

# AUDIENCE RESPONSE

## FIRST SESSION

**PROFESSOR GRZYBOWSKI:** My name is Grzybowski. I am associated with Duke Law School, and I am a specialist in Soviet international law. I have one question for Ambassador Koh.

Is it not true that it was the Soviet Union which first rejected the Convention? On the 18th of March, twelve days before the closing of the Convention, the Government of the Soviet Union enacted a decree in which it established an agency for deep sea mining and at the same time declared its total disapproval of the deep sea mining provisions of the Convention, which, in view of the fact that the Convention did not permit reservations to the Convention, amounted to the total rejection of the Convention. And that also meant that not only the Soviet Union but the entire Soviet Bloc rejected it.

Now the other question is, that although the main blame for the nonsuccess of the Convention is laid at the door of the United States, in fact, over 20 states have objected to it. And here we have a ridiculous situation because the West and the Soviet Bloc have adopted the same attitude towards a Convention, which happens very seldom.

**AMBASSADOR KOH:** Some of the facts stated are correct, but some of the facts are not correct, so if I may first state which of the facts are correct.

It is true that during the final session of the Conference, the Presidium of the Soviet Union enacted what, in effect, is unilateral national legislation on seabed mining. For this, naturally, they were subject to the criticism of the Group of 77, which had previously criticized the same behavior on the part of the United States, of the British, of West Germany, and of the French.

Why the Soviet Union chose that particular moment to act, I do not know. It seems to me the timing was very clumsy—extremely clumsy. The Soviet Union had been enjoying for many years the confrontation between the West and the developing countries. Why did they find it necessary at the last moment in the life of the Conference to join the West? I cannot understand, but then few of us can understand how the leaders of the Kremlin think.

But we should not be too critical about the misconduct of the Soviet Union, since the U.S. Government acted in the same manner two years earlier. In fact, if you look at it historically, it is rather ironical that the United States, which has, for many decades, taken the position that we must protect the traditional freedom of the high seas, that we must stem the tide of coastal states' unilateralism and expansionism, that we stand for a rule of law which must be the result of universal consensus, was the first to depart from its own ethical and legal principles. Wittingly or unwittingly, it was the United States which started the historical movement by coastal states to grasp the resources of the sea. I refer to the Presidential

Proclamation by President Truman on the 28th of September, 1945. By that Proclamation the United States claimed the right to the resources of the continental shelf, out to the 200 meters isobar. This action on the part of the United States was soon emulated by a number of coastal states in Latin America who claimed maritime jurisdictions out to 200 miles.

The second thing the United States did was in 1976. After fighting against the unilateral claims by the coastal states, in the expediency of an election year in 1976, President Ford signed into law a fisheries conservation zone of 200 miles. I still remember that on the day that the United States law was enacted, the coastal states, who were then meeting in New York, had a champagne celebration because the United States had put the imprimatur of legitimacy on their unilateral claims.

Then in 1980, again in the expediencies of another election year, President Carter signed into law the Deep Seabed Hard Minerals Act, authorizing U.S. companies to mine the deep seabed and ocean floor. So I must say, with respect, that the U.S. record is not a consistent one.

My second point is that you are totally wrong when you said the Soviet Union and its Warsaw Pact allies have rejected the Convention. That is not true. On the 30th of April the Soviet Bloc countries abstained on the Convention package for only one reason. In Resolution II of the Conference, which protects the interests of the pioneer investors, we require that until the Soviet Union signs the Convention, the Soviet Union cannot be registered as a pioneer investor. However, in the case of your four western consortia, which are unincorporated and which consist of partners from different countries, the signature of the Convention by one, any *one* of the countries whose companies form the consortia, would enable the consortium to register as a pioneer investor. And this the Soviet Union could not accept because they said this was a case of discrimination in favor of the West and against the Soviet Union. Foreign Minister Gromyko, speaking before the U.N. General Assembly in September, announced that the Soviet Union will sign the Convention in Jamaica. Other members of the East European group are likely to follow the Soviet Union, so you may assume that they will all sign the Convention.

MR. BRITTIN: I am Burdick Brittin from the great community of Great Falls, Virginia. I have two observations, one to Tommy Koh when he referred to the impact of sophisticated distant water fisheries creating the climate for what resulted in an Exclusive Economic Zone (EEZ) of 200 miles. I am not about to turn back the clock, but I would like to note that two factors were also present. One, the growth of distant water fisheries in the developing countries far outstripped what was happening in the developed countries. Secondly, and this is an unfortunate thing, while 99% of the fish are within the 200-mile zones of the world, the fact of the matter—the cruel fact—is that those fish are not distributed evenly. In fact it is so disparate that some places, like off the coast of Kenya, it is practically an ecological desert. The United States was a wealthy fishing nation to begin with, and we certainly gained, along with Canada, perhaps more than any other country in the world. That disparity, i.e., the marked uneven distribution of

marine resources, is a seed towards the world community looking at the issue again sometime in the future.

Now a comment to Fred Tipson. In his text he noted that in the 1958 Geneva Conventions there were no objections here in the United States before the Senate during the ratification procedure. I think three factors were present to produce that situation. One is that within the United States I do not believe anyone on the delegation and in the Senate felt that what was being put together, drafted and to be ratified, was an immutable instrument that was going to last forever. Continuing technological advances and knowledge of ocean regime history precluded that line of thought. As a matter of fact, experience shows us that a Law of the Sea Treaty might last for about twenty or thirty years; then something else has to be done to meet emerging problems. Yet if you listen to the rhetoric of some of the mining and administration interests in the United States, you get the sense that we are putting each word in concrete and that it means eternal devastation for the United States.

Secondly, and there are others in the room [Professor Horace Robertson, Jr., and Vice Adm. Jim Doyle USN, Ret.] who can speak more directly on this than I, it was my strong impression that the delegations for the United States for the 1958 and 1960 Conferences were closely knit. They represented many different industry and national interests, but I think it was uniformly appreciated and understood that the paramount interest of the United States in those negotiations had to do with national security and that accommodations were made based on that fundamental premise. Everybody understood that and respected it.

Lastly, when it came time for ratification, or the attempt for ratification, those same people from the industries involved lobbied the Senate very, very strongly indeed, and it is one of the real successes in how to get a treaty through the required advice and consent of the Senate.

Thank you.

AMBASSADOR KOH: I think the first point made by Bert Brittin is a very good one, and I am glad you raised it. When the Conference started, some of us in the Conference wanted to work for a quite different approach to the redistribution of the resources of the ocean, including fish. I supported strongly the approach advocated by Dr. Pardo for a very strong international oceans authority with extensive powers. Under this approach, we would regard fish in the high seas as part of the common heritage of mankind. This was, however, completely unacceptable to the coastal states and for understandable, though unfortunate, reasons. The coastal states' response was that, "No, the Pardo approach is not acceptable because we still live, whether we like it or not, in a era of nation-states." The impulse for international cooperation is relatively weak compared to the force of nationalism. The coastal states said that the only tool they would accept to deal with the problem of fisheries was to extend the power of the coastal states to conserve and manage the fish stocks of the world.

I agree with our colleague who just made the point that the end result of this Conference is a rather inequitable one. For example, the Exclusive Economic

Zones of all the African countries, put together, are smaller than the Exclusive Economic Zone of the United States alone. Second, the world is really unfair in that the fish stocks of the world are not equitably distributed. The fish stocks of the world, like the rich countries, tend to be in the temperate zones, and the richest fishing grounds are, fortunately for you and unfortunately for the poor countries, concentrated in the temperate zones.

MR. TIPSON: I think your point is well taken about the security advantages of the 1958 Conventions. And there are certainly important security advantages in this Treaty. I think part of the problem has been that we have made it so clear that we regard security as so important to us and that we felt that the provisions which had been achieved, while not perfect, were important for our security interests, that we gave the impression we would be prepared to accept almost anything else that appeared in the Treaty. I think we misled a great number of countries on that basis, and the notion that a trade-off was involved was truly accepted, even in principle, by many people in government. So it really came down to whether the other provisions of the Treaty would be outweighed by the advantages that we might gain from a security point of view.

I continue to believe that this Treaty is very helpful on security grounds and important to us. But those advantages, in my judgment, are not going to override some of the objections to other parts of the Treaty.

If I might, I would like to offer a counter-anecdote to Tommy [Koh]'s, not directly in point, but illustrative, I think. When President Carter began his effort to get the Panama Canal Treaties done, a friend in Congressional Relations said that their tactic was to bring over to the White House five people who were listed as leaning against and five people who were listed as leaning for, and these were generally people who they felt did not understand the issues, and if the President could really put the case to them on the security advantages of the Panama Canal Treaties and so on, then these people would come around. So they did. They brought them over, and Carter sat them down, and he went through an impressive description of the advantages of the Treaty and so on. These gentlemen went back and seven out of ten of them voted against the Panama Canal Treaty. Now you know that was a different treaty, a different situation, but I think to some members of the Senate there would be enough resistance to this Treaty on certain grounds that it does not have a chance of getting two-thirds, and as I say, you are hearing from someone who is generally regarded as a flaky liberal internationalist among his colleagues in the Senate staff. I do not represent the forces of darkness at all [laughter] and never have, so if someone like myself has a difficult time recommending in favor of U.S. ratification, I think that is symptomatic of a deeper problem in the institution.

PROFESSOR CHARNEY: I am Jonathan Charney of Vanderbilt University. I have one comment and one question. We must approach this Convention realistically. If it were to come into force it would be likely to remain in force for only a limited period of time. Conventions do not remain in force for hundreds of years. Twenty or thirty years is the maximum time period that the Convention as it exists today

might last. I do not think that we should assume that the contents of this Convention or any Convention that we could draft today would be workable well into the 21st century. It should be understood that the Convention will have to be modified or replaced to reflect the realities of the future.

My question is really a request for information. I wonder if Ambassador Koh would identify those countries that are likely to sign the Convention in December. It would be useful to get an idea of what participation there is likely to be from the Third World as well as from the developed world.

AMBASSADOR KOH: I do not have a list with me, but according to the Law of the Sea Secretariat, which has been monitoring announcements by various governments concerning their intentions, as of a week ago, they informed me they believe something between 60 to 80 countries will sign the Convention in Jamaica in December. This will include the Soviet Union, which has announced its intentions to sign. It will also include France, which has also announced its intention to sign. My guess is that the Japanese are very likely to announce their intention to sign, but whether they will do so by December or after, I do not know. The position in Britain and the Federal Republic of Germany is a touch-and-go situation. I understand that earlier the British Government had decided in favor of signature, but they will have to review the position in the light of the position which the United States government has taken.

Most of the developing countries will sign. I believe that the five Nordic countries will sign. Some of the medium-sized European countries such as Ireland, Greece, the Netherlands, Austria, and Canada are likely to sign, and this includes some members of the European Community. Almost the whole of the Commonwealth will sign. It is significant that a week ago eighteen heads of government of Commonwealth countries of the Asia-Pacific region, including Australia and New Zealand, meeting in Suva, Fiji, adopted a communique which, amongst other things, endorsed the Convention and called upon states to sign and ratify the Convention. So, I expect Australia and New Zealand to be on board too.

PROFESSOR STEIN: My name is Ted Stein from the University of Washington. I want to give Ambassador Koh an opportunity to respond to some of the remarks made by Professor Riesenfeld, and perhaps I can do it by directing you to one point, but if it is not the one you want to address, you have my proxy.

It seems to me that as a formal matter, grounded in classical international law doctrine, the United States is really resting on either the view that the navigational rights under the Convention will be accorded to all states as a matter of customary international law, or, alternatively, the United States will continue to be entitled to rely on the preexisting customary international law as a consistent objector to the new norm which would be applicable to nonstate parties other than consistent objectors. I wonder if you agree with that analysis as a doctrinal matter, and what consequences, in political terms, and world order terms, do you see flowing from a U.S. position based on that doctrinal base?

PROFESSOR RIESENFELD: Before you go off on that heavy stuff you are supposed

to answer, Mr. Koh, I just want to comment on your little story about "on balance." Secretary Wirtz used to say that if you have one foot in the deep freezer and one in the blazing fire, on balance you are comfortable [laughter].

AMBASSADOR KOH: I think the position of the United States will be that those parts of the Treaty which the United States likes, including the navigational parts, have either become or will soon become part of customary law. Therefore, all states, including those not parties to the Convention, may enjoy rights under customary law. Whether the coastal states or straits states or archipelagic states will accept this view or not, I am not sure. I know that in the case of one particular archipelagic state, one of its representatives has said that the concept of the archipelagic state has become part of customary international law. But, at the same time, he denies that the archipelagic sealanes passage, which the Americans want, is part of customary law. And he has said that if the United States wants to enjoy the right of archipelagic sealanes passage through its archipelago, it will have to sign a bilateral agreement with it.

The question raised by Professor Riesenfeld is a difficult question. If you go through the Convention and try to identify those parts of the Convention which really codify existing law, those which do not codify existing law but which reflect emerging customary law, and those parts which one can very confidently say are conventional law and have no existence in customary law, it is a very difficult exercise.