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Trade and Investmnet Issues: Patterns of Canadian-American Economic Problems

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Discussion

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Chairman Myres McDougal

I am going to suggest a slightly different organization from that which is indicated in Professor de Mestral's paper. The outline I would suggest follows on the remarks I made this morning. Dispute settlement is too narrow a focus. As an anthropologist would see the situation, our two countries have a lot of common problems. These problems are common not only to this continent, but to the whole hemisphere, and in some measure to the entire globe. There is a higher degree of interdependence on our continent, but because of the extent of global interdependence, none of our problems are genuinely domestic, internal problems. They are all transnational in impact.

The problem that demonstrates this best is that of the environment. Let us, first, identify what the factual problems are. Second, we should consider what the relevant policies might be and the degree to which we share acceptance of these policies. Third, we can examine the existing structure of the legal myth and the difficulties which this imposes upon us. Finally, we can consider the future and possible new alternatives in decisions. In this way, we may be able to move slowly from a very high level of abstraction to the most concrete particular instances. Now, let us look at each of these points briefly.

First, what, in terms of fact, are the more important environmental problems? This word "pollution" is just a vague word for "destructively affecting the environment." What are the specific environmental problems relating to oceans, lakes, rivers and land masses?

Second, what fundamental policies does Professor de Mestral recommend in relation to these problems? We should consider the degree to which we are willing to accept and share these policies, for application across our boundaries.

From this very explicit policy level, we will move to the legalistic level. What are the inherited doctrines and decision procedures? What are the types of injuries which occur? Apparently, the activities that affect the quality of the environment include a whole range of modalities, from the most deliberate intent to affect the environment to the completely inadvertant and unintended accident. That is one range of facts in terms of the actor's subjective state of mind. Another range of facts is a little more contextual in reference. Some activities are ultra hazardous, involving a very great risk of severe damage to the environment. Other activities are attended by very little risk. These are the ordinary activities that are involved in exchanges across our boundaries. The legalistic ways of talking about this leave me gasping. There are references to strict liability, absolute liability, *Rylands v. Fletcher,* and application of preexisting rules and equitable application apart from ex-

isting rules. None of this has much meaning for an observer who is not a professional.

Finally, what are the various settlement procedures available to us? The first problem, in this regard, is whether there are any constitutional difficulties in cooperating here. The United States still seeks to evade some responsibilities on the ground that it is a "federal state." A question about the competence of Canada, as a whole, was raised this morning. There is some suggestion that your country is a "federal state," not completely "sovereign." There are also distinctions between "legal" and "political" matters which are still made in my country, at least for the purpose of serving special interests. What is the scope of Canada's treaty power? Perhaps we can clarify these constitutional problems.

Assuming we are able to conquer constitutional difficulties, what are the procedures available to us? Consider Article 33 of the United Nations Charter. Is there any way of ordering the different modalities recited there and of establishing priorities? What are the best ways of handling these problems? I confess that I begin with a preference for simple negotiation: sitting down and talking the problems over. But we may need more permanent institutions for clarifying and securing common interests. We may wish to distinguish environmental problems from those being considered by the other two committees and suggest unique institutional modalities for cooperating, with respect to the maintenance and improvement of the quality of the environment. It may be appropriate to evaluate the possibilities of a special commission with competence, across the board, on environmental problems. We ought to consider the idea presented by Professor Macdonald: is it desirable to have some kind of threat in the background, whereby a third-party decision-maker requires us to negotiate seriously if the initial bilateral negotiations do not yield results? Is it desirable to involve other parties in the matter, such as Japan or Mexico, or whoever may be affected by the activities?

We must think of our problem, not merely in terms of dispute settlement, but rather in terms of long-term prevention, short-term deterrence and restoration in situations in which damage has occurred. Our objective should be to achieve a very comprehensive view of the substantive environmental problem and the potential institutional arrangements for cooperative resolution.

William Epstein

I would like to talk about an aspect of pollution and Canadian-American relations. It is a pollution of a much more dangerous and much more important order than ordinary marine pollution and oil spills. This involves the Trident submarines in the Bangor base two miles from Seattle, Washington. It is in the process of being built and will be the largest nuclear weapons base in the entire world. Therefore, it will be a target of the highest priority in the event of a nuclear attack. There are, obviously, two aspects of this problem. The first one is the security and survival of the western world. Second, there

is the problem of pollution in the Juan de Fuca Strait, one of the most heavily travelled straits in the world. At some points, it is only eleven miles wide and the boundary line goes right down the center. Consequently, at some points there are only five or six miles on either side. The Trident submarine will weigh over eighteen thousand tons and will measure more than five hundred feet in length. The Polaris/Poseidon submarine is only eight thousand tons and four hundred feet long. The Polaris/Poseidon submarine has sixteen missiles; the Trident will have twenty-four missiles.

The Trident is completely unnecessary, and serves only to fuel the arms race. Furthermore, it poses a threat not merely to the people in the Seattle, Portland and Tacoma area, but also to the people in Vancouver, Victoria, southern British Columbia and southern Alberta. In fact, it is a threat to all of the people in the Northern hemisphere because of radioactive fallout.

Canada was not consulted about the establishment of the Bangor base. When I raised this matter with the authorities in Washington and Ottawa, I was told by then-Secretary of State of External Affairs McEachern that not only was Canada not consulted, it had no right to be consulted. This was something that was strictly an American decision. They also mentioned an 1846 agreement providing for the free passage of ships in the Strait of Juan de Fuca. This was an agreement which, at that time, involved merely commercial shipping. Now, it applies to such things as nuclear submarines. As a result of tradition and usage, warships can ply the strait. As I understand it, nothing in the joint defense treaty between the United States and Canada specifically authorizes this.

There is a principle of international law, not merely in *Rylands v. Fletcher*, but in old Roman law, which says: *sic utere tuo ut alienum non laedas*. Loosely interpreted, this means: "You must not do with your property anything which can do damage to your neighbor." This is the same idea as: "You must not bring a tiger on your land." I think the Americans are bringing two tigers on their land. First, there is the danger of pollution as a result of collisions and accidents in the Strait of Juan de Fuca. Second, if there is ever a war between the United States and the Soviet Union, the Bangor base will be the primary target. I have heard the argument used in Ottawa that if there is ever a nuclear war, we are all dead. Well, that does not fit in with the new American philosophy of flexible response. Aside from that, if the Russians were to attack the Bangor base, there is a strong possibility of missing their target. Victoria is less than sixty miles away, and Vancouver is less than one hundred miles away. When a missile is going six thousand or eight thousand miles, it can go a little bit off course and land on Victoria or Vancouver. If it were to land nearby in the water, we might even have a tidal wave that would drown most of the population.

This is an issue of the utmost importance, and it is related to many other important issues in addition to pollution and environmental law. In the State of Washington, a law suit has been commenced attacking the Bangor base on the grounds that, among other things, a proper environmental impact statement was not prepared. Although the trial judge refused to grant an injunc-

tion against the construction of the base, he found for the plaintiffs, and the judgment is being appealed. Construction began just a few months ago, and the first Trident nuclear submarine will be launched sometime in 1980. The Canadian government should seemingly pay more attention to the wishes of the people in British Columbia. The American government should be encouraged to build the base in a less populated area. If enough pressure is brought to bear, they will probably stop building the base. It is totally unnecessary from a strategic point of view, and such a step can do much to improve the environment and safety of the people in North America and in the northern part of the world. It can also act as a real break on the escalating nuclear arms race, because if the Americans will do this, the Russians will act similarly with respect to the Kamchatka-Vladivostok area.

Chairman McDougal

We thank Mr. Epstein for his intervention. He clearly points out the interdependence of all these activities. He also makes very clear the policy conflicts. When others of you intervene, I hope you will try to keep our outline in mind. What are the facts with which we are concerned? What are the policies? What is the law? What are the potential remedies? For Mr. Epstein's benefit, this law he talks about already exists in the form of the international customary law. However, courts are not going to apply it, because they will not have the courage. They will call it a political question and head for the door.

Erik Wang

I would like to make a few comments based on my experiences over the last couple of years. I have been involved in negotiations with the United States concerning transfrontier pollution problems. The areas discussed included west coast tankers, the Beaufort Sea and offshore drilling.

I would like to compliment Professor de Mestral on his overview of the subject which coincides very much with my own ideas. I am in complete agreement with his judgment that international law with respect to transfrontier pollution is at an embryonic stage. I would also agree that governments have been slow in coping with the problems of transfrontier pollution. The balance of remedies is not yet there. It is being put into place slowly and will take many years. I think Professor de Mestral put it very well when he suggested there is a need to raise the general level of consciousness among politicians, legislators and lawyers. When we adjust our domestic laws, we must look over our shoulder to see what impact or lack of impact our actions could have on people living across the border.

I believe the overall problem can be characterized by saying technology has run very far ahead of lawyers and legislators. One example of this is seen in Canada's Arctic Waters Pollution Prevention Act, a fairly recent and, indeed, a fairly innovative piece of domestic legislation. It is so innovative that a number of other countries, including the United States, found it objectionable when it was first introduced, although it is now meeting with a high

degree of acceptance. The Act was drafted from a Canadian point of view with the interests of Canadians in mind. This is not unnatural, and I do not think anybody would want to apologize for that.

In the last two years, however, we commenced offshore drilling in the Beaufort Sea, and Denmark began exploratory drilling on its side of the Davis Strait. We become very conscious of the lacuna in the Arctic Waters Act which, as presently drafted, gives foreigners no clear access to the highly favorable liability regime of absolute liability which is available to Canadians. If a United States resident, living just over the line on the Beaufort Sea were to be damaged by a major oilspill or blowout from a site under Canadian jurisdiction, he would have virtually no rights of access or standing under the Act. Consequently, we have had to improvise. Season by season, we negotiate a kind of jerry-built liability and compensation fund with Dome Petroleum and their associates. This gives the Americans some assurance they will not be without a remedy if the worst happens.

Negotiators in these various areas would like a claimant to have access on the basis of local remedies without discrimination. We look, first, to domestic law. If there is concern, for example, about the possibility of a blowout from a Danish drilling operation in the Davis Strait, we look to Danish law. We ask ourselves what standing a Canadian has if there is a major spill which damages the coast of Baffin Island and destroys wildlife? Would the hypothetical Canadian claimant have to argue on the basis of fault or strict liability, or could he benefit from a regime of absolute liability such as he would enjoy under the Arctic Waters Pollution Prevention Act if the damage originated in Canadian territory? Finally, if he is successful in the foreign court, what are his prospects for collecting the judgment? Can the company or shipowner declare immediate bankruptcy and escape full payment?

The emphasis on local remedies is not just a solicitude for the old rule of exhausting local remedies before presenting an international claim. It goes much deeper than that. Several aspects of the problem demonstrate that it is more advantageous to develop parallel legal regimes under domestic law, rather than attempt to develop a superstructure of undertakings and obligations between respective governments. One area where this advantage is apparent is in the context of determining the applicable law. International lawyers are going to be arguing, for a long time, whether certain kinds of pollution should be subject to certain degrees of liability.

There are very different approaches, for example, to oil pollution. Many states regard this as a threat to the environment which calls for the most stringent standard of absolute liability, similar to that which exists under the Arctic Waters Act. Other states would argue that while strict liability is not good enough, the shipowner or the offshore drilling operator should be able to assert some defenses, such as "act of God." Other countries argue that simple negligence should be the appropriate basis for action. This argument may not be resolved for a long time. Meanwhile, technology is getting ahead of us. Major transfrontier spills will occur, and claimants will be anxious to learn what their rights and remedies are.

The only way to deal with so many different approaches to liability is to look to domestic law. We must seek to influence the direction of our neighbors' legislation, just as they must seek to influence the direction of our legislation. This is certainly a time-consuming process, but it is one which is being faced more clearly by officials and parliamentarians on both sides of the border.

The difficulties encountered by creating a superstructure of international law are also seen in the efforts made to create funds which would be available in the event of major damage. This is becoming a very real problem now that we have had experiences of transfrontier pollution running into millions of dollars. In the Arrow incident on the east coast, the cleanup and damage bill was approximately four million dollars. I believe the most expensive oil pollution case in history involved the oil refinery in Japan. It was not, strictly speaking, a marine pollution incident. It did not happen at sea. However, the massive oilspill from the land facilities at the refinery resulted in expenditures of 100 million dollars in order to clean it up. There are few entrepreneurs or insurance companies who are able to meet such astronomical costs, although the outer limit with respect to the latter has yet to be definitively set.

The fund set up under the Arctic Waters Act is currently at a level of fifty million dollars. If there were seventy million dollars worth of claims against that fund, which claims would have the highest priority? Any attempts to work that out between countries invites enormous problems. In the Beaufort Sea case, for example, we had created a fund of about twenty million dollars in favor of potential American claimants, and forty million dollars in favor of Canadian claimants. The Americans, quite understandably, questioned the equity of such a split. Depending upon the way the currents run and the location and nature of the spill, the major damage could be done on the Alaskan coast rather than on the Canadian coast.

Finally, we are confronted with the whole question of delays. The hypothetical claimant will be seeking remedies on an expeditious basis. When the claimant is reminded that it took almost twenty years to settle the Trail Smelter claims, he will understandably express strong dissatisfaction. The inescapable conclusion seems to be that when governments get into the process of trying to settle cross-border claims on a government-to-government basis, regardless of what or how good the intentions may be, a process of delay sets in as they work out all the modalities. A great deal of time is consumed setting up an arbitral tribunal to process the claims or deciding upon the terms of reference for an existing tribunal. It is a very cumbersome business when governments get into the act with their big galoshes. The emphasis in our talks with the Americans must be placed upon the issue of hastening the recovery process. Even if we are talking about legislation that has never been tested before the courts, we must attempt to satisfy ourselves that we have a mechanism for the settlement of claims which is both expeditious and fair.

Chairman McDougal

Mr. Wang, I would like to ask you two questions. First, how would you

justify the lawfulness, under international law, of the Arctic Waters Pollution Prevention Act? I have said publicly that Canada might be able to make out a good case in its favor.

Erik Wang

I believe that action was justified under a number of headings relating to the right of a coastal state to take measures to defend itself against major damage to its coastline. There was a vacuum in international law. Technology had moved well ahead of international lawyers, and it would have been irresponsible for Canada not to move into this area with a set of rules—purely on a functional basis—which could be accepted by industry and the other interests involved.

When the Prime Minister introduced the legislation in 1970, he pointed out that international environmental law was in a process of evolution. I think subsequent events have borne that out. This is aptly demonstrated by the Law of the Sea Conference. Attitudes have changed. There has been a consciousness-raising process regarding the dangers of offshore pollution. An article in the most recent Informal Composite Negotiating Text, which emerged from the Conference, specifically recognizes the rights of coastal states to take special environmental protection measures in isolated areas. We view this as belated recognition, seven years after the event, of the justification for the original action.

Chairman McDougal

My second question is: what are the disadvantages of parallel action?

Erik Wang

There are a number of problems there, of course. One of the major problems, from a conceptual point of view, would be the problem of reciprocity.

Chairman McDougal

What is it that does the most damage to aliens and has done so for the past two hundred years?

Erik Wang

I was not speaking in terms of who does more damage. But if the damage occurs, will the claimant have rights comparable to those he would enjoy if he took his case into his own courts? This is a very difficult problem because we have completely different traditions, legal systems and regulatory legislative systems. Each of these has its own history of concepts which come into play in domestic law. For example, if we are discussing the liability regime that is to apply to a particular form of pollution, there may be a hundred years of tradition behind American law which calls for the imposition of absolute liability, subject to four or five defences. Our legal tradition may be very different.

Chairman McDougal

I am suggesting that the greatest damage done to aliens is through national law. This is why we have the international law of the responsibility of states. The use of state law in "parallel law" is inadequate. It is necessary to give the poor fellow who is injured some recourse beyond state law because state officials are, by and large, the ones who are doing the damage. To expect them to make redress is a little optimistic. Perhaps something can be said for both parallel action and action on the international level.

Erik Wang

There are no easy answers. I believe the best line of approach, until we are satisfied that it cannot yield adequate results, is the line of parallel legislation on each side of a national boundary.

Chairman McDougal

This would be better than the alternative?

Erik Wang

Yes, I believe it would be. May I ask you a question, Professor? How would you characterize the Arctic Waters Pollution Prevention Act at this moment? Would you consider it consistent with emerging developments in international law?

Chairman McDougal

I was not referring to its validity merely in terms of emerging developments. I said it was possibly a lawful contiguous zone under doctrines nearly two hundred years old, embodying the concept of reasonableness. The question is: was the action reasonable in its particular context? Was the threat to Canada sufficiently great and the cost to the United States sufficiently small such that it was reasonable for Canada to do this? I think Canada could justify its actions without the new doctrines. This is precisely the same concept that underlies the customary international law concerning the environment.

Jan Schneider

I would justify the Arctic Waters Pollution Act on even broader grounds. The basic rationale is one of self-defense or self-protection. This rationale is upheld in the whole broad customary law and is incorporated in the reasonableness principle of contiguous zones. The reasonableness of a self-protective measure depends on whether environmental integrity is deemed an aspect of territorial sovereignty. If it is, then a state can take reasonable measures to protect its environment as part of self-defense. Contiguous zones are one aspect of that law.

Chairman McDougal

Would you require immediate, overwhelming necessity?

Jan Schneider

There may be an overwhelming necessity under your concept of "self-protection" or "security." You can have a long-term threat to a vital interest. In any case, whether the protective principle is a condition of transboundary or other kinds of relations, I think it is what you have to look at.

Environmental integrity is a part of territorial sovereignty. It was the Canada-United States Boundary Waters Treaty in 1909 which first established that, and the 1972 Great Lakes Water Quality Agreement assumed it. The Trans-Alaska Pipeline example was an exchange over the same basic issue: environmental integrity and whether there is a right and responsibility to protect and preserve it.

Turning to Erik Wang's specific arguments, I think the "ice-covered areas" provision in the I.C.N.T. is a solidification of the legality of the Arctic Waters Pollution Prevention Act. It writes backward in time by saying that if this was not legal at the time it was done, it is legal now and will henceforth be legal. But I do not believe this was really needed, other than as a political ratification of the Act, because there is a whole body of international environmental law which supports it.

The norms that are usually cited, summarized in Stockholm Principles 21 and 22, reflect preexisting doctrines of state responsibility. Principle 21 says the right of states to have resources is conditioned upon environmental factors. States have a right to exploit their own resources pursuant to their own environmental policies. Principle 22 imposes a responsibility to see that the activities of states do not injure the interests of other countries or common resources. States must also provide compensation for the victims of their mistakes.

Chairman McDougal

Can you indicate what that responsibility is?

Jan Schneider

It has been determined in several situations. In the Trail Smelter case, a *Rylands v. Fletcher* strict liability standard was imposed. In the Gut Dam arbitration, between Canada and the United States, a similar standard was enunciated. There are also the Corfu Channel standard and the Lake Lanoux decision. In short, there is an evolving pattern of those things which people consider vital problems, and there has been an evolving caselaw in which we have been attempting to define environmental needs and preferences in practical terms.

I very much agree with Mr. Wang's characterization that the International Joint Commission is making law. On a day-to-day practical basis, we are discovering the priorities of the two countries, how they are to be dealt with together and what substantive results we want. The Vessel Traffic Management negotiations between our two governments, the Beaufort Sea offshore drilling claims, and the Trans-Alaska Pipeline issue are all situations where law is being made on the bilateral and international planes. What are

the international rights that should be taken into account by neighboring countries? Our two governments are trying to ascertain and implement these norms.

The trouble is that there are also other instances where these rights are not being recognized today, and they are equally or more disturbing. The I.C.N.T. has a nice provision on "ice-covered areas," but it also happens to have a terrible provision on the territorial sea. That text says that no state can pass a law affecting vessel construction, design, equipment, maintenance and manning standards in its own territorial sea. If we acknowledge, by virtue of the reasonableness premise of contiguous zones, that environmental integrity is something states have the right to protect, then states certainly have a right to decide what standards are going to be applied in an area that has been under their sovereignty since time immemorial. The ratification of "ice-covered areas" in one provision must be balanced against the fact that the protection of sovereign environmental rights and interests is disregarded and/or undermined in another article. This is absolutely the worst part of the proposed new Law of the Sea Treaty from an environmental point of view. It is something which might even cause a concerned environmentalist to advocate dumping the whole thing.

Finally, I would like to raise a separate question concerning private redress. I am somewhat confused with respect to the problems of effective enforcement on both sides. As I understand the Dryden Chemicals case, Canada does not have long-arm jurisdiction and extraterritorial reach. It appears that one province cannot exercise jurisdiction and control over a company in another province as readily as this might be accomplished between different states. In the United States, this would not be as much of a problem, and it would not be much of a problem even against Canadian offenders. The bilateral difficulty for the United States is more one of enforcement of judgments, rather than Canada's substantive problem of legal reach. I raise this point because I do not understand Canadian law, generally, nor the Dryden Chemicals case in particular. However, that case seems far behind United States law in the area of environmental torts.

Professor de Mestral, do you have any response to that?

Armand de Mestral

It stems from the doctrine of the incompetence of provinces to adopt legislation having extraterritorial affect.

Jan Schneider

In other words, the United States would have fewer problems in a transboundary situation. This is more of a Canadian problem, except for the enforcement of judgments.

Armand de Mestral

Unless new law is made by Parliament to fill that gap.

Jan Schneider

Would it be easier to get a judgment in the United States against Canadian polluters than the other way around?

Armand de Mestral

I think so, if you are implementing new legislation in particular Canadian provinces.

Jan Schneider

Thank you.

Erik Wang

The Informal Composite Negotiating Text provisions relating to coastal-state powers in the twelve-mile territorial sea are of very serious concern to us. We have not yet given up all hope of having them improved at the next session of the Law of the Sea Conference. We have been working vigorously with a group of like-minded states to see if these provisions can be improved. I imagine after five sessions of the Conference, some of this language in the text is beginning to take very concrete form. Some of it, of course, we find congenial and attractive; other provisions are distinctly unattractive. Those relating to the twelve-mile territorial sea and to the rights of coastal states within the two hundred-mile zone are unattractive. I would not like to speculate as to how Canada might eventually view an overall package that contained a number of good provisions, as well as a number of poor ones. It will ultimately be a political judgment for governments to determine where their best interests lie before deciding whether to sign a new oceans agreement.

I would, however, add one practical point which should not be overlooked. It is some consolation that most of the marine traffic on our coasts is bound for either Canadian or United States ports. This is a function of our geographical position. Other countries in the world have a good deal of traffic going through their territorial waters which never comes close to their ports or the ports of neighboring states. The implication of this pattern of traffic is that one can look to the increased port-state powers, in the evolving text, for a stringent regime of control over standards, design, construction, manning and equipment. There is a significant degree of compatibility and harmony of standards between the United States and Canada. Indeed, in the recent Vessel Traffic Management negotiations on the west coast, the two Coast Guards made a detailed examination of regulations in a host of areas relating to very specific, technical requirements. The conclusion reached from the comparative study, with respect to pollution control, was that there is a very high level of compatibility and uniformity. There are differences. In some cases, American requirements and regulations are more stringent than ours. In other instances, Canadian requirements are more stringent.

This is a very practical approach to the problem. If we can be satisfied that shipping in our waters will become subject to either our jurisdiction in

our ports, or subject to the jurisdiction of a country with standards in which we have confidence, we can become less uneasy about any erosion of coastal state powers that might take place in the text itself.

Jan Schneider

I have two related questions to ask Mr. Wang. First, I cannot see that any country will accept or reject the new Law of the Sea Treaty on environmental grounds, so I do not accept that as an initial premise. Nevertheless, assume we were to evaluate it solely from an environmental point of view. Can it not be said that the Arctic Waters Pollution Prevention Act has, in a sense, been ratified at the expense of fundamental international legal norms upon which it was based and justified?

Second, you emphasized bilateral standards, and much has been said about the need for regional measures. It is true there are similar standards in our two countries for safeguarding against vessel-source pollution. It seems necessary, however, to look at the broad context, as well: the protection and preservation of the total global environment. Are you really less uneasy about erosion of coastal-state powers from the overall point of view of codification and progressive development of international law for the world community?

Erik Wang

Your first question, if I understand you correctly, is whether there was some sort of trade-off in the negotiating process, whereby Canada got what it wanted on ice-covered areas and seemed to be content to take a less acceptable result on territorial waters. I am afraid I do not see it in those terms.

Jan Schneider

I did not necessarily mean a political trade-off. I was suggesting that the Conference, as a whole, may have acquiesced in the special case, while having effectively rejected or undermined general environmental protection principles. The text appears to say that henceforth, the Arctic Waters Pollution Prevention Act is a recognized exception, but further measures to prevent pollution are not going to be accepted anywhere else.

Erik Wang

Based upon the discussions I have participated in, originally at Caracas and again at Geneva, I would not characterize the interrelationship in such a manner. The problem of ice-covered and special areas was dealt with, to a large extent, as a very separate problem. There are amendments to the Oil Pollution Convention, which make special reference to the Great Barrier Reef of Australia. I think this was treated as an exceptional case. With respect to territorial waters generally, the maritime powers with shipping interests have had a major voice in the development of the language in the I.C.N.T., for better or worse.

In response to your second question, I have to plead "functionalism." I become slightly uncomfortable when people ask if we are concerned about

sovereignty because no one has ever been able to define sovereignty for me in a simple way. In this case, I think you have to consider the broad question of what rights we now have concerning the territorial sea, and to what extent we would be relinquishing those rights. Would this be viewed as a retreat from sovereignty? This is a serious question which must be addressed by governments. At the same time, I hope we would not lose sight of what we are trying to do with sovereignty. Presumably, we exercise our rights, not because it makes Canadian hearts beat faster, but because we have specific interests to protect or to promote. If we feel we can protect and promote specific rights and interests by a functional approach, that may weigh in the final determination of what is politically acceptable for Canada.

Charles A. Marvin

Mr. Chairman, in 1955, you wrote an article about nuclear testing in the Pacific Ocean. In the context of what Mr. Epstein has said, if you were writing that article today, what generalized norms (not specific treaties, necessarily) have emerged in the last twenty years which might have changed your mind?

Chairman McDougal

Recent developments have not changed my mind; they have strengthened my position.

Charles Marvin

Well, you were speaking about the Arctic Waters Pollution Prevention Act. Assume it is reasonable to establish some standards from a unilateral, national point of view. In a situation with so many millions of people living along the Arctic and Beaufort Sea, I would suggest that the issue of reasonableness would be removed from the question of drawing standards or lines of proscription, to the question of what is the amount of damage done. I could imagine a case where the coastline or the ice is severely damaged. Unilaterally, the Canadian government could decide to send men and material to clean it up for millions of dollars. Then, the responsibility might be shifted to somewhere else. It could be along the coastline of Prince Edward Island, for example. I am suggesting that, from one spot in the biosphere to another, you should pose serious questions as to whether you are going from an act that would be characterized as pollution in one instance, to a situation where, solely on the grounds of reasonableness, perhaps it should not be so characterized.

There is another problem I wanted to bring up. In the literature a few years ago, Professor Coase and others of the Chicago school were worried about governments taking unilateral action and making certain areas national parks or crown lands, where no activities other than passive appreciation were to be allowed. Disregarding the fact that the natural world is changing all the time, sanctions are going to be applied against people who wish to be doing something in connection with resources which are located in a given place.

Compromises have been reached in areas where industries are well established, such as maintaining a maximum sustainable yield of certain stocks of fish in the sea. What about companies that might wish to obtain and exercise timber rights, for example? In Ontario, the commission under Mr. Justice Hart will be looking into the activities of the Reid Paper Company in northwestern Ontario. Perhaps questions will be raised concerning what is being done to the resources on Ontario soil?

In any event, I just wanted to raise these two categories of questions: First, are we not talking about standards on one level, but reasonableness as to damages on another? Second, why should we distinguish active human intervention from passive appreciation which is not characterized as human activity, during which time nature is making the changes?

Chairman McDougal

I think I can answer Professor Marvin with a brief summary. What I was trying to draw out, in relation to customary law, is a relatively simple point. If you take all the sources of law that have been mentioned here this afternoon—Article 21 of the Stockholm Resolution, the old Trail Smelter opinion, the Lake Lanoux decision, the Corfu Channel case, and so on—you do have a customary norm that Mr. Epstein put in an immemorial Latin phrase. The origins of this policy go back for centuries. States and other communities are to be held responsible for the damage they do to others.

What is the nature of this responsibility, and how is it to be measured? The contiguous zone concept is one that requires exploration. A history of two hundred years is fortified by an ancient decision of the Supreme Court of the United States. A seizure, by the Portuguese, of a ship two hundred miles off the coast of Brazil was held to be a reasonable effort to protect Brazil's commercial interests. The fundamental policy underlying the contiguous zone concept is exactly the same as that which underlies objective territoriality: a state may take reasonable measures to protect its internal value processes from injuries from the outside. When it is invoked to make states responsible for damage to the environment, this fundamental doctrine of customary law requires the decision-maker to look at all the facts of the case in context.

This is true whether the legal standard is absolute liability, strict liability or negligence. Precisely what has the defendant been doing? How much damage did he do or does he threaten to do? How important is that damage to the defendant? What, precisely, was the hurt to the complainant? How important is that to him or others? What alternatives are available to the parties for reducing damage? What alternatives are available to the community? Ultimately, you come to the concept of reasonableness, Mr. Marvin, and reasonableness must depend upon the facts of the case in context. If irreversible damage is being done by the tankers that go through the Arctic, then you do not have to prove there are millions of people living on the shores in order to show the unreasonableness of this behavior.

There must be a very disciplined contextual analysis of the whole problem, in light of the common interests of both complainants and perpetrators.

What should be done about the problem on a transnational basis? This idea is very old. This is the argument I used on the earlier nuclear tests, and I would still use it. I would use the same argument to establish that what the French did was unlawful. The judgment is one that must be made in light of all the surrounding circumstances. This is the only way these cases have ever been decided. It is the only way they can be decided. All the talk in terms of legal technicalities is merely a way of posing certain fundamental policy issues.

Do we want faster transportation and communication, or a little healthier environment? Do we want to keep something for our descendants or do we want to destroy it all now? These are very fundamental policy issues that underlie the appraisal of reasonableness. These are the kinds of questions which need to be raised. These are the policies that determine the choices in particular instances.

The best way of handling most of these problems would be to keep them from coming up. Preventive and deterrent measures require the establishment of institutions very different from courts and arbitral tribunals. We might want to recommend that the settlement of disputes is simply not the best way to do the job. The better way of preventing damage might be by cooperating, in advance, across national boundaries. This could take many forms. Hospital cases will, of course, continue to come up; they will come up, in some measure, even with the best precautions. This requires consideration of the modalities itemized in Article 33 of the United Nations Charter. Is there any way we can order these different modalities for settling "disputes" and achieve a more economic mode of ensuring reasonableness in decision? Finally, must we have the Court in the background? Do we require third-party compulsory decision-making? All that I see at the moment are questions.

Professor de Mestral, do you want to add anything?

Armand de Mestral

At the present time, would we be better off bringing it down to the Canada-United States situation? Should these two countries seek to resolve many of their problems on a bilateral basis, or are we better off attempting to promote broad multilateral global solutions? I think this is something all governments have to go through continually, and I do not believe they have any clear answers.

Chairman McDougal

I think we do have to go forward bilaterally. I am very skeptical of unilateral, or even parallel, action. We may have to involve Mexico. We should try to set up a model for a continental area that might be used elsewhere. Nevertheless, we should still try to get the best law of the sea conventions possible, and the best multilateral conventions on all the different specific problems. The little experience I have had suggests that our two countries cooperate almost automatically. Ambassador Wershof and members of the United States delegation to the Vienna Conference on the Law of

Treaties cooperated without the slightest effort. We automatically came together. We had a common interest, we saw it, and we acted accordingly. I think we do have a common interest on the whole environmental problem.