

# AUDIENCE RESPONSE

## THIRD SESSION

MR. BAILEY: I can assure Bernie [Oxman] that I did not come here bearing sticks today. I brought lots of carrots, and the only problem is trying to find something constructive to suggest for possible conflicts in future. Although Mr. de Soto would like to think of the Preparatory Commission's significantly improving the effects and application of the texts from the private investors' point of view, the United States will be absent from the deliberations. Although there will be many friends of the United States participating in the Preparatory Commission who will be sympathetic towards many of the United States' problems with the Convention and who will want the United States eventually to join the Treaty, one must remember that the United States' interests are not necessarily the same as those of, for instance, the West Europeans or the Japanese, who are in fact competitors. That was the point I was making in my paper. However, we look forward to the work of the Preparatory Commission, and I hope the results will be more conducive to seabed mining.

There are a couple of further points I should like to make. Bernie Oxman referred to Jim Malone's remarks about subsidies and Marne [Dubs] took this up later when he referred to taxation credits. It is a fact that many industrialized countries, including the United States, have entered into double tax agreements with developing countries. As the parties to the Convention by implication agree to the Authority's having taxation powers, there is nothing inconsistent with those countries which need the strategic metals giving tax concessions in respect of their companies' mining activities which are also taxed by the Authority.

Another point Bernie [Oxman] referred to—I am very much aware that my delegation and some others (the so-called "Group of 12") nearly had a compromise that was a far better text from the private investors' point of view—a compromise developed towards the end of the last session. Bernie attributes the failure of this compromise's being incorporated in the text to the attitudes of a couple of developing countries. Perhaps Ambassador Koh could elaborate on this, or Mr. de Soto, but as far as I am aware the Group of 77 were not convinced that if they accepted the transfer-of-technology provisions and other similar texts prepared by the Group of 12, the United States' administration would accept the Treaty. But Ambassador Koh might like to take this up further.

I would like to conclude by taking Bernie [Oxman] up on his several references to free market forces. I am a free-market-force man myself, but if pure free market forces prevailed, I doubt whether seabed mining would ever take place in my lifetime. I think it is a fact of life that factors other than free market forces will prevail to get seabed mining under way, and I will give you an example. It was my delegation in particular which tried to get into the text of the Convention a clause with teeth in it against subsidization of seabed mining industries. The prin-

cial opponents of this clause were Japan, a number of European countries, and, at an earlier stage, the United States delegation. (The United States delegation, at a later stage, did not oppose such a clause.) Those industrialized countries opposing such a clause were obviously prepared to subsidize their seabed mining industries to obtain assured access to strategic minerals. As a result of the opposition, the clause that was finally accepted has very few teeth in it. My example is to illustrate that it is not correct that only developing countries were opposed to the operation of market forces in this area.

Thank you.

AMBASSADOR KOH: My name is Tommy Koh. I would like, if I may, Mr. Chairman, to pick up John Bailey's invitation and comment on the point made by my good friend Bernie Oxman concerning the failure of the Conference to accept certain very constructive compromise proposals submitted to the Conference at its last session on Part XI of the Convention.

These very constructive compromise proposals were drafted by a group of twelve medium-sized Western countries at my invitation after the United States had submitted its famous Green Book. It seemed to me then that the Green Book was not going to be an acceptable basis for negotiations and certainly did not contain proposals that could be regarded as compromise proposals. So I approached this group of twelve Western countries to act as bridge-builders between the United States and the developing countries.

I think it is historically inaccurate, Bernie [Oxman], for you to have said that these proposals were blocked essentially by the developing countries or some of them. That is not what happened at the Conference. When these proposals were submitted to the Conference, the Chairman of the First Committee and I worked very hard to convince the United States delegation to accept them. I was then confident, and in retrospect I think I was right in having been confident, that if the United States delegation had found it possible to accept these compromise proposals, that I would have been able to carry the Conference, that I would have been able to persuade the Group of 77 and the Soviet Bloc countries to accept them.

But what was the U.S. response to these proposals? I remember the leader of the U.S. delegation saying that these proposals were not acceptable as a basis of negotiations, that indeed they did not even come close to its bottom line. With such an attitude, it was not surprising that I could not persuade its negotiating adversaries to embrace them. And indeed, the United States did not take a positive attitude towards these proposals until the last meeting of the Conference, at which it asked for a vote. After the United States had voted against the Convention it said, in explanation of its vote, that if the proposals submitted by the Group of 12 had been incorporated in the Convention, it might have taken a different attitude. Why did it not tell me that a month earlier?

I would also like, Mr. Chairman, to take exception to some of the remarks made by Bernie [Oxman] in his presentation. Bernie said to John [Bailey] that one should come bearing carrots, but not sticks. Unlike John, I have come bearing

both carrots and sticks. And I want to explain why I feel justified in doing so. I feel morally and legally justified in having both carrots and sticks in my arsenal. Bernie's fundamental thesis is "let a hundred flowers bloom, let the two systems contend, and whichever is superior will prevail in the market place of ideas." That sounds great, but the major premise of your argument is false—the major premise of your argument being that the seabed is open to mining by all states outside the Convention on the Law of the Sea.

You exhort us to allow the two competing regimes—the regime under domestic United States law and the regime under the Convention—to contend in attractiveness to the private sector. How do you expect the international community to accept this approach? Naturally, from the point of view of the private sector, the regime under United States domestic law will be the more attractive one. There are no conditions for transfer of technology to anybody. The payments to the international community are so minimal compared to what would seem reasonable as to be insignificant. I regard, and I want to say this very clearly, I regard the mining of the resources of the deep seabed outside the Convention as inequitable and illegal.

I may be wrong in my supposition that it is illegal, but I am prepared to refer this legal question to the International Court of Justice. And I think it is disingenuous of you to say that it is premature to refer this question to the court because it may split the court along North-South lines and do irreparable damage to the court. I take the view that, by virtue of the universal agreement arrived at in 1970, the resources of the seabed and ocean floor outside the limits of national jurisdiction constitute the common heritage of mankind, the only permissible activities to mine these resources are those governed by the Convention, and if any attempt is made by any state to mine these resources outside the Convention, it would be a violation of the common heritage principle, and I, for one, will do everything possible in my power to prevent it.

MR. OXMAN: I think that Ambassador Koh clearly and articulately identified some of the differences of perspective.

It is obvious that there will be different perspectives on what happened. I tried to make it clear that I am looking back solely for purposes of attempting to predict what would happen in the future. In terms of looking towards the future, we must rely rather heavily on state practice to ascertain the content of international law. Of course, to an important extent in terms of actual deep seabed mining, state practice has yet to occur. In the meantime, we have to deal with the reality of the statement of President Reagan and the decision which he has made. That is a current reality. In facing that current reality, I have a preference for avoiding dispute, conflict, and lack of accommodation where that is possible.

In any event, there are several reasons for believing that the question is premature. First, listening to all these economic projections (which I have no competence to affirm or deny), actual commercial mining on the deep seabeds is not imminent, although Mr. Dubs assures me that it will occur. Second, it is not possible, as Mr. Bailey himself emphasized, to tell what the actual nature of the deep

sea mining regime will be under the Convention because the regulations have yet to be written. I could be wrong, but in my opinion, leaving the United States aside, it is unlikely that Western European countries or Japan would make a decision to ratify the Law of the Sea Convention until they have an idea of what the precise terms of the mining regulations are, and of course until and unless they find those terms satisfactory. Accordingly, I do not think we have to debate ultimate questions of the sort just adverted to for quite some time to come.

Needless to say, I would hope that in the end, everyone can find some means of accommodation. Perhaps I am unduly optimistic. If I have sinned, I would hope that Ambassador Koh might regard it as a sin of optimism.

MR. DUBS: I would like to make one short comment, and that is that ocean mining is not just a notion or a collection of things on pieces of paper, whether they are in the U.S. government or the U.N. or elsewhere. There are things that have occurred—actual operations in the ocean over a period now of some twenty years—and the things that have occurred have been identification of resources over wide areas of the ocean; there have been large samples of minerals taken from the seabed; their processing has been examined; there is development of large-scale equipment (and I have to differ a little bit from what you said, John [Bailey] about prototype and the ability to go ahead; it is a little different from what you imagine). The end result of this is that the price tag has been steadily rising, but in the dollars of the day, probably at this time the dollars have risen to about 300 million dollars, that order at least. If you used an OECD index on it and brought it up to 1982 dollars, it would probably be more like 700 million dollars. So there has been a sizeable amount of effort that has been continuous and has continued over long periods of time. It has in fact continued over a period of time that even antedated principles of the common heritage declaration. I do not know what legal sense to make out of that, maybe others can, but there is not a vacuum. It continues today under the domestic legislation of the United States, Great Britain, France, West Germany, Japan. There have been applications for license areas under that legislation which presumably will result in the issuance of licenses at some time, probably shortly after the first of the year. So there is something that might be called state practices.

MR. BAILEY: Just to say to Marne [Dubs] that, as I understand the state practice so far, it has been consistent to a great degree with the terms of the present Convention, so it does not help those who are arguing about state practice outside the Convention to any significant extent.

PROFESSOR RIESENFELD: My name is Riesenfeld. I am from the University of California. I had tried this morning very hard to keep this conference from a comparison of sticks. It is very difficult to measure these sticks. Article 137 in the Convention may be valid; it may be invalid. Furthermore, I do not think it is too fruitful at this point to try to predict what the International Court would decide and whether this case should come before it or not. It is my fervent hope that it will never come before the International Court of Justice in any type of composi-

tion. It is also my fervent hope that it will never come before the Security Council of the United Nations, which is another alternative. We have heard this afternoon that apparently there was a lack of communication in whether the solutions proposed by the twelve "Good Samaritans" were acceptable or not, so I think it would be very helpful for this conference more than anything else to debate in what forum the differences could be resolved. Perhaps the Preparatory Commission is not the proper forum, but that remains to be seen. This morning someone said that it was too late. I do not think it is ever too late to reach a peaceful solution of a controversy. That there is a controversy cannot be debated even by President Koh. So we should make every effort, I think, to resolve it and not dwell too much on the imaginary or real sticks, on conflicts, on confrontations, on who might win these. But I think as law professors and perhaps also as economists and spokesmen for the industry, we could have some time which is not on the program to debate the question in what forum these conflicts could be peacefully resolved, at least in the long run, because I think it would be futile to reconvene a large conference. But there should be in my mind, other fora, and I think we should think about that more than about the relative merits of the sticks.

MR. DUBS: Again, speaking as a pragmatist, industry around the world has been conscious of the necessity of settling conflict under whatever auspices it can find to settle it. In that regard, I am encouraged under domestic legislation and certainly encouraged under the September 2nd agreement among certain states. There is under those auspices a movement by industry—a process that is under way—to try to get such conflicts settled in an easy way, the final process being commercial arbitration. And so I think that the issue of the settlement of conflicts, say on mine sites in the ocean, can be settled by a very pragmatic means. The political issues that exist among groups of states seem to be more difficult to resolve.

MR. BAILEY: I just want to touch on one point that Professor Riesenfeld made. After the last session of Law of the Sea Conference, when the Convention was adopted, a number of middle industrialized countries felt that because of an apparent misunderstanding that took place prior to the end of the last session, another attempt should be made to try to improve several of the seabed mining texts from the private investors' point of view and establish some sort of renegotiation between both sides. There were soundings—I think I do not breach a confidence in this—there have been a lot of soundings, but these options were closed by the position of the United States not to negotiate further. There were reasons, no doubt quite legitimate reasons, why the United States took the view that such negotiations would not be fruitful, but I just wanted to toss it in for the record that attempts were made in the succeeding months to get this going.

MRS. LEVERING: I am Miriam Levering. I appreciated what I have been hearing today about the importance of the most pragmatic approaches. When Ambassador Malone this morning got on to principle—when he was saying that the United States will insist on high seas rights to mine the seabed—I thought that we have a pair of different principles in American history. One, that of Manifest

Destiny under which we take what we want, and the other the rule of law. We have two hundred years' experience of our country, probably unparalleled, in bringing together diverse states and peoples under a rule of law. There are both of those principles, and I am more proud of the latter than I am of the former. But I am hoping here that we will concentrate on pragmatic answers, and it seems to me that the Preparatory Commission is our next opportunity to deal with some of the deficiencies in the seabed mining system. I would like to see the United States in the PREPCOM. But in any case, I would like to ask Mr. Dubs what, from his standpoint, would be priorities there in getting changes or rules and regulations that would be more satisfactory to the industry?

MR. DUBS: Let me expunge the word "priorities" because I am not prepared to set priorities, but I could run down a list of things that I think are important. First is the issue of access to the seabed. The statement of automatic approval of contracts which we hear so often, including automatic approval of contracts under a PIP proposal, is not quite that automatic or not quite that clear, because under the PIP proposal you are obligated, before you can get a contract, to accept and obey all the rules and regulations of the Authority. I do not know what those are, so not knowing what those are, I could see an automaticity of contract which would be a contract which no one could touch, just putting it in those words. Looking at access from the standpoint of the draft text, for example, under Annex III we have to meet certain qualifications—technical and financial qualifications. Those technical and financial qualifications can be written in such a way as to exclude almost anyone from access, or they can be written so as to make it (since I am surrounded here by free market promoters) a really free market approach.

Take the instance of the transfer of technology. The definition of technology in that article in Annex III can mean anything today. That definition could be written in a way that by the rules and regulations you would know what technology was and what its obligations are. Phrases such as "generally available in the market place"—I do not know what they mean. It talks about technology that must be the "same or equally efficient." There are terms of "reasonable commercial terms and conditions." But the point I want to make, without going into detail, is that there is a great deal undefined in those. I could define those terms myself so that I could exclude almost anybody from wanting to go into ocean mining, or I might define them in a way that would be quite acceptable. But even that is difficult.

There would still be some difficult issues left even if I could define the terms. One is what I call the Third Party Technology where the article requires—and this is an instance where I think the Conference could have done a better job to keep from locking things in—the article requires, for example, that if you cannot get a written assurance from the owner of any technology not covered under the article the technology in question should not be used by the operator.

There is a whole question in the treaty text as to the sanctity of contract. And I can argue on both sides of that question. I think I have. If you take the concepts of sanctity of contract and then interpret them in the most advantageous way, it

would look as if once you have a contract, it is pretty sound. But it is equally possible, and it has been done by clever lawyers, that you can interpret it as providing no sanctity of contract. Those issues are important, and the Preparatory Commission can operate to make ocean mining totally impossible by anyone from the developed countries, or it could operate to make it at least a proposition where the risk could be evaluated. I do not mean to make that closed. We could go on and talk some more.

MR. BAILEY: The very points that Marne [Dubs] is making, while I do not entirely agree with them from a legal point of view, are certainly arguments strongly in favor of the United States' participating in the work of the Preparatory Commission.

