

Bridging the Gap for Seabed Mining: Preparatory Instruments for the New Law of the Sea Convention*

UWE JENISCH**

The possibility of ratification of the Draft Treaty on the Law of the Sea increases the need to begin discussing the organizations that will be created under the treaty. This article discusses the need for, and structure of, a temporary preparatory commission to begin work on the International Seabed Authority once the treaty is ratified. The author concludes that the debate over the structuring of the Preparatory Commission is sure to be another obstacle to convention ratification.

At the recent ninth session of the Third United Nations Conference on the Law of the Sea, it became apparent that the Conference approaches its final political stage. The prospect of Convention ratification increases the need to begin structuring the international organizations that will be created under the Convention. New international organizations such as the International Seabed Authority need temporary Preparatory Commissions to pave the way for their early stages. Thus, the establishment of a Preparatory Commission (Prepcom) becomes a problem relating to the regulations governing the entry into

* This article is a revised and expanded version of the paper presented by Dr. Jenisch at the Law of the Sea Institute Conference in Kiel, West Germany, Oct., 1980.

** Dr. iur., Kiel University, advisor to the Law of the Sea Delegation of the Federal Republic of Germany, lecturer at Kiel University for International Law of the Sea, specialist in EEC law for the Ministry of Economics and Transport of the State of Schleswig-Holstein.

force of the Convention.¹

The Prepcom offers an opportunity to forge a link between national interim legislation and the Convention itself regarding seabed activities prior to the entry into force of the Convention, which cannot be expected until the second half of the 1980's. In the absence of a well drafted "grandfather clause" written into the Convention, potential investors will need some kind of interim protection. National legislation has already been enacted by the United States² and the Federal Republic of Germany.³ Similar legislation is in the parliamentary process in the United Kingdom⁴ and other industrialized nations are expected to follow.⁵ These "legislative states" have started negotiations to harmonize their respective national rules and regulations with the object of making their licensing systems complementary and reciprocating. This process, which is sometimes referred to as the "mini-treaty," is necessary to maintain fair competition among the industrialized mining States.

The developing States have consistently rejected the legality of national interim legislation.⁶ A realistic way of removing these legal challenges and threats of reprisal is a combination of risk insurance under national legislation and preparatory investment protection under the wider framework of the Prepcom.⁷

The ninth session under the chairmanship of the late Mr. H.S. Amerasinghe dealt briefly with proposals for a Preparatory Commission. The major organizational aspects of the proposed Preparatory Commission were outlined in a working paper dated March 3, 1980.⁸ The idea of a Prepcom along lines similar to the 1945 United Nations Preparatory Commission⁹ met with general approval.

1. Note by the President on the Final Clauses, FC/1 of July 23, 1979; Programme of Work for the Tenth Session, U.N. Doc. A/CONF.62/BUR.13/Rev. 1 (1980).

2. Deep Seabed Hard Mineral Resources Act of 1980, H.R. 2759, 96th Cong., 1st Sess. (1979).

3. Interim Law for Seabed Mining, [1980] Bundesgesetzblatt [BGBl] I 1457 (W. Ger.).

4. Deep Seabed Mining (Temporary Provisions) Bill, H.L. 32, 48th Parliament, 2nd Sess. (1980).

5. E.g., Belgium, France, Japan, Italy and the Netherlands.

6. Letter from Ambassador E. Kanyanya Wapenyi, Chairman of the Group of 77, to the President of the Conference (Aug. 29, 1980) *reprinted in* U.N. Doc. A/CONF.62/106 (Sept. 23, 1980).

7. Address by Ambassador Elliot L. Richardson, American Mining Congress (Sept. 24, 1980).

8. Note by the President on the Proposed Preparatory Commission, PC/1 of March 3, 1980; Report of the President on the Work of the Informal Plenary on the Preparatory Commission, U.N. Doc. A/CONF.62/L.55 (1980).

9. Instruments Establishing Preparatory Bodies of International Organiza-

An informal proposal by Conference President Amerasinghe envisions establishing the Prepcom by Conference Resolution as a forerunner to the International Seabed Authority.¹⁰ The Prepcom could emerge as the manpower and organizational forerunner of the Authority. As the proposal now stands, the Prepcom would start work as soon as fifty signatures were appended to the Convention and would carry on until the Convention entered into force.

Under the current proposal the Prepcom would consist of a representative of each State that signs or accedes to the Convention. The Prepcom would elect its own chairman, determine its own rules and regulations, and would be financed by repayable United Nations loans. The Prepcom would be entitled to establish subsidiary committees and its mandate is circumscribed as follows:

1. Convoke the Assembly of the Authority.
2. Prepare the agenda and first session of the Council.
3. Prepare draft rules of procedure and financial regulations for the Assembly and the Council.
4. Make studies and recommendations for the initial budget of the Authority and the Enterprise.
5. Prepare recommendations for relations with other United Nations organizations.
6. Submit proposals for the Secretariat, including staff regulations.
7. Make studies and recommendations on the establishment of the seat of the Authority and on the Law of the Sea Tribunal.
8. Deal with any other matter falling within its sphere of activities.

The most important function of the Prepcom is likely to be the preparation of rules, regulations, and procedures in accordance with art. 17 of annex III of the Convention. This work is necessary to start the first seabed operation and must be done before the Convention enters into force. A new art. 308, para. 4, introduced as part of the Final Clauses during the ninth session, stipulates that the rules, regulations, and procedures of the Prepcom are to apply provisionally pending formal adoption by the Authority through consensus.¹¹ This means that if consensus is not reached, the rules and regulations drafted by the Prepcom would remain in force indefinitely. However, according to the footnote

tions, FC/8 of Aug. 13, 1979 with a synoptical outline of precedents for preparatory commissions in the U.N. system.

10. Informal Proposal by the President of the Conference, PC/2 of Mar. 14, 1980.

11. *Id.* para. 8.

to art. 308, para. 4, this provision will be reconsidered as work progresses on the Prepcom.

Finally, the Prepcom is to deal with any other matter falling within its sphere of activity. This includes the possibility of establishing a preparatory investment protection system (pip system) for the interim period between signature and entry into force of the Convention. The chances for subsequent ratification of the Law of the Sea Convention by major industrialized States, will depend on the extent to which preparatory investment protection and the rules, regulations, and procedures outlined above are handled satisfactorily by the Prepcom. The United States made detailed proposals regarding investment protection in April of 1980 that established a link between the Prepcom and the industrialized States' interest in preliminary investment protection.¹²

The United States proposal relates to investments that will have to be made to develop seabed mining technology before the Convention enters into force. These pre-production investments include activities such as mapping, exploration, and construction of a small pilot plant. They do not include major production units which can only be justified once all rules and regulations have been passed. The cost of prospecting alone is estimated at roughly ten million dollars.¹³ An international pip-system for site-specific investments through the Prepcom is conceivable by the terms of the United States proposal provided these conditions are met:

1. Priority for the pre-Convention investor if mining rights for the same area are claimed by later applicants.
2. Similar priority for the Enterprise on a prospected area according to the parallel system.
3. Transformation of priority claims into legal rights to mine a site once the Convention has come into force, but subject to the fulfillment of all other objective preconditions of the application procedure according to annex III and on the understanding (if the proposal is interpreted correctly) that there is not a bona fide right to such transformation, but merely evidence of priority.

The first two conditions could be entrusted to the Prepcom to be executed by means of a simplified advance application procedure. The transformation into a legal right would have to be incorporated in the Convention itself because the circumstances of this transformation constitute an exception to the provisions of art. 6 of annex III which governs the approval of plans of work.

12. Informal Working Paper by the United States; An Approach to Interim Protection of Investment, IA/1 of April 2, 1980 and IA/1 of Aug. 11, 1980 (revised).

13. Address by Ambassador Elliot L. Richardson, American Mining Congress (Sept. 24, 1980).

This advance site designation system would enable the Enterprise in the pre-Convention stage to prepare for its role in the strict application of the parallel system. This would substantially accelerate the date at which commercial production could begin and would generate revenues for the Authority at an earlier date.¹⁴ However, it should be noted here that the United States proposal says very little about the reserved area where the Enterprise is supposed to work. Currently there are no proposals for some kind of "Interim Enterprise" or "Baby Enterprise." In order to be acceptable to a wide majority of States, the United States proposal should also cover the reserved area.

This system would serve as an incentive for States to sign the Final Act or accede to the Convention without delay in order to become a Prepcorn member. In this way, the Prepcorn and the pip-system bring the Convention nearer to ratification. On the other hand, parliaments responsible for ratifying the Convention will be annoyed that their approval is practically circumvented by the provisional implementation of substantial Convention provisions.

During the ninth session the developing States were opposed to the United States proposal but did not oppose the inclusion of Prepcorn and pip-system questions in the agenda for the tenth session to be held in the spring of 1981.¹⁵ The current controversy regarding the Prepcorn and pip-system leaves little doubt that there will be extremely difficult negotiations constituting, in effect, a "Conference within the Conference." More problems that must be dealt with include: environmental control on the seabed, preliminary activities in the reserved area, and the treatment of joint ventures with the Enterprise and between developing and industrialized States. Alongside other unresolved aspects of the Law of the Sea Convention and growing dissatisfaction with the overall distributive injustice, the problem of the Prepcorn seems sure to prove another stumbling block on the long road to initiate the new Law of the Sea Convention.

14. NEPTUNE, August 1980, at 1 (Interview with U.S. experts Knecht and Meyer).

15. Programme of Work for the Tenth Session, U.N. Doc. A/CONF.62/BUR.13/Rev. 1 (Aug. 28, 1980).

