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Comment

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COMMENT

BERNARD H. OXMAN*

I follow Mr. Bailey, who was the rapporteur of the First Committee, which dealt with seabed mining. As the Western member of the Bureau of the First Committee, he had to consider concurrently the views of countries such as the United States and Canada on this matter. This was certainly an unenviable position.

It is important to bear in mind, because we and our friends in the West have the tradition of speaking candidly to each other, that Mr. Bailey and the Australian delegation did not always agree with our government or our delegation. But they were all friends of the United States. They did everything within their power to use their considerable abilities, their good offices, and their well deserved reputations to achieve compromise texts that were acceptable both to the United States and to those with whom we disagreed. Indeed, Ambassador Malone's final statement at the Law of the Sea Conference rightly praised the activities of Australia and others in this regard.

I find myself on a panel with Mr. Dubs, a leading industry expert on deep seabed mining who was beyond doubt one of the most influential and respected industry representatives from any country at the Conference. (I hesitate to say that Mr. Dubs was the most influential, because Mr. Dubs is one of the few who is not a lawyer, but indeed the "client." Some might be tempted to think that that is why he was so effective.)

As many of you know, I have read about deep seabed mining issues and I have even written about them. But I am a neophyte on the underlying economic issues, and that really is the nub of the question. It is a "nub" that I expect we are saving for last and will hear from Mr. Dubs about. I needed the help of the authors just to read the MIT studies that Mr. Bailey summarized so well. Therefore, if I have anything to say myself on the future of deep seabed mining, it is as a lawyer. Actually, since I am not representing anyone here, I am here more as a law professor than as a lawyer. Not surprisingly, that is the problem, since everyone knows that law professors' crystal balls are notoriously cloudy. These days it seems only economists have the clarity of vision to assert (or at least imply) that the difference between heeding and ignoring them is the difference between Nirvana and Armageddon. My approach to this problem therefore is to be one of those rare commentators at symposia of this sort who in fact really comments on what he has just heard.

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Mr. Bailey said many interesting things. I heard him say that the nations that ratify the Law of the Sea Convention will be prohibited from recognizing mining rights asserted outside the Convention system. Many of us have read Article 137(3), on which he bases his conclusion. But as I listened, I remembered a comment by Secretary of State Schultz that the parties to a treaty may not alter the rights of nonparties under international law. All of us can appreciate the legal and logical foundations on which the Secretary's statement rests. It seems we have a dilemma. The Secretary of State declares that other people cannot alter our rights without our consent. Mr. Bailey states that other people may be prohibited from recognizing the existence of such rights.

Mr. Bailey and Secretary Schultz appear to have divergent views on the nature of future state practice. This is, of course, the very heart of the matter if we are undertaking a traditional analysis of the content of future customary international law. Mr. Bailey just said that he was confident that when deep seabed mining begins, it will take place under the regime established by the Law of the Sea Convention. He believes only government subsidies, such as insurance or some other form of subsidy, could compensate for the disadvantages of mining outside the treaty system.

This morning Ambassador Malone stated, "There will not be investment in seabed mining under the Law of the Sea Treaty unless governments are willing to heavily subsidize the companies and mining entities." As I considered these remarks, it occurred to me that if both Mr. Bailey and Ambassador Malone are correct, then whatever the legal regime, deep seabed mining would appear to require government subsidies. Quite clearly, each of them reaches his conclusion because he believes a more attractive alternative for industry exists. They differ on which is the more attractive alternative. On one level, the prospect of proponents of alternative legal regimes for the seabed vying with each other to offer more attractive deals to industry is not entirely unattractive to the investor. This is, of course, true only so long as the proponents of the different regimes duel with carrots.

The problem is that I think I saw Mr. Bailey bearing some sticks. I hope I am wrong because if he was bearing sticks, it may be a regrettable and premature step even from his own point of view. It is questionable policy to challenge the United States to a shoot-out, as I am sure Mr. Bailey would agree. Moreover, if it is our friends who are doing it, they may have something to lose whatever the outcome, as I am sure Mr. Bailey would also agree.

In particular, one must question whether it is fair for nations, because of their disapproval of the policies of the American government, to discriminate against private American citizens and companies. There is solid support for the view that a retaliatory taking of private property by a state is a violation of international law. If the basic legal principle is that the deep seabeds are open to all without discrimination—a principle that is basic to both the high seas regime and the treaty regime—then what justification can there be to close it to people because of disagreement with their government?

In contrast, Ambassador Malone rested his prediction on economic principles. He said the system being offered miners under U.S. law is inherently superior to

the regulatory regime under the treaty and will succeed for that reason. He rests his case on a U.S. statute that asserts that everyone has a right to mine the deep seabed. I did not hear him threaten to exclude treaty parties from that principle.

It appears that Mr. Bailey is counting his chickens long before they are hatched. Indeed, I am not even sure everyone sees as many eggs as he does. He does have supporters for his point of view, but so does Ambassador Malone. A major political or legal confrontation in that situation could only serve to divide and weaken the already fragile instruments of legitimacy available to the international community, whether they are international organizations, international courts, or the traditional processes of international law. To give just one example, I have serious doubts whether members of the Group of 77 would be able to present the issue to the International Court of Justice in a manner that could be answered without risking a deep division between Western and developing country judges that might harm the Court.

The reality is that the issue is premature. Mr. Bailey's assumption that he can lure many industrial states into ratifying the treaty is untested. I believe Mr. Bailey's predictions will definitely not be realized unless rules and regulations that substantially confine the thrust of the treaty regime on certain points are drafted reasonably soon. The question is, will the Group of 77 and their supporters do this?

Based on the experience so far, it is difficult to give an affirmative response. After President Reagan publicly pledged that he would support a treaty modified to accommodate his major concerns, the developing countries, particularly some developing countries with no direct interest in opposing what the United States was seeking, were not very forthcoming. Indeed they effectively, even if unintentionally, precluded constructive discussion of the compromise efforts of Mr. Bailey's own delegation—the so-called Group of 11 proposals—by attaching procedural conditions that they should have known could not be accepted by the U.S. delegation or any other delegation in its position. Moreover, Mr. Bailey knows that he nearly had agreement on a compromise on technology transfer that went far toward accommodating Western concerns and was acceptable to the developing countries with an interest in the subject, a compromise that was blocked by delegations from other developing countries whose economic ministries are unlikely to be interested in deep seabed mining technology for decades to come.

I look back and rehearse all of this only for purposes of trying to predict what action the Preparatory Commission is likely to take. In brief, if that was the response to President Reagan, is there reason to believe that there will be a more positive response to the technical delegations that may attend the Preparatory Commission from Europe or Asia?

I have known Mr. Bailey for a long time. I have no doubt regarding his determination to press ahead. But for what it is worth, I offer him some advice. I suggest he accept the competition in the open spirit of the free market. Perhaps the Preparatory Commission can write rules and regulations that satisfy many, if not all, of the concerns that are prevalent among investors in Western Europe and Japan. Both those who believe in the free market and those who do not believe

fully understand what companies will do if they are offered a more attractive arrangement.

For my part, my crystal ball is too cloudy to predict the outcome. Even if it were not, however, I would hesitate to do so. One of the things the world could use right now is a little healthy competition in the direction of encouraging the kind of climate needed for efficient production of natural resources in response to world demand.