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Discussion

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Mr. E. J. Cooper commenced the seminar with an explanation of various maps and charts.

Richard Baxter

I was very interested, Mr. Chairman, in the observations which were made about the role of the International Court in judicial settlement and the possibility of arbitration of boundary disputes in the ocean. There is a very interesting survey by the late Miss Monckman, published in the *British Yearbook of International Law, 1972-73*, in which she discussed the approach which had been taken by a number of tribunals that dealt with land and sea boundaries. She reached the conclusion that considerations taken into account by tribunals in the application of law often bore quite a close resemblance to considerations which might be taken into account in connection with a political settlement of the matter. The degree to which the tribunal was called upon to apply the existing law, and the degree to which the tribunal was called upon to lay out new boundaries, depended upon the degree to which there were treaties already in existence with respect to the matter. The issue, for example, of sovereignty over Machias Seal Island essentially involves the application of international law, which is fairly well established, to the question of sovereignty over territory in one case, and interpretation of a treaty in the other case.

At the opposite extreme, of course, we have all of these other situations being encountered today. The tribunal is not called upon to find out where the boundary is, but where the boundary ought to be. The tribunal is laying out a boundary that has never existed before. In effect, it is being called upon to make the same sort of equitable apportionment of resources as it is in the case of international rivers. We see an increasing number of spheres of human endeavor in which the courts are called upon to make an equitable allocation of resources which have been discovered to be a part of a common reserve.

I think I would question the conclusion that there is a greater latitude in this respect if one goes to arbitration than if one goes to judicial settlement. Although the International Court of Justice was expressly enjoined to lay down the principles in the North Sea Continental Shelf cases, the Court found itself in the position of laying down equitable principles of a very general character which would permit the two parties to compromise their claims. This was a very informal, relaxed and rather practical approach to the matter. On the other hand, the International Court of Justice has been asked, in the Greek-Turkish case, to actually delimit the continental shelf

boundary between the two countries. These are almost polar extremes. I suppose the real testing case would be to ask ourselves whether the result in the Channel case would have been any different had it been submitted to the Court. I am inclined to think it would not because it seems to me the nature of the task to be performed, rather than the nature of the tribunal, is dominant in these cases. There had never been a boundary in the channel before. The court of arbitration was asked where a boundary should be put. There has never really been a boundary in the Greek-Turkish case. The International Court is being asked where a boundary should be put. One can be fairly confident that the International Court of Justice would be as free to take into account considerations of equity as was the Anglo-French tribunal.

Consequently, I respectfully suggest that the type of forum is not so pertinent. Indeed, it may not be relevant at all; it is the nature of the dispute which is submitted to a tribunal that is important. To what extent is the tribunal called upon to create new boundaries free of legal constraints? I have often referred to this role as that of the Court simply being asked to play God in deciding where the boundary ought to be. There is the greatest of latitude, unconstrained by legal rules, and the Court is at pains to emphasize that each case is peculiar unto itself without really laying down much new law for the future. We are, indeed, in the presence of an extremely interesting phenomenon in international legal life, which has caused a certain degree of bewilderment among international lawyers concerning how they are to deal with these cases when they are taken into a judicial forum.

Chairman Charles B. Bourne

I have never considered it a matter of calling it an adjudication in a court, and calling it something else in arbitration. In both situations, the tribunals are doing the same thing: they are applying the law. In the case of arbitration, you may be able to prescribe the law and therefore limit or increase the role of that particular judicial body. I solve your problem by a definition of words, in a way. I think I would certainly agree with the substance of what you say. There is no essential difference in the nature of the process.

Claude Emanuelli

I am under the impression that the International Court might be more reluctant than an arbitral tribunal to create new law. I think that is the reason why I would make this distinction, for instance, with respect to the question of delimitation of new boundaries. When you speak about delimitation of economic zones, you are really speaking about principles which have not been established in law as of yet. In a way, you are speaking about creating new law and new rules. I was under the impression that perhaps the Court would be more reluctant to do these delimitations without having any hard law to rely upon, except for the principle of equitable delimitation. With respect to the continental shelf, it might be different because there are

already precedents. Certainly, the principle of equitable delimitation is covered by the decision in the North Sea Continental Shelf cases.

Richard Baxter

It is quite true there is an aspect of delimitation involved. The manner in which an arbitral tribunal or the International Court would approach such a matter demonstrates that there is, indeed, a rule of law which governs its function in each case. The rule of law says we should effect an equitable delimitation. At that point, one is left free to do anything. I have suggested this means that one is relatively unconstrained by precedent. Certainly, there is very little indication of the weight of precedent in the Channel case. At the same time, one does very little by way of creating precedent for the future, because the tribunal is happy to say that what is equitable in this case may not be equitable in another case. It is yet the role of the tribunal in legislating rather than intervening.

W. C. Graham

I am interested in whether the choice of the tribunal would make a difference. For example, the factfinding process in the International Court of Justice would appear to have its problems. In the Barcelona Traction case, where I was working with the Spanish government, there were mountains of papers from both the Belgians and the Spaniards, and the judges tried to figure out what it was all about. I suggest this would be a very unsatisfactory way to go about solving the factfinding problems which we have seen on the maps today; *e.g.*, where is the crevice in the seabed, and where do these channels lie? In the domestic court process, the judge spends ninety percent of his time ascertaining what the facts are and only ten percent on the law of the case. Where there are serious questions of fact to be determined, the International Court would be entirely unsatisfactory. You need a tribunal which is more oriented to the tasks of a domestic tribunal and which is empowered to find the facts. If necessary, we must call in witnesses and make findings of fact upon which they can base a judicial decision. But if we do not proceed that way, then it seems that we are opening up the possibility where all legal findings are not based on what the reality is.

I wonder what those who have had a little more experience in the International Court of Justice would say about the way in which it deals with the factfinding problem.

Richard Baxter

The International Court can hear oral testimony. It can appoint experts to look into these questions. There is nothing in the character of the proceedings which precludes a litigant from submitting maps from geographers, geologists, geomorphologists—the whole range of experts whose views should be taken into consideration. I have had very little experience in these matters, although I have acted as counsel for a government which is involved in litigation in the Court. However, I think one would find the procedure of the

Court is such that there can be as much reception of evidence as in any arbitral tribunal. Indeed, there is a fascinating wealth of technical data which one must have.

I am not altogether sure that cross-examination is really the best device for bringing out the truth when one is dealing with expert witnesses. Who could judge this? Nevertheless, I do not believe the complexity of these matters are beyond the reach of judges. I think they probably have the means of testing the accuracy of the evidence that is submitted and, indeed, one can be fairly sure that the technical data which are submitted to the Court by governments are accurate. It is true that diplomats are sent to the Court to lie for their countries; but, normally, the counsel and agents before the Court are not sent to lie.

Claude Emanuelli

I would not like to give the impression that I was seeking to make an absolute distinction between those conflicts that should be referred to the International Court of Justice and those which should be referred to arbitration. However, because there is more hard law with respect to questions like Machias Seal Island or the Dixon Entrance, and because of the nature of these problems, these could be questions which are more likely to be submitted to the International Court of Justice. In the alternative, these questions could be referred to arbitration for reasons of opportunity. With respect to actual delimitations, it would be easier to refer certain disputes to arbitration because of the absence of hard law. But it is impossible to draw a very clear-cut distinction. There are legal, political and scientific considerations which must be taken into account. This is particularly true with respect to the distinction between the delimitation of economic zones on the one hand, and the delimitation of continental shelves on the other. Perhaps the parties to a dispute involving delimitation questions would be freer to resort to experts and to orientate the delimitation on the basis of various scientific and technical principles, when referring the case to arbitration.

Chairman Bourne

With regard to the disputes we have heard about between the United States and Canada, is there any disagreement concerning the facts? If there is, what is being done to clear up the facts now, while the negotiations are going on, so that we can negotiate on the basis of reality.

W. C. Graham

In the case of the Gut Dam arbitration, the facts were very substantially in dispute. The case never proceeded far enough to get into a serious conflict, but the measure of damages claimed by the United States was approximately fifty-two million dollars. The case was eventually settled for about $350,000. The Canadian government was prepared to concede there was $100,000 in actual damages in the event the liability was established. The initial issue of liability was one that could be easily established by reference to law because

the facts were established. There was no dispute as to the location of the dam or the nature of the agreement entered into when the dam was built. But if the tribunal, having ascertained liability, then had to determine damages, it would have been in substantial difficulty.

Chairman Bourne

The dispute there was about the legal liability—the legal principle—was it not? Once the Court said that Canada was liable, its work was finished because Canada and the United States had no particular difficulty in working out a compromise concerning the actual damage. There are clearly cases, however, where there exists a difference of opinion because the facts are perceived differently. The key role of the International Joint Commission, for example, is in clearing up those misunderstandings. Its success lies in being able to bring the two governments, through their civil servants, to a common view of the facts. When reasonable men know what the facts are, they can usually reach an agreement.

Is this issue about factfinding in the International Court of Justice a real one, or is the issue actually one concerning the appropriate law to be applied? In the case of equity of utilization, of course, this is not a question of facts or laws. To what extent can some form of factfinding body play a role in boundary disputes? We know they play a significant role in fresh water disputes. Is there any role in salt water disputes? There is the Salmon Commission, which allows experts to play a role. But if it comes to drawing a line, which is a one-shot affair that will be settled forever, perhaps there is no role formed for these factfinding experts.

Claude Emanuelli

What about the geological formations or the configuration of the coasts?

Chairman Bourne

If that is an issue, it should be settled by the two governments getting together. If something turns on the shape of the ocean, we should find out how the ocean is shaped before we have a big fight.

Claude Emanuelli

When that has been resolved, the whole problem has been taken care of.

Geographer

So much depends upon the use of facts, even though the facts may be accepted. An example was put to us this afternoon regarding the boundary between the United States and Canada, near Maine. Reference was made to a deep sea channel. Historically, international boundaries between countries that involve a river have usually followed the deepest channel. In the case involving the boundary between Norway and the Soviet Union, which follows the Mastic River, it was ruled that the boundary would follow the deepest channel. This is simply because that is the only way to move up and down

the river. Someone can justify the deepest channel as having a practical significance. But submarine channels have nothing to do with this. Nobody knew they existed until the 1930's, but they have nothing to do with navigation. One does not need that depth of water in order to be able to move, so I do not understand what bearing a deep sea channel has as to where a boundary exists.

John Merrills

I would like to take up a point which was made earlier. Professor Baxter suggested that in many of these delimitation cases, the tribunal is not so much concerned with applying existing rules of law as it is in devising rules of law to settle a particular dispute. If one looks at a case like the North Sea Continental Shelf case, for example, one can see this process fairly much in evidence. However, there is a second problem which arises in cases of this kind. Granted, the tribunal is going to have considerable discretion because the existing law may not be very clear. But what sort of rule does the Court wish to devise to resolve this?

The Continental Shelf case poses two very different conceptions of the function of international law in disputes of this kind. On the one hand, the judgment in the case, supported by a number of the individual opinions, seems to view the prime function of international law as providing a very general framework of rules. Within this framework it is for the parties to agree upon a generally fair and equitable settlement. This leads to the conclusion that the parties are to go away and negotiate new boundaries in accordance with the principles. In direct contrast, the dissenting opinions assert that the function of international law is to provide a clear and certain framework of rules. These rules would be automatic in their application and would avoid disputes by providing the parties with a clear and definitive indication of what their respective rights are in advance. Of course, the dissenting judges placed a great deal of emphasis on the merits of the equidistance principle for precisely that reason and also tended to minimize the significance of the special circumstances provision in the Geneva convention.

This is a difference of opinion which is evident in a number of these cases. The Anglo-Norwegian Fisheries case contains the same disagreement. The majority is willing to allow the coastal state a good deal of discretion in the drawing of straight base lines and by permitting economic considerations to be taken into account. The dissenting opinion simply did not believe economic considerations had any relevance at all to a dispute of this kind, because it is not the function of international law to create a general framework which would be the start of the bargaining process. Rather, the parties must be provided with the clearest possible guidelines as to the kind of arrangement which the law requires. Therefore, one can agree that in these cases the tribunal will be making up the law as it goes along. I think it will then be faced with this further issue concerning the kind of a rule to come up with in the end. This, in turn, will depend on very fundamental choices as to how international law is to function in relation to boundary disputes.

Richard Baxter

Suppose I were to ask the previous speaker to divide one acre of land equitably between the Chairman and Professor Emanuelli, not necessarily at the equidistance line. The results of whatever determination is made would not provide any rule of law that would be available, in the sense of logical inference, for use in a future case. Every case will be different. However, certain guidelines to decisions may be produced from the wealth of considerations taken into account. A list of criteria that should be taken into account may emerge; perhaps even a list of things which are irrelevant. Considerations might center around the ages of the two people, their economic needs, the size of their families and their style of living. These simply guide decision, they do not dictate it. That is what is so interesting about this phenomenon. The courts are being asked to perform a function which is, in many ways, parasitic upon strict judicial function.

John Merrills

I think what Professor Baxter has just said is very accurate. The dissenting opinions in the North Sea Continental Shelf case were saying that if the parties had wanted that sort of judgment from the Court, they would have asked for the judgment *ex aequo et bono*, and that is not the Court's job. The dissenters believe the Court's rule is to decide the case in accordance with international law. This means looking for a set of hard and fast rules rather than directing the parties to go away and negotiate in accordance with equitable principles. The view which Professor Baxter has just expressed certainly described the majority judgment. The dissenting opinions, however, are in fundamental disagreement with such an approach in cases of this character.

Chairman Bourne

In that case, the Court was not asked to draw the line as it was in the other cases. Had it been asked to do so, the majority would have drawn it just as effectively as the dissenting opinions.

John Merrills

That is true. The Court was asked to state which principles were applicable. But the dissenters saw their function in terms of putting forward principles which would be almost automatic in their application, rather than very general principles which would merely provide a basis for negotiation. I think that is a very different conception of the judicial function.

Chairman Bourne

If we were to admit that, where does it lead you?

John Merrills

One thing which all of this suggests is that it is very easy to understand why states often hesitate to agree to settle delimitation disputes by referring them to judicial tribunals. If the disagreement about the Court's function is

as fundamental as I have suggested, the parties can have no assurance as to what the basis of the Court's decision is likely to be. This is a very serious deterrent to the use of judicial procedures. It is one thing to know what counts as an argument and to take the risk of losing because your argument will be rejected. It is quite another thing entirely to appear in court with very little assurance as to what the basis of the court's decision is likely to be or what is likely to be regarded by the court as a persuasive argument. This is the danger. I think we have very different conceptions of what the judicial role is, and this cannot fail to harm the prospects for judicial settlements of disputes of this kind.

A Speaker

Remarks have been made about settlement of boundary disputes on the basis of equity and according to principles of international law. There is also the possibility that a court may be asked to decide a boundary on the basis of fact. In the Labrador boundary case involving Canada and Newfoundland, the Judicial Committee was asked to settle this boundary dispute on the basis of where it was, not on the basis of where it ought to be. The tribunal was asked to search the historical facts and find out where this boundary actually was. This principle of settlement was accepted by both parties to the dispute and by the tribunal itself. I have always thought this principle could not be applied conclusively in that case because the historical facts were just not there. Nevertheless, this is what the tribunal undertook to do. When it came to writing the report, the tribunal simply chose between two alternatives which were about as extreme as two alternatives can be.

In the Alaska boundary dispute, after the award had been rendered, they undertook to set the boundary line along the crests of the mountains. Again, in the written remarks on the matter, they presented this as a location of the boundary according to historical fact. Nevertheless, they were unable to complete the line. Quite a large portion of it was left unsettled for determination by some commission afterwards. It seems to me that since they could not locate the division line, this casts at least some doubt upon the validity of the claim.

It is all very well to settle according to fact, if you can do it. But what about situations where the facts do not lend themselves to a conclusive decision. Presumably, in a situation like that, they have to resort to some other principle of settlement.

W. C. Graham

In discussing dispute settlement mechanisms, it appears we are being drawn into the question of whether, in this particular area, it might be better to have an advisory opinion solution to the problem rather than a definitive solution to the actual problem. This would result in the parties being more willing to use the mechanism of an established arbitral institution.

Claude Emanuelli

I think it might actually be a danger to resort to that kind of procedure. It might strengthen one position and weaken another, which would naturally make both parties further away than they were before they resorted to the advisory opinion.

Richard Baxter

There have been several instances of advisory opinions by arbitral tribunals in United States practice. We had two arbitrations, one with Italy and the other with France, with respect to questions arising under the bilateral air transport agreement between the United States and each of these countries. The terms for dispute settlement, incorporated in these agreements, stipulate that the matters would be submitted to arbitration but that the arbitral awards would not be binding upon the parties. This was done as a means of encouraging resort to arbitration. It is a device which can be used in connection with any arbitration, except that the parties will be free to determine, at the end, whether they view the result as being a fair solution to their differences. By telling the tribunal that the parties are going to be absolutely free to accept or to reject this award, one hopes to attract additional cases to arbitration. You are not really committing yourself to anything. For those who are in favor of the rule of law, you know if there is an adjudication of the matter, in all likelihood the parties will be shamed into accepting the result.

Whether this is a good device depends upon a very complex political prediction about whether you can catch more flies with honey than with vinegar. If you think you can get the matter arbitrated, and a final decision made, by the tribunal which is binding upon the parties, that is all well and good. If you think that the parties will not accept this, perhaps they will accept the option of backing out at the last moment. You might try that device. However, I think the advisory opinion, by way of arbitration, is second-best. It is a fallback and a type of lawyer's device to try to move things along when it is absolutely necessary.

As an aside, in the two cases between the United States and France and Italy, the countries did accept the awards, but then they negotiated new agreements because they thought the result was unsatisfactory in spirit.

Donat Pharand

I would like to ask Professor Baxter what he thinks of my view as to what would be an adequate mode of settlement. Let us suppose that Canada and the United States manage to agree on a package settlement. This would involve all of the boundary disputes with the exception of Machias Seal Island. It is not, it seems to me, inconceivable that that might occur, including the delimitation in the Gulf of Maine. The settlement would simply say: "yes, we agree on this line, however, subject to the beginning of the line, which, of course, depends upon the territorial sovereignty eventually accorded to one or the other of the parties over the island." The law is sufficiently well settled

with regard to this kind of dispute, and we might very well agree to go to the full Court or to a panel arrangement.

There are basically two kinds of principles of law involved. First, we have treaty interpretation. Second, there are the well established principles of international law in relation to effective occupation. Having regard to the nature of this territorial sovereignty dispute, and having regard to the well established principles of law applicable to the matter, I would think that this would be an ideal dispute to submit to judicial settlement.

Richard Baxter

I agree completely with everything you would have said, sir.

Chairman Bourne

I am not certain whether we are saying adjudication is a satisfactory way of settling all of Canada's maritime boundary problems. The discussion has focused on the problems of adjudication. Am I to conclude that most of us are of the opinion that these questions are suitable for adjudication if negotiation fails? We heard discussion this morning setting forth some of the pros and cons about the problems generally. We have been looking at particular maritime boundary problems, and I have not heard anyone making the qualification of the role of the court, the law, the arbitration in this field. Is that a fair conclusion?

Gordon Smith

What else is there? If negotiations break down and arbitration or judicial settlement is refused, what is there remaining?

Chairman Bourne

This morning, I thought some people were saying there were political questions which you simply have to live with because you cannot solve them. We are not saying that about this are we? We are saying that if there is no other way of doing it, then it should be done by adjudication.

Donat Pharand

Suppose Canada and the United States were not successful in settling any of the issues, and they insisted upon settling all of them as a package. If that were to come to pass, would it be preferable to arbitrate? I would agree that if you cannot settle it by negotiation, you must settle it somehow—either by arbitration or judicial settlement. What are you going to do? Are you going to give it to an arbitral tribunal and give your arbitral tribunal a very wide latitude in terms of reference, so that it will be able to, shall we say, take over the negotiating road, to a certain extent. Or, are you going to arbitrate each particular issue? I think this is the kind of question that might very well arise if negotiations were to fail completely.

Gordon Smith

There is, of course, the third possibility of postponement which might, in some circumstances, have a good effect.

Claude Emanuelli

I do not believe one can postpone a settlement too long because some issues require a speedy resolution. For instance, they might become more and more difficult to settle if one were suddenly to find oil around the Machias Seal Island. The subject might be even hotter than it is now since the various interests involved would be pressing governments to do something about these matters. But I also believe, for the reasons indicated in my paper, that each of the issues involved should be solved by different means of dispute settlement because of the different considerations to be taken into account in the settlement itself.