

University of Miami Law School  
**Institutional Repository**

---

University of Miami Inter-American Law Review

---

7-1-1981

# Oceans

James C. Bridgman

Follow this and additional works at: <http://repository.law.miami.edu/umialr>

---

## Recommended Citation

James C. Bridgman, *Oceans*, 13 U. Miami Inter-Am. L. Rev. 279 (1981)  
Available at: <http://repository.law.miami.edu/umialr/vol13/iss2/9>

This Report is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

## OCEANS REPORT

JAMES C. BRIDGMAN\*

The second portion of the ninth session of the United Nations Conference on the Law of the Sea (UNCLOS) convened in Geneva, Switzerland, on July 28, 1980 amid speculation that the failure of UNCLOS was imminent. Both the United States of America<sup>1</sup> and the Federal Republic of Germany<sup>2</sup> had recently passed seabed mining legislation which threatened any UNCLOS compromise. The Group of 77 was particularly disturbed by this trend. It labeled the action of the United States as contrary to international law, violative of the principle of good faith in negotiations, and stated that it jeopardized the progress of the conference.<sup>3</sup>

This view was endorsed by spokesmen for the African, Asian, Latin American and East European Socialist nations, China and Canada. United States Ambassador Elliot Richardson replied to these strong criticisms by assuring the Conference that the United States was committed to the good faith pursuit of an early and successful outcome for the Conference. He emphasized the interim nature of the United States legislation and that seabed mining exploitation could not take place until 1988. He also stated the U.S. position that the legislation is consistent with present international law and as supportive of the efforts of UNCLOS.<sup>4</sup>

The agenda for the second portion of the ninth session was established during the first portion of the ninth session. The first two weeks were to be devoted to negotiations on outstanding issues. Simultaneously, there would be plenary meetings to discuss the general clauses, the final clauses and the Preparatory Commission. The general debate would start during the third week of negotiations and a third revision of the text would follow the general debate. Substantial progress was reported by the intersessional meeting of the Drafting Committee.<sup>5</sup>

---

\*James C. Bridgman has attended UNCLOS sessions since 1973 as a non-governmental observer. He has a Master of Marine Affairs Degree from the University of Rhode Island and received his J.D. in May, 1981 from the University of Miami.

1. Deep Seabed Hard Mineral Resources Act of June 28, 1980, 30 U.S.C. § 1401 et. seq. (1980).

2. Act on the Interim Regulation of Deep Seabed Mining (unofficial translation) 19 I.L.M. 1330 (1980).

3. See U.N. Doc. A/C. 62/ SR. 130 (August 5, 1980) at 4.

4. See U.N. Doc. A/C. 62/103 (August 1, 1980) at 2.

5. U.N. Doc. A/C. 62/BUR./S.R. 54 (July 31, 1980) at 2, 3.

Despite substantial progress during the first three weeks, the Conference was unable to follow its time table. An additional two weeks were allotted to the negotiations.<sup>6</sup> The general debate took place and the Draft Convention on the Law of the Sea (informal text)<sup>7</sup> was produced by the end of the ninth session.

### I. NEGOTIATIONS AT THE NINTH SESSION

The process of the negotiations at UNCLOS has been based upon consensus of the delegations. This long and torturous process has come to symbolize the creation of "a conglomeration of mini-packages in one large package of ideas with which every member can live in spite of some discomfort."<sup>8</sup>

#### A. *Negotiations in Committee I*

Substantial agreement was reached on several of the most difficult Committee I articles during the August session. Article 140 of the Composite Negotiating Text of the Treaty had been a problem for years, with the industrialized states insisting that the benefits derived from seabed mining be limited to states who were parties to the Convention. The developing countries felt that entities other than states, such as non-independent, self-governing peoples or national liberation organizations should also share in the benefits.

The compromise which was achieved provides that activities in the seabed area are to be carried out for the benefit of mankind as a whole, taking into particular consideration the interests and needs of developing states and of peoples recognized by the United Nations who have not attained full independence.<sup>9</sup> The financial and other economic benefits are to be shared equitably in accordance with article 160(2)(f).<sup>10</sup>

Article 160(2)(f)(i) requires the Assembly of the proposed seabed mining authority to consider and approve, upon the recommendation of the council, the rules, regulations and procedures on the equitable sharing of financial and other economic benefits. If the Assembly does

6. U.N. Doc. A/C. 62/BUR./S.R. 56 (August 22, 1980) at 2.

7. U.N. Doc. A/C. 62/W.P. 10/Rev.3/Add.1, 19 I.L.M. 1129 (1980); (first issued as U.N. Doc. A/C. 62/W.P. 10/REV. 3).

8. U.N. Doc. A/C. 62/L. 62 (August 26, 1980) at 2.

9. Draft Convention on the Law of the Sea (informal text), U.N. Doc. A/C. 62/W.P. 10/Rev.3/Add.1, 19 I.L.M. 1129, 1188 (1980).

10. *Id.*

not approve the recommendations of the council, it must return the recommendations to the council for reconsideration.<sup>11</sup> A national liberation organization would be unable to obtain funds from seabed mining unless such funding is recommended by the council. The major question is, therefore, what groups will control the council. Industrialized countries fear that national liberation organizations will obtain funding from seabed revenues.

The second set of issues on which an acceptable compromise was reached were those in article 151, dealing with the allocation of seabed mining tonnage.<sup>12</sup> This compromise represents the middle ground between those countries which produce nickel, copper, cobalt, and manganese from land-based sources, and the industrialized countries who wish to mine the seabed immediately. The former group demands restricted seabed mining because it fears markets will be flooded by cheap sea-mined minerals. The latter group desires no restrictions on seabed mining so that inexpensive sources of minerals will become available.

A compromise text was produced during the first portion of the ninth session and was the subject of extensive discussion during the August meetings. Article 151 requires that the tonnage of minerals mined from the seabed be restricted by the annual growth rate for nickel consumption. A complex formula was proposed that would allow the tonnage allocation for seabed mining to be calculated with a guaranteed minimum growth rate when real growth in the world nickel consumption is very low. Thus even when growth in nickel consumption is very low, seabed mining will still take place.

The developing mineral producing states expressed great concern that seabed mining activities would be subsidized by various governments. Such subsidization would make it possible for seabed minerals to undercut the prices required to produce the same minerals on land. This fear was partially alleviated by article 150(i) which provides that the conditions of access to markets for imports of seabed minerals be no more favorable than the most favorable access of imports from land-based mines.<sup>13</sup> Developing land-based mineral producers were not entirely satisfied with the formula and deferred its discussion until the tenth session.

An additional concern of developing mineral producers has been that those nations producing cobalt, manganese and copper may be

---

11. *Id.* at 1198.

12. *Id.* at 1192.

13. *Id.*

hurt by seabed production even if that production is within the limits based on the growth in nickel demand. Article 151(4) attempts to remedy such harm by empowering the authority, at the request of a harmed country, to initiate studies of the adverse effects on countries mining these three metals.<sup>14</sup> The council may then recommend that the Assembly establish a compensation system for countries suffering serious adverse effects on their export earnings or economies due to seabed mining.

In past sessions, it was agreed that there would be a review of the Convention fifteen years after the date of the first commercial seabed mineral production. Major disagreement existed as to the consequences if such review conference failed to reach agreement. Developing country proposals for a moratorium on seabed mining were not included in the Informal Draft Convention. A compromise was reached under article 155(4) whereby the Review Conference could adopt, and submit to states for ratification, amendments to the seabed mining system.<sup>15</sup> These amendments, upon entry into force, would become binding upon all parties to the Convention. Some states could not accept the proposal that these amendments would become binding upon them without their consent. This language was retained in article 155(4) although no consensus was achieved.

The most important breakthrough of the ninth session was an agreement on a three tiered decision making mechanism in the council. The council of the proposed mining authority would consist of thirty-six members and make the critical decisions with respect to the practicalities of seabed mining. The selection of these thirty-six members would be based upon geographical representation and special interest.<sup>16</sup> Substantial agreement on the composition of the proposed council was achieved. The position of the small European industrialized States, however, is that they should be guaranteed two seats for their interests. This proposal will be discussed at the tenth session.

The decisions to be made by the council are divided into four categories. Decisions on questions of procedure will be taken by a majority of the members present and voting under article 161(7)(a). Decisions on questions of substance arising under certain convention provisions will require a two-thirds majority of at least half the State Parties. Decisions on questions of substance dealing with other articles

---

14. *Id.* at 1194.

15. *Id.* at 1196.

16. *Id.*, article 161, at 1199.

will be taken by a three-fourths majority and the most difficult questions will be decided by consensus under article 161(7)(d).

Therefore, at least some of the most difficult issues to be resolved will await the consensus of the council and will not be settled at UNCLOS. Although the voting system may be cumbersome, it protects most interest groups. Consensus on this voting system was reached at the August meeting, but there was fear that the system would make it impossible for the council to operate. Goodwill and cooperation will be essential to the functioning of the council and the authority.

An additional breakthrough linked to the voting system in the council, was a compromise on how seabed mining contracts were to be approved. Article 162(2)(J) requires the council to approve plans of work, in accordance with article 6 of Annex III, within sixty days of their submission by the legal and technical commission.<sup>17</sup> If the commission recommends the approval of the plan of work, it shall be deemed to have been approved by the council unless detailed written objections are submitted. Upon receipt of such objections the conciliation procedure of article 161(7)(e) will apply. If the conciliation procedure fails to remove the objection, the plan of work will be deemed to be approved by the council unless the council, by consensus, expressly disapproves it. If the commission recommends disapproval of the plan of work, the council may still approve it by a three-fourths majority. The Informal Draft Convention shifts the major decisions on the approval of a plan of work from the council to the legal and technical commission.

In article 5 Annex III progress was achieved with respect to the transfer of technology. It was unclear, however, whether a consensus had been reached. The contractor who wishes to exploit seabed minerals, is required to make available to the enterprise the technology which the contractor is legally entitled to transfer. Other technology, (which the contractor is not legally entitled to transfer) is also to be made available to the enterprise if at all possible. The contractor should attempt to acquire the right to legally transfer such technology. These undertakings must be included in each contract until ten years after the enterprise has started its own commercial production of seabed minerals.<sup>18</sup>

---

17. *Id.* at 1202.

18. *Id.* at 1256.

### *B. Negotiations in Committees II and III*

While substantial progress was achieved regarding seabed mining issues, little progress was made for those issues relating to coastal state control of maritime zones.

In the August portion of the ninth session, the previously discussed issue of passage of warships through straits and the territorial sea was again debated. Approximately forty developing countries proposed all warships be required either to give prior notification of their passage or to ask the consent of the coastal state for such passage. This suggestion was not included in the Informal Draft Convention. There was little discussion on the definition of the outer edge of the continental margin, (article 76) or revenue sharing beyond 200 miles, (article 82).<sup>19</sup> These disputed articles may never truly reach consensus and are likely to remain in the text as is. Their acceptance or rejection may depend on an eventual vote of the Conference.

The major dispute of the Second Committee, and perhaps the entire Conference, was the delimitation of boundaries between opposite and adjacent States.<sup>20</sup> Two equally numerous groups have formed over the years. The first insists such boundary delimitation be based upon special circumstances and the specific geographical situation. The second group demands that an equidistant line be drawn between neighboring countries. No agreement regarding these two views was reached at the ninth session.

The Third Committee further elaborated the substantive agreement achieved during the eighth session concerning the protection and preservation of the marine environment (Part XII), marine scientific research (Part XIII) and the development and transfer of marine technology (Part XIV). Sitting as a committee of the whole, the Third Committee considered the drafting suggestions which had earlier been produced by the Drafting Committee. Many of these suggestions, and other substantive and drafting suggestions, were accepted and reflected in the Informal Draft Convention.<sup>21</sup>

### *C. Negotiations with Respect to Dispute Settlement, Final Clauses, General Provisions and Drafting.*

This informal plenary meeting also considered the final clauses to the Convention. Fifteen meetings were held which produced substan-

---

19. *Id.* at 1172, 1174.

20. *Id.*, articles 15, 74, 83 at 1150, 1171, 1174-75.

21. U.N. Doc. A/C. 62/L. 61 (August 25, 1980) at 1.

was reached to divide the dispute settlement procedures into three sections. The first section<sup>22</sup> provides for voluntary procedures under certain conditions. The second section<sup>23</sup> provides for compulsory and binding dispute settlement procedures, and the third section<sup>24</sup> lists the limitations and optional exceptions to those compulsory procedures.<sup>25</sup> The object of these divisions was to clarify and coordinate all the provisions of the dispute settlement regime. Substantive changes to Part XV were not intended and questions relating to the settlement of delimitation disputes in article 298(1)(a)(3), (4), were postponed to a later time.

This informal plenary meeting also considered the final clauses to the Convention. Fifteen meetings were held which produced substantial agreement in most areas. Article 305 on signature, article 306 on ratification and article 307 on accession were found acceptable, except that the final form of articles 305 and 307 will depend on the disputed issue of who may sign or accede to the convention. Article 308, on entry into force of the convention, was accepted. Sixty ratifications or accessions were agreed as the number required for entry into force of the Convention.

The acceptance of article 309 on reservations and exceptions was a major breakthrough. A reservation or exception to an article of the Convention will be permitted only where the substantive article itself specifically uses the terms "reservation" or "exception." A State Party will not be permitted to register an exception (reservation) to an optional exception (reservation) under article 298(1)(a), of another State Party.

Article 310 on declaration and statement, article 311 on the relation of the Convention to other conventions and international agreements, articles 312, 313 and 314 on amendments, and article 317, on denunciation, were all accepted by the informal plenary meeting and were included in the Informal Draft Convention. Also accepted and incorporated into the informal draft were articles 318, status of the annexes, article 319 depository, and article 320 on authentic texts.<sup>26</sup>

---

22. Draft Convention on the Law of the Sea (informal text), U.N. Doc. A/C. 62/W.P. 10/Rev.3/Add.1 articles 279-85 19 I.L.M. 1129, 1239-40 (1980).

23. *Id.*, articles 268-96 at 1240-43.

24. *Id.*, articles 297-99 at 1243-46.

25. U.N. Doc. A/C. 62/L. 59 (August 23, 1980) at 1.

26. U.N. Doc. A/C. 62/L. 60 (August 23, 1980); U.N. Doc. A/C. 62/L. 60 Corr. 1 (August 25, 1980).

The informal plenary meeting also considered the general provisions of the Convention. Three articles were accepted concerning good faith and abused rights (article 300), peaceful uses of the seas (article 301) and information disclosure (article 302). A further article on *jus cogens* achieved consensus after substantial consultation but was not reflected in the Informal Draft Convention. Also adopted was article 303 on archaeological objects and objects of historic value.

A further proposal was that the provisions of the Convention apply with due regard to the special characteristics of a region, and lead to results consistent with the principles of justice and equity. General rules and principles of international law which are not incompatible with the Convention would be used to interpret the Convention. These suggestions were not accepted by the informal plenary meeting and further negotiations were recommended.<sup>27</sup>

The August meeting of the ninth session again dealt with the massive task of harmonizing the words and expressions of the six official languages of the ICNT Rev. 2.<sup>28</sup> The six language groups held eighty-one meetings to review the text and prepare it for an article by article review by the whole Drafting Committee. No language group finished its task during the ninth session. Serious drafting problems still existed in the text of over 400 articles. Informal intersessional meetings were proposed to continue the drafting work before the convening of the tenth session.<sup>29</sup>

## II. INTERSESSIONAL SHENANIGANS

The ninth session ended in a euphoric atmosphere due to the session's various successes. Ambassador Elliot Richardson of the United States of America called the ninth session the most significant single event in the history of peaceful cooperation since the founding of the United Nations.<sup>30</sup> The euphoria of the moment, however, was not to last. Four major blows beset the UNCLOS before the tenth session convened.

The first blow was that Ambassador Richardson resigned from the United States delegation.<sup>31</sup> Although viewed as inevitable by

---

27. U.N. Doc. A/C. 62/L. 58 (August 22, 1980).

28. Informal Composite Negotiating Text, U.N. Doc. A/C. 62/W.P. 10/REV. 2, April 28, 1979, 18 I.L.M. 686 (1979).

29. U.N. Doc. A/C. 62/L. 63 (August 27, 1980).

30. Statement by Ambassador at Large Elliot L. Richardson, Special Representative of the President for the Law of the Sea Conference Geneva, Switzerland, August 29, 1980.

31. New York Times, Oct. 19, 1980 at 1, col. 5.

some, the resignation deprived the delegation and UNCLOS of a strong leader and proponent of a workable treaty.

On December 4, 1980 the President of the Conference, H. Shirley Amerasinghe died. President Amerasinghe was the individual perhaps most responsible for bringing UNCLOS close to a successful resolution. Uncertainty regarding his successor led to speculation that the tenth session might be dominated by political debates over the Presidency.

The election of Ronald Reagan as President of the United States of America, injected further uncertainty into the UNCLOS process. The administration's first position toward UNCLOS was defined during an interagency meeting on March 2, 1981, a week before the beginning of the tenth session of UNCLOS. The administration stated serious problems with the Informal Draft Convention existed and that UNCLOS negotiations should not be completed until a policy review was conducted by Washington.<sup>32</sup>

The last shock to the UNCLOS negotiating process took place less than forty-eight hours before the start of the tenth session of UNCLOS. The Reagan administration announced that several United States delegates to the session had been dismissed, including the acting head of the delegation, George H. Aldrich.<sup>33</sup>

By the time the tenth session of UNCLOS opened on March 9, 1981, it was a certainty that signature of the Convention would not be achieved by the end of 1981.

### III. THE TENTH SESSION

Four tasks were left for the tenth session to accomplish. The first was to establish a preparatory commission which would establish rules, regulations and procedures for the International Seabed Authority. The second task was to make provisions for priority as to seabed mine sites for those who made investments in seabed mining before the Convention entered into force. The third task was to decide what entities other than states would be allowed to become parties to the Convention. Such entities as the European Communities, the Pacific Trust Territory and certain liberation organizations have expressed the desire to sign the Convention. The last task was for the

---

32. Obersorter, *Sea Law Treaty Being Blocked at White House*, Washington Post, March 4, 1981 at 1, col. 3.

33. Gwertzman, *President Replaces Top U.S. Diplomats of the Sea Law Talks*, New York Times March 9, 1981, at 1, col. 5.

Drafting Committee to complete its work and a decision to be made on the wording of the articles concerning delimitation between opposite and adjacent states.

Despite the uncertainties, the tenth session made some progress. After one week of debate, Ambassador T.T.B. Koh of Singapore was elected President of the Conference.

The tenth session concentrated on a general debate on the preparatory commission, and the cost and the location of the International Seabed Authority. Agreement was reached that the location of the Authority would be decided in the second week of the next session. Major progress was achieved by the Drafting Committee which concentrated on conforming the language of the six official treaty languages in Part XI.

Some private meetings took place and the Negotiating Group Seven attempted, without success, to achieve further progress on a formula for delimitation between opposite and adjacent states. The Group of 77 tied discussions on a priority system for seabed operations commencing before the coming into force of the Convention to discussions of formalization of the Treaty. As a result, little progress was made.<sup>34</sup>

The uncertainty of the United States position has hurt the tenth session. As of this writing, the President's nominee for ambassador, Mr. Malone, has not been confirmed by the Senate. His deputies have not been appointed and the United States delegation is in the position of attending meetings without negotiating instructions. It is unclear whether the United States will demand changes to the Informal Draft Convention.

In the March 16, 1981 General Committee meeting on the Plan of Work, the United States was the only delegation to ask for a delay in completion of a treaty and for the setting of the next session in January of 1982. The second portion of the tenth session was set for the four weeks in August, 1981 in Geneva. The United States delegation has stated that it is uncertain whether Washington's policy review will be completed by August, 1981. Some delegations have indicated that they will push for completion of the Convention with or without the cooperation of the United States.

---

34. Private Communication, UNCLOS, April 17, 1981.

## IV. GERMAN LEGISLATION

Prior to the convening of the August meeting of the ninth session, the Bundestag of the Federal Republic of Germany passed its own seabed mining legislation.<sup>35</sup>

The Act assumes that the regime of the high seas still applies to the mining of seabed minerals. Residents of the Federal Republic of Germany are required to obtain an authorization under the Act, or from a reciprocating state,<sup>36</sup> if they wish to mine seabed minerals. Exploration will be authorized by a license. The license grants exclusive rights to explore and acquire ownership rights in hard mineral resources as is required for development, construction and testing of processing facilities.<sup>37</sup>

Residents of the Federal Republic must meet certain criteria to receive an authorization. The first criterion is that no authorization has previously been granted under the Act or by a reciprocating state covering the same mine site. The second criterion is that the applicant must guarantee an orderly development of hard mineral resources, including operational safety requirements and prevention of industrial accidents.

Additional criteria are that such an authorization will not substantially impair the high seas rights of others, the maritime environment, or disturb the foreign relations of the Federal Republic. An international agreement on seabed mining which comes into force for the Federal Republic may terminate the issuance of the authorization if that agreement prohibits such authorizations.<sup>38</sup>

The recovery of minerals will be authorized by a permit granting exclusive rights to recover and own hard mineral resources. Mineral recovery will not be permitted before January 1, 1988.<sup>39</sup>

A grandfather clause is also included so that those German citizens who are presently exploring mine sites may continue such exploration. License applications must be made within three months of passage of the legislation.<sup>40</sup>

---

35. Act on the Interim Regulation of Deep Seabed Mining, August 17, 1980 (unofficial translation), 19 I.L.M. 1330. Bundesgesetzblatt, Part I, 9080, No. 50 (August 22, 1980) at p. 1429.

36. *Id.*, section 3(1).

37. *Id.*, section 4(1).

38. *Id.*, section 5(1).

39. *Id.*, section 4(2), 4(3).

40. *Id.*, section 6.

Where there are conflicting applications for the same mine site, the first to file would be given priority if that application contains sufficient information to ascertain whether the requirements of Section 5 have been met.<sup>41</sup>

Applications are to be accompanied by a plan of work containing a description of the project, the timetable, the recovery method and the marine protection methods to be used. Additional requirements include information on the structure of the mine site, the type, position and volume of the mineral deposit and the recovery targets of the operation.<sup>42</sup>

A license will be valid for ten years and a permit will be valid for twenty years. Both periods may be extended.<sup>43</sup> Requirements provide that the mine site be of sufficient size to carry out a profitable recovery of minerals, and that periodic and reasonable investments be made.<sup>44</sup> Additional provisions and modifications of such authorizations are included to safeguard foreign trade and other public interests.<sup>45</sup>

Transfers of authorization and the payment of an amount or fee for a permit based on 0.75 percent of the average market price of the metals and minerals in the year of recovery are also included.<sup>46</sup> A trust fund is established for transfer of funds to the International Seabed Authority after entry into force of the convention for the Federal Republic of Germany. Prior to the transfer, the trust fund will aid in the development of seabed resources.<sup>47</sup> The legislation recognizes the applications and authorizations of other states with essentially the same provisions for regulation of seabed mining.<sup>48</sup> The Federal Minister of Economics is given the responsibility of enforcing federal law, and establishing and monitoring regulations for seabed mining activities.<sup>49</sup>

Certain acts are established as disorderly conduct subject to a fine of up to 10,000 DM. These include developing seabed minerals without an authorization, failure to comply with enforceable conditions of

---

41. *Id.*, section 7.

42. *Id.*, section 8.

43. *Id.*, section 10(1).

44. *Id.*, section 10(1), (2).

45. *Id.*, section 10(5).

46. *Id.*, section 11, 12.

47. *Id.*, section 13.

48. *Id.*, section 14.

49. *Id.*, section 16, 17, 18.

the Act and actions in violation of the regulations promulgated under the Act.<sup>50</sup> Fines and imprisonment are provided for negligent acts that endanger the life, health and property of a third party.<sup>51</sup>

---

50. *Id.*, section 19.

51. *Id.*, section 20.