

Synopsis

RECENT DEVELOPMENTS IN THE LAW OF THE SEA 1979-1980

This Synopsis highlights major events occurring between December 1979 and December 1980 that affect the law of the sea. It discusses the Ninth Session of the Third United Nations Conference on the Law of the Sea (UNCLOS III) and significant events outside UNCLOS III. The primary sources used to complete this synopsis include: United Nations documents, United Nations press releases, the *United Nations Chronicle*, *International Legal Materials*, the *United States Department of State Bulletin*, Department of State internal documents, *United States Code*, *Congressional and Administrative News*, the *Congressional Quarterly*, *Worldwide Reports*, *Law of the Sea*, the *New York Times*, the *Wall Street Journal*, the *Washington Post*, the *Los Angeles Times*, and the *London Times*.

THE NINTH SESSION OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

Introduction

The Ninth Session of UNCLOS III offered new hope that the protracted negotiations¹ would in fact lead to the successful conclusion of an international Convention on the Law of the Sea in

1. The Third Conference on the Law of the Sea (UNCLOS III) opened in 1974. Since then, sessions have been held annually. UNCLOS is the longest and largest plenipotentiary conference ever convened. At the last meeting of the Ninth Session in Geneva, 160 States participated in negotiations.

1981.² The basic structure of the Ninth Session followed that of previous sessions,³ with meetings in New York and Geneva. The negotiators at the New York meeting made considerable progress toward the formulation of a draft convention, resolving many of the outstanding issues of the Eighth Session.⁴ Nevertheless, extended debate and continued failure to reach agreement on a voting mechanism in the Sea-Bed Council⁵ prevented the Conference from meeting the ambitious timetable⁶ it had established the previous summer. Even so, many negotiated compromises received consensus approval and the meeting produced a second revision to the Informal Composite Negotiating Text (ICNT/R2).⁷

At the resumed Ninth Session in Geneva the negotiators were

2. United States Ambassador to the Law of the Sea Conference, Elliot L. Richardson, said it was "all but certain" that the text would be ready for signing in 1981. *N.Y. Times*, Aug. 30, 1980, § A, at 4, col. 1.

3. It consisted of three main committees. Committee I dealt with management and control of deep seabed resources in areas beyond national jurisdiction. Committee II discussed jurisdictional issues within the territorial sea, the 200-mile exclusive economic zone, the continental shelf, and the high seas. Committee III developed regimes regulating marine pollution and scientific research.

During the New York meeting, Committees I and II were further divided into seven established negotiating groups on particular issues. The Working Group of 21 and several expert groups conducted additional negotiations. On several occasions, the Conference met in Informal Plenary. See Second Revised Informal Composite Negotiating Text, U.N. Doc. A/Conf. 62/WP. 10/Rev. 2, at 18-22 (Apr. 11, 1980) [hereinafter cited as ICNT/R2].

4. Meetings of the Eighth Session in 1979 resulted in sufficient progress to produce a first revision to the Informal Composite Negotiating Text. Revised Informal Composite Negotiating Text, U.N. Doc. A/Conf. 62/WP. 10/Rev. 1 (April 28, 1979) [hereinafter cited as ICNT/R1]. For detailed coverage of the Eighth Session, see Synopsis, *Recent Developments in the Law of the Sea 1979*, 17 *SAN DIEGO L. REV.* 691 (1980) [hereinafter cited as *Recent Developments 1979*]. For additional background, see Oxman, *The Third United Nations Conference on the Law of the Sea: The Eighth Session*, 74 *AM. J. INT'L L.* 1 (1980) [hereinafter cited as Oxman].

5. The Council is the executive organ of the International Sea-Bed Authority. The Authority is the body which would supervise the conduct of deep seabed mining.

6. Report of the General Committee as Submitted to and Approved by the Conference at 1st 118th Meeting, U.N. Doc. A/Conf. 62/BUR/12 (Aug. 20, 1979). The revised time table deferred the plenary debate on specific articles of the draft Treaty until the Geneva Meeting. See U.N. Dep't of Pub. Information, Press Release SEA/396, at 6 (Apr. 4, 1980) [hereinafter cited as SEA/396].

7. The Informal Composite Negotiating Text and its several revisions constitute the basic negotiating documents for the draft Treaty. The procedure to be followed in revising the negotiating texts was established at the Seventh Session in 1978:

[A]ny modification or revision . . . should emerge from the negotiations themselves and should not be introduced on the initiative of any single person, whether it be the President or a Chairman of a Committee, unless presented to the plenary and found, from the widespread and substantial support prevailing in plenary, to offer a substantially improved prospect of a consensus.

U.N. Doc. A/Conf. 62/62, para. 10 (Apr. 30, 1978).

largely successful in reaching agreement on the remaining major substantive issues, including resolution of the voting issue. This permitted general debate in plenary and the transformation of the ICNT/R2 into a Draft Convention. The Conference also considered procedures for formalizing the draft document into the finalized Convention. United States Ambassador to the Law of the Sea Conference, Elliot L. Richardson, characterized the session "as the most significant single development of the rule of law since the founding of the United Nations itself."⁸ The Ninth Session adjourned with the expectation of completing all formal work on the Convention at a New York meeting scheduled for March 1981.

The New York Meeting, March 3 - April 4, 1980

Committee I

The most significant negotiations and changes to the text took place in Committee I. The deadlock over terms for transferring seabed mining technology to the Enterprise⁹ was partially broken. Compromise on this issue, reflected in the revised negotiating text,¹⁰ resulted from extensive negotiation in the Working Group of 21¹¹ and Negotiating Group One.¹² Significant concessions were made by both the industrialized nations and the Group of 77.¹³ All sides recognized the importance of providing the Enterprise with access to seabed technologies in order for a viable parallel mining system¹⁴ to develop. The industrialized nations, however, wanted to clarify and limit such obligations.

8. N.Y. Times, Aug. 30, 1980, § A, at 4, col. 1.

9. The Enterprise is the organ of the International Sea-Bed Authority that would conduct deep seabed mining.

10. ICNT/R2, *supra* note 3, Annex III, art. 5. Compare *id.* with ICNT/R1, *supra* note 4, Annex II, art. 5.

11. The Working Group of 21 was formed at the request of developing nations to consider Committee I issues in a smaller forum.

12. Negotiating Group One dealt with the system of exploration and exploitation of the deep seabed and with resource development policy.

13. The Group of 77 is a bloc of approximately 110 developing countries. Their concerns within UNCLOS III have usually conflicted with those of the highly industrialized countries. For a discussion of the Group's role in UNCLOS III, see Friedman & Williams, *The Group of 77 at the United Nations: An Emergent Force in the Law of the Sea*, 16 SAN DIEGO L. REV. 555 (1979).

14. The term "parallel mining system" refers to the proposed system of mining in the International Sea-Bed Area that would allow for simultaneous participation of private contractors, States Parties, and the Enterprise.

A particularly controversial provision, the "Brazil clause,"¹⁵ had required prospective miners to provide developing countries with the same technology provided to the Enterprise. The clause was modified to limit transfer obligations to developing countries to those circumstances where the Enterprise chose not to assert its own right of access.¹⁶ Nevertheless, the United States continued to object to the new version of the clause.¹⁷

Negotiated consensus on the timing, nature, and limits of technology transfer obligations resulted in other changes in the text. Among these was the imposition of a time limit upon the duty to transfer technology. Mining contractors would be subject to this duty only until commencement of commercial operations by the Enterprise; thereafter, the transfer obligation would be applicable to such contracts for no more than ten years.¹⁸ Other changes that received United States approval included the elimination of a blacklisting provision,¹⁹ the strengthening of protections for proprietary information,²⁰ and the simplification of dispute settlement procedures.²¹ Overall, these revisions improved the Enterprise's access to the tools needed to exploit seabed resources.

At the same time, greater recognition was given to the limited ability of states with access to seabed technologies to bind themselves and their citizens to assure the availability of this technol-

15. ICNT/R2, *supra* note 3, Annex III, art. 5, para. 3(e). For a discussion of Brazil's role in UNCLOS III, see Morris, *Brazil at the Third United Nations Conference on the Law of the Sea*, 7 OCEAN DEV. INT'L L. 131 (1979).

16. ICNT/R2, *supra* note 3, Annex III, art. 5, para. 3(e). Compare *id.* with ICNT/R1, *supra* note 4, Annex II, art. 5, para. 1(e).

17. U.S. Delegation Report, Ninth Session of the Third United Nations Conference on the Law of the Sea, New York, February 27 - April 4, 1980, at 14 (unpublished paper) [hereinafter cited as U.S. Delegation Report, New York, 1980].

18. ICNT/R2, *supra* note 3, Annex III, art. 5, para. 7. Ambassador Richardson reminded industry critics of the technology transfer provisions that "the intended transfer is a *sale* of the technology in question on fair and reasonable *commercial* terms and conditions." (emphasis in original). Richardson, *In Pursuit of a Law of the Sea*, Washington Post, Mar. 24, 1980, § A, at 22, col. 4.

19. ICNT/R1, *supra* note 4, Annex II, art. 5, para. 1(b). Compare *id.* with ICNT/R2, *supra* note 3, Annex III, art. 5, para. 1(b). The blacklisting provision, intended as a sanction against third party owners of technology who refused to make their technology available to the Enterprise, was deleted in favor of a more general obligation of States Parties having access to such technologies to act concertedly to ensure availability. ICNT/R2, *supra* note 3, Annex III, art. 5, para. 5. The possibility of reintroducing more direct sanctions was left open for further consideration.

20. ICNT/R2, *supra* note 3, Annex III, art. 5, para. 1.

21. *Id.* Annex III, art. 5, para. 3(b). Compare *id.* with ICNT/R1, *supra* note 4, Annex II, art. 5, para. 2. The new text omitted a provision that would have allowed disputants to resort in the first instance to protracted, non-binding conciliation procedures.

ogy.²² Similar recognition was given to the limitations on states' abilities to police their contracting nationals engaged in mining operations. The revised text made sponsoring states responsible only to the extent feasible under their respective legal systems, assuming that those states first discharged their responsibilities by enacting appropriate implementing legislation.²³ The United States expressed concern, however, over new language placing responsibility for the actions of multinational corporations on those sponsoring states which "effectively control" such applicants.²⁴

Negotiating Group One was largely successful in reconciling disagreement over quotas and anti-monopoly provisions governing the Authority's approval of mining applicants. Two stringent criteria for assessing whether approval of a mining contract would lead to monopolization were adopted.²⁵ A further guarantee was added to prohibit a transfer of rights from one contractor to another in circumstances that would create a monopoly.²⁶ Negotiations concerning the applicant screening process also resulted in revised criteria for assigning priority consideration,²⁷ and in giving preference to the Authority to exploit reserved areas.²⁸

The Group resolved the uncertainty regarding the status of joint ventures entered into by the Enterprise. Under the new text, joint arrangements between the Enterprise and other contractors would have the same protections against termination,

22. U.S. Delegation Report, New York, 1980, *supra* note 17, at 10.

23. ICNT/R2, *supra* note 3, Annex III, art. 4. Compare *id.* with ICNT/R1, *supra* note 4, Annex II, art. 4.

24. ICNT/R2, *supra* note 3, Annex III, art. 4, para. 2. See U.S. Delegation Report, Eighth Session at the Third United Nations Conference on the Law of the Sea, New York, July 16 - August 24, 1979, at 11 (unpublished paper) [hereinafter cited as U.S. Delegation Report, New York, 1979].

25. The first would limit a country's seabed operations to two percent—reduced from three percent—of the total seabed area open to exploitation by states and private parties. The second, aimed at preventing a monopolization of sites in a given area, would limit a country's approved and current holdings to 30% of a circular area of 400,000 km². ICNT/R2, *supra* note 3, art. 6, para. 3(d). France had earlier unsuccessfully sponsored several amendments to strengthen the anti-monopoly provisions. U.S. Delegation Report, New York 1979, *supra* note 24, at 13.

26. ICNT/R2, *supra* note 3, Annex III, art. 20.

27. Priority consideration would be given to applicants who had already invested the most effort and resources in prospecting or exploration, *id.* Annex III, art. 7, para. 2(c), and to applicants who had previously applied, but had not yet received approval. *Id.* Annex III, art. 7, para. 3.

28. The qualified-preference would apply "whenever fewer reserved sites than non-reserved sites are under exploitation." *Id.* Annex III, art. 7, para. 5.

suspension, or revision as would ordinary contracts with the Authority.²⁹ The revised text did not, however, allay the previously expressed concerns of the United States that the joint arrangements of the Enterprise would not subject that body to a program of payments to the Authority.³⁰

Debate over the array of sanctions to be levied against contracting parties resulted in additional changes. Negotiating Group One provided for increased flexibility in these sanctions by allowing monetary penalties³¹ as an alternative to suspension or termination of mining contracts with the Authority. This lesser sanction would be available even in cases of serious and persistent violations of contract terms or regulations.

The revised text also resolved one of the most intractable issues of the Conference: the approach to future review of the seabed mining system.³² The contested provisions, which would have enabled the Assembly at a future Review Conference³³ to impose a moratorium on seabed mining after 25 years, were deleted in favor of provisions enabling the Review Conference to submit and ratify amendments to the system of exploration and exploitation.³⁴ At the same time, the Assembly would be precluded from changing certain fundamentals of the system. Overall, these revisions provided for meaningful review while eliminating the more drastic measure of a moratorium.

Negotiating Group One tightened the language pertaining to control of activities in the International Sea-Bed Area. The negotiators sought this specificity in order to limit discretion of the regulatory bodies.³⁵ For example, the revised provision governing activities in the Area required policies be carried out "as specifi-

29. *Id.* Annex III, art. 11, para. 1. Compare *id.* with ICNT/R1, *supra* note 4, Annex II, art. 10, para. 2.

30. U.S. Delegation Report, New York, 1979, *supra* note 24, at 16.

31. ICNT/R2, *supra* note 3, Annex III, art. 18, para. 2. Compare *id.* with ICNT/R1, *supra* note 4, Annex II, art. 17, para. 2.

32. SEA/396, *supra* note 6, at 9.

33. ICNT/R1, *supra* note 4, art. 155, para. 6.

34. ICNT/R2, *supra* note 3, art. 155, para. 5. The Review Conference would be scheduled 15 years after the beginning of commercial production, rather than 20 years as previously agreed. *Id.* art. 155, para. 1. Amendments would require a two-thirds majority vote in the Assembly. *Id.* para. 5.

35. The U.S. Delegation noted there was an increased need to rationalize and consolidate procedures for the promulgation of rules and regulations by the governing bodies. U.S. Delegation Report, New York, 1980, *supra* note 17, at 9. Professor Oxman of the U.S. Delegation observed that:

[m]ajor consumers and seabed producers can hope to have no greater assured voting power in the Authority than the reasonable prospect of preventing adverse decisions. They will be unable to impose positive decisions. The solution to the risk of inaction or deadlock is to establish the precise conditions for mining in advance

Oxman, *supra* note 4, at 12.

cally provided."³⁶

The United States delegation was instrumental in the movement to reinforce the environmental protection functions of the Legal and Technical Commission.³⁷ The revised text gave the Commission the duty to recommend and coordinate monitoring and inspection programs for activities within the Authority's jurisdiction.³⁸ The Commission also would make recommendations to the Council regarding proceedings before the Sea-Bed Disputes Chamber, and the issuance of emergency orders or disapproval of areas for exploitation to prevent harm to the marine environment.³⁹ The Conference did not approve an earlier United States proposal that would have given the Legal and Technical Commission a more direct decision-making role.⁴⁰

A provision declaring financial returns from the mining of seabed resources to be for the "benefit of mankind as a whole," rather than for the sole benefit of the States Parties to the Convention, continued to cause difficulty. The provision expressly recognized the needs and interests of peoples "who have not attained full independence or other self-governing status."⁴¹ Despite disagreement over this language, the matter was not given much attention at the New York meeting.⁴²

36. ICNT/R2, *supra* note 3, art. 150. Compare *id.* with ICNT/R1, *supra* note 4, art. 150.

37. In meetings of the Working Group of 21, the U.S. Delegation reintroduced the amendments to article 165 it had proposed at the Eighth Session. All but a proposed change in title for the Commission were included in the ICNT/R2. U.S. Delegation Report, New York, 1980, *supra* note 17, at 28.

38. ICNT/R2, *supra* note 3, art. 165. For a discussion of national and regional efforts to create legal regimes to protect the marine environment see notes 296-312 and accompanying text *infra*. For a discussion of UNCLOS pollution control enforcement mechanisms, see Bernhardt, *A Schematic Analysis of Vessel-Source Pollution: Prescriptive and Enforcement Regimes in the Law of the Sea Conference*, 29 VA. J. INT'L L. 265 (1980). For a discussion of the problem of pollution enforcement in the exclusive economic zone, see Freidman & Bowen, *Neglected Issues at the Third United Nations Law of the Sea Conference*, 5 OCEAN MANAGEMENT 309 (1979).

39. ICNT/R2, *supra* note 3, art. 165. Compare *id.* with ICNT/R1, *supra* note 4, art. 165.

40. U.S. Delegation Report, New York, 1979, *supra* note 24, at 31.

41. ICNT/R2, *supra* note 3, art. 140. Compare *id.* with ICNT/R1, *supra* note 4, art. 140. For a Third World perspective on the role of the non-independent states at UNCLOS see Agrait, *The Third United Nations Conference on the Law of the Sea and Non-Independent States*, 7 OCEAN DEV. INT'L L. 19 (1979).

42. After further debate at the resumed session in Geneva, the United States was still referring to it as a "potentially destructive issue." N.Y. Times, Aug. 30, 1980, § A, at 4, col. 1.

Negotiating Group Two reported general agreement on a broad range of revisions to the financial arrangements for seabed development. Revisions in the financial scheme for the Enterprise were incorporated into an extensively reworked Statute of the Enterprise.⁴³ Changes to the Statute reflect the emerging consensus that the Enterprise should operate on "sound commercial principles" and with considerable autonomy from other governing organs such as the Authority, the Council, and the Assembly.⁴⁴ Specific powers and functions of the Governing Board of the Enterprise were consolidated into a cohesive set of provisions.⁴⁵

Despite divergent positions of various delegations, Negotiating Group Two also reached tentative agreement on Enterprise liability for financial payments to the Authority, and on the related topic of national taxation.⁴⁶ The amended Statute made it clear that the Enterprise would make payments to the Authority from its mining proceeds just as other seabed miners would be obliged to do. Such payments would, however, be waived for an initial period, not exceeding 10 years, to permit the Enterprise to become self-supporting.⁴⁷ The new text also deleted the Enterprise's controversial immunity from national taxation, leaving the issue for negotiation between the Enterprise and the host countries.⁴⁸

A key aspect in ensuring the viability of the parallel mining system was the guarantee of financing of an initial mine-site and of certain attendant costs of exploration, exploitation, processing, and marketing. After considerable debate, the Group left unchanged the formula for financing this initial project.⁴⁹ The Group did, however, reach new compromises on an early determination of the total amount of loans required⁵⁰ and on ceilings for

43. ICNT/R2, *supra* note 3, Annex IV. Compare *id.* with ICNT/R1, *supra* note 4, Annex III. The U.S. Delegation analogized the Statute "to the charter and by-laws of a private corporation." U.S. Delegation Report, New York, 1980, *supra* note 17, at 24.

44. This emerging consensus was less than wholehearted. Some countries called for supervision by the Council, whereas others preferred direct control by the Assembly. U.S. Delegation Report, New York, 1980, *supra* note 17, at 24.

45. ICNT/R2, *supra* note 3, Annex IV, art. 6.

46. The Group of 77 argued for exemption from payments and national taxes, while many developed countries pushed for a status similar to any other mining contractor. SEA/396, *supra* note 6, at 19.

47. ICNT/R2, *supra* note 3, Annex III, art. 13, Annex IV, art. 10.

48. *Id.* Annex IV, art. 13, para. 5.

49. *Id.* Annex IV, art. 11, para. 3. Financing would be provided through loans from States Parties in accordance with their U.N. scale of contributions. One-half of the total loan amount would be interest free. *Id.*

50. Incorporating a U.S. proposal, the revision would require the Preparatory Commission to determine the amount prior to the ratification process in order to give adequate notice to potential signatories to the Convention. ICNT/R2, *supra* note 3, Annex IV, art. 11, para. 3(a).

contributions by individual states.⁵¹ The delegates also overcame an earlier impasse on the form of payments. The new provision required financial contributions be made to the Enterprise only in convertible or freely usable currencies.⁵² Despite these successes, the controversy over a loan repayment schedule remained unresolved.⁵³ The "mixed system" for financial payments to the Authority from seabed mining contractors remained essentially unchanged from the previous text.⁵⁴

Although disharmony among the delegates prevented substantial change,⁵⁵ the text did represent the best possible compromise. The United States obtained acceptance of several minor proposals,⁵⁶ but encountered resistance to its position that a twenty-five percent floor on attributable net proceeds created "a serious distortion in the calculation of return on investment."⁵⁷

The Expert Group on Production Limitations attempted to achieve consensus on production controls that would protect the market of land-based nickel producers while giving adequate stimulus to a nascent seabed mining industry. The basic scheme

51. If, as is considered likely, less than all the U.N. Members ratify the Convention, there would be a need for additional loan contributions from certain countries exceeding their share as determined by the U.N. assessment scale. A compromise, not entirely acceptable to the United States, would limit additional assessments to 25% of the cost of one fully integrated mining project. ICNT/R2, *supra* note 3, Annex IV, art. 11, para. 3(c). The United States had declared an intention to limit its own contribution to a 25% "cap" equivalent to the amount it would normally contribute in accordance with the U.N. scale. The Soviet Union took a similar position. U.S. Delegation Report, New York, 1980, *supra* note 17, at 23.

52. ICNT/R2, *supra* note 3, Annex IV, art. 11, para. 3(g).

53. While the Group of 77 was reluctant to burden a nascent Enterprise with debt service, the industrialized countries maintained that a repayment schedule, published in advance of the ratification process, was indispensable. U.S. Delegation Report, New York, 1980, *supra* note 17, at 22.

54. ICNT/R2, *supra* note 3, Annex III, art. 13. Compare *id.* with ICNT/R1, *supra* note 4, Annex II, art. 12. The "mixed system" combines profit sharing with royalty payments. See *Recent Developments 1979*, *supra* note 4; note 24 and accompanying text *supra*.

55. SEA/396, *supra* note 6, at 20-21.

56. ICNT/R2, Annex III, art. 13, para. 4(k) was modified to permit contractors to carry losses backward as well as forward. ICNT/R2, Annex III, art. 13, para. 3 was modified to permit waiver of a fixed fee where commencement of commercial production would be postponed because of a production quota.

57. U.S. Delegation Report, New York, 1980, *supra* note 17, at 20. "Attributable net proceeds" is defined as "the product of the contractor's net proceeds and the ratio of the development costs in the mining sector to the contractor's development costs." ICNT/R2, *supra* note 3, Annex III, art. 13, para. 4(3).

remained largely unaltered,⁵⁸ but the group did establish new minimum⁵⁹ and maximum⁶⁰ growth allowances for seabed mining production. Seabed production was further limited by a maximum tonnage allowance for any single mine-site.⁶¹

Despite its inclusion in the ICNT/R2, the system of production limitations was still unacceptable to a number of land-based producing countries.⁶² Also retained in the new text despite continued objections by some industrialized countries⁶³ was a provision for unrestricted participation by the Authority in commodity agreements.⁶⁴

Preparatory investment protection, an issue closely related to seabed production policies, was considered at the New York meeting. The United States submitted an informal working paper⁶⁵ which outlined a proposed mechanism to accommodate continued seabed mining development and investment during the period between signature and entry into force of the Treaty.⁶⁶ No

58. *Id.* art. 151. Compare *id.* with ICNT/R1, *supra* note 4, art. 151. The broad outline of this scheme would prohibit seabed production of nickel exceeding 60% of the annual increase in total world production. For a discussion of various proposals aimed at protecting the land-based nickel producing market while stimulating the growth of the seabed mining industry, see Herman, *The Niceties of Nickel—Canada and the Production Ceiling Issue at the Law of the Sea Conference*, 6 SYRACUSE J. INT'L L. COM. 265 (1979).

59. This compromise formula would provide seabed mining interests with a guaranteed three percent increase even in slow growth years when the actual increase in consumption might be less. ICNT/R2, *supra* note 3, art. 151, para. 2(b)(iii).

60. The group found it necessary to balance the benefit of this minimum growth allocation to seabed mining with a "cap" that would protect land-based producers. Thus, the 3% floor would be limited in all events to 100% of the actual consumption increase. *Id.* Australia had argued for elimination of production limitations in favor of more direct prohibitions against national subsidization of seabed mining. See SEA/396, *supra* note 6, at 16.

61. The annual limit was set at 46,000 tons. ICNT/R2, *supra* note 3, art. 151, para. 2(e).

62. Canada had argued that the formula, "intended as a safeguard could clearly have the effect that in low market growth conditions it could permit seabed mining to take up more than 100% of world growth and thus force land-based producers to cut back their production." Written Statement by the Delegation of Canada, April 2, 1980, U.N. Doc. A/Conf. 62/WS/4, at 3 (Apr. 10, 1980). For an overview of Canada's role in UNCLOS III negotiations, see Mestral & Legault, *Multilateral Negotiation—Canada and the Law of the Sea Conference*, INT'L J., Winter 1979-80, at 47.

63. U.S. Delegation Report, New York, 1980, *supra* note 17, at 3.

64. ICNT/R2, *supra* note 3, art. 151, para. 1.

65. Informal Working Paper by the United States: An Approach to Interim Protection of Investment, 1A/1 (Apr. 2, 1980); U.S. Delegation Report, New York, 1980, *supra* note 17 (attachment).

66. The mechanism would be a treaty provision charging the Preparatory Commission, during an interim period, with receiving state-sponsored mining applications, granting priority to sites requested, and banking reserved sites for use by the Enterprise or by developing countries. See U.S. Delegation Report, New York, 1980, *supra* note 17, at 44. Various spokesmen within the mining industry

agreement was reached on this proposal although the need to provide some form of security for investors during this interim period was recognized.⁶⁷

Negotiations on the system of voting in the Council continued throughout the New York meeting with little progress reported. Delegates meeting in Negotiating Group Three and the Working Group of 21 essentially agreed to retain the two-tiered approach developed at the previous session,⁶⁸ but did not agree on the number of votes necessary to block decisions affecting sensitive issues.⁶⁹ The composition and representation of special interest groups on the Council were also debated, with little agreement other than as to general approach.⁷⁰

The United States was particularly dissatisfied with the inclusion of a new provision that substantially altered the procedure for approving plans of work submitted by mining applicants and that upset the relationship between the decision-making organs of the Authority.⁷¹ Otherwise, it was generally agreed that the revised text further clarified the relationship between the Council and the Assembly, and the various functions of the Authority.⁷²

Many issues outstanding on the settlement of seabed disputes were resolved at the New York meeting. The Group of Legal Experts on Sea-Bed Dispute Settlement submitted a compromise

have stated that passage of the Treaty would halt seabed production for most of this decade unless more guarantees for investors were written into the draft version of the Treaty. *BUS. WEEK*, April 21, 1980, at 63.

67. U.S. Delegation Report, New York, 1980, *supra* note 17, at 44.

68. The two-tiered approach was not incorporated into either the ICNT/R1 or the ICNT/R2, but was contained in the Chairman's Report for the Resumed Eighth Session, U.N. Doc. A/Conf. 62/91, at 57. For a summary of the two-tiered approach, see *Recent Developments 1979*, *supra* note 4, at 706 n.86. See also Oxman, *supra* note 4, at 16.

69. The United States would have settled for five negative votes to block an action, but many developing countries favored a number closer to 10. SEA/396, *supra* note 6, at 22.

70. U.S. Delegation Report, New York, 1980, *supra* note 17, at 27.

71. In decisions to award contracts, article 162, paragraph 2(j), would give greater control to the Council at the expense of the Legal and Technical Commission. ICNT/R2, *supra* note 3, art. 162, para. 2(j). Compare *id.* with ICNT/R1, *supra* note 4, art. 162, para. 2(j). The United States protested that this new provision had been added to the text without sufficient discussion or support. U.S. Delegation Report, New York, 1980, *supra* note 17, at 26.

72. U.S. Delegation Report, New York, 1979, *supra* note 24, at 25. See ICNT/R2, *supra* note 3, arts. 157, 158, 160.

text on commercial arbitration that received general approval⁷³ and was incorporated into a new provision of the ICNT/R2.⁷⁴ The new provision made commercial arbitration compulsory at the request of either party to a dispute, with concurrent compulsory referral to the Sea-Bed Disputes Chamber of the Law of the Sea Tribunal. This would permit the Tribunal to retain jurisdiction over all questions involving the interpretation of the Convention.⁷⁵

The new text provided a choice of forums for resolution of disputes between States Parties.⁷⁶ The Group further agreed that labor disputes should be resolved through a regulatory structure to be established by the Preparatory Commission⁷⁷ and the Authority.⁷⁸ Because technology transfer obligations under the revised text would become part of a miner's contractual undertaking,⁷⁹ disputes concerning such obligations would also be subject to compulsory arbitration.

Committee II

Committee II completed most of the work on the continental shelf and maritime boundaries at the New York meeting, although a few outstanding issues remained. The Chairman of the

73. The negotiations on the commercial arbitration issue involved essentially three interests. The United States and several Western European States considered it important to provide for commercial arbitration for contractual disputes. The [Group of 77] was concerned with maintaining the integrity and unity of the jurisdiction of the Sea-Bed Disputes Chamber over the interpretation of the Convention. The Soviet Union was concerned that, in preserving this integrity, the text should not inadvertently permit entities other than States to use the arbitral tribunal to raise issues of the interpretation of the Convention

U.S. Delegation Report, *supra* note 17, at 30.

74. ICNT/R2, *supra* note 3, art. 188. For a discussion of the various dispute settlement procedures adopted at UNCLOS, see Bernhardt, *Compulsory Dispute Settlement in the Law of the Sea Negotiations: A Reassessment*, 19 VA. J. INT'L L. 69 (1979).

75. ICNT/R2, *supra* note 3, art. 188, para. 2. Compare *id.* with ICNT/R1, *supra* note 4, art. 188, para. 2. The Law of the Sea Tribunal would consist of 21 members of different nationalities, representing the principal legal systems of the world. This Tribunal would operate through various small chambers, the largest of which would be the 11-member Sea-Bed Disputes Chamber. Carnegie, *The Law of the Sea Tribunal*, 28 INT'L COMP. L.Q. 669, 671-72 (1979).

76. Such disputes would be referred to either a Special Chamber of the Law of the Sea Tribunal or to an ad hoc Chamber of the Sea-Bed Disputes Chamber. ICNT/R2, *supra* note 3, art. 188, para. 1.

77. The Commission would direct the establishment of the Authority and its various organs. It would function between the time of signing and entry into force of the Convention. See notes 114-119 and accompanying text *infra*.

78. SEA/396, *supra* note 6, at 26.

79. ICNT/R2, *supra* note 3, Annex III, art. 5, para. 3(e).

Second Committee and Negotiating Group Six⁸⁰ reported success on a compromise formula on coastal state jurisdiction over the continental shelf that took account of oceanic ridges.⁸¹ The new formula closed a controversial loophole in the definition of the continental margin where its natural features extend beyond the generally accepted 200-mile exclusive economic zone (EEZ).⁸²

Negotiating Group Six also specified the functions to be performed by a Commission on the Limits of the Continental Shelf.⁸³ The proposed 21-member body would recommend limits to the jurisdiction of coastal states where the continental shelf extends beyond the EEZ.⁸⁴ Provisions on exploitation of the continental shelf beyond 200 miles otherwise remained unchanged. There was heated debate, however, concerning the exemption from revenue sharing of those developing coastal states that would be net importers of the off-shore mineral resource—typically oil.⁸⁵ This exemption remained the chief unresolved issue concerning the continental shelf.

The United States was among a group of countries particularly concerned about a movement to require prior authorization be obtained by warships exercising rights of innocent passage through a coastal state's territorial sea.⁸⁶ The ICNT/R1 had required prior notification to the coastal state and had allowed that state to tem-

80. Report by Ambassador Andres Aguilar, Venezuela, Chairman of the Second Committee, U.N. Doc. A/Conf. 62/L. 51.

81. The revisions to article 76 amended the definition of the continental shelf, limiting its extension to 350 nautical miles where submarine ridges were to be taken into account. ICNT/R2, *supra* note 3, art. 76.

82. The EEZ is an area beyond and adjacent to the territorial sea and is under the jurisdiction of the coastal state and subject to the legal framework established by the Convention. *Id.* arts. 55-75. For a discussion concerning the development of the EEZ concept, see Krueger, *The Evolution of the 200-mile Exclusive Economic Zone: State Practice in the Pacific Basin*, 19 VA. J. INT'L L. 321 (1979).

83. A new Annex II of the ICNT/R2 details the functions of the proposed Commission.

84. ICNT/R2, *supra* note 3, art. 76, para. 8. Negotiating Group Six had agreed upon a strengthened version of this paragraph that would have required the coastal state to determine its limits "on the basis of" the recommendations of the Commission. The ICNT/R2, however, retained the weaker language of the earlier text.

85. *Id.* art. 82, para. 3. The United States had sought to replace this exemption with a scheme that would have permitted developing countries to opt out of the revenue-sharing system for a fixed period. U.S. Delegation Report, New York, 1980, *supra* note 17, at 32.

86. Interview with Hugo Caminos, U.N. Conference on the Law of the Sea, Office of the Under-Secretary-General, U.N. Headquarters, New York (July 11, 1980).

porarily suspend innocent passage when "essential for the protection of security or for the safety of ships."⁸⁷ This broad discretionary language met with strong objection at the New York meeting. As a result, the provision was amended to clarify the conditions under which temporary suspension was justified, with particular reference to "weapons exercises" by the coastal state.⁸⁸

The United States reintroduced an article⁸⁹ that would increase the protection of marine mammals. The article received general support and was incorporated into the revised text.⁹⁰ The article emphasized the role of international organizations and regional cooperation in protecting whales and other marine mammals.⁹¹

The method of delimiting boundaries between adjacent or opposite states was not resolved,⁹² however, Negotiating Group Seven did submit a new text defining the criteria for delimiting EEZ and continental shelf boundaries between such states.⁹³ The new text incorporated both the "equitable principles" approach and the "equidistant" approach, within the overall requirement that the delimitation agreement be effected "in conformity with international law."⁹⁴ These changes improved the prospects for resolving an issue which had threatened to substantially delay completion and ratification of the Treaty by the coastal states directly affected.⁹⁵ There was no redrafting of provisions affecting the related issue of interim measures and mechanisms settling

87. ICNT/R1, *supra* note 4, art. 25, para. 3.

88. The revised text deleted the words "or for the safety of ships," in favor of a more restrictive provision condoning suspension of innocent passage during "weapons exercises" by the coastal state. ICNT/R2, *supra* note 3, art. 25, para. 3.

89. *Id.* art. 65. Compare *id.* with ICNT/R1, *supra* note 4, art. 65. The new version recognized greater rights of coastal states to regulate the exploitation of marine mammals.

90. U.S. Delegation Report, New York, 1980, *supra* note 17, at 33.

91. For a discussion of efforts to foster regional cooperation in the regulation of marine mammal kills incidental to fishing operations, see notes 319-21 and accompanying text *infra*. For a discussion of the role of environmental groups in shaping the United States negotiating position, see Smith, *Landfall at UNCLOS*, NAT'L PARKS CONSERVATION MAGAZINE, Jan. 1980, at 2.

92. SEA/396, *supra* note 6, at 30.

93. ICNT/R2, *supra* note 3, art. 74, para. 1, art. 83, para. 1. The principles governing delimitation of the territorial sea between adjacent or opposite states had previously been resolved. *Id.* art. 15. For a discussion of the principle methods of delimitation, see Adede, *Towards the Formulation of the Rule of Delimitation of the Sea Boundaries Between States with Adjacent or Opposite Coasts*, 19 VA. J. INT'L L. 207, 211-21 (1979).

94. ICNT/R2, *supra* note 3, art. 74, para. 1, art. 83, para. 1.

95. Oxman, *supra* note 4, at 30. Because "[t]he function of the provisions on the exclusive economic zone and the continental shelf is to define the respective rights and duties of any coastal state and all other states as a class in the same area," the resolution of such boundary issues is essential to the advancement of the Convention as a "package deal." *Id.* at 29.

delimitation disputes.⁹⁶ It was generally assumed that the existing text would be acceptable once the more basic issue of delimitation criteria was resolved.⁹⁷ The Chairman reiterated his assessment that only under a scheme of "compulsory conciliation could the parties reach a compromise on this controversial issue."⁹⁸

Committee III

The Third Committee completed revisions to the regime for marine scientific research, thereby concluding all substantive negotiations within its purview. The primary issue confronting the Committee was the right to engage in research in areas of the continental shelf beyond 200 miles from the shoreline.⁹⁹ Researching states sought access to this entire area.¹⁰⁰ Many coastal states, however, maintained that their jurisdiction extended over the entire breadth of the shelf.¹⁰¹ The factions compromised, allowing coastal states an unchallenged right to prohibit foreign research in certain parts of their continental shelves beyond the 200 mile limit. In return, researching states would have greater access to all other parts of this region.¹⁰²

96. ICNT/R2, *supra* note 3, art. 74, paras. 3, 4, art. 83, paras. 3, 4.

97. U.S. Delegation Report, New York, 1980, *supra* note 17, at 33.

98. SEA/396, *supra* note 6, at 32.

99. *Id.* at 33.

100. Coastal states sought access to the continental shelf beyond 200 miles even in areas where no operations were planned. *Id.* at 34.

101. A coastal state would have the right to regulate, authorize, and conduct marine scientific research both within its EEZ and on its continental shelf. ICNT/R2, *supra* note 3, art. 246.

102. Ordinarily, a coastal state would not have the right to withhold its consent to the conduct of marine scientific research within its EEZ, or on its continental shelf, by another state if that project:

(a) is of direct significance for the exploration and exploitation of natural resources, whether living or nonliving;

(b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment;

(c) involves the construction, operation or use of artificial islands, installations and structures . . . ;

(d) contains information communicated . . . regarding the nature and objective of the project which is inaccurate or if the researching state . . . has outstanding obligations to the coastal state from a prior research project.

Id. art. 246, para. 5.

Under the compromise document, the coastal state could designate certain areas of its continental shelf, beyond 200 miles, in which it could begin exploitation or detailed exploratory operations within a reasonable period of time. Within these areas, the coastal state could exercise its discretion to withhold consent to re-

The Committee also limited the right of a coastal state to require cessation of foreign research projects.¹⁰³ Under the ICNT/R1, a coastal state could halt a research project if the project failed to meet certain conditions established by the coastal state.¹⁰⁴ The new text required an initial suspension period before the coastal state could order cessation of research activities.¹⁰⁵ This suspension period would give the researching state a reasonable time to comply with any conditions established by the coastal state.¹⁰⁶ If the researching state failed to comply, the coastal state could then order cessation.¹⁰⁷

Informal Plenary

The Informal Plenary reached agreement on the text of the Preamble to the Convention. The Preamble harmonized the conflicting desire of some countries for a political text with that of others for a brief non-substantive statement.¹⁰⁸ The primary controversy concerned the language to be included in a preambular clause enumerating the interests to be considered in the development of a just and equitable international economic order. Developing countries felt their interests should be emphasized, whereas the United States felt the needs of mankind as a whole should be stressed.¹⁰⁹ The Informal Plenary agreed on a clause that recognized the needs of mankind generally, as well as the particular

search by foreign states. In all remaining areas of this region, the coastal state could not withhold consent under subparagraph (a) of the above-quoted paragraph, although consent could be withheld under subparagraphs (b), (c), and (d). *Id.* art. 246, para. 6. The designation of such areas by the coastal state would not be subject to the dispute settlement procedures. *Id.* art. 296, para. 2(b).

103. *Id.* art. 253.

104. The coastal state could demand cessation if a research project were not being conducted in the manner originally communicated. Cessation also would be authorized if the researcher failed to give certain information concerning the project to the coastal state. *Id.*

105. *Id.* art. 253, para. 1. Where a major deviation from the procedure originally authorized occurred, the coastal state could order cessation of research activities without first ordering suspension. *Id.* art. 253, para. 2.

106. *Id.* art. 253, para. 3. If the researching state complied within a reasonable time with the conditions established by the coastal state, the coastal state would be required to lift the suspension. *Id.* art. 253, para. 5.

107. *Id.* art. 253, para. 3. A coastal state's suspension or cessation of a research project would be subject to review. Either party to the dispute could submit the decision to conciliation. *Id.* art. 296, para. 2(b).

108. Acting as a main committee, the Conference met in Informal Plenary on several occasions. The Preamble accepted by the Conference developed out of discussions based on two earlier texts. The first version in the 1977 negotiating text was limited to a short, non-controversial statement. The second was a more elaborate text proposed in 1978 by Fiji on behalf of the Group of 77. SEA/396, *supra* note 6, at 37.

109. U.S. Delegation Report, New York, 1980, *supra* note 17, at 40.

needs of developing countries.¹¹⁰

A second issue dealt with by the Informal Plenary on the Preamble was whether the Convention should seek to "develop," or whether it should seek to "give effect to" the principles of the Sea-Bed Declaration.¹¹¹ The Informal Plenary reached agreement on a preambular clause that stated the Convention would seek to develop the principles of the Sea-Bed Declaration.¹¹² The Informal Plenary believed this language would emphasize the independent existence of the principles of the Declaration.¹¹³

The creation of a Preparatory Commission was considered in detail for the first time at the New York meeting.¹¹⁴ The Informal Plenary decided the Commission should function from the conclusion of negotiations until such time as the Convention entered into force. The Commission was given a specific mandate to lay the groundwork for the initial sessions of the Assembly, the Council, and the Law of the Sea Tribunal.¹¹⁵ This mandate included the establishment of a headquarters for the Authority.¹¹⁶

110. The clause that was finally incorporated read as follows:

Bearing in mind that the achievement of such goals will contribute to the realization of a just and equitable international economic order which would take into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked.

SEA/396, *supra* note 6, at 37.

111. The Sea-Bed Declaration was made in the General Assembly of the United Nations in 1970. Its full title is the "Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof, Beyond the Limits of National Jurisdiction." G.A. Res. 2749, para. xxv.

112. SEA/396, *supra* note 6, at 37.

113. *Id.* If the phrase "give effect to" had been used, the inference would have been that the principles of the Sea-Bed-Declaration were dependent on the Convention to invest it with status. In this regard, the President of the Conference stated:

It must be made clear that an expression had to be used which while not affecting the question of the juridical status of those Principles, would express the desire and intent of the Conference to provide for the application of the concept of the common heritage of mankind by establishing through the present convention the institutional and legal framework and machinery to give the concept practical shape and form.

Id.

114. U.N. Doc. A./Conf. 62/L. 55.

115. SEA/396, *supra* note 6, at 38. The mandate would be expressed in a resolution to be adopted by the Conference at its final session. *Id.*

116. *Id.* at 39. Other proposed functions included arrangements and the drafting of an initial budget for the Authority's secretariat. The attempt to establish a definitive list of functions to be performed by the Preparatory Commission caused considerable controversy, mainly because delegations were unsure of the outcome

Most significantly, the Commission was charged with the responsibility for adopting draft rules, regulations, and procedures for the regulation of seabed mining.¹¹⁷ After extensive debate, the Informal Plenary agreed that membership in the Preparatory Commission would require signature or ratification of the Convention,¹¹⁸ and that the format for decision-making in the Commission would be left up to that body.¹¹⁹

Anticipating the completion of the negotiating stage of the Conference, the Group of Legal Experts on Final Clauses discussed extensively the legal effect of the future Convention. The Group submitted an annex of 13 tentative final clauses in its report to the Conference.¹²⁰ Because the delegates did not have time to consider the report, no new Final Clauses were incorporated into the revised text, and negotiations were deferred until the resumed session in Geneva.¹²¹ Similarly, although initial discussions were held on the adoption of certain General Provisions for the Convention, the matter was taken up more fully in Informal Plenary at Geneva.¹²²

The Geneva Meeting, July 28 - August 29, 1980

Delegates negotiating at the resumed Ninth Session in Geneva achieved major breakthroughs but were unable to complete an approved formal text. The results of the meeting were incorpo-

of substantive negotiations still in progress. U.S. Delegation Report, New York, 1980, *supra* note 17, at 39.

117. Debate ensued over whether the draft rules, regulations, and procedures should be adopted provisionally, pending consideration by the Authority, or whether they should merely be recommended to the Authority. The United States argued for the former approach because the provisional operations of rules, regulations, and procedures would provide certainty about the initial operation of the seabed mining system. *Id.* at 39. Certain developing countries argued, to the contrary, that such an approach might compromise the powers of the Authority. *Id.* The issue was left open until the Geneva meeting, at which time the Conference adopted the U.S. position. *See* note 217 and accompanying text *infra*.

118. U.S. Delegation Report, New York, 1980, *supra* note 17, at 38. The United States had favored this approach because it would have required members to demonstrate an intent to be bound by the Convention. Certain delegations had argued for less restrictive criteria for Commission membership. *Id.*

119. *Id.* Some delegations had urged the establishment of a rigid decision-making structure for the Commission that would have required all decisions to be made by consensus. SEA/396, *supra* note 6, at 39.

120. The report was not published as a Conference document. *Id.* at 40. The 13 proposed articles pertained to: the entry into force of the Convention, reservations, relation to other Conventions, amendments, denunciation, and the authenticity of texts. *Id.*

121. U.S. Delegation Report, New York, 1980, *supra* note 17, at 42. The Final Clauses section of the ICNT/R2 reflected the work of the Expert Group prior to the Ninth Session. ICNT/R2, *supra* note 3, arts. 299-303.

122. SEA/396, *supra* note 6, at 41. *See* notes 209-12 and accompanying text *infra*.

rated into a third revision of the negotiating text, denominated the Draft Convention on the Law of the Sea (Informal Text).¹²³

Committee I

The major accomplishment of Committee I¹²⁴ negotiations was agreement on a new voting procedure for the Sea-Bed Council. The new procedure replaced the blocking vote approach with a three-tiered system requiring consensus on a limited number of sensitive issues. This system divided the substantive issues to be decided by the Council into three categories according to their sensitivity. Different voting majorities were specified for each category.¹²⁵

Developing countries continued to oppose any veto mechanism as inherently discriminatory; but after extensive negotiations they accepted the more democratic procedure of consensus.¹²⁶ Under the new procedure, any of the thirty-six Council members, rather than a select few, would have the power to block decisions on sensitive issues.¹²⁷ The Soviet Union also found this formula

123. U.N. Doc. A/Conf. 62/WP. 10/Rev. 3 (Aug. 27, 1980) [hereinafter cited as Draft Convention]. The President of the Conference explained that "[i]t is a negotiating text and not a negotiated text, and does not prejudice the position of any delegation." Explanatory Memorandum by the President of the Conference, U.N. Doc. A/Conf. 62/WP. 10/Rev. 3/Add. 1, at 2 (Aug. 28, 1980). Most of the meeting was taken up with informal negotiations, the results of which were reported to the three Committees. In addition, the Informal Plenary, acting as a Main Committee, developed new texts on General Provisions, the Settlement of Disputes, and Final Clauses. The meeting concluded with three days of general debate. The Draft Convention reflected the consensus texts reported from each of these negotiating forums, as well as changes to the ICNT/R2 recommended by the Drafting Committee. *Id.*

124. The First Committee met formally at Geneva only once, and considered the proposals reported out of the informal negotiations. In contrast to previous sessions, the established Negotiating Groups did not meet in Geneva. Instead, meetings were held by four informal negotiating groups, each addressing a different set of unresolved issues: the system of exploration and exploitation; financial arrangements and the Statute of the Enterprise; decision-making in the Authority; and production policies. The Working Group of 21 also met to review outstanding "hard-core" issues. All of these groups reported to the Chairman of the First Committee. U.S. Delegation Report, Ninth Session of the United Nations Conference on the Law of the Sea, Geneva, July 28 - August 29, 1980, at 1 (unpublished paper) [hereinafter cited as U.S. Delegation Report, Geneva, 1980].

125. Draft Convention, *supra* note 123, art. 161., paras. 7(b)-(d).

126. Consensus is defined as the "absence of any formal objection." *Id.* art. 161, para. 7(e).

127. The United States had hoped to obtain a provision giving the five advanced seabed mining nations the power to overturn a Council decision stopping the award of a mining contract. Had this provision gained acceptance, the United

more acceptable because of its non-discriminatory character. Some delegates expressed concern that a lack of consensus on important issues could impede decisions. The Draft Convention minimized the possibility of such deadlock by limiting the number of issues in the consensus category and by providing for expedited conciliation procedures.¹²⁸

Consensus would be required prior to the adoption of: measures to protect land-based producers against adverse economic effects of seabed resource activities;¹²⁹ amendments to the system of sea-bed mining;¹³⁰ and rules, regulations, and procedures of the Authority.¹³¹ The latter category was particularly significant in that it encompassed the most important set of decisions to be made by the Council. For instance, consensus was required on all new rules, regulations, and procedures governing prospecting, exploration and exploitation, financial management and internal administration of the Authority. This consensus category included rules on borrowing and transfer of funds from the Authority to the Enterprise.¹³²

Most other substantive issues not included in the consensus categories would require a three-fourths majority vote,¹³³ whereas

States and its four seabed mining allies—Japan, West Germany, Britain, and France—would, in effect, be in a position to grant or deny a contract. N.Y. Times, Mar. 27, 1980, § A, at 3, col. 4.

128. If within 14 days of the submission of a proposal to the Council the President ascertained that a formal objection would be made, the Council would be required to constitute a Conciliation Committee. This Committee would attempt to reconcile differences and produce a proposal which could be adopted by consensus. The Committee would be required to report to the Council within 14 days. Draft Convention, *supra* note 123, art. 161, para. 7(3).

129. *Id.* art. 162, para. 2(1), art. 150(g). Consensus would be required for any Council recommendations to increase protection of developing countries' land-based mining industries by modifying the scheme of seabed production limitations. *Id.* art. 150(g).

130. *Id.* art. 161, para. 7(d), Part XI, arts. 133-91.

131. *Id.* art. 161, para. 7(d), art. 162, para. 2(n). The new uniform procedure contained in these two articles would provide all rules, regulations, and procedures be adopted and provisionally applied by the Council pending consideration and approval by the Assembly. *Id.*

132. *Id.* art. 160, para. 2(f), art. 162, para. 2(n). The Group of 77 argued that all matters on which rules, regulations, and procedures would be needed were not reasonably foreseeable in advance of ratification. To meet this concern, the new text was amended to indicate that the list of actions subject to rules, regulations, and procedures of the Authority was not intended to be exhaustive. *Id.* Annex III, art. 17, para. 1. Compare *id.* with ICNT/R2, *supra* note 3, Annex III, art. 17.

133. Draft Convention, *supra* note 123, art. 161, para. 7(c). Significant among Council actions in this category were: the issuance of emergency orders to prevent serious environmental harm (art. 162, para. 2(v)), selection among seabed miners when production must be limited (art. 162, para. 2(p)), and recommendations to the Assembly on suspension of the rights and privileges of membership (art. 162, para. 2(s)). U.N. Dep't of Pub. Information, Press Release SEA/422, at 6 (Sept. 2, 1980) [hereinafter cited as SEA/422].

other less sensitive issues would require a two-thirds majority.¹³⁴ When not otherwise specified, residual issues would be decided by consensus.¹³⁵ If questions arise as to the appropriate voting category for a particular issue, the higher or highest majority requirement would apply.¹³⁶ Decisions on procedural issues would require a simple majority of members present and voting.¹³⁷

The United States delegation emphasized that the voting formula compromise enhanced the possibility of resolving certain other substantive issues. By providing that resolution of such outstanding issues be set forth in the rules, regulations, and procedures of the Authority, the Draft Convention assured States of a standing veto until consensus could be achieved.¹³⁸ An example of this secondary impact was the tentative resolution of the controversy over the sharing of benefits derived from activities in the International Sea-Bed Area.¹³⁹ Under a new provision, the Assembly would equitably distribute benefits consistent with the rules, regulations, and procedures of the Authority.¹⁴⁰ States Parties would thus be assured that politically sensitive proposals for sharing economic benefits with "peoples who have not attained full independence or other self-governing status" would be subjected to the scrutiny of consensus decision-making.¹⁴¹

Related to the resolution of voting procedures in the Council was the revision of procedures for the approval of plans of work.¹⁴² While the Group of 77 favored greater discretionary

134. Draft Convention, *supra* note 123, art. 161, para. 7(b). This category included the decision to submit disputes to the Law of the Sea Tribunal or to binding arbitration. *Id.* arts. 188, 189.

135. *Id.* art. 161, para. 7(f).

136. *Id.* art. 161, para. 7(g).

137. *Id.* art. 161, para. 7(a).

138. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at iv.

139. The resolution of this issue was reflected in revised article 140, read in conjunction with revisions to articles 160, paras. (2)(f), (j), (n), and article 160 para. 7(d).

140. Draft Convention, *supra* note 123, art. 160, para. 2(j), art. 162, para. 2(n)(i).

141. *Id.* arts. 140, 162, para. 2(n)(i). Despite apparent resolution of this difficult question, the Conference President indicated the related issue of participation of national liberation movements in the Convention was one of three outstanding issues to be dealt with at the New York meeting scheduled for March of 1981. SEA/422, *supra* note 133, at 2. Decisions on the equitable sharing of revenue from exploitation of the continental shelf beyond 200 miles would also be subject to consensus in the Council. Draft Convention, *supra* note 123, art. 82.

142. See note 71 and accompanying text *supra*. Under the "split contracting system," approval of plans of work would be considered separately from the allocation of a specific quota through a production authorization. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 20.

power for the Council, the United States argued that approval should be left primarily to the Legal and Technical Commission.¹⁴³ A compromise was reached that would effectively limit the Council's power to reject a recommendation of approval by the Commission. To override a recommendation, the Council would have to act by consensus.¹⁴⁴ If the Commission recommended disapproval, the Council could approve the plan of work by a three-fourths majority.¹⁴⁵ Another new provision ensured a stable approval process by requiring that the Commission base its recommendations solely on the grounds set forth in the Convention.¹⁴⁶

The controversial provision concerning the sponsorship of multinational applicants was retained despite repeated objections by the United States delegation. The provision required sponsorship by both the incorporating state and the state that effectively controlled the corporation. The committee avoided impasse by providing that the criteria and procedures for implementing the sponsorship system would require consensus in the Council.¹⁴⁷

The scheme for transferring seabed mining technology was significantly revised at the Geneva meeting. The Group of 77 desired elimination of the time limit on technology transfer, in contrast to greater limitations urged by the industrialized countries. Compromise was reached to require technology transfer obligations in all contracts concluded within ten years after the start of commercial production by the Enterprise. All transfer obligations would expire after that time.¹⁴⁸ The United States accepted this revised scheme after being assured by developing countries that they would not press to include processing and marketing technology in the transfer obligations.¹⁴⁹ It was decided that in cases of technology owned by third parties, the contractor's obligation would be limited to situations where the contractor could acquire a legal right to transfer without substantial cost.¹⁵⁰ Less well received by

143. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 20.

144. Consensus in this instance would not require the vote of the state making the application or sponsoring an applicant. Draft Convention, *supra* note 123, art. 162, para. 2(j) (i). Compare *id.* with ICNT/R2, *supra* note 3, art. 162, para. 2(j).

145. Draft Convention, *supra* note 123, art. 162, para. 2(j) (ii).

146. *Id.* art. 165(b), Annex III, art. 6. The revised text required decision-making procedures of the Commission be established by the rules, regulations, and procedures of the Authority. *Id.* art. 165, para. 11. Compare *id.* with ICNT/R2, *supra* note 3, art. 163, para. 10.

147. Draft Convention, *supra* note 123, Annex III, art. 4, para. 2.

148. *Id.* Annex III, art. 5, para. 7. Compare *id.* with ICNT/R2, *supra* note 3, Annex III, art. 5, para. 7.

149. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 9.

150. Draft Convention, *supra* note 123, Annex III, art. 5, para. 3(c). Compare *id.* with ICNT/R2, *supra* note 3, Annex III, art. 5, para. 3(c). Where substantial cost

the United States and other industrialized countries was the Conference decision to retain a modified version of the "Brazil clause."¹⁵¹ Although all sides continued to exhibit some dissatisfaction during plenary debate,¹⁵² negotiations on the technology transfer scheme were deemed closed by the end of the Ninth Session.

The Group on Production Limitations reconvened during the Geneva meeting to further consider ways to accommodate the concerns of land-based producers. These negotiations resulted in strengthened protections through a provision prohibiting seabed mining states from establishing easier market access than that available to land-based producers.¹⁵³ At the same time, the Group emphasized the developmental goals of the Authority in a new provision calling for the "development of the common heritage for the benefit of mankind as a whole."¹⁵⁴

The Group on Production Limitations also addressed the particular concerns of the poorer land-based producing countries which would be adversely affected by new production from the seabed. Revisions aimed at a system of compensation to these countries were incorporated, requiring the Authority to initiate studies and to establish "measures of economic adjustment assistance."¹⁵⁵ Although the overall scheme of production limitations appeared to be accepted, several land-based producing countries continued to express dissatisfaction during plenary debate.¹⁵⁶

The French delegation reintroduced three amendments to strength the quota and anti-monopoly provisions for seabed mining contracts. Although these particular proposals were not accepted, the Conference did agree on a general provision

was involved, the Enterprise would reimburse the contractor. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 8.

151. Draft Convention, *supra* note 123, Annex III, art. 5, para. 3(e). See notes 15-17 and accompanying text *supra*.

152. SEA/422, *supra* note 133, at 15.

153. Draft Convention, *supra* note 123, art. 150(i).

154. *Id.* art. 150(g). This language was intended to dispel the impression that seabed production might become a residual source of supply. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 5.

155. Draft Convention, *supra* note 123, art. 151, para. 4. Compare *id.* with ICNT/R2, *supra* note 3, art. 151, para. 4. Certain African States had sought additional changes to this compensation scheme, which would have placed the funding burden on the developed countries rather than on the Authority. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 6.

156. Canada, Australia, and several African States voiced continued concern about the inadequacy of protections. SEA/422, *supra* note 133, at 12-13.

consistent with France's position which granted the Authority the power to adopt "other procedures and criteria" in addition to the maximum density limitations.¹⁵⁷ The imposition of gross seabed production limitations would necessarily limit the number of qualified miners that could be accepted. In such a case, the Authority would be directed to "avoid discrimination against any State or system," as well as to prevent monopolization, in applying its selection criteria.¹⁵⁸

The procedure for future review of the seabed mining system underwent little change at Geneva. Some developing countries unsuccessfully reintroduced the controversial proposal to allow the future Review Conference to impose a moratorium on seabed mining.¹⁵⁹ The Conference did, however, revise the procedure for entry into force of amendments to the seabed mining system. The revisions gave states more time to conform their own laws to amendments promulgated at the Review Conference.¹⁶⁰ Another change to the text made it clear that the Review Conference could take action only by proposing amendments or revisions to the Convention.¹⁶¹

Although the financial terms of seabed mining contracts remained largely intact,¹⁶² the system of financing the Enterprise was extensively revised.¹⁶³ The negotiators modified the scheme for determining the initial capital needed by the Enterprise. To provide a more definite scheme in advance of ratification, the Preparatory Commission would be required to specify the capital

157. Draft Convention, *supra* note 123, Annex III, art. 6, para. 5. The provision applied after the expiration of the interim period covered by the production limitation. Any action taken under the provision would be pursuant to the rules, regulations, and procedures of the Authority. *Id.* France had been particularly concerned about the failure to apply the anti-monopoly and quota provisions to those parts of the seabed reserved for the Enterprise and developing countries. SEA/422, *supra* note 133, at 15.

158. Draft Convention, *supra* note 123, Annex III, art. 7, para. 5. *Compare id.* with ICNT/R2, *supra* note 3, Annex III, art. 7, para. 4.

159. SEA/422, *supra* note 133, at 18.

160. Draft Convention, *supra* note 123, art. 155, para. 4. Amendments adopted five years after the commencement of the Conference would enter into force 12 months after ratification by two-thirds of the States Parties. *Id.* The earlier text had provided for entry into force of the amendments after a 30-day period. ICNT/R2, *supra* note 3, art. 155, para. 5.

161. Draft Convention, *supra* note 123, art. 155, para. 5. *Compare id.* with ICNT/R2, *supra* note 3, art. 155, para. 4.

162. Although several Western European countries had proposed substantial reductions in the payments to be made by the contracting miners, the Group of 77 blocked this effort, claiming the existing text to be the "absolute bottom line." SEA/422, *supra* note 133, at 16.

163. Draft Convention, *supra* note 123, Annex IV, art. 11. Negotiations were carried on by the Working Group of 21 and by a smaller group presided over by the chairman of the former Negotiating Group Two.

needed to finance the Enterprise's first integrated mining system in the draft rules, regulations, and procedures of the Authority.¹⁶⁴ To provide future flexibility,¹⁶⁵ the modifications also required the Preparatory Commission to set out the "criteria and factors" for any necessary adjustment of the stated figure, taking into account inflation and other unforeseen costs.¹⁶⁶

A second change to the Enterprise financing system ensured sufficient funding in the event the Convention lacked universal participation. The negotiators dropped the twenty-five percent ceiling on supplementary financing previously agreed to, and replaced it with a more flexible provision requiring the Assembly to adopt by consensus measures for dealing with a potential shortfall in funding.¹⁶⁷

A schedule for calling up the funds promised to the Enterprise was specifically addressed for the first time in the new text. Compromise was reached on a two-step procedure proposed by the Netherlands delegation. First, States Parties would be required to deposit irrevocable promissory notes with the Enterprise at the time of ratification in the amount of their total share of interest-free loans. Thereafter, the Governing Board of the Enterprise would prepare schedules of its financial needs, and draw against the promissory notes following these schedules.¹⁶⁸ The negotiators also agreed on revisions dealing with the adoption of a repay-

164. Draft Convention, *supra* note 123, Annex IV, art. 11, para. 3(a). Compare *id.* with ICNT/R2, *supra* note 3, Annex IV, art. 11, para. 3(a). The Preparatory Commission's draft rules, regulations, and procedures would be provisionally applied by the Authority when the Convention first entered into force. Draft Convention, *supra* note 123, art. 308, para. 4.

165. The Group of 77 stressed the need for flexibility. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 12.

166. Draft Convention, *supra* note 123, Annex IV, art. 11, para. 3(a).

167. *Id.* Annex IV, art. 11, para. 3(c). Compare *id.* with ICNT/R2, *supra* note 3, Annex IV, art. 11, para. 3(c). See note 51 and accompanying text *supra*. This compromise was reached after extensive debate. While the Group of 77 argued that a 25% ceiling might not meet the needs of the Enterprise, the United States and the Soviet Union objected to any obligatory supplementary funding in excess of their U.N. assessments. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 3. Since the text of the Convention did not establish any fixed obligation to meet the shortfall, it was understood by the United States that "any supplementary fund established by the Assembly would have to be voluntary." *Id.*

168. Draft Convention, *supra* note 123, Annex IV, art. 11, para. 3(d). The Group of 77 rejected an earlier proposal by the United States that would have given a potential veto over Enterprise operations to industrialized countries. The United States proposal would have applied consensus decision-making to requests for loan advancements. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 13.

ment schedule for loans to the Enterprise.¹⁶⁹ In advising the Assembly and the Council on adoption of schedules, the Governing Board would be required to give particular emphasis to ensuring the financial independence and successful performance of the Enterprise.¹⁷⁰

Renewed controversy over tax immunities for the Authority led to a complete revision of the negotiating text on that subject.¹⁷¹ Under the revised text, the Authority would be exempted from direct taxation when acting within the scope of its official activities. Although the Authority would not be exempt from indirect taxes in the form of charges for services rendered, States Parties would be required to take measures "to the extent practicable" to reimburse the Authority for such taxes.¹⁷² Additionally, a revised provision on tax immunity for staff members would allow States Parties to tax the salaries only of their own nationals.¹⁷³

Few changes were made regarding the composition and functions of the Council. Proposals to give better representation to certain groups of states were strongly opposed because of the impact such changes would have on the delicately balanced voting formula.¹⁷⁴ The new text did change one aspect of the developing countries' representation on the Council but the overall composition of that body remained unchanged.¹⁷⁵ In addition, the Conference accepted a new provision that would provide a caucus voting procedure for the nomination of Council members. The procedure would ensure effective representation of special interest and regional groups.¹⁷⁶ The Conference also agreed to longer terms and stiffer qualifications for membership on the Council's two Commissions in order to enhance the independence and quality

169. Draft Convention, *supra* note 123, Annex IV, art. 11, para. 3(f). *Compare id. with* ICNT/R2, *supra* note 3, Annex IV, art. 11, para. 3(f). The Group of 77 had consistently rejected efforts of certain industrialized countries to have the loan repayment schedule drawn up by the Preparatory Commission in advance of ratification. SEA/422, *supra* note 133, at 16. *See* note 53 and accompanying text *supra*.

170. Draft Convention, *supra* note 123, Annex IV, art. 11, para. 3(f).

171. *Id.* art. 183. *Compare id. with* ICNT/R2, *supra* note 3, art. 183. The earlier text had left this subject open for negotiation between the Authority and the host countries. *See* note 46 and accompanying text *supra*.

172. Draft Convention, *supra* note 123, art. 183, paras. 1, 2.

173. *Id.* art. 183, para. 3.

174. Several smaller industrialized states had pressed for better representation through an enlargement of the Council's membership. SEA/422, *supra* note 133, at 10.

175. Among the special interests of developing countries represented on the Council would be a new category of potential land-based producers of minerals also found on the seabed. Draft Convention, *supra* note 123, art. 161, para. 1(d). *Compare id. with* ICNT/R2, *supra* note 3, art. 161, para. 1(d).

176. Draft Convention, *supra* note 123, art. 161, para. 2(c).

of those bodies.¹⁷⁷

The Group of 77 renewed its sharp opposition to unilateral deep seabed mining legislation, such as that recently enacted by both the United States and the Federal Republic of Germany.¹⁷⁸ Those two delegations responded that the legislation was an interim measure necessary to maintain investment interest in the seabed mining industry.¹⁷⁹ Because both countries prohibit exploitation in the International Sea-Bed Area until 1988, the interim period arguably would leave sufficient time for the UNCLOS Convention to enter into force and thereby supersede these national laws.¹⁸⁰ Nevertheless, opposition to the passage of the national mining legislation made it impossible for the United States to incorporate further protections for interim investment into the overall treaty package.¹⁸¹ The stalemate in negotiations on preparatory investment protection persuaded the Conference leadership to defer that issue, together with the details of the Preparatory Commission's mandate, until the Tenth Session.¹⁸²

Committee II

The Second Committee met only once during the resumed Ninth Session and limited discussion to a review of the Drafting Committee's recommendations. Although most formal matters within the Committee's purview were deemed closed, intensive private negotiations were held on unresolved issues. These included the delimitation of the EEZ and continental shelf boundaries between opposite or adjacent states, and jurisdiction over stocks of fish found both within and beyond the EEZ.¹⁸³

177. *Id.* art. 163, paras. 3, 7. Compare *id.* with ICNT/R2, *supra* note 3, art. 164, paras. 3, 7.

178. SEA/422, *supra* note 133, at 18. See notes 232-37 and accompanying text *infra*. For a discussion of the effect unilateral deep seabed mining legislation has had on developing countries see Lee, *Deep Seabed Mining and Developing Countries*, 6 SYRACUSE J. INT'L L. COM. 213 (1979).

179. SEA/422, *supra* note 133, at 18.

180. See notes 238-41 and accompanying text *infra*.

181. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 38. The Group of 77 was concerned that any treaty provisions designed to protect interim investment would give existing private ventures a disproportionate advantage over the Enterprise. *Id.*

182. *Id.* Active consultations between sessions were anticipated on both of these issues.

183. *Id.* at 23. A number of delegations were annoyed that the Second Committee had not met formally to reconsider various issues that had been deemed closed. SEA/422, *supra* note 133, at 20.

Negotiators made little progress in finalizing principles for establishing boundaries between opposite or adjacent states. Sides remained clearly divided between those who favored the "equi-distance-line" approach, and those who favored the additional consideration of "equitable principles."¹⁸⁴ No definitive scheme emerged and the existing open-ended formula was retained.¹⁸⁵ The negotiators did resolve certain misunderstandings about the relation of existing international law to the problem of delimitation; including the kinds of "other circumstances" that could be considered in defining boundaries. Nevertheless, it appeared likely that unless a breakthrough occurred at the Tenth Session, a number of states affected by this controversy would seek reservations at the time of ratification.¹⁸⁶

Argentina, Canada, and a number of other states continued to urge textual changes favoring the coastal states' authority to conserve stocks of fish which range both inside and outside the EEZ.¹⁸⁷ Although no revisions were made,¹⁸⁸ the need to elaborate the dispute settlement procedures for conserving such fish stocks was generally recognized.¹⁸⁹

Two other Committee II issues resurfaced at Geneva, but substantial opposition to the proposals prevented any changes to the negotiating text. The first was a renewed insistence by some developing countries on a requirement of prior notification or authorization for warships crossing the territorial seas.¹⁹⁰ The proposal was labeled a "Conference breaker" by the major mari-

184. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 19. See notes 92-98 and accompanying text *supra*.

185. Draft Convention, *supra* note 123, arts. 74, 83. Compare *id.* with ICNT/R2, *supra* note 3, arts. 74, 83.

186. SEA/422, *supra* note 133, at 19; U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 25.

187. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 24. Under both the ICNT/R2 and the Draft Convention, the coastal state and the foreign fishing state were required "to agree upon measures necessary for the conservation of these stocks in the adjacent area." Draft Convention, *supra* note 123, art. 63, para. 2.

188. Many delegations were concerned about the implications the Canadian-Argentinian proposal would have for expanding coastal state jurisdiction beyond the 200-mile EEZ. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 24.

189. *Id.* The U.S. Delegation noted there was a need to study the question of conforming the text of article 63 with that of article 117 on the "duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas." *Id.* at 25.

190. SEA/422, *supra* note 133, at 20. All three of the latest negotiating texts provided for "innocent passage" by warships through the territorial seas of coastal states. Draft Convention, *supra* note 123, art. 17. See notes 86-88 and accompanying text *supra*. For a discussion of the effect of UNCLOS on the mobility of naval warships, see Richardson, *Power, Mobility and the Law of the Sea*, 58 FOREIGN AFF. 902 (1980).

time powers, and was subsequently withdrawn.¹⁹¹

The second issue concerned unvindicated demands of geographically disadvantaged states for more effective guarantees of their equitable participation in the new international ocean regime.¹⁹² These states demanded more protection of their rights of access to the sea, greater participation in the exploitation of the living resources of the EEZ, and the creation of a Common Heritage Fund to be financed by a percentage of coastal state revenues derived from exploitation of the EEZs and the continental shelves.¹⁹³

Committee III

Discussions in the Third Committee did not include any substantive negotiations, because it was agreed that all such negotiations had been concluded during the Spring session in New York.¹⁹⁴ Instead, the Committee focused its attention on proposed drafting changes.¹⁹⁵ Debate ensued when it again became apparent that certain of these changes would have a substantive effect on the text of the Convention. The Chairman quickly resolved this debate by ruling that substantive changes would not be allowed.¹⁹⁶

Informal Plenary

The Informal Plenary agreed to a set of General Provisions and

191. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 23-24.

192. SEA/422, *supra* note 133, at 20. An article in the New York Times observed that "by allowing coastal states to claim ownership of ocean riches up to 200 miles from their shores, the United Nations is effectively helping the rich get richer since the major beneficiaries will include the United States, Canada, the Soviet Union, Britain, France and Japan." N.Y. Times, Aug. 30, 1980, § A, at 4, col. 1. For a discussion of the position taken by the Organization of African Unity on the land-locked states issue see Ferreira, *The Role of African States in the Development of the Law of the Sea at the Third United Nations Conference*, 7 OCEAN DEV. INT'L L. 89, 104-07 (1979).

193. SEA/422, *supra* note 133, at 20. The latter proposal for a Common Heritage Fund had been introduced at previous sessions. Land-locked States urged the Conference to reconsider the proposal at its next session. *Id.*

194. *Id.* at 21.

195. The Committee considered 169 proposed drafting changes and accepted

135. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 26.

196. The Chairman prevented the reopening of substantive negotiations by applying the rule that no changes would be adopted over the objection of any single delegation. *Id.*

included them in the Draft Convention.¹⁹⁷ One of these provisions was aimed at protecting archaeological and historical objects recovered from the seabed.¹⁹⁸ The provision gave coastal states authority to monitor the removal of such objects within their contiguous zones.¹⁹⁹ A second provision authorized states to refuse to supply information to another state²⁰⁰ when disclosure of the information would be contrary to the essential interests of the former state's security.²⁰¹ Other provisions called for the peaceful use of the seas²⁰² and good faith compliance with the obligations of the Convention.²⁰³

Under the auspices of the Informal Plenary, the Conference also concluded its substantive negotiations on provisions dealing with dispute settlement.²⁰⁴ A restructuring of the text consolidated in one section the circumstances under which disputing parties would be obliged to submit to compulsory conciliation.²⁰⁵ Conciliation would be required for maritime boundary disputes, fishery disputes within the EEZ, and disputes over certain marine scientific research matters.²⁰⁶ Other disputes would be subject to binding judicial or arbitral procedures.²⁰⁷

197. U.N. Doc. A/Conf.62/L.58.

198. Draft Convention, *supra* note 123, art. 303. This topic had been the subject of numerous proposals in the past. It was of particular interest to Mediterranean nations, whose coastal waters possess many valuable objects. SEA/422, *supra* note 133, at 26.

199. The contiguous zone extends 24 nautical miles from the baseline from which the breadth of the territorial sea is measured. Draft Convention, *supra* note 123, art. 33.

200. *Id.* art. 302.

201. The Conference President asserted that this article would not detract from the Convention's obligations concerning the transfer of technology and marine scientific research, or the settlement of disputes thereon. SEA/422, *supra* note 133, at 27.

202. This provision required all States Parties, in exercising their rights and obligations under the Convention, to refrain from threatened or actual use of force against the territorial integrity or political independence of any state. Draft Convention, *supra* note 123, art. 301.

203. All States Parties would be required to discharge in good faith their obligations under the Convention. The provision also required State Parties to exercise their rights under the Convention in a manner which would not constitute an abuse of rights. *Id.* art. 300.

204. Most of these provisions were included in Part IV of the Draft Convention. The only substantive change to the negotiating text at the New York meeting was with regard to the number of conciliators a country could appoint to a conciliation commission. *Id.* Annex V, art. 3(b).

205. *Id.* arts. 297-98. Compulsory conciliation would require a party to submit to conciliation, but would not necessarily result in a binding recommendation. SEA/422, *supra* note 133, at 28.

206. The expanded use of compulsory conciliation had first been advocated by Argentina at the New York meeting of the Ninth Session. *Id.*

207. Draft Convention, *supra* note 123, arts. 286-96. Before permitting recourse to adjudicatory or compulsory conciliation procedures, the Convention would re-

The Informal Plenary also incorporated a new provision detailing the procedural machinery for the Convention's special use of compulsory conciliation. Under this innovative procedure, notice of intent to institute conciliation by one party would oblige the other party to submit to compulsory conciliation. Failure to submit to conciliation would not impede the proceeding.²⁰⁸

The Informal Plenary extensively reviewed the work of the Group of Legal Experts on Final Clauses.²⁰⁹ Most of the Final Clauses met with general acceptance²¹⁰ and debate over the mandate of the Preparatory Commission and over participation in the Convention was deferred to the Tenth Session.²¹¹ All sixteen Final Clauses detailing the legal effect of the Treaty were incorporated into the text of the Draft Convention.²¹² The most fundamental issue concerned the procedure for ratification and entry into force of the Convention. Conference delegates agreed the Convention should remain open for signature in Caracas for two years and that only sixty ratifications would be needed for the Convention to become law.²¹³

On the related question of achieving balanced representation on the Council, the Conference was faced with the issue of how best to prevent distortion that might result from a low number of ratifications. Even if the Treaty received the requisite sixty signatures, a low number of ratifications could make it difficult for States Parties to achieve the mandated composition of the Coun-

quire all disputants to submit to preliminary procedures aimed at voluntary settlement. *Id.* arts. 279-85.

208. *Id.* Annex VI, arts. 11-14.

209. The deliberations of this Expert Group were supplemented at the resumed session by meetings of the Informal Plenary. SEA/422, *supra* note 133, at 21.

210. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 32.

211. The participation controversy centered on the question of whether any entities other than states should have the right to accede to the Convention and thereby share in the "common heritage" benefits. Three distinct types of entities were vying for participation: regional organizations, such as the European Economic Community; dependent territories on the verge of gaining independence, such as the U.S. Trust Territories of the Pacific; and national liberation organizations, such as the South-West Africa People's Organization and the Palestinian Liberation Organization. While there was general agreement that regional organizations and dependent territories could be accommodated in a limited fashion, the proposed participation of liberation organizations continued to meet fierce opposition. SEA/422, *supra* note 133, at 25.

212. Draft Convention, *supra* note 123, arts. 304-20.

213. *Id.* arts. 304, 306.

cil.²¹⁴ The Conference decided to retain the language of the Expert Group's proposal, drafted in New York, despite concern over the vagueness of that formula.²¹⁵

As a key aspect of the "package deal"²¹⁶ approach to acceptance of the Convention, the Conference retained a clause calling for the provisional application of the rules, regulations, and procedures drafted by the Preparatory Commission.²¹⁷ The Informal Plenary further sought to protect the consensus nature of the Convention by incorporating the general principle that no reservations or exceptions would be permitted except where expressly provided for in particular articles.²¹⁸ To balance this general prohibition, and to facilitate ratification, the Informal Plenary would permit states to make declarations or statements not purporting to alter the legal effect of particular provisions.²¹⁹ The Conference also encouraged ratification by deleting an earlier draft's five-year freeze on denunciations. Under the new Draft Convention, a State Party could give notice of its intent to denounce the Convention at any time, with the denunciation taking effect one year after notification.²²⁰

The Informal Plenary also developed a comprehensive scheme for amending the Convention. The new scheme was set out in the Final Clauses. It established two methods for proposing and adopting amendments to provisions related to non-seabed matters. The more formal method would require convening an amendment conference, if favored by at least one half of the

214. The composition of the 36-member Council is specified in article 161 of the Draft Convention.

215. The article stated that "[t]he first Council shall be constituted in a manner consistent with the purpose of article 161 [on Council composition and voting procedures] if the provisions of that article cannot be strictly applied." Draft Convention, *supra* note 123, art. 308, para. 3. To allow a greater number of ratifications, the entry into force of the Convention would be delayed until 12 months after the date of the sixtieth signature. *Id.* art. 308.

216. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 33.

217. Draft Convention, *supra* note 123, art. 308, para. 4. Pending adoption of rules, regulations, and procedures by the Assembly, the provision helped maintain continuity of rights and obligations during the interim, and to promote an orderly transition of administrative responsibilities. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 33.

218. Draft Convention, *supra* note 123, art. 309. The effect of a reservation is to exempt a state from the application of a particular provision. Among provisions most likely to expressly permit reservations would be those dealing with the determination of EEZ and continental shelf boundaries between opposite or adjacent states. *Id.* art. 309, note 1. See notes 69-71 and accompanying text *supra*.

219. Draft Convention, *supra* note 123, art. 310.

220. *Id.* art. 317, para. 1. The five-year freeze had been proposed in the report of the Expert Group meeting in New York at the beginning of the Ninth Session. SEA/396, *supra* note 6, at 40. Denunciation would not affect any rights or duties of a state, if they had accrued prior to denunciation or had existed independent from the Convention. Draft Convention, *supra* note 123, art. 317, paras. 2, 3.

States Parties. This procedure would be available after ten years from entry into force of the Convention. Adoption of amendments would proceed by consensus or, if consensus were not achievable, by a two-thirds majority vote of the Assembly.²²¹ Alternatively, the Convention would provide for a simplified procedure, not requiring a special conference. A proposed amendment would be considered adopted if after one year no formal objections were registered.²²² Under either procedure, the adoption of non-seabed amendments would require ratifications by two-thirds of the States Parties and would then enter into force only as to the ratifying States Parties.²²³

The procedure for amending seabed provisions would require consensus in the Council and a two-thirds majority approval by the Assembly.²²⁴ To avoid having two divergent schemes for seabed mining, the Conference agreed that adopted seabed amendments should enter into force for *all* States Parties one year after being ratified by three-fourths of the States Parties.²²⁵

The new text on Final Clauses also included provisions detailing the Convention's relation to other international agreements. According to these provisions, the Convention would supercede the three 1958 Geneva Conventions on the Law of the Sea, but would not alter the rights and obligations of States Parties arising under other compatible agreements.²²⁶ Yet another Final Clause required States Parties to agree that there could be "no amendments to the basic principle relating to the common heritage of

221. *Id.* art. 312, paras. 1, 2.

222. *Id.* art. 313.

223. *Id.* art. 316, paras. 1, 3. States adhering to the Convention after the entry into force of an amendment would be expected to adhere to the Convention as amended. *Id.* art. 316, paras. 4, 6.

224. *Id.* art. 314, para. 1. This would be an alternative procedure to amendments adopted through the Review Conference as described in notes 48-50 and accompanying text *supra*. Draft Convention, *supra* note 123, art. 155. An amendment adopted pursuant to article 314 would be subject to the condition it would not prejudice the system of seabed mining pending the Review Conference. *Id.* art. 314, para. 2.

225. *Id.* art. 316, para. 5. Amendments pertaining to the Law of the Sea Tribunal also would enter into force for *all* Parties after ratification by three-fourths of the Assembly. *Id.* The Tribunal was renamed the "International Tribunal for the Law of the Sea." SEA/422, *supra* note 133, at 29.

226. Draft Convention, *supra* note 123, art. 311, paras. 1, 2. Two or more States Parties could modify or suspend provisions of the Convention between themselves if such agreements did not deviate from the basic principles of the Convention or affect the rights and duties of other States Parties. *Id.* art. 311, para. 3.

mankind. . . ."²²⁷

The Drafting Committee met informally throughout both Ninth Session meetings, as well as during a special intersessional meeting in June. The Committee harmonized provisions drafted by the Main Committees and brought the six official language versions of the Convention into conformity with the original English draft. The authority of the Drafting Committee was limited to linguistic interpretation.²²⁸

At the close of the Ninth Session, the Conference President indicated three outstanding issues to be addressed by the Tenth Session, scheduled to meet in March 1981. These included the resolution for the creation of a Preparatory Commission, the United States proposal for the establishment of preparatory investment protection, and proposals for the participation in the Convention by entities other than states.²²⁹ Also left for resolution was the precise formulation of provisions regarding the delimitation of maritime boundaries between opposite or adjacent states. It was generally agreed, however, that the latter issue could be resolved without postponing completion of the Convention.²³⁰

The Conference approved a timetable which provided for a Tenth Session in New York in March 1981, preceded by an intersessional meeting of the Drafting Committee. During the first half of the Tenth Session, the Conference was scheduled to discuss outstanding issues and recommend textual changes. The second half of the meeting was to be devoted to formalizing the status of the completed Draft Convention. This included a period for the submission of formal amendments in the event consensus on a completed negotiating text should prove impossible. Finally, a concluding session in Caracas was scheduled where formal statements could be made and the Convention would be opened for signature.²³¹

227. *Id.* art. 311, para. 6. This statement of basic principles emerged as a compromise after some delegations had argued for a provision declaring the "common heritage" principle to be a "preemptory norm" of international law. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at 34. Two standard provisions were incorporated, designating the Secretary-General of the United Nations as the depository of the Convention, and declaring all six official language texts to be authentic. Draft Convention, *supra* note 123, arts. 319-20.

228. SEA/422, *supra* note 133, at 29. Members of the Drafting Committee were cautioned about making any substantive changes. *Id.* See note 196 *supra*.

229. SEA/422, *supra* note 133, at 2.

230. U.S. Delegation Report, Geneva, 1980, *supra* note 124, at iii.

231. SEA/422, *supra* note 133, at 3.

DEVELOPMENTS BEYOND THE CONFERENCE

Unilateral Deep Seabed Mining Legislation

Legislation governing deep seabed mining has been introduced in every session of the United States Congress since 1972.²³² On June 28, 1980, President Carter signed into law the Deep Seabed Hard Minerals Resources Act.²³³ This legislation establishes a comprehensive interim program to encourage and regulate development of deep seabed hard mineral resources until a superseding international agreement is implemented.²³⁴

232. Kitos, *A Report on Legislation: The Deep Seabed Hard Mineral Resources Act*, 10 LAW OF THE AMERICAS 963 (1978).

233. The Deep Seabed Hard Mineral Resources Act, 30 U.S.C.A. §§ 1401-1473 (Supp. 1980) (enacted as Pub. L. No. 96-283, 94 Stat. 555 (1980)) (hereinafter cited as Mineral Resources Act). This act was introduced as H.R. 2759 on March 8, 1979, by Representatives Murphy (New York), Breaux, Udall, Santine, Zablocki, Bingham, Bonker, Ullman, Pritchard, Young (Alaska), Serwinski, and Conable. The bill was referred to the House Committees on Merchant Marine and Fisheries, Foreign Affairs, Interior and Insular Affairs, and Ways and Means.

On August 2, 1979, the House Committee of Interior and Insular Affairs ordered that the bill, as amended, be reported to the House of Representatives with a recommendation that it be approved. H.R. REP. NO. 411, pt. 1, 96th Cong., 1st Sess. (1979). A similar recommendation was made by the Committee on Merchant Marine and Fisheries after the bill was amended and reported by them on August 17, 1979. H.R. REP. NO. 411, pt. 2, 96th Cong., 1st Sess. (1979).

On November 2, 1979, the House Ways and Means Committee ordered that the provision of the bill requiring an excise tax on any revenues from deep seabed mining be reported to the House of Representatives with a recommendation that it be approved. H.R. REP. NO. 411, pt. 3, 96th Cong., 1st Sess. (1979).

On May 15, 1980 the House Foreign Affairs Committee ordered that the bill, as amended, be reported to the House of Representatives with a recommendation that it be approved. H.R. REP. NO. 411, pt. 4, 96th Cong., 2d Sess. (1980).

The bill passed the House on June 9, 1980. The Senate amended the bill and passed it on June 23, 1980. On June 25, 1980, the House agreed to the Senate amendments. Among the substantive Senate amendments agreed to by the House was a provision requiring processing plants for the retrieved minerals to be located within the United States, and a provision requiring the Secretary of State to negotiate with foreign nations to establish a "stable reference zone" where no mining would occur. The zone would be used as a reference for evaluating the environmental effects of ocean mining. The President signed the bill on June 28, 1980.

On August 17, 1980, a bill similar to the Deep Seabed Hard Mineral Resources Act was passed by West Germany. This act is set forth in 19 INT'L LEGAL MATERIALS 1330 (1980).

234. Mineral Resources Act, *supra* note 233, at § 2 (Findings and Purposes), § 3 (International Objectives of the Act).

Section 2(b) states the purpose of the Act:

(b) Purposes. The Congress declares that the purposes of this Act are . . .

(1) to encourage the successful conclusion of a comprehensive Law of

Under this legislation, United States mining companies are required to obtain from the National Oceanic and Atmospheric Administration (NOAA) a license to explore the seabed and a permit to commercially recover the minerals.²³⁵ In granting the license, the administrator of NOAA must make determinations concerning the applicant's mining capabilities. Diplomatic and environmental effects of the mining must be taken into account as well.²³⁶

There is concern this legislation will hamper treaty prospects at the Third United Nations Conference on Law of the Sea.²³⁷ In order to minimize this possibility, certain amendments have been proposed. One such amendment postpones by six years the date commercial recovery of minerals can begin.²³⁸ Also proposed is a

the Sea Treaty, which will give legal definition to the principle that the hard mineral resources of the deep seabed are the common heritage of mankind and which will assure, among other things, nondiscriminatory access to such resources for all nations;

(2) pending the entering into force of such a treaty, to provide for the establishment of an international revenue sharing fund, the proceeds of which shall be used for sharing with the international community pursuant to such treaty;

(3) to establish, pending the ratification by, and entering into force with respect to, the United States of such a treaty, an interim program to regulate the exploration for and commercial recovery of hard mineral resources of the deep seabed by United States citizens.

For a discussion concerning the questionable legality of the act under international law, see *Recent Developments 1979*, *supra* note 4, at 714.

235. Mineral Resources Act, *supra* note 233, at §§ 1411-1428.

236. The administrator must find that the applicants are financially responsible and that they have the technical expertise to mine. The administrator must also find that the mining activities will not interfere with the operations of other countries exercising freedoms of the high seas, conflict with international obligations of the United States, or result in "significant adverse effect" on the environment. If circumstances change so that mining activities become detrimental, the administration can modify restrictions in the permit or license, or suspend a license or permit. *Id.* at §§ 1413(c), 1415(a).

237. Wall St. J., June 27, 1980, at 4, col. 1. In 1979, the Carter Administration unsuccessfully asked the Senate to delay further action on legislation that would allow United States companies to mine the seabed. The Senate passed S. 493 on December 19, 1979. At the request of the State Department, the President urged a similar delay in the House. The House Foreign Affairs Committee agreed to postpone consideration of the bill until Elliot Richardson, the United States Ambassador to the LOS conference, was able to report back in April. 38 CONG. Q. 160 (1980). For a discussion of the reaction of Third World Countries to this legislation, see Oxman, *supra* note 4, at 8.

238. H.R. REP. NO. 411, pt. 4, 96th Cong., 2nd Sess. (1980). When appearing before the Committee on Foreign Affairs, Mr. Richardson suggested three amendments be included in the bill: (1) a provision changing from July 1, 1982, to January 1, 1988, the date commercial recovery of minerals could occur; (2) a provision narrowing the definition of "commercial recovery" to exclude demonstration and testing activities; (3) a provision requiring the Secretary of the Interior, within a year of enactment of the bill, to propose legislation protecting interim investments made for exploratory purposes while the LOS treaty was being negotiated. Mr. Richardson believed that including these amendments would prevent the bill from damaging the treaty process. The committee subsequently incorporated the

tax of 3.75 percent of the "imputed" value of minerals removed from the deep seabed.²³⁹ These tax revenues are to be held in a "Deep Seabed Revenue Sharing Trust Fund." Any contributions required to be made to the international community by an international deep seabed treaty will be paid out of this fund.²⁴⁰

The Deep Seabed Hard Minerals Resources Act also includes a provision aimed at protecting investments made by prospective mining companies.²⁴¹ It was felt this provision would be necessary to obtain the support of industry for such legislation.²⁴² The legislation does not, however, include the industry provision compensating miners for losses incurred as a result of the proposed international treaty.²⁴³

amendments into the bill. *Deep Seabed Hard Minerals Resources Act: Hearings on H.R. 2759 Before the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. (1980).

239. Mineral Resources Act, *supra* note 233, at §§ 4495-4498. The amount of the tax is 3.75 percent of the imputed value of the removed resource. For purposes of these sections, imputed value means 20 percent of the fair market value of the commercially recoverable metals and minerals. *Id.* at § 4497(a).

240. Mineral Resources Act, *supra* note 233, at § 403(d). This provision also provides the tax will terminate ten years after enactment of the seabed law. If an international deep seabed treaty is not in effect with respect to the United States at that time, the Trust Fund will be available for such purposes as Congress shall decide. Mineral Resources Act, *supra* note 233, at § 403(e).

241. Mineral Resources Act, *supra* note 233, at § 1441(a). This provision states Congress intends that an international agreement signed by the United States provide "assured and nondiscriminatory" access to the seabed for United States citizens. Industry reportedly favored a provision adopted by the Interior Committee which would give greater protection for any investments in deep seabed mining. However, the provision adopted by the Interior Committee was not enacted into law. 38 CONG. Q. 163 (1980).

242. *Deep Seabed Hard Minerals Resources Act: Hearings on H.R. 2759 Before the House Comm. on Interior and Insular Affairs*, 96th Cong., 1st Sess. 107-09 (1979) [hereinafter cited as *Hearings on H.R. 2759, May 1, 1979*]; *Deep Seabed Hard Minerals Resources Act: Hearings on H.R. 2759 Before the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 149-55 (1979), [hereinafter cited as *Hearings on H.R. 2759, May 22, 1979*].

243. Mining industry spokesmen asked for a provision compensating them for any losses incurred as a result of the proposed international treaty on deep seabed mining. *Hearings on H.R. 2759, May 1, 1979, supra* note 242; *Hearings on H.R. 2759, May 22, 1979, supra* note 242. See also Young, *Inducement for Exploration by Companies*, SYRACUSE J. OF INT'L LAW & COM. 199, 205 (1979). The Carter administration, however, has strongly opposed such guarantees on the ground that the Federal Government should not set a precedent by promising to compensate certain segments of the private sector for financial losses that might be occasioned by future federal actions taken to advance the national interest. Richardson, *Deep Seabed Mining Legislation*, DEP'T STATE BULL., April 1978, 54, at 54.

Antarctic Treaty on Marine Living Resources

Representatives from fourteen countries²⁴⁴ met in Canberra, Australia in May of 1980 to draft a convention on the conservation of Antarctic Marine Living Resources.²⁴⁵ The primary issue facing the members of the conference concerned the harvesting of small shrimp-like krill found throughout the Antarctic Ocean. Conservationists contended that because krill form the basis of the Antarctic food chain, overfishing the krill could have catastrophic ecological effects on the Antarctic Continent.²⁴⁶ The whale, seal, fish, squid and bird populations would all be affected.²⁴⁷

In answer to this concern, the convention has adopted an "ecosystem" approach, rather than the "maximum sustainable yield" formula commonly used in fishery management.²⁴⁸ Under the ecosystem approach, ecological relationships between krill and dependent species must be considered in determining the amount of krill permitted to be harvested.²⁴⁹ The "maximum sus-

244. The countries present at the meeting were: Argentina, Australia, Chile, France, East Germany, West Germany, Japan, New Zealand, Norway, Poland, South Africa, USSR, United Kingdom, and the United States. This group includes 11 of the 12 states originally parties to the Antarctic Treaty of 1955, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 702 U.N.T.S. 71. The states originally parties to the Antarctic Treaty of 1955 were: Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, USSR, United Kingdom, and the United States. *Id.*

245. The convention and related documents are set forth in 19 INT'L LEGAL MATERIALS 837 (1980).

246. Wash. Post, Sept. 17, 1979, § A, at 2, col. 1. *But see* London Times, Feb. 1, 1980, at 10, col. E. According to a report on the management of Southern Oceans by the International Institute for Environment and Development, the development of the krill fishery as an industry is unlikely to be sufficiently profitable to pose any serious threat to the ecology of the Antarctic region. *Id.*

247. Krill are the major food supply of five species of whale, three species of seal, twenty species of fish, three species of squid, and many species of bird. Wash. Post, Sept. 17, 1979, § A, at 2, col. 1.

248. The Antarctic Convention states:

Any harvesting and associated activities in the area to which this convention applies shall be conducted in accordance with the provisions of this convention and with the following principles of conservation:

(a) prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment. For this purpose its size should not be allowed to fall below a level close to that which ensures the greatest net annual increment;

(b) maintenance of the ecological relationship between harvested, dependent and related populations of Antarctic marine living resources and the restoration of depleted populations to the levels defined in subparagraph (a) above; and,

(c) prevention of changes or minimization of the risk of changes in the marine ecosystem which are not potentially reversible over two or three decades,

Convention on the Conservation of Antarctic Marine Living Resources, art. II, § 3, [hereinafter cited as Antarctic Convention].

249. Jackson, *All for the Want of Krill*, 13 OCEANS 2 (1980).

tainable yield" approach does not take such relationships into account; only the individual species being regulated is examined.²⁵⁰ Decisions concerning management of the fisheries will be made by a commission comprised of parties to the convention.²⁵¹

Fishery Disputes

In July of 1980 Mexico seized three United States tuna boats fishing within Mexico's 200 mile zone.²⁵² Although it maintains a 200 mile fishing zone as well,²⁵³ the United States has asserted that international law exempts migratory fish such as tuna from coastal states' jurisdiction in the 200 mile zone.²⁵⁴ In response to the seizure, the United States placed an embargo on all Mexican tuna.²⁵⁵ The two countries have been negotiating to resolve the dispute.²⁵⁶ Currently, Mexico is considering a suggestion by the United States that a permanent inter-American commission be created to manage the tuna fishery.²⁵⁷

250. *Id.*

251. Antarctic Convention, *supra* note 248, at art. VII. Critics of the treaty feel that it establishes a decision making procedure which is too cumbersome. The critics feel that this procedure will bar the commission from making adequate decisions concerning conservation of the krill. *Managing the Antarctic Ecosystem*, 5 OCEANS 64 (1980).

252. L.A. Times, July 10, 1980, § A, at 1, col. 5; L.A. Times July 11, 1980, § A, at 1, col. 2. For a discussion of seizures of U.S. tuna boats in 1979 by Canada, Costa Rica, Mexico, and Peru, see *Recent Developments 1979*, *supra* note 4, at 719-20.

253. 16 U.S.C. § 1811 (West Supp. 1980).

254. It is the sense of the Congress that the United States Government shall not recognize the claim of any foreign nation to a fishery conservation zone (or the equivalent) beyond such nation's territorial sea, to the extent that such sea is recognized by the United States, if such nation—

.....
(2) fails to recognize and accept that highly migratory species are to be managed by applicable international fishery agreements, whether or not such nation is a party to any agreement.

16 U.S.C. § 1822 (e) (West Supp. 1980).

255. L.A. Times, July 12, 1980, § A at 1, col. 1. United States law requires that upon the seizure of a United States vessel fishing for migratory fish within the 200 mile exclusive economic zone of a foreign country, an embargo be placed on all fish or fish products from the country involved. 16 U.S.C. § 1825 (West Supp. 1980).

256. L.A. Times, July 10, 1980, § A, at 1, col. 5.

257. *Id.* In the past, tuna catches were regulated by the Inter-American Tropical Tuna Commission, of which the United States and Mexico were members. In 1977 Mexico and Costa Rica withdrew from the commission. Over the past two and one-half years, negotiations have been underway with Mexico for a revised inter-American arrangement for tuna. To date, these negotiations have been unsuccessful. L.A. Times, April 13, 1980, § E, at 5, col. 4; *see also* L.A. Times, July 10, 1980, § A, at 1, col. 5.

Legislation was introduced in Congress²⁵⁸ to reduce foreign fishing within United States waters by as much as fifteen percent a year beginning in 1981.²⁵⁹ There is some question as to the legality of the bill under international law. The Draft Convention on the Law of the Sea allows a coastal state to determine its own capacity to harvest the living resources of its exclusive economic zone by taking into account all relevant factors,²⁶⁰ but the relevant factors are not clearly specified. The committee on Merchant Marine and Fisheries opines that a coastal state need only consider its own economic interest in determining the allowable foreign catch. The committee believes this would be sufficient to meet the requirements of international law.²⁶¹

Britain is currently engaged in a fishing dispute with the European Economic Community.²⁶² Britain claims that much of the waters within the European Economic Community's collective 200 mile fishing zone are British,²⁶³ and that Britain should therefore

258. H.R. 7039 was introduced on April 15, 1980. H.R. 7039, 96th Cong., 2d Sess. (1980).

259. H.R. 7039 established 1979 as a base harvest year for each fishery. Beginning in 1981, foreign fishing is to be reduced by an amount equal to 15 percent of the base harvest for each fishery. After the 1981 season, if United States vessels harvest 75 percent or more of a phase-out reduction factor amount determined for the immediately preceding harvest season, foreign fishing is to be phased out in an amount equal to 15 percent of the base harvest for each fishery. If United States vessels only harvest 50 to 75 percent of the phase-out reduction factor amount, foreign fishing is only to be reduced by 10 percent of the base harvest. If United States vessels harvest less than 50 percent of the phase-out reduction factor, foreign fishing is not to be reduced for that season.

260. The convention states that in managing the fishery stocks, the coastal state shall take into account all relevant environmental and economic factors. Draft Convention, *supra* note 123, Add. 1.

261. The report states that under Articles 61 and 62 of the ICNT/R2, the coastal state is given discretion to determine the allowable catch of the living resources of its exclusive economic zone. The report goes on to state that, in making this determination, the ICNT/R2 allows the coastal state to rely on numerous factors, including its own economic interests. Also cited in the report are fishing agreements with Mexico and Japan in which the United States government is given discretion to set quotas on foreign fishing. H.R. REP. No. 1138, pt. 1, 96th Cong., 2d Sess. 23-30 (1980).

262. London Times, Jan. 30, 1980, at 6, col. G. See also London Times, May 31, 1980, at 13, col. A, for a discussion of Britain's failure to concede "equal access" to fishing waters at the Luxembourg summit, where Britain's contribution to the European Economic Community budget was discussed.

The European Economic Community was established by the Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11. The original parties to this treaty were Belgium, France, Germany, Italy, Luxembourg and the Netherlands. On January 1, 1973, Denmark, Ireland and the United Kingdom became parties to the treaty.

263. British waters contain about 60 percent of all the fish caught in the European Economic Communities collective 200 mile fishing limit. London Times, Jan. 30, 1980, at 6, col. G.

be given preferential treatment.²⁶⁴ The European Economic Community has taken the position that a claim of preferential treatment is invalid under Article 7 of the European Economic Community Treaty.²⁶⁵

On March 29, 1979 the United States and Canada signed an agreement concerning control of East Coast fishery stocks.²⁶⁶ This agreement was aimed at codifying conservation and management rights of the respective countries over fishery stocks in the countries' exclusive economic zones.²⁶⁷ Due to opposition by the United States fishing industry, ratification of the treaty appears unlikely.²⁶⁸ The industry objects that the treaty gives Canada too large a share of the catch.²⁶⁹

Legislation on Ocean Thermal Energy Conversion

Legislation has been enacted by the United States authorizing the NOAA to issue permits for ocean thermal energy conversion (OTEC) facilities.²⁷⁰ The legislation also enables industry to obtain loan guarantees to develop pilot or demonstration models of

264. Britain's position is that its fisheries should be granted: an exclusive 12 mile sea zone; preference in a zone between 12 to 50 sea miles; and favored treatment in the allocation of national quotas in the European Economic Community. *Diw Wochenbericht*, Nov. 29, 1979, at 497-501, translated and reprinted in 110 *WORLDWIDE REPORT, LAW OF THE SEA* 71 (1980).

265. West Germany asserts that Britain's claim of preferential treatment is invalid under the ban on discrimination in Article 7 of the European Economic Community Treaty. *Id.*

266. This agreement, entitled United States-Canada East Coast Fishery Agreement and Boundary Treaty, was referred to the Senate Foreign Relations Committee on May 3, 1979. Hearings were held in April of 1980.

267. Control over fisheries in the United States and Canada's respective exclusive economic zones has been a hotly contested issue since the two countries declared 200 mile fishing limits in 1977. *MacLean's*, Apr. 21, 1980, at 27.

268. *N.Y. Times*, Apr. 16, 1980, § A, at 4, col. 1. See also *MacLean's*, June 30, 1980 at 24.

269. One of the primary objections to the treaty is that it entitles Canada to more than 73 percent of the scallop catch. Objections have also been raised about the permanent nature of the treaty. The fishing industry would like to see a provision allowing the government to alter quotas or redraw fishing jurisdictions at a later date. *Christian Sci. Monitor*, July 9, 1980, at 4, col. 1.

270. The Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C.A. §§ 9101-9167 (Supp. 1980) (enacted as Pub. L. No. 96-320, 94 Stat. 974 (1980)). This act was introduced as S. 2492 on March 27, 1980 by Senators Inouye, Cannen, Hollings, Magnuson, Mathias, Matsunoya, Packwood, Sarbanes and Stevens. The bill was referred to the Senate Committee on Commerce, Science and Transportation. The Senate passed the bill on July 2, 1980. The House passed the bill on July 21, 1980. The bill was signed into law by the President on August 3, 1980. The purpose of the bill is to establish a licensing and permit system for ocean thermal energy con-

such facilities.²⁷¹ The legislation raises questions of international concern. Placement of OTEC facilities within a coastal state's 200 mile exclusive zone may subject such facilities to the jurisdiction of the coastal state.²⁷² On the other hand, if these facilities are placed on the high seas they may infringe on the rights of countries using the high seas.²⁷³

Extension of Sovereignty over Fishing and Territorial Waters

Unilateral extension of sovereignty over fishing waters continues. Australia,²⁷⁴ Malaysia,²⁷⁵ Indonesia,²⁷⁶ and Namibia²⁷⁷ have announced an extension of the fishing zones around their coun-

version (OTEC) facilities and plantships within the National Oceanic and Atmospheric Administration. S. REP. NO. 721, 96th Cong., 2d Sess. 1 (1980).

OTEC facilities obtain their energy from the sea by using the temperature difference between surface water and water 2,999 feet down. The warm water is used to vaporize a fluid which powers a turbine. The fluid is then reliquified using the cold water. L.A. Times, Apr. 18, 1980, § A, at 4, col. 1.

271. Pub. L. No. 96-320, *supra* note 270, at § 230. This loan guarantee provision is an important step in encouraging industry to participate in the costly experimental stage in the development of OTEC facilities. S. REP. NO. 721, 96th Cong., 2d Sess. (1980).

272. At present, the law of the sea provides that ocean thermal energy, because of its inexhaustible nature, defies property or quasi-property rights. Nevertheless, Article 56 of the Draft Convention 1980 states:

1. In the exclusive economic zone, the coastal state has (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the seabed and subsoil and the superadjacent waters, and with regard to other activities for the economic exploitation and exploration of the zone, such as the *production of energy from the water, currents and winds*; . . . (emphasis added).

Therefore, under the Draft Convention, coastal states would have jurisdiction over OTEC facilities within their exclusive economic zone. See, Booda, *Ocean Energy Challenges Technology: Grows*, 19 SEA TECHNOLOGY 10, 14 (1978).

273. Under Article 2 of the Convention on the High Seas, UN Soc. A/1 Conf. 13/L. 53, freedom on the high seas exists to the extent that such freedom is recognized by the general principles of international law, and is exercised with reasonable regard for the interests of other states in their exercise of the freedom of the high seas. The issue, therefore, is whether or not OTEC facilities can be operated with reasonable regard for the interests of other states. For a discussion of this issue see H. KNIGHT, J. NYHART, & R. STEIN, OCEAN THERMAL ENERGY CONVERSION 53-58 (1977) and Comment, *Ocean Thermal Energy Conversion on the High Seas: Toward an International Regulatory Regime*, 18 SAN DIEGO L. REV. 473 (1981).

274. Christian Sci. Monitor, Nov. 6, 1979, at 7, col. 1. Japanese fishermen will be the chief beneficiaries of this extension, because the Australian government has agreed to allow them to fish for tuna within the new 200 mile zone. Sydney Morning Herald, Oct. 18, 1979, at 3, *translated and reprinted* in 110 WORLDWIDE REPORT, LAW OF THE SEA 34 (1980).

275. Kuala Lumpur International Service, Broadcast at 0630 GMT, Apr. 28, 1980, *translated and transcribed* in 120 WORLDWIDE REPORTS, LAW OF THE SEA 15 (1980).

276. Hong Kong AFP, Broadcast at 1134 GMT, Mar. 21, 1980, *translated and transcribed* in 116 WORLDWIDE REPORTS, LAW OF THE SEA 10 (1980).

277. Johannesburg Domestic Service, Broadcast at 1115 GMT, Nov. 5, 1979, *translated and transcribed* in 110 WORLDWIDE REPORTS, LAW OF THE SEA 29 (1980).

tries from 12 to 200 miles. These unilateral declarations have led to a dispute between the Australian and Indonesian governments concerning placement of the boundaries for these zones.²⁷⁸ Ecuador has announced an extension of its fishing zone.²⁷⁹ Nicaragua has also announced an extension of its territorial sea to 200 miles.²⁸⁰ Nicaragua's claim conflicts with Columbian claims in the adjacent waters.²⁸¹ In an attempt to resolve this dispute, Nicaragua has agreed to negotiate with Columbia concerning delimitation of the surrounding waters.²⁸²

Delimitation of the Continental Shelf

Negotiation continues concerning delimitation of the continental shelf in the southeast Asian region.²⁸³ Indonesia has agreed to negotiate with both Malaysia²⁸⁴ and Vietnam²⁸⁵ to delimit the continental shelf surrounding the three states. Malaysia and

278. The Australian government has reached an agreement with Papua New Guinea concerning the establishment of maritime boundary lines; however, no agreement has been reached with Indonesia. Pending such an agreement, the Australian government has decided to draw median lines in accordance with Australia's maximum legal entitlement. The Indonesian government has sent a note of protest. *Christian Sci. Monitor*, Nov. 6, 1979, at 7, col. 1. For a discussion of the Indonesian government's position on this matter, see Sina Harapan (Jakarta), Oct. 10, 1979, at 1, *translated and reprinted* in 110 *WORLDWIDE REPORTS, LAW OF THE SEA* 52 (1980).

279. Madrid, EFE, Broadcast at 0109 GMT, Jan. 18, 1980, *translated and transcribed* in 113 *WORLDWIDE REPORTS, LAW OF THE SEA* 15 (1980). Ecuador has extended its extensive fishing zone from 60 to 100 nautical miles. Ecuador generally forbids foreign fishing inside the exclusive fishing zone. Foreign ships may, however, catch up to 800 tons of fish provided they sell 20 percent of this catch to Ecuador. *Id.*

280. Barricada (Managua), Dec. 24, 1979, at 7, *translated and reprinted* in 112 *WORLDWIDE REPORTS, LAW OF THE SEA* 3 (1980).

281. The Nicaraguan decree claims sovereignty over the Serrano, Quitasueno, and Concordon Keys. These keys were ceded to the Columbian government in 1928 pursuant to the Barceñas-Menses-Esquerre Treaty. *La Prensa* (Managua), Dec. 26, 1979 at 1, *translated and reprinted* in 112 *WORLDWIDE REPORTS, LAW OF THE SEA* 5 (1980). It is the position of the ruling junta in Nicaragua that this treaty is invalid because it was signed pursuant to American intervention in Nicaragua. *Id.*

282. Madrid, EFE, Broadcast at 1925 GMT, Feb. 12, 1980, *translated and transcribed* in 114 *WORLDWIDE REPORTS, LAW OF THE SEA* 29 (1980).

283. For a discussion of prior negotiations concerning delimitation of the continental shelf in the south-east Asian region, see *Recent Developments 1979, supra* note 4, at 716-17.

284. Antara (Jakarta), Broadcast at 0721 GMT, Mar. 11, 1980, *translated and transcribed* in 115 *WORLDWIDE REPORTS, LAW OF THE SEA* 23 (1980).

285. Kuala Lumpur Domestic Service, Broadcast at 1130 GMT, Mar. 25, 1980, *translated and transcribed* in 117 *WORLDWIDE REPORTS, LAW OF THE SEA* 1 (1980).

Thailand have agreed to establish a joint authority for the exploration and development of mineral resources on the continental shelf off their eastern coasts.²⁸⁶ This joint authority will continue until the two countries are able to reach a permanent delimitation agreement.²⁸⁷

A dispute has developed over delimitation of the continental shelf in the South China Sea. Japan and South Korea have agreed to jointly develop oil resources off their coasts.²⁸⁸ North Korea,²⁸⁹ China,²⁹⁰ and Taiwan²⁹¹ have protested the agreement. Both China²⁹² and Taiwan²⁹³ claim sovereignty over the area in which Japan and South Korea intend to drill. South Korea and Japan, on the other hand, assert that they have sovereignty over the area because of an agreement between their governments delimiting the continental shelf.²⁹⁴ The Chinese maintain that the delimitation agreement is illegal under international law because it is based on midline principles of delimitation.²⁹⁵

National Legislation Aimed at Curbing Ocean Pollution

Pollution of the oceans continues to be a threat to both marine

286. For a discussion concerning the operation of this joint authority see *Business Times* (Kuala Lumpur), Feb. 8, 1980, at 1, *translated and reprinted* in 119 *WORLDWIDE REPORT, LAW OF THE SEA* 14 (1980).

287. *Id.*

288. Tokyo radio, KYODO, Broadcast at 0547 GMT, May 1, 1980, *translated and transcribed* in 120 *WORLDWIDE REPORT, LAW OF THE SEA* 7 (1980).

289. Pyongyang radio, KCNA, Broadcast at 0426 GMT, May 15, 1980, *translated and transcribed* in 121 *WORLDWIDE REPORTS, LAW OF THE SEA* 9 (1980). The protest by the North Koreans is based on the claim of the North Korean government to South Korea. *Id.*

290. Beijing Review (Beijing), May 19, 1980, at 6, *translated and reprinted* in 121 *WORLDWIDE REPORT, LAW OF THE SEA* 13 (1980).

291. Hong Kong radio, AFP, Broadcast at 0728 GMT, May 13, 1980, *translated and transcribed* in 121 *WORLDWIDE REPORT, LAW OF THE SEA* 16 (1980).

292. Beijing Review (Beijing), May 19, 1980, at 6, *translated and reprinted* in 121 *WORLDWIDE REPORT, LAW OF THE SEA* 13 (1980). The Chinese position is that, under international law, delimitation of the continental shelf may only occur through consultation and agreement between the countries concerned. *Id.*

293. Hong Kong radio, AFP, broadcast at 0718 GMT, May 13, 1980, *translated and transcribed* in 121 *WORLDWIDE REPORTS, LAW OF THE SEA* 16 (1980).

294. The South Korean government has stated that its agreement with Japan to delimit the continental shelf in the South China Sea is legal under international law. Nevertheless, the government has also stated its willingness to negotiate with China on this issue. Tokyo radio, KYODO, May 9, 1980, *translated and transcribed* in 120 *WORLDWIDE REPORT, LAW OF THE SEA* 10 (1980).

295. Beijing Review (Beijing), May 19, 1980, at 6, *translated and reprinted* in 121 *WORLDWIDE REPORT, LAW OF THE SEA* 13 (1980). Delimitation based on midline principles exists where all points of a boundary are an equal distance from the baseline of the respective countries. In the North Sea Continental Shelf Cases, the International Court of Justice ruled that delimitation of the continental shelf need not be based on midline principles; special circumstances may also be taken into account. North Sea Continental Shelf Cases. [1969] I.C.J. 3.

and human life.²⁹⁶ Responding to this threat, President Carter asked that a 1.6 billion dollar fund be established to clean up both oil and chemical hazards.²⁹⁷ Congress responded by introducing various bills aimed at cleaning up oil and chemical pollution.²⁹⁸ One House bill²⁹⁹ provides a comprehensive system of liability and compensation for oil pollution,³⁰⁰ as well as for pollution

296. Marine experts of the United Nations warned that human life is threatened by ocean pollution. These experts maintain that pollutants discharged into the ocean enter the food cycle, thereby endangering human life. *L.A. Times*, Apr. 27, 1980, § 8, at 10, col. 5.

297. *Wash. Post*, June 14, 1979, § A, at 2, col. 1. Ocean pollution arises from two main sources. By far the largest source of pollution is land based, mostly from chemical runoff and industrial waste. Vessels are the second main source of ocean pollution, primarily due to oil discharge. Richardson, *Prevention of Vessel-Source Pollution*, 2 *OCEANS* 2 (1980).

298. S. 1480 was introduced in the Senate on July 11, 1979. S. 1480, 96th Cong., 1st Sess. (1979). Two bills were introduced in the House of Representatives, H.R. 85 on January 15, 1979, and H.R. 7020 on April 2, 1980. H.R. 85, 96th Cong., 1st Sess. (1979); H.R. 7020, 96th Cong., 2d Sess. (1980).

As originally introduced, H.R. 7020 was intended to clean up inactive hazardous waste sites and was inapplicable to pollution of navigable waters. In November of 1980, S. 1480 was incorporated into H.R. 7020. H.R. 7020 was then passed by the Senate and the House. On December 9, 1980, the bill was sent to the President. The bill was approved on December 11, 1980 and became Pub. L. No. 96-510.

299. H.R. 85 was introduced by Representatives Biaggi, Murphy (New York), Treen, Snyder, Jones (North Carolina), Pritchard, De La Garza, Young (Alaska), Patterson, Bauman, Ginn, Lent, Hubbard, Evans (Delaware), Bonker, Forsythe, D'Amours, Emery, Oberstar, Dorman, Hughes, Tribble, Mikuski, Bonior, Akaka, Bowen and Zeferetti. The bill was referred jointly to the Committee on Merchant Marine and Fisheries, and the Committee on Public Works and Transportation. Additional members joined as co-sponsors after the bill's introduction.

On May 15, 1979, the Committee on Merchant Marine and Fisheries ordered that the bill, as amended, be reported to the House of Representatives with a recommendation it be approved. H.R. REP. NO. 172, pt. 1, 96th Cong., 1st Sess. (1979).

On May 16, 1980, the Committee on Public Works and Transportation also ordered that the amended bill be reported to the House of Representatives with a recommendation it be approved. H.R. REP. NO. 172 pt. 2, 96th Cong. 2d Sess. (1980).

The bill was then referred to the House Ways and Means Committee at the request of Committee Chairman Ullman. On June 20, 1980, the Ways and Means Committee ordered that the bill be reported to the House of Representatives with a recommendation it be approved. H.R. REP. NO. 172, pt. 3, 96th Cong., 2d Sess. (1980). The bill passed the House on September 19, 1980.

300. H.R. 85, *supra* note 298, at § 104. Under this bill, owners are strictly liable for damages arising from the discharge of oil by their vessel or facility. Liability is limited; however, shipowners are liable for up to 30 million dollars, depending on the size of their ship; owners of deep water ports are liable for up to 50 million dollars; and owners of offshore facilities such as oil wells are liable for the total removal cost incurred plus 50 million dollars. *Id.*

caused by the release of hazardous substances into the water.³⁰¹ The proposed legislation also would establish a fund to finance cleaning up oil spills³⁰² and pollution caused by hazardous substances.³⁰³ A similar bill introduced in the Senate has subsequently been enacted into law.³⁰⁴ The Senate version established a much larger clean up fund³⁰⁵ but limits its coverage to pollution caused by hazardous substances.³⁰⁶

301. H.R. 85, *supra* note 298, at Title III. Liability under Title III is the same as liability for oil pollution under § 104. *Id.*

302. H.R. 85 establishes a 375 million dollar fund to clean up oil spills. The fund is established by imposing a fee of 1.3 cents per barrel on all oil entering or leaving the United States. H.R. 85, *supra* note 298, at § 102. Currently, an international fund for the compensation of oil pollution damage exists. International Fund for Compensation of Oil Pollution Damage, *opened for signature* Feb. 1, 1977, *Leg/UA/Conf. 2/4*, 16 INT'L LEGAL MATERIALS 621 (1977). The Carter administration, however, did not ratify the Fund Convention because it believed the compensation limit was too low. Richardson, *Prevention of Vessel-Source Pollution*, 3 OCEANS 58, 59 (1980). The compensation limit of this convention was recently increased to 63 million dollars, and if H.R. 85 fails to pass this year the United States may seek to ratify the Fund Convention. *Id.*

303. H.R. 85 establishes a 375 million dollar fund which is used to clean up pollution caused by the release of hazardous substances into the waterways. The fund is established by imposing an excise tax on primary petrochemicals at a rate of 1.18 dollars per ton, and an excise tax on certain inorganic substances at a rate of 31 cents per ton. H.R. 85, *supra* note 298, at § 301 (c).

304. The Comprehensive Environmental Responses, Compensation, and Liability Act of 1980, Pub. L. No. 96-510 [hereinafter cited as Comprehensive Environmental Responses Act] was introduced as S. 1480 and as H.R. 7020. S. 1480 was introduced by Senators Culver, Muskie, Stafford, Chafee, Randolph, and Moynihan. The bill was referred to the Committee on Environment and Public Works. Additional members joined as co-sponsors after the bill's introduction.

On July 11, 1980, the Committee on Environment and Public Works ordered that the bill, as amended, be reported to the Senate with a recommendation it be approved. S. REP. NO. 848, 96th Cong., 2d Sess. (1980).

On November 24, 1980 H.R. 7020 was amended by the Senate to include the language of S. 1480. H.R. 7020 was then passed by the Senate. On December 3, 1980 the amendments to H.R. 7020 were agreed to by the House.

305. The Comprehensive Environmental Response Act establishes a 1.6 billion dollar Hazardous Substance Response Trust Fund. 1.38 billion dollars of this fund is established by collecting from each manufacturer, importer, or generator of a hazardous substance, a fee on each unit of hazardous substance produced, manufactured, or imported into the United States and each unit of hazardous waste generated. The remaining 220 million dollars comes from appropriations of general revenue. Comprehensive Environmental Responses Act, *supra* note 304, at Title II.

306. *Id.* at § 101 (14). As originally introduced, the Comprehensive Environmental Responses Act included a very comprehensive definition of hazardous substances. The original bill would have held companies liable for damage caused by any emission or release not governed by existing clean air and clean water laws. Industry was strongly opposed to this provision as it superceded existing pollution laws, thereby greatly increasing industry's potential liability. *Environmental Emergency Response Act: Hearings and Markup on S. 1480 Before the Senate Comm. on Environment and Public Works*, 96th Cong., 1st Sess. 713-51 (1979). An amendment to the bill was adopted which dramatically limited the types of hazardous substance releases covered by the measure. The amendment exempted certain releases allowed under five existing environmental laws: Clean Water Act,

Regional Pollution Plans

Various regional programs aimed at controlling ocean pollution have been enacted. The Baltic Marine Environment Protection Commission was established³⁰⁷ and met in Helsinki on May 8, 1980 to attempt to draft a comprehensive program to clean up the Baltic Sea.³⁰⁸ The commission agreed upon increased regulation of ships carrying oil or chemicals into the Baltic Sea.³⁰⁹ Also, the Soviet Union agreed to stop its practice of dumping untreated sewage into the Baltic by 1985.³¹⁰

The Mediterranean countries agreed on a plan to clean up the Mediterranean Sea.³¹¹ This agreement covers a wide range of pollutants and is expected to cost the signatories 10 to 15 billion dollars over the next 10 to 15 years.³¹²

Meeting of the International Whaling Commission

The International Whaling Commission (IWC)³¹³ held its annual conference on July 21, 1980 in Brighton, England.³¹⁴ At the

Clean Air Act, Safe Drinking Water Act, Resource Conservation and Recovery Act, and Ocean Dumping Act. S. REP. NO. 848, 96th Cong., 2nd Sess. (1980).

Certain members of Congress were strongly opposed to passage of the Comprehensive Environmental Responses Act due to its omission of oil spill coverage. Nevertheless, the measure was approved after proponents promised to pursue a bill governing oil spills next year. 38(49) CONG. Q. 3509 (1980).

307. This commission was established pursuant to the Baltic Protection Convention, *done* March 22, 1974, *reprinted in* 13 INT'L LEGAL MATERIALS 544 (1974). The members of this commission are Denmark, Finland, East Germany, West Germany, Poland, the Soviet Union, and Sweden. *Id.*

308. London Times, May 9, 1980, at 10, col a.

309. The commission issued a recommendation that every tanker of more than 24,000 tons and every chemical carrier of more than 1,600 tons report its entry into the Baltic and also report its position at regular intervals to a chain of ground stations. *Id.*

310. Currently, Leningrad and Copenhagen dump all of their sewage into the Baltic untreated. *Id.*

311. N.Y. Times, May 14, 1980, at 12, col. 1. A total of 17 countries were present at this meeting. The only Mediterranean country that did not participate was Albania. *Id.*

312. Christian Sci. Monitor, July 18, 1980, at 12, col. 1. Pollution of the Mediterranean Sea presents a particularly difficult problem for countries attempting to clean up the sea because the narrow passage out of the sea at Gibraltar prevents pollutants from readily escaping. *Id.*

313. The International Whaling Commission was established by the International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. 1849, 161 U.N.T.S. 72.

314. L.A. Times, July 22, 1980, § 1, at 2, col. 1. The countries present at the meeting were Argentina, Australia, Brazil, Britain, Canada, Chile, Denmark, France,

meeting, the United States attempted to obtain a world-wide ban on the commercial killing of whales.³¹⁵ The proposal failed to obtain the required three-fourths majority.³¹⁶ The IWC did agree, however, on a 9.2 percent reduction in the world-wide whale kill quota.³¹⁷ The Commission also agreed to reduce slightly the quota of bowhead whales permitted to be killed by Alaskan Eskimos.³¹⁸ An issue not dealt with by the Commission concerned protection for smaller seagoing mammals such as porpoises.³¹⁹ Porpoises are now protected under United States law, and the United States has urged the Commission to adopt similar protective measures.³²⁰ Although it did not adopt protective measures for the porpoises, the Commission did ask its scientific committee to prepare a report for the 1981 meeting on the possibility of protecting such mammals.³²¹

SUMMARY

Renewed optimism marked the close of the Ninth Session of UNCLOS III. Delegates from over 150 nations were able to agree on the text of a Draft Convention resolving most of the outstanding issues. Particularly significant was the achievement of consensus on a voting procedure for the Sea-Bed Council.

At the opening of the Tenth Session, delegates were less certain about an expedited conclusion of the convention. This was due largely to a decision by the new United States administration to

Iceland, Japan, Mexico, the Netherlands, New Zealand, Norway, Oman, Peru, the Seychelles, South Africa, South Korea, U.S.S.R., Spain, Sweden, Switzerland, and the United States. L.A. Times, July 23, 1980, § 1, at 1, col. 1.

315. L.A. Times, July 23, 1980, § 1, at 1, col. 1.

316. Japan led the fight against this proposal. Wash. Post, July 22, 1980, § A, at 11, col. 1. Japan is the world's largest consumer of whale meat. Its whaling industry is also the largest in the world, employing an estimated 50,000 persons. *Id.* The Japanese contend that the quotas set by the IWC are based on inaccurate data. They contend that the IWC is underestimating the available whale stocks and therefore the established quota is overly restrictive. L.A. Times, Nov. 23, 1979, § 8, at 1, col. 1.

317. L.A. Times, July 27, 1980, § 1, at 5, col. 1. Five years ago, the quota was 25,000 whales, two years ago it was 20,102 whales, last year's quota was 15,656 whales, and this year the Commission set the quota at 14,553. *Id.*

318. The new quota is 45 whales landed or 65 whales struck (harpooned) in the next three years with a maximum of 17 whales landed in any one year. *Id.* Members of the Alaska Eskimo Whaling Commission disagree with the findings of the IWC. They contend that 48 whales are a safe and desirable number to harvest each year. Bockstone, *Battle of the Bowheads*, 5 NATURAL HISTORY 53, 60 (1980).

319. Once a year, Japanese fishermen on Uki Island round up and kill porpoises in an attempt to thin their population. American environmentalists have attempted to stop this practice. L.A. Times, Mar. 3, 1980, § 1, at 4, col. 4.

320. The Commerce department has adopted regulations limiting the number of porpoises which may be killed as tuna are netted. The 1981 limit is 20,500 porpoises. L.A. Times, Oct. 22, 1980, § 1, at 3, col. 5.

321. L.A. Times, July 27, 1980, § 1, at 5, col. 1.

undertake a substantive review of the entire treaty package.³²² Although the convention may still be completed in 1981, its viability could be jeopardized should the United States choose not to participate.

Many significant developments occurred in the law of the sea outside the conference. The Antarctic Treaty on Marine Living Resources was concluded. Unilateral legislation authorizing companies to mine the deep seabed was passed in the United States, as was legislation aimed at curbing ocean pollution. In addition, regional pollution plans were established in the Baltic and the Mediterranean. Many issues remain unresolved however. The most noteworthy of these concern the lack of agreement between the United States and its neighbors, Canada and Mexico, over fishing rights in adjacent waters.

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322. L.A. Times, Mar. 6, 1981, § 1, at 1, col. 3.

