decision-making; (4) the Review Conference; (5) transfer of technology; (6), production limitation; (7) compensation fund; (8) financial terms of contract; and (9) environmental considerations. It is important to note that all such issues concern only the deep seabed mining regime of the Convention. The environmental issue was not further discussed in the informal consultations because there was general agreement that the rules for the protection and preservation of the marine environment from deep seabed mining activities should be developed by the Authority on the basis of the work done by PrepCom.

In 1992, a first summary on the Dialogue was issued by the UN Secretariat which developed into a 'rolling text'. The statements made were summarized and elements of general agreement,

49 R. Wolfrum et al. (eds), *Law of the Sea at the Crossroads: The Continuing Search for a Universally Accepted Regime. Proceedings of an Interdisciplinary Symposium of the Kiel Institute of International Law* (1991).

50 PrepCom (52nd meeting), 1 September 1989. See R. Platzöder, *supra* note 6 at 473.

the so-called 'findings', were identified. The list of eight remaining 'hard core issues' could easily suggest that the deep seabed regime is likely to be unravelled. However, the UN Secretary-General made it quite clear in 1992, that the purpose of the informal consultations was not to renegotiate the deep seabed regime of the Convention, but to find a practical way out of the difficulties which have inhibited the industrialized countries from ratifying or acceding to the Convention.<sup>51</sup> In 1992, informal consultations were opened to all interested States and other participants in PrepCom, and were attended by some 75 delegations. At present, the envisaged 'practical way' towards the universality of the Convention is still in the dark. At least there is general agreement to follow the Secretary-General on a long march.

On the occasion of the 10th anniversary of the Convention, the Secretary-General made a remarkable statement from which one may gather that he sees himself as a promoter of the Convention and a protector of those States which have already ratified or acceded to the Convention. He indicated, among other things, that he intended to continue to work towards the adherence of all the major industrialized countries to the Convention, and that he would continue the informal consultations for as long as necessary, 'with perseverance, patience and obstinacy'.<sup>52</sup>

In an information note of 10 December 1992, the eight 'hard core issues' were divided into two categories in accordance with their particular practical importance. It was felt that five issues (Costs to States Parties – The Enterprise – Decision-making – Review Conference – Transfer of Technology) would have to be considered in more detail. With regard to the remaining three issues (Production Limitation – Compensation Fund – Financial Terms of Contract) the point was made that because of the expected delay in deep seabed mining, and the uncertainty of the economic, financial and technological conditions that may be prevailing at the time when commercial production of deep seabed minerals takes place, it would be neither necessary nor prudent at this stage to go beyond general principles. The use that should be made of the findings resulting from the consultations was also discussed along with the arrangements that should be made for the period between the entry into force of the Convention and the time when deep seabed mining becomes commercially viable, as well as the legal form in which any general agreement or understanding that might arise would have to be laid down.

In an information note of 8 April 1993, a further stage of the Secretary-General's endeavours was achieved. The note is divided into two parts, A: Consideration of Procedural Approaches, and B: Formulation of the Results of the Consultations. Part B is subdivided and suggests 'Arrangements following the entry into force of the Convention' and 'Draft texts concerning the definitive deep seabed mining regime'. It contains an annex on 'Preliminary estimates of the administrative expenses of the Initial Authority', and covers 41 pages.

Information note of 4 June 1993 is an up-date of the previous one, and there is still no agreement on the most controversial question: how to change the substance of a multilateral treaty before its entry into force. The note identifies four different procedural approaches. They are as follows:

- (i) A suggestion is made to amend the Convention by a formal protocol to be open to all States and entities entitled to become party to the Convention. No insurmountable problems were seen in amending the Convention in a procedure different from that provided in the Convention.<sup>53</sup> Such an instrument could be submitted to the UN General Assembly for adoption. The advantage of such a protocol is that it would be a clearly legally binding

51 Information Note, 10 December 1992, 2.

52 UN Doc. A/47/PV.83, 6 January 1993, 11.

53 Articles 155 and 314

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instrument. The disadvantage would be that not all States might become party to such protocol, and consequently there could be two different deep seabed regimes.

- (ii) In assessing the nature of each 'hard core issue' as well as the agreements reached so far on substantive issues, an interpretative agreement could be an answer for such changes to the Convention which fall in the category of interpretation or application of particular provisions. The problem with such an approach is that it would be difficult to draw a line between the issues which need amendments and those which could be dealt with by understandings of interpretation. In this context, the information note addressed the problems pertaining to the States which have already ratified or acceded to the Convention. The solution formulated was to apply a simplified procedure, coupled with an implied consent approach, using Article 313 as a model. Under this scheme a proposal for amending the Convention, with the exception of the deep seabed regime, would be circulated by the Secretary-General, and would be considered adopted, if, within a certain time period, no formal objection was raised.
- (iii) From the view point of innovations in legal thinking the third approach is certainly the most interesting one. The starting point is to protect the interests of States which have already ratified or acceded to the Convention. Whether those States deserve such protection is, of course, another matter. On the one hand, they were quite aware that the Convention as adopted in 1982 was not acceptable to the major industrialized countries; on the other hand, the decisions to become party to the Convention saved the Convention from being worn away by the changing winds of the Reagan ocean policy.<sup>54</sup> In any case, this third approach does not entail changing the Convention. It suggests that an additional interpretative legal instrument should be agreed by which, for an interim period, an Initial Authority and an Initial Enterprise would be established. The interim period would commence when the Convention enters into force and would end with the adoption of a definitive deep seabed regime. For the adoption of such a regime a special conference would have to be convened by the Initial Authority and the conference would be 'triggered' by a group of technical experts upon their assessment that commercial recovery of deep seabed minerals is around the corner. The proposed interpretative agreement would contain the obligation to participate in the conference and the definitive deep seabed regime is based on the findings of the informal consultations conducted by the Secretary-General before the entry into force of the Convention. This approach would have the effect that for those States which have ratified or acceded to the Convention, the deep seabed regime of the Convention would be put in limbo. Those who submit the Convention together with the proposed interpretative agreement before their governments, would not be bound by the provisions of the deep seabed regime.
- (iv) Finally an additional agreement is suggested which is similar to the Resolutions I to IV of the Conference, and would become an integral part of the Convention. The agreement would establish a very streamlined Authority and would evolve over time. The Authority would be entrusted with the mandate to develop solutions for outstanding issues.

In his information note of 4 June 1993, the Secretary-General remarked that the elements of all four approaches could be combined and that he was open to other proposals.

On 3 August 1993, a document referred to as the 'Boat Paper' was prepared and submitted by representatives of several developed and developing States as a contribution to solve the outstanding issues. It suggested the adoption by the General Assembly of a resolution containing as annex an agreement relating to the implementation of Part XI of the 1982 Convention. This

<sup>54</sup> Statement by the President on United States Ocean Policy of 10 March 1983, *Weekly Compilation of Documents*, vol. 19, No. 10.

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document was circulated by the UN Secretariat to all States and will be discussed at the next round of informal consultations in November 1993.

### **Conclusions**

The problem of changing the 1982 UN Convention on the Law of the Sea before its entry into force is mainly a political one. Two General Assembly resolutions have already identified the essential issues;

... political and economic changes, including particularly a growing reliance on market principles, underscore the need to re-evaluate, in the light of the issues of concern to some States, matters in the regime to be applied to the Area and its resources, and that a productive dialogue on such issues involving all interested parties would facilitate the prospect of universal participation in the Convention, for the benefit of mankind as a whole.<sup>55</sup>

If the international community could act on the basis of this position it should be possible to amend the Convention by means of a proper legally binding instrument such as a protocol. As long as the discussions in the Dialogue have not reached that understanding, the efforts undertaken through the informal consultations have to be considered as an attempt to overcome political differences by using legal imagination, and the success of such an operation will depend in the end on 'human factors'. It needs a few key players, not fighting each other but striving together to cut the Gordian Knot.

55 UN Res.46/78, 12 December 1991; UN Res. 47/65, 11 December 1992 (paragraph 5).