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International Law and International Business

G. Winthrop Haight

INTERNATIONAL LAW AND INTERNATIONAL BUSINESS*

by G. Winthrop Haight**

Introductory Remarks

Presented by Professor Myres S. McDougal***

We're very honored to have Mr. Haight with us today and much appreciate his coming down. Mr. Haight is one of the great and distinguished members of the practicing international law bar. He was once counsel for Royal Dutch Shell in London. For some years since he retired from that important position he has practiced law here in New York and is engaged in many important enterprises. He plays a very important role in all of our professional organizations. He is very active in the American Branch of the International Law Association which includes lawyers from about forty or fifty countries, including Communist countries. He is vice president of that organization. He has been assistant editor of *The International Lawyer* which is published by the International Law Section of the ABA. He plays a very active and important role in the American Society of International Law. He and I have been friends for longer than probably either he or I would care to remember. We were students together in

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** Of counsel, Forsyth Decker Murray & Hubbard, New York City. A.B. 1928, Yale College; LL.B. 1931, Yale Law School.

*** Professor of Law, New York Law School. A.B., A.M., LL.B. 1927, University of Mississippi; B.A., B.C.L. 1930, Oxford University; J.S.D. 1931, Yale Law School.

the fall of 1930 at the Yale Law School before it occupied anything like the building and position it occupies today.

I was a humble graduate fellow who had been educated in a provincial university in England in a very conventional, conservative manner. We had a course together called Credit Transactions under the greatest teacher I ever had—Wesley Sturges. Sturges was much more sadistic than many of your professors here, and he discovered I was a stubborn, legalistic fellow who would fight him. Sturges would beat my brains out for about forty minutes and when he'd demolished me he'd turn to Mr. Haight and say "Mr. Haight, clear up all the confusion that Mr. McDougal has created." Mr. Haight would clear it up and I'd hate him.

I later got to know he was really a nice fellow and a very magnanimous man. His willingness to give to public affairs is a mark of his greatness. We all much appreciate his being here.

TEXT OF LECTURE

That story is apocryphal. I don't think I was ever called upon to clear up anything Mr. McDougal ever said. It was never necessary. But I have greatly admired the work that he has done over a considerable period of time. One of my handicaps today, not only here but elsewhere, is that I never had the privilege of studying under him.

When I was at the Yale Law School, international law did not seem very important. Professor Borchard taught it and from what I could find out it was pretty dull stuff. I didn't pay any attention to international law until many years later when working in the Shell Group in London. We had a lawyer from Vienna in the Legal Department there, and any time any question of international law came up he always took it. He liked the subject very much, as all lawyers from Vienna do, or did at that time, but he would talk at such length when he was called upon to explain something that I was confirmed in my opinion that it was all pretty much wind. It wasn't until the early 1950's that I suddenly woke up to the fact that something was going on in the United Nations on this subject that was going to have some impact on the oil industry. From then on I began to get interested in it, and have been ever since. With what effect I don't know. It is, however, a matter of increasing interest to lawyers in international business. It is along the line of their interest that I shall talk today.

One of the committees at the New York City Bar Association is called "The Lawyer's Role in the Search for Peace." I don't know if

any of you have had anything to do with it, but some years ago I was a member of that Committee and what we tried to do was to explore political situations like Cuba and Vietnam and see what lawyers could do about them. There wasn't, of course, very much that lawyers could do, but every now and then something would come up like China. Professor McDougal was on the panel at that time and we had Lord Shawcross from London. He was very critical about the legal position that the United States then took on the recognition of China. England had recognized China, their position being that all you had to find out was whether the government was the proper government of the country. If it was, they were entitled to recognition. You didn't do what we do: namely, recognize governments you like, and don't recognize governments you don't like. Shawcross was very critical of our policy and by and large the audience shared his criticism. It is interesting that we've finally come around to the view in this country that the government of Peking is obviously the government of the country and we ought to recognize it as such.

The debate on this topic shows that lawyers can fruitfully discuss some of these subjects. However, I have a feeling that the title of this Committee is perhaps wrong. Instead of "in search for peace" it should be entitled "The Lawyer's Role in the Search for Law," because while we talk about peace in the world what we are really trying to do is find out something about the law. Lawyers can and should make some contribution to that subject.

In some areas international law is not a mere academic exercise; in the field of international business it has its mercenary aspects. As you know, multinational corporations operate all over the world and are very much on the defensive in many places, not least in this country. People blame lots of things that happen on multinational corporations, such as what is going on in Iran. Probably a lot of the explosion there is due to the fact that international business brings in new techniques and new customs and practices that many people do not like.

The real problem for these companies is the thing we call sovereignty. Law, of course, is something that comes from the sovereign. As the government produces the law, one view is that what the sovereign gives, it can take away. However, our civilization was built on the thesis that the sovereign is subject to law and cannot be above it. Reading the book of Barbara Tuchman on the 14th Century,[1] one sees the lawyers wrestling at that time with the problem of the abso-

1. B. TUCHMAN, A DISTANT MIRROR (1978).

lute sovereign becoming a subject to a rule of law.

Incidentally, one of the things that happened at that time (and this is not stressed by Barbara Tuchman) was that the French king, Charles XII, established that succession of the French crown could only come about through the male line. The British were trying to maintain in the Hundred Years' War that the English king's claim based on descent through the female line was legitimate. Well, that was settled on the battlefields of France.

International law is bedeviled by this problem of sovereignty. Professor Brierly of Oxford describes the concept of sovereignty as a *damnosa hereditas*, because over a period of time political philosophers had developed concepts of absoluteness. Lawyers seemed to feel that they were bound by these concepts where injury resulted from some act of a sovereign. This has gradually been, and is being, changed. We now take it for granted, that where there is a community, in this area a community of States (there are now over 150 States in the UN), the community must be based on law and subject to law. If law is not operative in the community, there simply is no community. There would be just a jungle.

The idea that the sovereignty of States is subject to law is very well put in a study for UNCTAD[2] by Dirk Sticker, a former Secretary General of NATO.[3] He was asked by the first Secretary General of UNCTAD to do a report on international business. In one of the chapters in his report, Sticker addressed the legal aspects of international business. This chapter deals very well with the supremacy of law over sovereignty. Unfortunately, it has not carried much weight in UNCTAD, as we see from the New International Economic Order. The developing countries do not pay much attention to what they regard as imperialist and outdated notions of capitalist law. It is not, of course, capitalist law, because the Soviet countries are just as strong as we are on the strength and reality of international law. Nevertheless, private capital countries always get blamed for trying to impose their legal concepts.

During the last few years, we have had the push for a New Economic Order and we have the document known as the "Charter of Economic Rights and Duties of States" which came up for adoption in the General Assembly in December 1974. There was a tremendous battle at that time behind the scenes. Foreign Minister Rabasa of Mexico was a great friend of Kissinger and he called him up on the

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2. The United Nations Conference on Trade and Development.
3. The North Atlantic Treaty Organization.

telephone at the time the Charter came up for a vote. Rabasa pleaded with Kissinger to abstain and not to vote against this Charter because it was of such tremendous importance to developing countries. Fortunately Kissinger stood firm on this and the United States voted against the Charter and was supported by five other countries and ten abstentions. The vote of 120 to 6 with 10 abstentions looks quite absurd, but the fact of the matter is that this was a defeat for the developing world. They did not get a consensus on this Charter and it has been a dead letter ever since.

Article II provides that each State has the right to regulate and exercise authority over foreign investment within its national jurisdiction and in accordance with its laws and regulations. It further provides that each State has the right to nationalize, expropriate, or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State, taking into account its relevant laws and regulations and all circumstances the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it should be settled under the domestic law of the nationalizing State and by its tribunals.

This was a declaration of sovereign independence on the part of the developing countries vis-à-vis foreign investment and presented a black and white issue for the developed countries. The question was whether or not they should go along with the concept of sovereign absoluteness, or something like it. There was great pressure, as I have said, to let the developing world have its way. The battle continues, of course, as the issue is coming up all the time in different forums. It will certainly continue for some time.

What are international organizations in this area doing at the present time? In the UN Commission on Transnational Corporations there is an effort to put together a code of conduct for multinational companies. In UNCTAD codes are being prepared on the transfer of technology and on principles of restrictive business practices. These are just three, there are many others (taxation and so on) that are cooking. How these particular issues are resolved will probably set the pattern for a good many other things to follow.

One of the questions is whether these codes ought to be binding. Strangely enough, a tremendous amount of time is spent arguing on this subject. The developing countries insist that they be binding because they want what they call "law" as part of their New International Economic Order. Having been defeated on the Charter they want to deal with the matter in this piecemeal way. Developed countries, on the other hand, say that they do not want anything binding: there should only be principles of good behavior for these compa-

nies, as has been elaborated by the Organization for Economic Cooperation and Development in Europe.

If a code of conduct is "binding" in effect, it would mean that the governments which have adopted the code have made a treaty on the subject. They would then be bound to do whatever the Code required the governments to do, and to this extent they surrender their sovereignty. The companies involved would not, of course, be parties to any such treaties. And so, when they are said to be binding, the companies would not be bound, only their own governments. The impact on the companies would simply depend on what their own governments decided to do. I cannot really see very much consequence of binding or not binding, but it is a great issue and the discussion goes on and on.

The exercise on international antitrust is perhaps a little different, because this is something that started after the war in the Conference at Havana. An attempt was then made to set up an International Trade Organization and write an international code on antitrust. This was rejected by the United States. It was later pushed in the UN. That also did not succeed. Now an effort is being made to get an agreement on principles of restrictive practices in UNCTAD. This is something that our Antitrust Division is supporting actively. What is interesting is that the developing countries are not in the least bit interested in antitrust; they are not interested in compeition. The only thing they want is some mechanism to apply to the activities of multinational companies that come within their borders. The principles that have been developed so far on this subject are curious hybrids. The definition of restrictive business practices speaks of harmful effects not only on international trade but on the economic development of the developing countries as well. To involve such economic development is a distortion of antitrust law, because antitrust has nothing to do with harmful effects on economic development, but only with effects harmful to competition. As I have said, developing countries are not interested in competition; they're interested in developing their own companies and their own trade.

There is a great deal of confusion also as to the meaning of what is called a "dominant position." This is a concept taken from the European Common Market. However, in the UNCTAD principles the concept of dominant position is extended beyond that of a single company, what we would call a monopoly. The draft that is now being discussed says that it refers to a situation where an enterprise, either by itself or together with "a few other enterprises," is in a position to control the relevant market. So, if there are a few companies, whatever that may mean, which together control a market,

they are each regarded as occupying a dominant position and the provisions of the Code apply to each of them just as if they individually had a monopoly.

Another problem that comes up in this exercise is the application of the Code, and this is particularly a problem in relation to the Code on the Transfer of Technology, to transactions between a parent and subsidiary company and between affiliated companies. Here, American concepts of excluding transactions within a corporate family run counter to concepts developed not only the developing countries but also in Europe and in Canada. In negotiating on this particular aspect, the United States thus finds itself somewhat isolated in defending the exclusion of group behavior. You can imagine that the American business lawyers are very much concerned with this development. It would be a revolution in many ways for parent and subsidiary relationships to be governed by law applicable to independent entities. Many of us who have worked in this area see problems in not maintaining arms length dealings between parent, subsidiary and affiliated companies. But in the business world this is just unreal. Where subsidiaries exist in foreign countries, management expects them to do what the parent companies want them to do. And if they do not, managers are sent somewhere else. This kind of thing thus has an element of unreality. Lawyers can dress it up and make it look very real and businesslike, but ultimately it is unreal because the management of a subsidiary must conform his practices with practices within the group. Otherwise, other companies in the group may suffer. Stockholders of the parent company may raise questions and even proceed against the directors.

When wrestling with problems in these international organizations (UNCTAD, the UN Commission, and various other groups) we really do not know whether law is being developed or whether mere guidelines for good behavior are being established. It is apparent that a lot of people are insisting that law is being made. If so, as far as the United States is concerned, we have four tiers of lawmaking: City, State, Federal, and then on top of all that, an international tier. Most lawyers haven't really the faintest idea about whether the lawmaking process is going on in this fourth tier.

A good deal of publicity has been given recently to the Conference on the Law of the Sea, which is now in its fifth year. That exercise has produced over 300 articles in a draft treaty, many of which are accepted and probably constitute new law without having to go any further than tacit acceptance or recognition by the States involved.

Proposals have been made in the Conference on the Law of the

Sea to establish an international law-making body which would control the natural resources of roughly one half of the globe. We know that there is a tremendous amount of wealth in this area but few companies are prepared to go out and develop it under proposals now being discussed at the Conference. The developing countries are anxious to stop any development by individual countries like the United States and put it all in the hands of an international organization which they would control. They would determine how much should be produced and on what terms. Professor Darman of Harvard wrote in *Foreign Affairs*[4] that the objective is to create an International Seabed Authority which would have policymaking and regulatory powers, along with taxing powers and direct operational capabilities intended to allow it to become fully self-supporting. Its jurisdiction would initially be limited to exploration for, and exploitation of, seabed mineral resources. But the assumption that over time this might not lead to a world legislature where the United States would have only one of many voices, and which would be effectively controlled by the third world, could prove to be naive and shortsighted.

The third world is not disposed to our system of private capital and privately owned enterprise. The international organization would itself be a statist organization; and its operating agency, which is called the Enterprise, would be a state enterprise. It would be centrally directed and managed. The question is whether it would be in our national interest to set up such an organization, particularly when our own privately financed companies are prepared to undertake these risks themselves.

I started off by suggesting the need to search for law in the international arena. We are now in the midst of creating international law-making institutions that may have capacities to engulf us with new laws, new regulations, new procedures, and huge new bureaucracies. The questions facing all of us are: Is this what we really want? Are we prepared to yield law making by our own institutions, which we do control, to those which we do not control? Can we maintain our own systems and institutions under legal regimes imposed by developing countries hostile to our own views of private enterprise, individual freedoms and standards of right and justice?

As I have said, it is currently fashionable to talk about the Codes being nonbinding and voluntary, but they will create standards of behavior and conduct and will be treated as law in a very large

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4. Darmon, *The Law of the Sea: Rethinking U.S. Interests*, 56 FOREIGN AFFAIRS 373 (1978).

part of the world. And for all practical purposes, as far as the companies are concerned, they would be binding and might well be made into positive law by national legislatures. What is also of concern to American companies is the fact that Codes and Declarations may be instruments to which the United States would adhere without having the benefit of the advice and consent of the Senate. Naturally the State Department is not going to ask for advice and consent where it does not have to. By saying that these Codes are not binding, they can avoid having to go to the Senate. Nevertheless, in view of the fact that these Codes will in practice have the same effect as binding precepts, it might be better to face up to the fact that they all should be put in binding form, in treaty form, and then put to the Senate for their advice and consent as to adherence by the United States.

At the outset, I said that I suffered from the disability of not having studied under Professor McDougal. I am not sure that I understand his approach but I think I do. What I understand it to be, subject to correction, is what might be described as the progressive development of international law by the process of States claiming something, dealing with counterclaims and then resolving issues by practice among foreign offices, judicial decisions and other ways of indicating acceptance. Of course, you have to include in this process resolutions of the UN, declarations and other expressions of international agreement. These do not themselves make law, but they do in varying degrees evidence a recognition of what is coming to be customary international law. The more formal law-making process by multinational treaties will of course continue, but much of the law of the sea treaty indicates that a multilateral treaty process is apt to produce fuzzy, ambiguous texts that are difficult to understand without exhaustive analysis of legislative history and which may leave more of a legacy of uncertainty and risk of controversy than clarification and settlement.

There is much of interest to all of us in these developments and I am sure that some of you will find rewarding careers in this area. Thank you.