INTERNATIONAL LEGISLATION: THE NEGOTIATION PROCESS

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After nearly thirty years as an international negotiator, I did not anticipate that discussing the relationship of international legislation and the negotiating process would be exceptionally difficult. It seemed to be a neighborhood I knew rather well. Yet, quite often one works in a neighborhood so long that it becomes like an old suit of clothes. Then one day, you look around and it is not your neighborhood anymore; it has changed, and you hardly notice the change because it was so incremental.

When I began to reflect about where we currently stood with regard to aspects of international legislation and the negotiating process, I discovered that a substantial number of changes had taken place. My thinking on this point was influenced by the fact that I am counsel in a lawsuit to which the United States is a party. Belgium, France, Switzerland, the United Kingdom, and the United States are plaintiffs in an action against the Federal Republic of Germany. The central issue of the case can be stated rather briefly: whether the least depreciated currency is the most appreciated currency. The action concerns a rather large quantity of bonds — the Young Loan bonds of 1930 which are still in the process of being paid off as a result of the debt settlement arrangements made in 1953 when Germany, in effect, went through a voluntary international bankruptcy proceeding at the London Conference on German external debts. This case has been moving along for quite some time; the earlier pleadings were fairly conventional. They concentrated on the standard approaches to the interpretation of treaty language, history of the *contra proferentes*, and so forth. In the final stages, however, we have been dealing with a series of issues in international financial law. The focus of these aspects of the case has revolved around activities of the International Monetary

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Fund (IMF). The disagreements we are having are concerned to a great extent with such matters as par values, parities, rates of exchange, and the effect of floating on values of currencies. The IMF is looked to as a primary source of the law on the subject. In effect, the rulings, decisions, procedures, and practices of the IMF are being viewed as constituting international law. What is the process by which these various actions have become international law? It certainly is not the classical process of making conventional law or customary law. Yet, the positions of the IMF appear to be accepted as constituting international law. This leads to a consideration of the extent to which the classical view of how international law develops remains accurate. Is a tidy division between the effects of treaty negotiation and the accretion of customary law still plausible? Does the treaty process remain the major workable means to develop international law on an integrated basis? The answer to all three of these questions may be in the negative. It is impossible at this stage to reach any judgment that is less than speculative. Nonetheless, it is undesirable that the traditional methods of formulating international law are in the midst of fundamental change.

Consider, for example, the subjects to be addressed at this Workshop. A very important factor in the current development in these areas — maritime law, space law, the new international economic order, law of the sea and outer space, and developing international trade law — is that the work is being carried on within an international organization according to a set of procedures and practices molded by the Secretariat of that organization. With regard to maritime law, we are currently witnessing a movement away from a long established method of forming international maritime law through the *Comité Maritime International* — that is, a private organization composed of the leading private interests in the world of shipping. The practice of the *Comité* has been to formulate draft rules of law on a broad spectrum of shipping issues. After these rules are formulated, they are sponsored by a government — customarily the government of Belgium; a diplomatic conference is held of the old-fashioned type; and the code is adopted. However, in recent years, more and more of this work has been taken over by several of the United Nations family of international organizations. The United Nations Commission on International Trade Law (UNCITRAL) is one such organization. UNCITRAL recently held a conference in Hamburg to overhaul the 1924 Convention on Carriage of Goods by Sea. The Hamburg Conference

was based upon a draft produced by a UNCITRAL inter-governmental working group over a five-year period. The legal studies produced or commissioned by the United Nations Secretariat and the assistance of that Secretariat played a large role in the production by the Hamburg Convention of a complete and rather innovative Convention. The Hamburg Convention will be competing with a recent product of the Committee on International Maritime Law called the VISBY amendments, which have made some changes in the 1924 Convention, but essentially leave intact key principles which favor heavily the shipowning interests. The UNCITRAL draft may win out because it is the product of a universal organization.

From the standpoint of negotiation, the major difference between these two methods of treatymaking is the prominent role of the UNCITRAL Secretariat in the development of the Hamburg Rules. The Secretariat's contribution is a feature in the current development of international law. In nearly all United Nations activities that deal with the international lawmaking process, the Secretariat plays an active role. The UNCITRAL Secretariat is an extraordinarily competent group in my opinion. It has been shaped by a series of very capable lawyers. Allan Farnsworth will address the functions of UNCITRAL; I merely wish to stress the body as an illustration that the negotiating process includes, whenever an international organization is concerned, an expert group that is organized by, or formed from, the Secretariat and that plays an important role in formulating the convention or treaty or set of rules under consideration.

The United Nations Commission for Trade and Development (UNCTAD) also participated in the development of the Hamburg Convention. UNCTAD is much more of a policy-making organization than UNCITRAL. Basically, it was set up to provide the developing countries a forum to explore what could be done to improve their economic status, to improve adverse conditions of trade, and to eliminate barriers to their development. One thought in setting up the group may have been to permit other international organizations to move toward saving the world in their own particular way, without too much debate over equal treatment from developing states.

UNCTAD turned out to be an activist group rather than a debating society; it plunged into all sorts of projects to transfer money and technological knowledge and to move power from the wealthy

to the developing states. Among other things, it has been quite active in maritime law. It has kept a very close eye on UNCITRAL's activity regarding the carriage of goods by sea. It has attempted to curtail the authority of the shipping conferences with respect to rate-fixing. The UNCTAD negotiation procedures have resulted in some changes in customary international practice.

Negotiating in UNCTAD is designed to take into account the fact that, for many developing countries in the world of the international organization, the vote is their most valuable asset. Their experience has convinced them that in order to make their votes effective they must avoid the consequences of the Roman maxim "divide and conquer." Hence, the developing countries seek to avoid division; they seek to avoid being taken advantage of, as they see it, because of shortages in training, expertise, and experience, the lack of which is often reflected in the dearth of talented people to carry on negotiations for them. Given the number of international organizations which are active in quite technical areas in which the developing countries have shown an interest, they simply lack the trained personnel to represent them. How can they prevent this fact from being used against them? Attendance at a UNCTAD conference is an eye-opener. There is a plenary session to open the conference. Then, in effect, this session is adjourned and the developing countries' representatives meet to decide upon a course of action — their minimum requirements and what their positions will be. This may take several days, sometimes even longer. During this period, the other groups meet to formulate their plans. A group generally referred to as the "Western European and Others Group," of which the United States in an "other," meets and displays the usual lack of cohesiveness in preparing for the conference. This is indeed one of the most discouraging features of conference participation if you happen to be a member of the Western European and Others Group. Within this group, there is a propensity to seek individual national ends; a fairly severe crisis is necessary to achieve unanimity in the group. After the developing countries have adopted a unified position, the conferees get down to work. Usually, the unified position is initially presented to the rest of the conference on a "take it or leave it" basis. However, there is usually some degree of "give or take" in the developing countries' unified position.

While the developing countries could, by sheer force of numbers, force acceptance of an agreed position *in toto*, they realize the

foolishness of pursuing this course of action absolutely. They realize that the real balance of power does not lie in the number of states voting; it lies outside their group. Cooperation with the wealthier states is necessary to achieve real, rather than paper, results. There are, however, major exceptions to this general approach, one of which can be discussed in connection with the new international economic order. Furthermore, the developing states' monolithic position is not that much of a monolith. The developing countries' individual interests differ as all states' interest differ. Under sufficient pressure, their original unified position — which is itself a compromise — might collapse completely if pushed too hard. Thus, it is generally possible to achieve a series of compromises with respect to the basic unified position and to agree on a final text of the conference which, of course, never will be satisfactory to everyone — but what conference is?

A part of the developing countries' strategy is to avoid formal voting to the maximum extent possible. Indicative votes are often used to demonstrate where the balance of interest lies, but the formal adoption of the provision is mainly on the basis of "without objection." The atmosphere is inclined to induce broad abstention in this kind of voting. This type of voting is caused by the belief that if a clear majority favors a set of articles or a resolution put forth for acceptance without objection, it would be unfriendly in the atmosphere of the conference to vote against it. If one does not agree with the majority view, the inclination is to keep silent.

This practice, which flourishes within UNCTAD, has become fairly typical of many of the worldwide meetings that take place under the auspices of the United Nations. The major drawback to this "passive" approach is that the apparent acceptance, or at least tolerance, of undesirable positions can result over the course of several years in the apparent acceptance of propositions which, if considered on their merits and in isolation, would be opposed by a substantial number of states. This development is not just happenstance. Rather, it is often the result of a carefully orchestrated effort by the leaders of a large group of states whose vote is their most effective asset; it ensures that this asset plays a substantial role in international life and that it has a payoff. The leaders of this group are perceptive enough to realize that forcing an issue is not always the best means to attain their objective, and that the vote is often most valuable when it does not have to be cast. In many cases, they seek to avoid showdowns.

A recent example of this strategy occurred at the Vienna Conference on the Succession of States to Treaties. At the first session in 1977, the Council for Namibia, which was established by the General Assembly to act as an executive arm in relation to Namibia, was invited to attend. There was some confusion as to the precise nature of the invitation as well as some discussion at the outset as to what the position of Namibia in the Conference should be.

A proposal was advanced by several delegations to seat the Council for Namibia as a full-fledged delegation, that is, as the representative of a state. This proposal provoked considerable reaction from a number of states that were concerned about the effect of such recognition. While the Council for Namibia easily could have been accepted as an organ of an international organization, the position that the delegation represented a state delegation met few, if any, of the standard conditions which are considered useful in determining whether a state exists. Even though there has never been a generally accepted definition of what a state is, actual control of some amount of territory, as well as actual control of some people in that territory, is needed to be recognized as a state. This initial effort was settled by giving the Namibian Council a set of arrangements which placed representatives above observer delegations without making it a state delegation. Nothing more was heard on the issue until near the end of the conference. At this point, an effort was made to push through a resolution on a consensus basis. The resolution demanded that the Namibian Council be treated as a delegation of the state of Namibia. This created a crisis. Such a crisis is often created at the close of a session by states desiring to push a resolution through. It seemed, however, that the resolution might be pushed to the point of preventing the session from finishing its work. Opposition to the recognition of the Namibian Council as a state had solidified the Western European and Others Group. A reasonable number of other states had indicated they would oppose the resolution by fighting as hard as they could to defeat it. As the debate, which disrupted progression on a number of other issues, droned on, I happened to be chatting with an African delegate who was a leader in the push to convert this United Nations organ into a state. I said to him, "If you are really so interested and determined to force this issue through, why don't you just vote it through; you certainly have enough votes?" He replied, "No, that is not the plan." He did not tell me what that plan was,

but the issue was settled suddenly on the basis of a few minor concessions as to how the Council representatives should be treated.

In the second and final session of this Conference in 1978, it was anticipated that the Namibia issue would be pushed from the outset. Yet, the issue was not raised, and the Conference was completed with no push to settle the question. At the signing of the final act, however, after the Convention had been negotiated and agreed upon, all the state delegations came forth one by one to sign the text. No sooner had the last delegation signed than the representatives of the Council for Namibia came forth and signed the final act as a state. This obviously had been worked out on a well-organized and cooperative set of arrangements, because it required assistance from the Secretariat and other officers of the Conference to have laid the foundation for this signature without notification or knowledge of it getting out. No delegation objected to Namibia's signature. This is an illustration of the effect of setting the precedent of not raising objections to important issues. There should have been an objection to the Council's signature as a state. Obviously, the signature in and of itself does not make Namibia a state, but a final act of a conference is a legal document of considerable importance in the international sense; what is commenced may develop into a pattern of treating as a state a group that meets none of the formal requirements of a state. The end result is to weaken the traditional international law of recognition.

The developing states have made it clear that they consider traditional international law to be a legal order which was devised to provide reasons for treating them as colonies when they were colonies, and for keeping them in what they consider to be a condition of economic colonization now that they enjoy political freedom. In their view, perhaps it is worthwhile to destroy the traditional definition of a state if it will assist them to achieve what they consider to be more important ends. The act of signing conference documents is more than a futile gesture.

The experiences that have occurred with regard to the new international economic order clearly exemplify the efforts by the developing states to establish such an order. To a large extent these efforts are based on the hypothesis that if one says anything often enough, it will happen. You may remember that during the 1920's there was a great fad for something called "Coveism," so named after its promoter Dr. Cové. Followers of this good doctor repeated at stated intervals throughout the day that "everyday in every-way

they were getting better and better." After one had done this often enough, one was supposed to become better and better. John Galsworthy, in the *Forsythe Saga*, had Soames Forsythe become a devotee. If such a hard-nosed individual as Soames was lured by this fad, you can understand what a vogue it was for a while. It might be that what the developing states are attempting with regard to the new international economic order is a form of Coveism. They use international organization procedures, particularly the conference, to introduce into every convention resolution that has any relationship to their aims and purposes some reference to the new international economic order. These references are sometimes innocuous, sometimes nocuous. There is, however, a general tendency among the states against whom these resolutions are directed to feel that these resolutions are not causing any particular harm, and that a pitched battle against them would be counterproductive in that the desired conference results might not be achieved. The attitude is, therefore, to accept the resolution as mere verbiage.

It is useful to inquire whether all this activity is producing international law. The answer may be that we just do not know. But if it is, we will find out too late in the day for our own good. That developed states have always had sufficient power to protect their interests is a major element in shaping our strategic planning for conferences. But is a world environment developing in which this will no longer be true? It might also be useful to ask whether international law should be an important element in the framing of national policy. Roger Fisher referred in his opening statement to the assertion of Dean Acheson that international law had no bearing whatsoever upon the Cuban missile crisis. That, of course, is the standard type of statement Dean Acheson was fond of making — provocative but untrue. I was the State Department's legal liaison at the Pentagon during the Cuban missile crisis, and I can say that international law played a prominent part in that crisis. There was a group of us in a small office outside the office of the Secretary of Defense doing such things as calling back the general orders to the fleet because the Navy had decided to send them out with the word "blockade" instead of "quarantine." This may seem like something of little importance, but President Kennedy was enormously concerned about maintaining world support for our control of the high seas around Cuba, and this was one of the legal positions which we were relying upon to maintain that support. The intent was to construct a regime that was not too broad — that was not a total block-

ade of Cuba. This little legal group set up the NAVICERT system to supplement the quarantine. This again was designed to maintain the support of other nations by minimizing the interruption of the normal passage of ships through the area in which we were operating. A ship which had been issued one of these navigation certificates could proceed freely through the quarantined area. Why were we so concerned with getting the world's support? If we had the world's support, we could count on gaining support within the United States for what we were trying to do. Vietnam is an illustration of what happens when public support is lost, and believe me the dangers involved in the Cuban missile crisis far exceeded anything involved in Vietnam. Cuba was indeed a rather frightening affair, particularly if one was following the events on the Secretary of Defense's situation map. The fact that the United States had a substantial, strong legal position, and that great care was taken to maintain and improve that position, was an essential element in solving the Cuban missile crisis. The United States should view the development of world law as important to our nation's interests and take into account the necessity of preventing world law from slipping into procedures and forms which may later prove to be intolerable to us. The negotiating process is one of the areas in which care must be taken to ensure that the development of world law is not undermined for short-range and dubious objectives.

Q. Ambassador Kearney, what specifically can the United States do to avoid the problems you have identified with respect to developing nations' negotiating tactics and the consequent effect these have on the development of world law?

A. I wish I had a short, simple answer, but I do not. Certainly we must start by taking this matter seriously, and perhaps we should reevaluate our past approaches to negotiation. For example, as I noted earlier, we are very inclined to seek to wind up conferences with a win and to have matters tidied up according to schedule. We like to come out of a conference with an agreed convention — with an agreed set of principles or an agreed upon working paper. The problems that are involved in allowing important areas in international law to be deformed or weakened, at least from our point of view, may not seem sufficiently important to delegations — who are there with specific instructions to get one thing or the other — to imperil the immediate objective. In the negotiation process, it is a very difficult task to determine at what stage one should drop the

immediate gain in order to preserve the medium or long-range future of the international order. We must find, however, a means of balancing competing values. Another negotiating approach we could change, it seems to me, is just to sit tight when a dilemma arises. We are inclined to compromise. We think it is sensible to do so, and indeed it usually is. But there are some issues that should not be compromised. The problem is to draw accurately a bead on what is, and what is not, an important principle that should be protected even at the expense of other, short-term goals. This, it seems to me, will have to be addressed on a continuing *ad hoc* basis.

Q. Are you suggesting that international law played a significant role in the Cuban missile crisis?

A. There was a lot of support for invading Cuba. International law played a large part in the decision not to invade Cuba. At that stage, there were a lot of people who supported an invasion. I did not intend any in-depth analysis of the Cuban Missile Crisis, but I thought it useful to point out that international law did play a large role in emphasizing the need to oppose attempts to change international law by default. Certainly international law did not play the ultimate role, and it would not have had much to do with the decision whether someone pushed a button and the rockets went off. That is the position that Acheson was thinking from — that in the final analysis ultimate force controlled the settlement of the matter. But that view is overly simplistic. What actually happened was that a policy of moderation, based in substantial part on international legal considerations, was successful.