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Closing Session

Reports on Seminars

Thomas Drucker, Trade and Investment Seminar

In the seminar on trade and investment issues, Mr. William Biggs read a paper which touched on many of the major dispute areas between Canada and the United States, including antitrust, trading with the enemy and taxation. The paper analyzed certain patterns of conduct which were apparent in the disputes. It referred to the very few examples of retaliation and suggested the possibility of wider notification procedures as a preventative measure, as well as possible multilateral solutions to dispute settlement.

I propose not to dissect the ensuing discussion but rather to follow its general outline. The first speaker emphasized the limited amount of retaliation which has taken place and described Canadian Bill C-58, which prevents the deduction of advertising expenses paid to American television stations, as a mistake. A reference was then made to the United States Sovereign Immunities Act which, it was argued, limits the application of the doctrine of sovereign immunity. But this effect was questioned by the next speaker. The issues were analyzed by this speaker as twofold: First, how can disputes be avoided? Second, how can disputes which do arise be dealt with?

The broad-brush stroke approach was questioned, and it was suggested that a pragmatic approach by dispute area might be preferable. In particular, individual instruments could be prepared to cover disputes in separate areas. One possible avoidance measure suggested was the advance consideration of the impact of any measure on the neighboring state.

The subject of linkages was of particular interest during the discussion. It was first suggested that, although linking may not be publicly referred to, it does exist. Moreover, the need for safeguards against linkages was expressed. To this came the response that linkages are human. The same speaker suggested the need to secure the goodwill of Congress. As a followup to this point, another speaker suggested that the Canadian Parliament and Congress should have an exchange on a regular basis and that Canada should even consider lobbying. The comment was made that lobbying could be seen as an interference in United States domestic affairs and that lobbying was, in any event, unfamiliar to Canadians.

It was also pointed out that linkages may, in certain circumstances, be unavoidable and even beneficial. The inevitability of linkages was repeated by another speaker who referred to linkages in the antitrust area.

The amateur, together with another speaker, expressed the widespread concern, outside Canada, concerning the imposition of countervailing duties by the United States in the Michelin case, in which regional incentives to Michelin, in Canada, were seen as a bounty to the company by the United States. The question of disputes between private individuals or corporations and states was then raised, but the discussion reverted to the possible use of multilateral dispute settlement procedures. For example, the GATT pro-

cedures were referred to in the animateur's report. The speaker pointed out that some disputes, such as boundary disputes can, by their very nature, be drawn out whereas others require prompt settlement. Those disputes requiring quick settlement need a bilateral solution. The comment was also made that GATT procedures may be problematic for countries which are not economic superpowers.

The point was then made that the area of dispute settlement in Canada is made more complex by reason of the nature of the Canadian Constitution. This was supported by a comment that Canada may not have signed the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States for constitutional reasons. Finally, it was suggested that some major issues of provincial concern should not be channeled through the federal government for settlement.

In summary, the discussion was both lively and well-informed. However, time did not permit consideration of many important areas, including the Foreign Investment Review Act, disputes and dispute settlement procedures between private individuals or corporations and the state or its subdivisions, and the effect of recent Canadian provincial actions and proposals on the evolution of international law. It was as if we had only quickly snatched a few pieces of fruit from a fully laden tree. I do hope that the opportunity will arise to reap the full harvest.

Charles B. Bourne, Boundary and Resource Seminar

The task of my group was a rather narrow one. It was to examine the problem of the settlement of disputes of a particular kind; that is, boundary disputes. We focused particularly on marine boundary disputes. Our discussions were influenced by the actual existence of a number of difficult disputes of this sort at the present time.

The particular disputes were referred to in some detail by Professor Emanuelli, who presented the paper opening the discussion of the group. First, the problems in the Gulf of Maine were mentioned, where the boundary for the continental shelf and the fishing zone is in dispute. Associated with this is the problem of the sovereignty over Machias Seal Island. Second, there is the dispute concerning the boundary line for the continental shelf purposes and fisheries off the coasts of Alaska and Canada in the Arctic. Third, we have the problem of drawing the boundary between the two countries off Dixon Entrance, and of the A-B line within Dixon Entrance, itself. Finally, our attention was drawn to the boundary line off the Strait of Juan de Fuca. In addition, there are some serious disputes about fisheries, especially the salmon fishery.

In his paper, Professor Emanuelli outlined the traditional methods of settling international disputes and, in general, came to the same conclusions that were reached by the panelists in the opening session yesterday. That is to say, he recognized the advantages of negotiation, conciliation and good offices, but he admitted it was not likely that these would be used by Canada and the United States. Ultimately, the submission of a dispute to third-party

settlement, either by an arbitration board, or by the International Court of Justice or any one of its Chambers, was viewed as a possibility. Negotiation was viewed as the best means of solution.

The conclusion Professor Emanuelli reached was that, failing negotiation, third-party decision was the sensible thing to do. On this point, he seemed to draw a distinction between submission to the Court and to an arbitration tribunal, mainly on the ground that the arbitrators would, he thought, have more flexibility. In the discussion that followed his paper, however, this was critically examined.

The view that emerged was that the law was essentially the same in both types of tribunals. More importantly, in these boundary disputes the result is likely to be the same. The special nature of boundary problems was emphasized. The task of the Court or arbitral tribunal would be to draw a line. This would involve the exercise of a legislative function, because there would be no rules of law to aid in determining where to draw the line. This is especially true in the case of drawing a line which divides resources, where the rule requires that it be done on the basis of equitable principles. There may be criteria that should be taken into consideration, but it is ultimately a subjective judgment. This subjective factor in drawing boundary lines—the uncertainty about the result—was recognized as discouraging states from submitting such disputes to third-party settlement.

Professor Emanuelli also suggested a distinction between drawing a boundary line based on treaty interpretation or occupation, and a line of apportionment of resources. In the latter case, he saw the need for a procedure that would involve the use of experts. In the discussion following his paper, however, the opinion was expressed that the need to involve experts should not influence the decision whether to submit the matter to the International Court of Justice or to an arbitral tribunal, because the Court could also utilize experts in its consideration of the case.

Professor Emanuelli also expressed the opinion that each issue, each particular boundary line, should be looked at individually and that the appropriate form of settlement for the issue should be chosen. He was against referring all of these questions to the Court or to arbitration in one package. He thought the particular terms of reference, and the particular technique used, might vary from case to case. For example, if one is dealing with a fisheries problem, perhaps there would be a need for a different procedure and even a different type of tribunal, than would be required if we were dealing with the seabed. Each case should be considered on its own basis.

The general discussion following the paper produced little dispute. The consensus was that the Canada-United States maritime boundary disputes were justiciable, and if no agreement could be reached, they should be submitted either to the Court or to an arbitration tribunal. However, no clear opinion emerged concerning which particular tribunal is to be used. The feeling was that there is not any essential difference between these tribunals, although it was asserted that the use of a chamber of the Court was more appropriate than using the full Court. It was also the opinion of the group that

the decision on the matters in dispute should be reached soon, as it would be a serious complicating factor if some valuable resources were discovered in the disputed areas, and were ready for exploitation, before the boundary line was drawn. If one knows what is there, it is more difficult to contemplate giving up or losing your right to it. There was, then, a feeling that the issues should be dealt with soon, and if negotiation does not produce any immediate solution, there should be quick progress to third-party determination.

Myres McDougal, Pollution Seminar

In the seminar on pollution issues, we organized our inquiry with reference to: first, what are the specific problems which exist between our two countries in relation to the environment; second, what fundamental policies might be relevant to, and acceptable for, the solution of these problems; and finally, what legal processes, both national and international, might be available for the solution of such problems. We attempted to place emphasis upon both the substance of the law and upon the procedures or remedies that might be available. We did not approach the subject for the purpose of coming up with solutions to a very comprehensive, important, continuing set of problems. Rather, we attempted to outline a framework of inquiry for future study and future recommendation. We felt that the mandate of the committee was not to concentrate upon some narrow conception of pollution, but to consider the whole range of environmental problems.

When we began to reflect upon these problems, we saw that damage to, and changes in the environment could come from almost any source—from the land masses, from the waters, and from the atmosphere—and that all of these sources comprising the environment were completely interdependent. Much of the pollution affecting the land masses came from the ocean. In turn, much of the pollution of the oceans came from the land masses. Similarly, many of the activities of the land masses pollute the atmosphere and affect both the waters and the land masses. I recall the remark of Professor John McHale, in which he pointed out these interdependencies very graphically by noting that the atmosphere over Tokyo, one day, will be over Ottawa and New York thirty days later.

What we are really concerned with, when we are talking about environmental protection, is the protection of our whole resource base: land, water and air. Professor de Mestral itemized all of this in very considerable detail. A number of specific problems were reviewed, including the Head Harbour Passage, the Cherry Point Oil Refinery, the drilling for hydrocarbons in the Beaufort Sea, the legality of the Arctic Waters Pollution Prevention Act, river pollution, the Poplar River, the Garrison Diversion, the implementation of the Great Lakes Water Quality Agreement, and the Detroit-Lake Saint Clair air pollution. Mr. Epstein also pointed out that the building of a nuclear submarine base and nuclear installations will have great impact.

It was not, however, this specific itemization that most concerned us; rather, it was the whole complex problem, of which these itemizations are but momentary manifestations. We did, of course, anticipate urgent, continuing

problems in maintaining the quality of our environment—our shared environment—and the quality of the resources that we must inevitably share.

When we turned to the basic policies at stake, we began with this conception of the large problem. The first and most fundamental policy question concerned how we are to protect the quality of the environment. How do we protect the viability and productivity of our resources for the greatest production and widest sharing of all the values we cherish? This fundamental policy, however, had to be accommodated, in particular instances, to particular activities in the production and sharing of goods and services, in the management of communications, transportation and all the other activities we carry on. All of these activities do, in some measure, affect the quality of the environment and exhaust resources.

Consequently, the question remains as to how we accommodate this overriding general policy of protection with the necessities of particular instances. We saw this accommodation as a balancing of the costs and benefits, of particular activities, to all involved. With a view towards the long-term preservation of the environment and resources, both for ourselves and our children, we took into account that geography does make a difference in this balancing. Some activities have more important benefits on one side of a boundary than the other, and some activities will have more important costs on one side of the boundary than the other. There must be an accommodation between our particular exclusive interests and the promotion of a long-term aggregate interest in the maintenance of the best environment and most viable resources. We did not try to outline the details of such accommodation. We did not have the time to suggest guidelines for particular industries and particular activities. This was an application of the framework of inquiry that we wished to leave open.

We were, perhaps, a little more optimistic than some of you might have expected us to be when we discussed the legal processes that were at our disposal for accommodating basic policies. We spoke with reference to both the national and international levels, and dealt with both substantive law and with the procedures or sanctions that might be available. On the international level, we began with a fundamental principle of customary international law that is, as Mr. Epstein pointed out, as old as the Roman principle that one community is responsible to any other community and its members for activities within its own boundaries that do damage across boundaries. We made some effort to give this broad fundamental principle more empirical indices.

Our animateur traced the long history of this principle through Article 21 of the Stockholm Resolution. Some of you will remember the Trail Smelter case, in which Canada agreed to a compromise that put the burden on Canada to make compensation for damages done within the United States. The tribunal announced broad propositions in terms of this customary international law. We also noted the Corfu Channel case, in the International Court of Justice, the famous Lake Lanoux arbitration and a great many offi-

cial utterances and multilateral and bilateral agreements, which establish these customary expectations.

We observed that, in the literature, there is a great confusion about the degree of responsibility that this fundamental norm imposes. One finds, in the books, much discussion about absolute liability, strict liability, liability for negligence, ultrahazardous activities and so forth. These are very vague words which make only dim reference to the factual context and beg the question of legal consequences. There is always a flow of subjectivities in the actors, from the most intentional to the completely unintentional or inadvertant. In any context, you can arrange the activities in terms of threat to the environment, from the most hazardous to the least hazardous. I suppose there is some hazard to the environment in any kind of activity that man engages in. The ordinary production of goods and services, and movement across state lines, may involve an inescapable minimum.

What is needed is a mode of analysis of particular instances that can accommodate itself to these minute differences in the subjectivities or deliberateness of the parties, and to the varying factual differences in the degree of hazard. With such a mode of analysis, one might then calculate the costs and benefits of the activities on both sides. This involves noting the options available to each side in order to minimize the costs and maximize the benefits for all. We would thereby come up with a conclusion which is rational in terms of long-term common interests. This is precisely what these famous historic decisions have attempted to accomplish. If you look closely at the opinions, this is how the judges have operated, whatever the legalistic labels, and regardless of whether the talk is of strict liability, absolute liability or negligence. The technical language of the legal myth is merely a way of setting up a disciplined, contextual examination of the whole problem in order to achieve a decision that is reasonable. Hence, our conclusion was that the customary international law, which calls for the restoration of damage after the damage occurs, is not in such bad shape, and that it does serve the purpose of putting some onus upon different communities to cooperate.

Another general conclusion, however, was that this simple goal of restoring damage already done is not sufficient. There are also the problems of prevention and deterrence, mentioned in the other seminars. For the achievement of these goals, we thought that new institutional machinery might be necessary. I will return to this point in my conclusion.

As I said, our first observation was that certain customary international law is in reasonably good shape. We went beyond this customary rule, however, in considering the concept of contiguous zones, the concept of impact territoriality, and other principles of jurisdiction. The fundamental policy embodied in these latter concepts is that which might justify regulation of pollution in the Arctic. If you can show the potential of irreversible damage there, then you hit the basic concept of the contiguous zone which permits a coastal state to take whatever measures are reasonable to protect its own internal processes from external threats. What we were attempting to clarify

is that the fundamental policy underlying all these technical doctrines is the same.

When our committee moved to the national level, we had to recognize that we are both federal states. I hope that my country is much less of a federal state than it used to be. In fact, I know it is; the state lines have, for most important purposes, become largely myth in my country. They serve no purpose except to provide a modest geographic diffusion of administration and power, giving a little more political patronage to some people than they would otherwise get. We are a unitary state, and the internal divisions can do little without the cooperation and assistance of the center. But the myth lingers on, even with us. Canada apparently feels that it has a much greater federal problem than we do. There are some things that your central government cannot do, because there are some important competencies that are reserved to the provinces. Certain steps must be taken, apparently, if you are to perform a responsible role in cooperation with us, or as a sovereign state in the larger community of states.

These are difficulties beyond the basic structure of authoritative decision and require very detailed exploration. They are difficulties in effective power. No president or national leader can do much unless he takes his larger constituencies with him. The problems of opinion building in our countries are as important as the legal structures.

Yet, we are both required to recognize that in the domain of international law, the problems of an internal geographic diffusion of power make little difference. We are held responsible as competent, comprehensive entities under traditional international law. This is a doctrine at least two hundred years old. Under the doctrines of state responsibility, states are held responsible for the injuries they do to others, without any regard to their own constitutional inadequacies. The only dissent from this appears in the recent propagation of a new economic and international order by newly independent people who have not yet discerned their own common interest. On the treaty level, Ambassador Wershof fought valiantly for a federal clause at the Vienna Convention on the Law of Treaties. He even sought the aid of others. The American delegation stuck with him, and we both went down with flags flying. There is no federal clause in the Vienna Convention on the Law of Treaties. The Convention makes clear that every state has to put forward officials with competence to do whatever needs to be done. Hence, at the international law level, we have no escape because of the inadequacies of our own constitutions.

Turning from the substantive law level to procedures or remedies, our committee began with the indispensable, if simple, problem of how to restore parties who are damaged in particular instances. We felt the necessity of establishing some order of priorities in the modalities itemized in Article 33 of the United Nations Charter. Some of us began with a strong preference for negotiation as the most important of these modalities, but there were other preferences. We had some discussion as to whether it would be desirable to establish, in the background, a requirement of compulsory third-party deci-

sion in order to encourage a willingness to negotiate and to be a little more responsive. I do not believe we came to any conclusions on this.

Our principal concern, in moving beyond this problem of restoring damage once it has occurred, related to the much more important goals of long-term prevention and deterrence. This brought us to the need for institutions which are comprehensively and continuously concerned with the whole quality of the environment. The environment is the most important resource we have. We all breathe a shared atmosphere. We all drink waters from shared sources. There is an interdependence in all aspects of life and our activities. We need institutions that are appropriate for the problems. The institutions must perform new intelligence functions, acquire better information, prepare new programs for action, recommend new modes of cooperation, and evaluate the costs and benefits of different kinds of production and distribution. We thought the present International Joint Commission might be a pretty good model for this kind of activity. Some members of our group were well acquainted with its activities and contributions.

The competence of a new commission would have to be expanded to cover, not only the specific problems, but also the whole range of potential problems affecting the quality of the environment. The developing literature on the environment indicates a very wide range of problems stemming from the unities in the resources, (water, air and land). There are also unities in technology and utilization practices that raise unique problems.

Before we had institutions like the Tennessee Valley Authority and the Missouri Valley Authority, federal judges would get in row boats and go down the Colorado River, sticking their fingers in the water to see whether it was polluted. We need to get away from this primitive way of handling these problems and to set up machinery that will permit us to bring our best expertise to bear.

I think our panel was fairly clear about these problems and consistent in its recognition of the need for change. We had too little time to explore specific problems in any great depth. We are, however, hopeful that the Canadian Council, the Canada-United States Law Institute and other appropriate institutions will provide further opportunities for discussion of these very important issues.