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Discussion

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Discussion

Chairman: *Max Wershof, Q.C.*

Chairman Max Wershof, Q.C.

Thank you very much, gentlemen, for the summaries of your respective seminars.

Myres McDougal

I would like to inquire of Mr. Drucker as to what the difficulty was concerning the new Sovereign Immunities Act in the United States?

Thomas Drucker

Apparently, some Canadians believe the Act might, in some way, limit the application of the doctrine of sovereign immunity.

Myres McDougal

They did not want it limited?

Thomas Drucker

They did not.

Myres McDougal

It would not limit Canada. I should think Canada would like to have our limits.

M. D. Copithorne

As I understand it, in making the distinction between an act by the government in its sovereign, as distinct from its commercial, capacity, the Act more or less continues the distinction set out in the Tate Letter of 1952. Before and after this Act, there remains the problem of determining whether something is a sovereign or commercial act. The difference is that, instead of pleading before the State Department and requesting, in effect, that a suggestion be issued to the courts, now the foreign governments concerned are going to have to retain counsel and present their arguments in court as to why they are immune under the principle of restrictive immunity.

Myres McDougal

This distinction between commercial and noncommercial activity has had broad use throughout the world for a very long time. In the past, its application was tied to the Tate Letter. What the new Act does is to remove the discretion of the State Department. The Act purports to place in the courts the competence to say what is commercial and what is noncommercial. There are no arbitrary conceptions of commercial and noncommercial. The call is for balancing two conflicting policies: preventing states from interfering with

each others' essential governmental functions; and assuring private parties of a fair day in court. This balancing has to be achieved on a case-by-case basis depending upon what is reasonable in the context.

There is some controversy in my country as to the degree to which the Act removes this competence from the Executive. There are some of us who take the position that the Executive cannot be bound by the Act, if the situation is one in which our national security is at stake. Under such circumstances, if the Executive should say it did not want this governmental agency sued, the Supreme Court would, in all probability, say that this is a political question and head for the door. The President's independent competence cannot, in my view, be regulated by the Congress. There is, however, a difference of opinion on this.

Beatrice Bazar

I have two questions. First, what is the relationship between private international law and the settlement of disputes? We might refer to the Michelin Tire example because there would seem to be some kind of private international law involvement or consultation there. Second, when representatives of either or both governments enter into negotiations at whatever level, there are many sectors in each country that are affected. Certainly, in the Michelin Tire case, the labor movement was very much involved or should have been. My question is what are the procedures that take place during the consultative period, or perhaps before it, which involve the private parties to a dispute?

Thomas Drucker

Your first question appears to be directed to the area of possible disputes between host states and transnational corporations. There are quite a number of possible methods of dispute settlement, whether they are treated as public international or private international law methods. Obviously, there may be negotiation between the parties. There may be diplomatic exchanges between the home state and the host state. There may be conciliation proceedings. There may be, for example, arbitration proceedings and, ultimately, proceedings before national or international courts. Arbitration, specifically, is a method of dispute settlement which can only take place with the consent of both parties. The institution in which I am particularly interested is the International Center for the Settlement of Investment Disputes Between States and Nationals of Other States, which was created under the 1967 World Bank Convention on the subject. The Court of Arbitration, established by the International Chamber of Commerce, is a second possible vehicle. There are also a number of regional vehicles for dispute settlement. For example, in 1975, the Inter-American Convention on Commercial Arbitration was entered into. This may turn out to be a useful vehicle in some circumstances. The arbitration rules of the Economic Commission for Europe are a further possible vehicle for dispute settlement. There is a tremendous variety of possible

procedures and vehicles for dispute settlement within the private international law area.

M. D. Copithorne

In response to the second question, the extent to which the private persons and companies, directly involved in these sorts of problems, are consulted and involved in the decision-making process, is something that is very much in mind. In some cases, we are more successful than others in bringing the parties, or the potentially affected parties, into the actual process. I think a very good example in which this process is very highly developed is the law of the sea delegation. Representatives of the unions, the fish packers, the Mining Association of Canada and the provinces came together to ascertain their common interests.

Myres McDougal

I would like to say a word on the first question. I have had an opportunity, recently, to hear a discussion by a group of international lawyers from all over the world which tends to confirm much of what Mr. Drucker says. The private international law concepts do not introduce any new problems concerning the modality for the settlement of disputes. What the private international law has to offer are really the principles of jurisdiction of public international law. These are the principles that allocate competence between different states to make and apply law to different activities. They purport to regulate controversies between private associations, as well as between the private associations and states. There is some suggestion that if the controversy is between a private association and a state, the principles ought to be called transnational law.

With respect to multinational corporations, the first problem is what state may confer its nationality upon a business enterprise. There is great debate about this. Those of you who are experts in this field know what a wide range of thought exists. One proposal is that the United Nations confer nationality upon the great private business enterprises that operate throughout the world. The people who make this proposal are sometimes naive. They are not always aware of the specific problems in which nationality becomes important. There are problems about access to different geographic areas, protection of an enterprise's assets, organization of enterprises, and the allocation of profits and losses. Most of these problems raise very different policy issues. Each involves a different set of facts, and some require a tremendous democratization in the process of decision-making. Most of this law is applied by state courts in reciprocal tolerances and retaliations. Private international law offers a body of inherited principles like public international law, which assist in the exploration of the more fundamental policies involved in the maintenance of a transnational economy and society. I do not think it raises any new questions regarding remedies.

J. G. Neuspiel

I would like to address myself to the problem of dispute avoidance prior to the existence of a justiciable or nonjusticiable dispute. We have heard a great deal about the desirability of establishing transborder instrumentalities or bodies for the purpose of discussing and ironing out these problems, and various models were suggested. But, in the particular area of trade, and also investment, I wonder whether, in this preliminary process of possible dispute avoidance, the right people are talking to each other.

Let us consider, for example, the problem of the extraterritorial application of one country's laws to the real or perceived detriment of the other country. What good does it do if American antitrust specialists in the Justice Department get together with out anticombines people? That which is one party's antitrust and quasi-criminal problem may be a matter of the other party's trade policy, employment policy and resource management. Therefore, the task force that should be working at dispute avoidance should not be composed of opposite numbers in the sense that they are people who deal with the same type of problem. Rather, the Canadians may be industry, trade and employment resources people, while the Americans would be anti-trust enforcers. I can think of a number of other scenarios where simply creating combined groups of the same type of people from both sides of the border does not solve the problem. For instance, one country's national security interests may be contrary to the other country's export policy. The task force working at this business of dispute avoidance at early stages should be composed in a more imaginative fashion, rather than merely on the principle that we must have better links with our "opposite numbers" on the other side.

Thomas Drucker

I thoroughly agree with Professor Neuspiel's comment on the international arena, and I will give an example of the need for good communication even within the domestic arena. In one African country, the government, in its wisdom, denationalized us, and the Minister signed a decree to this effect. However, the decree was lost, so I found myself physically taking the decree from the Minister's desk to the printer to ensure that it was not lost a second time. And that was an effective step.

Peyton Lyon

I would like to make two points. First, I very much sympathize with almost everything Dean Macdonald was saying yesterday. I believe that countries like Canada and the United States should be doing more to strengthen the authority and jurisdiction of the International Court of Justice. I would still employ the action of my government, some years ago, in association with the Arctic Waters Pollution Prevention Act. It was deemed necessary to go back on long standing Canadian policy and attach a reservation on cases going to the International Court of Justice.

My second point is to rise in defense of politics. We have heard many tributes to the I.J.C. I subscribe to all of those expressions of admiration. I think it is a fine institution, but one of the essential ingredients in its success story has been the discretion which it has practiced or has had imposed upon it by political judgment. My understanding is that the automatic jurisdiction of the I.J.C. is confined to a very limited range. The bulk of its work has been in dealing with matters referred to it by two governments, thereby implying a political judgment that both governments were prepared, if not to implement, then at least to welcome the report that would come out of the I.J.C. If some of the enthusiasm for the I.J.C. were implemented, if its jurisdiction was greatly extended and the range of issues which it heard were greatly expanded, its success record would probably be rather different. The remarkably successful record of the I.J.C., in coming up with persuasive reports on how to deal sensibly and rationally with the issues that inevitably arise between countries sharing the long and complex border that we do, would look rather different. It seems to me that there is a distinction between law and politics. I think the I.J.C. has a magnificent record, but all sorts of political judgments are involved in its procedures. That record would look rather different if it had not been for the continual exercise of political judgment in deciding which cases the I.J.C. should tackle.

Ronald St. J. Macdonald, Q.C.

During this conference, many of those who have spoken have not only praised the International Joint Commission, but have also suggested that new responsibilities might be given to it. I would like to know whether any effort has been made at the official level to seek an amendment to the treaty. The co-chairman of the Commission, in his testimony before Senator van Roggen's committee, spoke along these lines, and there have been repeated suggestions that an approach has been made or was in contemplation of being made, to the American government. It might be useful to know whether this is a dead issue or whether something can be done along those lines.

Erik Wang

A number of proposals have been made for broadening the role of the International Joint Commission, and for amendments to the Boundary Waters Treaty, so as to give more scope for activity by the I.J.C. These ideas are, I suppose one could say, "under review." But I think one stream of thought within official circles in Ottawa is that there is already ample flexibility within the scope of the Treaty as it now exists.

The language of the Treaty is broad enough to enable the two governments to assign new tasks to the Commission where and when the governments are so inclined. One illustration of this came up fairly recently in talks between Canada and the United States regarding vessel traffic management in the Strait of Juan de Fuca. These talks were in anticipation of the possibility of greater tanker traffic from Alaska to the northern states. The question arose whether the International Joint Commission might play a continuing

monitoring role, in order to ensure that environmental protection measures and vessel traffic management measures were of the highest priority, in the interests of preservation of the environment in that area. This would be a role somewhat akin to the role which the International Joint Commission has taken up in relation to the Great Lakes. This is certainly a possibility that governments might be looking at. But I do not think anyone has suggested that an amendment to the 1909 Treaty would be required to move the Commission into that area.

I think it is fair to say that in its entire history, the emphasis in the Commission has been very much on fresh water, cross-border environmental problems. I do not believe the Commission has, to date, been asked to concern itself with any problems relating to salt water. If it were to move into this area, this would be a significant departure from past practice. It is, however, one that would be possible; at least, there would be no legal bars to such a role.

One concern about such a role in that area, and I am sure this arose in relation to the Great Lakes role which the Commission has undertaken, is that we want to be certain that any machinery which might be utilized would not impede the process of direct cooperation between agencies on both sides of the border. In relation to problems of navigation in the Strait of Juan de Fuca, there is already a pattern of very close cooperation and consultation between the coast guards, the environmental agencies and the law enforcement agencies on either side of the international boundary. This is a long-standing cooperation with daily, and sometimes hourly, contact by direct telephone link on various technical and operational aspects of the navigation control in the area. One would want to be careful to ensure that any new machinery that might come into play would not impede this level of cooperation. It should enhance it and not intrude upon it.

Douglas Johnston

I thought I might ask a question that serves to link the statements made by the two chairmen this morning. Professor Bourne reported that many people in his workshop felt that if a general maritime boundary limitation issue were to go to adjudication, whether it be the Court or an arbitration tribunal, its subjectivities would have a major influence on the determination. Professor McDougal noted there is a need to be aware of traditional semantic confusion, because semantic distinctions conceal more than they reveal about the actual factors that operate in the minds of adjudicators.

Consider, for a moment, a general maritime boundary issue which deals with both the seabed, on the one hand, and the water column and surface waters on the other. If such an issue were to go to adjudication, and if both these statements by the chairmen are true, would it not be logical for Canada and the United States to agree to ask that the matter to be determined *ex aequo et bono*?

I suppose there is the thought that both governments will be reluctant to make such an agreement for positional reasons. The normal reaction of a

lawyer is to invite adjudication in a situation where there is maximum confusion as to the most probable outcome. Difficulties of prediction are very great, indeed, and this is presumably the reason why two states have never agreed to resort to this kind of determination. However, if we search the logic of this reluctance, it does not appear to be very convincing if it is true that, regardless of the form of the procedure, subjectivities will have a maximum effect upon the determination. There is relatively little so-called "hard law" in recent judicial decisions, at least on the fisheries side, and, to a lesser extent, on the continental shelf side. Logically, then, what is the argument against resorting to adjudication *ex aequo et bono*?

Charles Bourne

I am not sure I would agree that a judge who is under an obligation to decide a question in accordance with equitable principles has the same freedom as a judge who can make a determination *ex aequo et bono*. The practical result may be the same. It is one thing to tell a man you can do as you please, which is entirely subjective. It is something else to tell him that the rule is one of reasonableness.

Most of our court questions are decided on the basis of whether you are acting as a reasonable man. This does not mean that a judge can do as he pleases. He has to try and seek some objective, reasonable standard. In the field of environmental law, when you say that the beneficial uses of a drainage basin should be apportioned on a basis of a reasonable share of such uses, you have enunciated a principle that allows for the application of both rules within the range of decisions and certain particular problems. After a time, if there were enough situations coming before a tribunal, a fairly firm rule would develop to deal with a particular aspect. If we were dealing with pollution, there might be a stricter rule. I think there is some scope for objective application of a rule. Consequently, I would not approve of wording it in the manner which you have suggested. I think that there is a difference between the two.

Myres McDougal

Professor Johnston seems to ignore the idea that these rules about responsibility of states for damage do not confer a complete discretion upon the decisionmaker. They are rules that are formulated in terms of common interest and require a very careful examination of all the factors in the context. However, I do not think a decision in terms of *ex aequo et bono* would give complete freedom of subjective choice. I think this would set up the same kind of disciplined examination of the context in relation to common interest. The answer to Professor Johnston is that people like to preserve the myth. They do not want to acknowledge the degree of freedom of choice that is, in fact, involved in the decision.

William Epstein

I beg your indulgence to raise, once again in this forum, the problem of nuclear pollution. It is really a neglected area, not only among lawyers, but also among political scientists and other students and scholars of government and current affairs. It suffers from both ignorance of the facts and apathy. This is due, I think, to the fact that it is in the areas of national and international security; there has been a deliberate conspiracy of silence about this thing. Whatever happened to radioactive fallout? In the 1950's, everybody was worried about it. Yet, today, many people are dying from leukemia and other forms of cancer as a result of the hundreds of nuclear weapon tests in the atmosphere in the fifties and early sixties. There were hundreds of tests and, since this is the context of Canadian-American relations, I should point out that the United States conducted twice as many as the Russians. Something else which has recently been discovered is that every one of these explosions in the atmosphere or outer space destroys a portion of the ozone layer. Nobody knows quite how bad it is, but everybody agrees that it is not good. In fact, it is a lot more dangerous than the freon released by aerosol cans, about which we have heard a great deal, and I would be very surprised if there were more than two or three people here who know that nuclear testing has already destroyed a significant portion of the ozone layer. Furthermore, we do not know how or whether it restores itself.

The 1963 Partial Test Ban Treaty banned nuclear tests in the atmosphere, in outer space and underwater, but not underground. Subsequently, the nuclear powers, with the exception of France and China, have conducted tests underground. They have conducted more of these than they did in the atmosphere, but these, too, create problems. There is a danger of seepage and leakage into the underground water streams.

We do not know very much about this, either, but we do know that a number of these have vented. Here, again, there has been a conspiracy of silence. The 1963 Partial Test Ban Treaty allows underground testing to continue, provided that the radioactivity from venting does not cross the borders of the state. It has now been discovered, however, that radioactivity cannot be projected into the atmosphere without being carried across the borders of a state. It does not all come down as radioactive fallout within a few miles of the test. It goes up into the upper reaches of the atmosphere and is then carried around the world.

If nuclear weapons are ever used in war, this radioactive fallout is going to be much worse in its impact on other countries that are not participants in the war than any other form of indirect injury. Even if only small tactical nuclear weapons are used, or the neutron bomb, there is going to be radioactivity released which is going to affect people all over the world, but mainly in the northern hemisphere.

The reason for my intervention is that lawyers have really neglected this area. There should have been a great deal more input into this whole field than there has been. There has been quite a lot about marine and other forms of pollution, but practically nothing has been said regarding this particular form of pollution which, to my mind, is the most dangerous because it

goes on for generations. Radioactivity decays, but it may not disappear for hundreds of years.

This is an area that is worthy of much more attention. In the first place, I think we ought to demand more information and more openness from governments. We have detected fallout or radioactivity in the atmosphere in Canada as a result of American and Soviet nuclear tests that have vented. Because of security, this was hushed up. When the French and the Chinese test in the atmosphere, there is quite a bit of publicity about it, but when the United States and the Soviet Union conduct underground tests, there is practically no publicity.

President Carter has announced that he wants to stop all nuclear testing and dispose of all nuclear weapons. Next spring, a special session of the United Nations General Assembly will be devoted solely to the question of disarmament. I think that if lawyers were to interest themselves just a little bit more—international lawyers, particularly—in this whole area, it might have a very beneficial effect on the laws of pollution, the environment and on human survival.

Thomas Drucker

I would question whether the area of nuclear damage has been ignored by lawyers as much as you would indicate. The problem of nuclear damage creates problems of private liability as well as state responsibility. For example, private suppliers of equipment and parts to nuclear power stations could, in some countries, find themselves under extremely heavy liability should those power stations be defective and cause injury. Similarly, there would be an alternative kind of liability if the station simply stops working without causing any nuclear damage, but resulting in a large number of people being cut off from an energy source. That could give rise to liability. I think many lawyers, at least in the private sector, are giving considerable thought to this area.

William Epstein

I agree with you, Mr. Drucker. There has been a fair amount of attention paid to the legal implications of nuclear power reactors, breakdowns and melt downs, both from the point of view of the possible escape of radiation, and from the point of view of the breakdown resulting in a lack of electrical energy and power. My intervention was directed to a different aspect: the military uses of nuclear energy, not civilian uses. On the military side, there has been almost a complete dearth of legal studies, particularly in recent years. In the early fifties there were some, but there are almost none today.

Chairman Max Wershof, Q.C.

Well, ladies and gentlemen, I am sorry. These are important subjects, and it is a pity that there is not more time for further comments and remarks from all those present. But I am afraid there is not. I would like to thank our distinguished chairmen for their work and for their statements this morning, and to thank all of you for your cooperation and discussion.

