COMMENT

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Because of the excellent job that Bernie Oxman did presenting almost, but not quite, an industry point of view, I feel that I should present a legal point of view. However, I think I will not do that. It is difficult to decide what points I should bring before this Symposium that would be useful in the debate.

When Ambassador de Soto spoke earlier, I was struck by several things that he said. Something that he said which particularly caught my ear was that he thought it had been wise to put off consideration of a detailed mining code in 1974. He also said that the Law of the Sea Convention is not perfect and that there is much work to do in the Preparatory Commission. He also said that the question of the lawfulness of seabed mining outside the Treaty is apt to be skirted by the nations and the real decision will be taken by the bankers.

As usual, Ambassador de Soto gave some good advice and raised the basic points that we really need to pay attention to. In addressing this issue, and I'm not going to ignore your paper, John [Bailey], we might look at the future of the exploitation of the resources of the deep seabed and ask the question, "Will mining occur?" We should also raise the question as to whether conflict will occur and how that conflict might be settled. In fact, we might look at the issue of whether mining will occur in terms of economics, risk, and conflict.

With respect to economics, I consider that all the various models often cited for the economics of ocean mining have missed the fundamental point. At any particular time in history when one computes return on mineral product projects, one gets either an unrealistically high number or an unrealistically low number because of the cyclical behavior of prices and the overwhelming effect of prices on returns. The economic question, then, is not what is the return on investment (although one would eventually have to answer that question). The real question is: what is the cost competitiveness of minerals from the ocean? Using that criterion, most of us who have worked on seabed mining development would come to the conclusion that the recovery of minerals from the ocean can be cost competitive with new supplies of these minerals but not with existing production.

Cost competition is a question that each company and each organization will answer in its own way based on the facts that are available. However, I think that if we recognize that ocean mining is cost competitive, the questions of whether or not metal prices are low today, whether or not returns today are low, are unimportant. In general, the mining industry has to plan a long way into the future; I could give you an example from my own company. Today the copper business

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can only be described as an early 1930's-type disaster. Nevertheless, we have just committed one hundred million dollars for a new copper smelter at one of our mines. The reason we have done this is that we see the future for this kind of investment. We understand mining is a cyclic business, and we must base our decisions on the long view.

Today, the nickel industry (nickel is one of the important products from seabed minerals) is, if anything, in worse shape than the copper industry. However, the same principles apply, and at some time minerals from the deep seabed will be mined and enter into the marketplace.

It is not just a case—and this is the other issue I want to raise with respect to John [Bailey's] paper—of whether there are plentiful mineral supplies on land. I think that, as we were saying earlier, all the minerals that one will ever need are in the earth's crust. They will never run out because the "rust" will go back into the ground. The real problem is to obtain them at low cost. Thus, we find that what a mine represents is a place where the minerals occur in such a concentration and in such a way that their costs are competitive today. Therefore, it is not a case of plentifulness of supply; it is a case of what it costs to get them. Generally, the lower the cost that one pays to get these materials, the better off humanity is. At least I feel that way. Any ocean mining project today would be an economic disaster. However, in the long run, ocean minerals are expected to be competitive. So much then for economics.

Some people have labeled myself and other industry people in this room as pro-treaty, anti-treaty, pro-this, and anti-that. I am a pragmatist with respect to this issue, and I am primarily concerned with the question of risk. Thus, we might couch the arguments developed by John Bailey and Bernie Oxman in terms of risk. There are clearly different risks associated with different regimes.

Let us look at the Law of the Sea Treaty as it presently stands. Today, most of industry would feel that the risk in the Draft Treaty is far, far too large and that therefore it would not be a good investment vehicle. There is no point in boring you with the risks seen by industry since they have been recited ad naseum. They are not too different from some of the risks which I am sure Ambassador Malone covered in his talk earlier. Could these too large risks have been reduced? I think that at the Law of the Sea Conference's concluding session they could have been markedly reduced, and it is unclear to me why they were not. If the risks are not reduced, even if every nation in the world joins the Treaty, it could well be that industry would not pursue ocean mining; the risks would just be too great. On the other hand, the risks—and this is the pragmatist in me speaking and responding directly to Dr. de Soto's comment earlier—could be tremendously reduced by the Preparatory Commission. Again, commenting on John Bailey's remarks, his view was that because the United States is not participating in the Preparatory Commission, other nations will just let things slide and these risks will not be reduced. I hope that this view is not true. I hope that when the Preparatory Commission meets that it will keep that in mind and work on the rules and regulations in the spirit of reducing the risks for the investor.

Of course there is an overriding problem: because some of the fundamental

phrases, words, and clauses in the Treaty were not properly couched, the ability of the Preparatory Commission to deal with those risks may be severely limited. That, I think, is one of the problems we have to look at for the future.

What is the risk on the other side? The risk of operating outside the Treaty is not infinite. Too often I have heard people say that so-and-so and so-and-so will not recognize what the United States is doing. On the other side, the United States may not recognize what somebody else is doing. In that sense the risk of operating alone under a U.S. flag might be lower than the risk of operating, say, under a French flag, with France being in the Treaty. I am not proposing that this is so or not so. I am merely pointing out that there are comparative risks that have not been completely assessed as yet. I think that the Preparatory Commission, if it met, could balance that risk portfolio a lot better than it is balanced now, and I hope that will be done.

John Bailey's paper mentioned some of the risks perceived by industry. One of these risks was the transfer-of-technology clause. Much has been said about it, and it is a difficult thing for industry. It could have been changed. The Group of 11 made great progress on it. There were some further modifications that could have been made that would have made it at least marginally acceptable from an industry point of view.

In addition, John Bailey mentioned the taxation situation. The situation, however, is not nearly so good as he indicates it to be. It is not clear to me whether any government will give a tax credit against the payments to the Authority because there are some very fundamental national principles involved. Nevertheless, I do not know how it will come out. From what I have seen of the U.S. Treasury—forgetting not signing or signing treaties—they would fight a tax credit tooth and nail on basic revenue-raising considerations. You are smiling Carl [Maw] because you remember very well earlier arguments on that, when I said, "I don't want to talk about financial provisions unless you first settle the tax credit." That issue still exists, however. As you know, the British Treasury takes the same point of view. Therefore, if there were no tax compensation—if seabed profits were simply double-taxed—the economic provisions of the Treaty would turn out to be unacceptable. These are merely some examples of difficulties with the Treaty; I do not want to spend too much time on further detail.

I also thought that we should talk about conflict and how to settle conflict. If one U.S. miner goes out under U.S. auspices (assuming the U.S. is out of the Treaty) and a British miner goes out under British auspices (let us assume the British are under the Treaty), and they want to mine at the same place in the ocean, what will happen? There will be a conflict. It is not clear to me how that conflict will be resolved. But resolved it will have to be. And I believe that, notwithstanding the arguments of whether or not one can recognize mining outside of the Treaty, the result of that resolution of conflict could well be a de facto recognition of one's rights to mine the seabed outside the Treaty. Nevertheless, I do not know how this conflict will be resolved.

The same thing could be said with respect to Japan. The Japanese have a national effort, and they have appeared on the surface of things to be quite favor-

ably inclined toward proceeding with the Treaty; at least they appeared to be favorably inclined at the session in New York. It is very clear to us in industry, however, that the Japanese national project is uncommonly concerned about conflict with the United States, whether or not the United States is in the Treaty. I am glad that they are because I think that attitude is helpful.

Thus, one thing that we need to consider when we think about the future of the law of the sea and the future of ocean mining is that the world may not be able to execute a universal treaty. It could be likely that there will still be these arguments and discussions for many years before parallel paths can reach a common point—and I would like to think that they will. In the meantime, I think it would be wise to stop speculating as to who would win such a conflict—whether one system will dominate or not—but simply to recognize that we are in a regime in which for some years to come these two systems (in and out of the Treaty) may be in conflict. We had better determine how to settle that kind of conflict in a peaceful way and, I hope, at a low economic cost. The result, I believe, will make minerals available for the world and will be helpful rather than destructive to the process of establishing universal law.

Before I close, although I am not here in any way, shape, or form representing industry, I want to share with you parts of an industry platform that was adopted by the American Mining Congress (AMC) at its annual convention a few weeks ago because they do show the industry attitude. I will quote out of context, but I guarantee that I have not changed the nature of the thoughts. This platform states that the "development of these resources requires a stable and realistic regime under which investors with the necessary capital and skill can exercise their historical right of freedom of the high seas in pursuit of deep seabed resources in a secure, reasonable, and nondiscriminatory manner." This statement is a good motherhood phrase to which we all could agree. The next phrase is quite different, however. It states that the proposed Convention on the Law of the Sea provides none of these conditions. The treatise goes on and notes that the AMC, like the Administration, "finds the proposed treaty objectionable. It would make private investment in deep seabed mining highly unlikely, if not impossible." Concerning PIP (Preparatory Investment Protection), it says PIP "fails to provide conditions that would allow investment. The Resolution [No. 1] contains inadequate assurances of access and security of tenure under fixed and reasonable terms and conditions." A fundamental objection to the Treaty held by the AMC is the new and disproportionate political and economic restrictions that it would impose. The industry platform continues: "The American Mining Congress supports the President's position announced on July 9, 1982, that the U.S. will not sign the proposed treaty and encourages him to remain firm in his decision." In addition, the platform encourages the President to communicate to other nations to urge them to join the United States in declaring that they will not sign the Treaty. It urges the United States to consider the past and future development of seabed resources as a reasonable exercise in freedom of the high seas, a right to be protected. It further states that the issuance of licenses and permits is a legitimate exercise of regulatory powers permitted under general principles of international law, and it goes on to

note that the United States encourages the establishment of reciprocal arrangements with its allies and other states. Finally, it states that the United States will recognize reasonable and consistent practices of other nations and their exercise of the freedom of the high seas.

In conclusion, my own pragmatic view is this: ocean mining will occur; the basic economics are there. The risks are high: the technical risks, the economic risks, and the political risks. Thus, I would like—speaking now for my own organization—to keep our options open for the future. I am not sanguine about the present Treaty. On the other hand, I will be watching the work of the Preparatory Commission with great interest to see whether it can give a best case interpretation of the Treaty, taking care of some of its difficulties and not producing the worst case situation foreseen by the ocean mining industry.