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*The opinions expressed herein are those of the authors and
do not necessarily reflect the views of the
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Editorial

Volume 4 No. 2

If the world is indeed a different place after the events of 11 September last year, it seems to be premature for anyone to venture to assess what will be the lasting changes to our international environment. The time for initial reactions is past; the initial shock is beginning to recede. The 'malaise' which Catherine Kessedjian detects among the normally prolific international legal community, as described in her introduction to our 'Recurring Themes' section, may simply be a reflection of the fact that, only six months on, it is too early, for the long-term consequences for the structure and practice of international law to have begun to emerge. The world of international law is still struggling to accommodate and analyse what took place within the framework of existing definitions and concepts – it is as if we have been overtaken by events. An array of legislative measures has, meanwhile, been adopted in the United States to cut off the main economic supply lines to terrorist organisations. The implications for the legal and business communities of functioning against this background of heightened vigilance are explored by Peter D. Trooboff and Masanobu Katoh.

In our 'In the News' section, Surya Subedi reviews the UN conference on Financing for Development held in March this year in Monterrey. The subject of our Profile, contributed by Cesare Romano, is Shepard Forman, Director of the Centre of International Cooperation at New York University. For 'Work in Progress', Eric Wyler contributes an update on the recent Geneva seminar on reparation for crimes against humanity. In 'Conference Scene', Yitiha Simbeye reviews a recent conference in Amsterdam on the practice and prospects for internationalised criminal courts and tribunals, and Walid Ben Hamida reports on the Swiss Arbitration Association conference on investment treaties and arbitration. Eduardo Valencia Ospina, whose 'Bookshelf' we feature, entices us into the world of literature in his mother tongue, Spanish.

In the News / Actualité

The International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002

SURYA SUBEDI

The first UN Conference on Financing for Development was held in Monterrey, Mexico, between 18 and 22 March 2002 to adopt a new global approach to financing development in the 21st century. The object of the conference was to find ways of enabling developing countries to have more say in the future of the global economy. At the top of the agenda was reform of the world's financial structures. Split into six segments, the agenda of the conference included coherence in domestic resources, the role of foreign direct investment, the impact of international trade on development, official development assistance and debt relief and international financial systems. The conference was expected to address the ways of getting the various fund providers to work together more coherently, with the UN playing a more effective role.

The Monterrey Conference was different in many respects from many other previous UN conferences. For the first time in the history of UN-hosted international conferences it allowed for the direct quadripartite exchange of views between governments, civil society, the business community and the institutional stakeholders on global economic issues. This was a significant departure from the traditional practice and a welcome development. The conference was attended by some 800 delegates, including 50 Heads of State or Government and over 200 ministers. Delegates were addressed by, *inter alia*, the UN Secretary-General and the heads of the IMF, World Bank and WTO. Among the 50 Heads of State or Government addressing the conference was the U.S. President George W. Bush, who announced a significant increase in the U.S. contribution to overseas development assistance. A similar announcement was made on behalf of the European Union.

The most important outcome of the conference was the Monterrey Consensus, adopted unanimously, which outlines the vision for financing development in the 21st century.¹ This document speaks of "mobilizing and increasing the effective

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¹ UN Doc. A/Conf/198/3.

use of financial resources and achieving the national and international economic conditions needed to fulfill internationally agreed development goals”² and calls for “a new partnership between developed and developing countries.”³ However, apart from repeating the empty rhetoric and including all sorts of lofty ideals, this document contains no concrete plan of action to achieve the development goals of the international community. The Monterrey Consensus rightly calls for sustainable, gender-sensitive, and people-centred development, but contains no clear financial commitment to achieve these objectives. With regard to the trade concessions to least developed countries, where poverty is more acute, the conference did not go beyond the Doha Declaration of the WTO of November 2001.

Many richer countries failed even to guarantee that they will meet the target of 0.7 per cent of gross national product (GNP) as official development assistance (ODA) to developing countries, and 0.15 to 0.20 per cent of GNP to least developed countries, let alone that they would increase this target. In other words, the Monterrey Conference provided a nice forum for Western political leaders to talk about the link between poverty and international terrorism in the aftermath of the 11 September 2001 events and to present themselves as “compassionate” world leaders but not much more beyond that. The poorer countries were asked to further liberalize their economy, make a wholesale subscription to the bandwagon prescribed by the WTO and the World Bank and improve good governance – a well-worn phrase used in so many international documents – as a way towards prosperity. These countries were not offered any concrete package to halt their economic marginalization. All in all, the outcome of the Monterrey Conference was quite encouraging in terms of outlining the long-term vision for financing development but disappointing in terms of concrete measures or specific action plans to achieve the development goals of the international community.

² Monterrey Consensus, paragraph 3.

³ *Ibid.*, paragraph 4.

Recurring Themes / Thèmes récurrents

The Aftermath of 11 September / Les conséquences du 11 septembre 2001

Introduction

Le 11 septembre 2001 restera gravé dans nos mémoires collectives et individuelles comme étant la seconde attaque physique, concertée, subie par les États-Unis d'Amérique sur leur territoire¹ mais la première qui ne puisse pas être attribuée à un État bien qu'elle revête l'ampleur d'une attaque dont on aurait pu penser, jusqu'à cette date, qu'elle ne pouvait provenir que d'un État.

Au-delà de la rhétorique à laquelle cette attaque a donné lieu, il nous est apparu important de nous interroger sur l'impact de cet événement sur à la fois la structure du droit international et sa pratique².

Le comité de rédaction a demandé à de nombreux auteurs, professeurs, praticiens, actifs dans les relations internationales à la fois publiques et privées, de participer à la discussion que FORUM voulait publier dans le présent numéro. Mais, les réponses reçues méritent que l'on s'y arrête un instant. Certains s'étant exprimés par ailleurs (notamment dans la grande presse francophone ou anglophone) n'ont pas souhaité participer à une nouvelle discussion, comme si l'on pouvait avoir une position arrêtée une fois pour toutes sur ces événements. D'autres n'ont pas souhaité s'exprimer, le sujet étant trop brûlant compte tenu de la personnalité de l'attaqué et de l'attaquant. D'autres enfin, après nous avoir donné leur accord, se sont finalement désistés pour diverses raisons.

A la réflexion, les différents refus auxquels nous nous sommes heurtés reflètent un malaise qui ne fait que grandir dans la communauté internationale des juristes pour ne citer que celle-là même avec laquelle nous sommes le plus familier et avec laquelle nous travaillons. Quelles peuvent être les causes de ce malaise³ ?

¹ La première était, évidemment, l'attaque de Pearl Harbour par les forces japonaises qui a entraîné l'entrée des États-Unis dans la seconde guerre mondiale.

² C'est le projet qu'avait formulé le comité de rédaction à l'origine. Toutefois, les deux communications que nous publions s'en tiennent seulement à deux aspects de la pratique.

³ Nous avons conscience que la réflexion qui suit n'est pas « scientifiquement » prouvée. Nous offrons ces quelques observations comme un élément de plus dans le débat sans prétendre que notre vision représente, en tout ou en partie, une part de la vérité.

La personnalité de l'attaqué est probablement la première d'entre ces causes. Depuis plus d'un siècle les Etats-Unis ont pris une place à part dans la communauté internationale et le développement des normes qui régissent les relations des membres de cette communauté. A partir de la fin de la seconde guerre mondiale et jusqu'à la chute du mur de Berlin, leur rôle était essentiellement celui d'un contre-pouvoir vis-à-vis d'une autre puissance militaire et politique, l'URSS. Depuis la dissolution de cette autre puissance, les Etats-Unis demeurent la seule puissance réelle dans la communauté internationale, toutes les autres jouant un certain rôle, mais comme les puissances mineures qu'elles sont devenues (un peu comme dans l'Olympe, le rôle des divinités mineures). Ceci vaut aussi pour l'Union européenne qui, malgré certaines évolutions vers une unité politique, ne s'accompagne pas encore d'une véritable politique étrangère unifiée. Or, tout élément dominant dans un groupe quel qu'il soit⁴, bride l'expression des autres membres du groupe, soit directement, soit indirectement, en raison d'une crainte révérencieuse face au dominant, d'un respect contraint dû à la force, à l'inquiétude de son propre sort face aux représailles éventuelles en cas de désaccord exprimé ou à l'espoir de promotion personnelle que l'accord avec le dominant pourrait engendrer.

Lorsque, de surcroît, le dominant se trouve être temporairement attaqué et revêt les habits de la victime, le sens critique est encore plus émoussé par la compassion naturelle que tout être humain éprouve pour la victime.

La personnalité de l'attaquant joue également un rôle fondateur dans la cristallisation du malaise. Nous savions tous, probablement, au moins de manière intuitive, que des groupes, plus ou moins agressifs, existaient et préparaient des actes violents comme nous en avons connus à d'autres moments dans l'histoire. Mais, rares sont ceux qui pouvaient imaginer que ces groupes avaient la puissance, l'organisation, la structure, les hommes et les moyens pour mener à bien des actes d'une telle intensité agressive et meurtrière. De surcroît, le fait que ces actes soient perpétrés au nom d'une idéologie régressive, rétrograde, à forte connotation démagogique et donc relayée par une masse de population n'ayant plus rien à perdre, engendre une difficulté d'autant plus grande à articuler une analyse froide et technique de la condamnation qui pourrait être formulée. Ceci doit être couplé avec le fait que la revendication des attaques a été faite au nom d'une certaine interprétation de la religion musulmane. Or, nous constatons tous que nous sommes assez ignorants de cette religion et de ses diverses interprétations si bien que l'interprétation même des événements du 11 septembre en devient extrêmement périlleuse.

Du point de vue de notre compréhension des forces agissantes dans le monde,

⁴ Cela vaut pour le monde animal comme pour le monde humain.

le 11 septembre est également significatif. Certains ont affirmé que les Etats-Unis, pas plus que leurs alliés ou les autres pays participant au monde libre, ne sont en guerre, appelant à leur rescousse les théories de la guerre telles que conçues par Clausewitz et qui ont influencé toute la pensée contemporaine sur la guerre. Toutefois, si le point de départ de la pensée de Clausewitz ne semble effectivement pas rempli (il n'envisageait qu'une attaque fomentée et mise en œuvre par un Etat), on ne peut pas nier qu'il ait été influencé par les mouvements révolutionnaires contre lesquels il a développé une partie de ses idées et que sa conception de la guerre totale ne soit pas aujourd'hui l'essence même de la stratégie mise en œuvre par les Etats-Unis. C'est ainsi qu'il convient d'interpréter le Presidential Military Order du 13 novembre 2001 dans lequel le Président des Etats-Unis déclare que son pays est dans un état de conflit armé⁵.

Il n'est pas fortuit de constater que, après la riposte armée qui a été menée sur le territoire d'un Etat, l'Afghanistan, qui était censé abriter les centres nerveux de l'organisation attaquante, la guerre se poursuit notamment sur le front juridique et économique. La réglementation « anti-terroriste » est de plus en plus importante en nombre et étendue dans son champ d'application, impliquant, comme le montre bien Peter Trooboff dans l'article qui suit, toutes les entreprises qui de près ou de loin sont appelées à participer à des activités de commerce international. De la même manière, la population américaine, dans l'immédiat après 11 septembre a été très sensible à la consigne patriotique lui demandant de dépenser pour que l'économie, un moment ébranlée, reprenne sans attendre.

On constate des conséquences également sur les mesures prises en matière de tribunaux d'exception, de règles de procédure modifiées, de suspension de tout ou partie des droits de la défense, et d'une myriade d'autres règles mettant à mal les principes les mieux ancrés sur lesquels se fondent l'Etat de droit. De manière surprenante, ces mesures ne soulèvent quasiment aucune réprobation publique de la part des groupes américains traditionnellement très militants pour la protection des droits de la personne et les libertés civiles⁶. Cela vient vraisemblablement du fait que les mesures en cause sont prises sous la bannière de la « légitime défense » par la victime qui, utilisant⁷ l'une des plus vieilles lois de ce monde, la loi du talion,

⁵ 41 ILM 252 (2002), section 1 (a).

⁶ Voir, toutefois, en sens contraire, les informations contenues dans un article du *International Herald Tribune* des 20 et 21 avril 2002 sous le titre "US blocks identification of detainees" dans lequel il est fait état de la résistance de certains tribunaux américains.

⁷ Il n'est peut-être pas inutile de rappeler que la loi du talion justifie certainement la défense mais jamais l'attaque. De plus, son application a toujours été considérée comme délicate car nécessitant le respect d'une stricte proportionnalité. Par ailleurs, les docteurs

tente ainsi de justifier ce qui peut apparaître comme injustifiable⁸.

Par ailleurs, on peut se demander si les ratifications du Traité instituant la cour pénale permanente internationale n'ont pas été facilitées par les attentats⁹. Face au devoir de juger les responsables de telles attaques, l'existence de la Cour est particulièrement significative. Certes, la Cour n'a pas de compétence rétroactive (c'est-à-dire qu'elle ne peut pas juger des actes perpétrés avant son entrée en vigueur). Du point de vue de sa compétence *ratione materiae*, si elle n'est pas compétente, *expressis verbis*, pour juger des actes de terrorisme, son statut lui donne compétence pour juger les actes d'agression même si, pour le moment encore, les Etats ne se sont pas mis d'accord pour adopter une définition commune de cette notion. De surcroît, la Cour est compétente pour statuer sur des crimes contre l'humanité. Mais, là encore, tous les commentateurs qui se sont exprimés ne sont pas d'accord pour dire que les attaques du 11 septembre sont des crimes contre l'humanité qui, dans la définition qu'en donne le statut de la Cour sont des crimes « commis dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile ». On doit également rappeler que malgré le fait que les Etats-Unis ne sont pas Partie au Traité instituant la Cour, ils pourraient néanmoins en accepter ponctuellement la compétence pour faire juger les responsables. Mais, il apparaît clairement que cela n'est pas dans l'intention des Etats-Unis.

On peut encore noter un effet majeur des événements du 11 septembre sur la législation pénale de certains Etats qui, depuis longtemps, cherchaient à lutter contre ce qu'ils considèrent comme des dérives des sociétés contemporaines. Or, ces Etats ont fait voter par leur Parlement des législations sécuritaires et liberticides sous prétexte de lutte contre le « terrorisme » qu'ils n'auraient jamais pu faire voter avant cette date¹⁰. On ne peut non plus s'empêcher de lire les actions guerrières du présent gouvernement israélien sous ce même prisme lorsque l'on entend les déclarations de leur chef de gouvernement.

Toutefois, tout ce qui vient d'être dit montre aussi le rôle du droit dans nos sociétés « occidentales ». En notre qualité de juristes, nous avons tendance à donner au droit un rôle qui ne devrait peut-être pas être le sien. Nous pensons d'autant

de la loi ont très tôt interprété la loi du talion en remplaçant le châtement en nature par une réparation pécuniaire ou par équivalent.

⁸ Toutefois, on doit noter que les associations internationales de protection des droits de l'homme, telle Amnesty International, ont protesté.

⁹ Rappelons que la soixantième ratification a été obtenue au début du mois d'avril 2002 permettant ainsi au statut de la Cour d'entrer en vigueur le 1^{er} juillet 2002.

¹⁰ C'est le cas de la France et du Canada.

plus à cette question en lisant la communication ci-après de M. Katoh qui, en sa qualité de non juriste, ne trouve pas que le monde sera bien différent avant et après le 11 septembre. Or, pourquoi les juristes (essentiellement les juristes occidentaux) sont généralement d'un avis contraire ? Tout d'abord, ils pensent que le droit est apte à prévenir des comportements a-sociaux. Or, le 11 septembre ne prouve-t-il pas, une fois encore, que le droit ne peut être que réactif. Certes, comme nous le disions dans l'éditorial du volume 3, numéro 4, de *Forum*, des normes juridiques existaient avant le 11 septembre qui auraient pu vraisemblablement, si elles avaient été appliquées, prévenir de tels événements. Mais, force est de constater que le foisonnement des normes juridiques en rend l'application trop difficile, incertaine et, partant, inefficace. Le rapport du temps au droit est également mis en cause. Nos sociétés s'accélèrent à un point tel que l'essence même de notre métier, réflexion sur le long terme et pérennité de la norme, est battue en brèche. Les normes juridiques ne sont plus pérennes. Elles sont désormais préparées dans l'urgence et se succèdent à un rythme tel qu'il est désormais impossible de mettre en application l'adage fort connu « nul n'est censé ignorer la loi », adage qui régit encore en théorie le rapport au droit dans nombre de nos sociétés.

Si le 11 septembre nous apprend quelque chose, c'est l'absolue nécessité de la coopération. Malheureusement, il n'est pas certain que cette leçon soit encore comprise. Certes, le discours d'une grande majorité de ceux qui sont chargés de l'élaboration des normes de droit international utilise ce concept mais, en pratique, qu'en est-il vraiment ? Pour coopérer, encore faut-il connaître l'autre. Le monde d'aujourd'hui (mais n'était-ce pas déjà le cas hier et avant-hier ?) ne nous permet plus de le penser dans un unique rapport de soi à soi, comme dirait les psychanalystes, mais dans un rapport de soi aux autres. Or, connaître l'autre demande du temps, de la tolérance, du respect. Ce n'est pas tâche aisée mais elle comporte un défi suffisamment éloquent pour notre survie à tous qu'il vaut la peine de le relever.

CK

September 11 – Legal and Practical Implications for the U.S. Practitioner

PETER D. TROBOFF*

In the short period of six months since September 11, and as a consequence of the events of that awful day, the clients of private practitioners in the United States have experienced dramatic changes in the legal issues that they face and for which they seek the assistance of outside counsel. Since September 11, the United States and other nations, acting in compliance with United Nations resolutions, have implemented anti-terrorism measures that directly affect the international operations of multinational companies. Important new legislation has broadened the scope of U.S. government powers and increased the responsibility of private companies to prevent new attacks, especially financial institutions through which terrorists' funds might flow. Further, the vulnerability of U.S. interests to the attacks has led many companies to conduct limited, focused audits to confirm their controls over equipment, materials and technology that could potentially contribute to the development of biological, chemical or nuclear weapons. These self-imposed compliance steps follow news reports that Al Qaeda manuals showed plans to purchase from open sources items potentially useable for constructing weapons of mass destruction.

Executive Order and Implementation Targeting Global Terrorists¹

On September 23, President Bush signed Executive Order 13224 that requires U.S. persons to block the assets of a new category of sanctioned parties, known as specially designated global terrorists ("SDGT"). For these purposes, U.S. persons include U.S. citizens and permanent residents, U.S. corporations and their non-U.S. branches and anyone in the United States. U.S. companies face a challenge in ensuring that they are not doing business or handling the funds of these many designated individuals and entities. Also prohibited are any business or other transactions with such designated persons.

While the Order originally designated a limited number of individuals, organizations, charities and business entities believed to be connected with terrorists, the list now includes hundreds of entities. The Office of Foreign Assets Control, U.S.

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¹ This section draws upon (with updating) material that appeared in my column on Antiterrorism Measures in the *National Law Journal* (December 17, 2001).

Department of the Treasury (“OFAC”), has responsibility for implementing the Executive Order. Because many of the SDGTs operate under various names, the official OFAC-terrorism list includes lengthy entries with multiple designators for the same individual or entity. The current lists may be located on the OFAC web site, www.treasury.gov/ofac (click on “Terrorism,” list appears after brochure; also all entries were added to the OFAC Master List of “Specially Designated Nationals”). In December 2001, acting under new legislative authority, the Treasury took action against certain charities in the United States. This Treasury list of specially designated global terrorists keeps growing – since early 2002, the Treasury Department has, in cooperation with the Spanish government, named Basque terrorists and added the offices in Somalia, Pakistan, Bosnia-Herzegovina and Kuwait, as well as in Afghanistan, of charities suspected of funding terrorist activities.

At this point, OFAC has four different sets of regulations directed at terrorists with additional regulations anticipated to implement the September 23 Executive Order. This complexity imposes a challenge on the private practitioner in keeping track of the differences and assisting clients in understanding whether any legal consequences flow from these distinctions.

The Secretary of the Treasury has made it clear that the success of these measures should not be measured by the amount of assets blocked. In fact, by early March 2002, Secretary O’Neill reported that the United States had blocked more than \$34 million in terrorist assets and that other nations had blocked more than \$70 million. He was quick to add, “More important than the dollars found in the accounts is the shutting down of these pipelines for much larger amounts of money.” (U.S. Treasury, Remarks of Secretary O’Neill, March 11, 2002.) He also pointed to the new safeguards that identify suspicious financial transactions and the improved information sharing “within the U.S. government and among allied governments.” And he referred to engaging all governments in examining and improving their own financial systems.

Undersecretary of the Treasury Kenneth Dam, a respected scholar in the anti-trust field specifically and the international field generally, told Congress in late January 2002 that, based on intelligence reports, the Administration believes that “Al Queda and other terrorist organizations are suffering financially as a result of our actions.” He added, “We also believe that potential donors are being more cautious about giving money to organizations where they fear that the money might wind up in the hands of terrorists.”

Threat of Future Unilateral U.S. Action and Retaliation in the Event of Non-Cooperation

President Bush has threatened to freeze the assets and transactions of banks and other financial institutions that refuse to share information about terrorists. Section 1(d) of the September 23 Executive Order includes as the target of the sanctions persons who “provide financial or other services” to designated terrorists. Section 5 broadly authorizes the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to take actions short of blocking of property against those whose actions cause them to fall within the scope of Article 1(d) of the Executive Order.

Unilateral action by the United States to carry out this threat against other nations would risk a breakdown of the cooperation with those nations that President Bush has explicitly relied upon in the military and economic action against the Taliban and other terrorists. That concern surely explains the United States effort to persuade U.N. Security Council members to adopt anti-terrorism resolutions and to convince U.S. allies in Europe to take measures within their existing institutions (e.g., the European Union) to achieve a coordinated response.

Due Diligence to Implement U.S. and U.N. Blocking Requirements

United States companies are responsible for ensuring that they do no business with any of the designated SDGTs and have blocked any property of SDGTs that happens to be in their possession or control, including goods or accounts payable. For a number of years, U.S. financial institutions, with OFAC encouragement, have installed interdiction software to screen transactions that are executed electronically. These systems permit U.S. banks and non-U.S. banks with U.S. operations to determine whether particular transactions require blocking or rejection. (For a discussion of the role of this software, see OFAC web site: www.treas.gov/OFAC (under “Industry Summaries” click on “Banks,” at page 3, Section IV. “Compliance Programs and Audit Procedures.”) As the length of the OFAC designation lists has grown and with the addition of the global terrorists, many manufacturing and non-banking service companies are considering installation of some type of interdiction software to assist in reviewing their sales transactions and vendor purchases.

United States companies have also considered whether terrorist organizations might have infiltrated their operations, domestic or international, or have been taking advantage of their equipment or technology. In defense and other high-technology industries, U.S. companies are accustomed to adopting strict security procedures to prevent unauthorized access to equipment and technology. However, reports about the workings of the Al Qaeda network reveal that it was prepared to

find targets of opportunity for developing biological, chemical and even nuclear weapons. As a result, some U.S. companies have initiated limited and focused audits to determine whether, for example, their laboratories and testing facilities have equipment that terrorist groups might attempt to take or utilize.

Included in such a review might be requirements to list equipment or technology of potential utility to such groups, and to determine who has access and who has authority to grant access, how the items or data are secured and where responsibility rests for acquisition, transfer or disposition. Good recordkeeping on such efforts would presumably demonstrate good-faith compliance efforts in the unlikely event that one or more employees (or others with access to company facilities) were, in fact, collaborating with such groups or that equipment or technology had fallen into the hands of terrorists.

The tough U.S. stance on cooperation explains why some U.S. companies are requiring their non-U.S. subsidiaries, even though not U.S. persons, to receive parent company approval prior to entering into any transaction with an individual, organization or entity that is the target of the terrorism sanctions applicable to U.S. persons. In most instances, local law, implementing the U.N. measures, should proscribe any proposed foreign-subsiary transaction with a designated terrorist and, in any event, there would be severe public relations consequences resulting from any other course. Thus, it seems unlikely that the decision of U.S. companies to implement such policies will give rise to the kinds of controversy that led in the 1980s to the famous Soviet Pipeline dispute with European trading partners or that caused, most recently, the strong European Union reaction to the continuing U.S. sanctions against trade with Cuba by European subsidiaries of U.S. companies which are "persons subject to the jurisdiction of the United States" under the Cuban Assets Control Regulations (15 C.F.R. Part 515 (especially 31 C.F.R. 515.319 defining "person subject")).

This situation might change rapidly if the United States were to designate individuals or entities that our leading trading partners did not accept to be engaging in terrorist activities or supporting such activities. As discussed below, I believe that the United States has to date rather skillfully avoided such controversy. The deftness is probably, in part, because of the hard lessons that accompanied the Pipeline dispute and other similar controversies (e.g., aspects of the Iran-Libya Sanctions Act and the Helms-Burton legislation) engendered by U.S. extraterritorial measures, especially those which were unilaterally imposed. Yet, the risks of controversy are real and in early April 2002, some of them came to the surface. For example, in the same week, both *The Wall Street Journal* ("U.S. European Divisions Hinder Drive to Block Terrorists' Assets – Some Countries Identify Few Targets Except Those That Are of Local Interest," April 11, 2002 at 1) and *The New*

York Times (“5 Months after Sanctions again Somali Company, Scant Proof of Qaeda Tie,” April 13, 2002, at 10), documented European concerns, namely, “the U.S. hasn’t provided enough evidence to back up its requests [to list terrorist organizations] and isn’t doing enough to crack down on offshore tax havens that can provide cover to terrorist” (*WSJ*) and “[s]ome European countries that assisted in shutting down Al Barakaat [which is based in Somalia] say proof of a terror link has not materialized” (*N.Y. Times*). While not yet threatening the multilateral financial blocking strategy of the United States, these complaints could begin to weaken the expeditious cooperation of our leading trading partners in the days that followed September 11 and, left unanswered, eventually threaten the entire effort.

U.S.A. PATRIOT Legislation²

Responding to President Bush and Attorney General Ashcroft, Congress moved promptly after September 11 to close a number of perceived gaps in U.S. legislation directed at preventing money laundering and other financial transactions that could assist terrorists. In the Uniting and Strengthening America Act by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (“U.S.A. PATRIOT”), Pub. L. No. 107-56, 111 Stat. 272, Congress included the International Money Laundering Abatement and Financial Anti-Terrorism Act. This legislation substantially restructured federal anti-money laundering programs, expanded the Secretary of the Treasury’s regulatory authority over anti-money laundering measures, imposed new reporting and recordkeeping requirements, principally on financial institutions and financial agencies, and revised the scope and applicability of U.S. statutes.

It is difficult to overstate the complexity of this legislation – my colleagues required five pages just to summarize the anti-money laundering provisions of this new statute and 42 more pages to analyze them. Further, on November 20, less than a month after enactment, the Treasury Department issued Interim Guidance to banks, savings associations and other depository institutions concerning their obligations under two key provisions of the new legislation (56 Fed. Reg. 59342 (Nov. 27, 2001)). The first concerned the prohibition under Section 5318(j) on opening correspondent accounts for foreign banks that lack a physical presence in any country, so-called “shell banks.” Such accounts receive deposits from and make

² For the discussion of the money laundering provisions of the U.S.A. Patriot Act, I have relied heavily on the analysis of this complex legislation by my partner D. Jean Veta and Covington & Burling associates Debra R. Volland and James M. Hanlon, Jr.

payments on behalf of foreign financial institutions or handle other financial transactions on their behalf. They include accounts utilized to settle U.S. dollar transactions, as well as those that are established for fiduciary purposes including custody and escrow accounts. They also encompass accounts utilized for funding purposes such as time deposit accounts or for processing transactions that involve the purchase of various financial instruments. The new proscription also targets foreign banks that service shell banks, even if the foreign bank itself has the requisite physical presence. The Interim Guidance also addressed the requirement (Section 5318(k)) for U.S. banks establishing a correspondent account with a foreign bank to maintain records of the owners and agents in the United States who are designated to accept service of summons or subpoenas for records regarding such an account. Included in this first action was a certificate on which banks could rely in meeting these obligations.

In December 2001, the Treasury Department implemented these two provisions through proposed regulations that extended the coverage of the provisions to securities brokers and dealers. In addition, the affected financial institutions were given 90 days to obtain or verify the required information and secure the requisite certifications. Further, they are responsible for reverification every two years.

Also in December, the Treasury issued proposed regulations implementing Section 265 of the new legislation which gives the Treasury Department's Financial Crimes Enforcement Network, known as FinCEN, access to reports by non-financial trades or businesses when they receive more than \$10,000 in coins or currency. The Treasury had access to such reports for financial institutions but learned from the post-September 11 investigations that cash and currency transfers among entities not covered by the previous legislation posed a major threat to U.S. interests. In early January 2002 acting under its new authorization, the Treasury also extended the requirement to register with FinCEN and file suspicious activity reports to certain money service businesses including underground money transmitters.

In early February, the Treasury Department issued interim and proposed regulations to implement Section 314(a) of USA PATRIOT which addresses information exchanges between financial institutions and the government and among financial institutions for the purpose of detecting those suspected of terrorist acts or money laundering activities. Again, the rules to be followed are complex and build upon the suspicious activity reporting obligations that existed prior to USA PATRIOT but that have been supplemented by that legislation and by the obligation to respond to FinCEN inquiries. Further, these new rules have the effect of helping U.S. federal agencies to request information from targeted suspects and to receive reports about such suspects from financial institutions without having the

suspects learn of an investigation. Undersecretary Dam explained in January 2002 that the guiding principle for the new regulations is that “people should not be able to shift from one type of financial institution to another in order to avoid a regulatory scheme or anti-money laundering [regime]” because, he explained, “our financial system is only as secure as its most vulnerable point.”

Future U.S. Implementing Actions

Much remains to be accomplished in the implementation of the provisions of USA PATRIOT that amended the Bank Secretary Act. Over the coming months, the Treasury Department will issue regulations, interim or proposed, relating to the due diligence and special measures required of financial institutions that maintain either private bank accounts or correspondent accounts for non-U.S. persons, particularly when those accounts may be utilized for money laundering (Section 311 and 312), methods for identifying and confirming the identity of foreign nationals (Section 326) and methods for improving compliance with the obligation to report foreign bank accounts (Section 361). Additional Treasury directives will address the minimum requirements for anti-money laundering compliance programs of financial institutions. Indeed, new Treasury Department regulations appeared on April 23, 2002, that broaden and deepen the scope of the requirements summarized above (67 Fed. 21110 (April 23, 2002)).

Reflections on the Impact on Private Practice in the United States

Because so much has occurred since September 11, it is perhaps appropriate to step back and reflect on how the legal and regulatory changes reviewed above and other post-September 11 measures have affected our practices. First, the foregoing does not begin to cover the changes in airport security procedures, shipping practices and the like and the responses to these steps (e.g., greater use of conference calls and limitations on travel). Second, it is important to emphasize that these developments have occurred while other significant occurrences not apparently related to the September 11 attacks have immeasurably captured the attention of the American legal community (and I omit the general economic slowdown that had begun before attacks but continues to affect law firm hiring and operations).

None of the foregoing reflects the responses that our law firm and others have adopted as a result of the anthrax mailings that occurred in the fall of 2001. For example, no package arrives in a major U.S. company today without careful attention to the sender and its bona fides. We have become even more mindful of the importance of planning for business interruption of the kinds that occurred in the days following September 11. Thus, American lawyers generally are thinking more these days about remote computer access, alternative sites for operations and other

such backup steps to ensure the capacity to continue serving clients in the midst of another national emergency.

Since the Enron, Arthur Andersen and Global Crossings collapses, clients have asked American lawyers to devote considerable attention to not only the legal issues arising from their accounting practices but also to record maintenance and destruction policies. For a telephone seminar on the latter subject, we have had literally hundreds of clients ask to participate. We are only beginning to cope with the fallout from these significant breakdowns in established internal corporate controls.

For those of us whose practices concentrate in advising on the laws and regulations summarized above, we devote much attention to preparing summaries that permit clients to understand complex new regulations. In particular, our clients want to do the right thing but face great challenges in sorting out how specific measures affect their operations. Clients also need assistance with training their personnel and adopting internal compliance programs that respond to the perceived problems without disrupting operations. Designing those programs is a far greater challenge than most realized and major corporations are only beginning to develop programs and share best practices.

As should perhaps be expected, the proposed U.S. governmental actions to implement the post-September 11 legislation of the Treasury Department has given rise to some controversy. In February, the New York Clearing House, the American Bankers Association, the Bankers' Association for Finance and Trade and the Securities Industry Association expressed concerns to the Treasury Department about certain aspects of the proposed implementation of the USA PATRIOT Act. In particular, and while proposing improvements in the definition of "correspondent accounts" to close certain possible loopholes, the Clearing House urged that enhanced scrutiny not be required for normal correspondent accounts with established foreign banks or where the foreign bank is a primary participant in the transaction. In those cases, the Clearing House argued, the risk of money laundering or financing terrorism is minimal. The Clearing House also raised concerns about imposing the new certification requirements on the non-U.S. branches of U.S. banks, when their competitor banks in these foreign markets will not be subject to similar requirements. Also questioned by this key banking industry association were the timing for terminating such accounts and the absence of adequate provision for relief when such accounts serve as collateral for the bank or for third parties. The Securities Industry Association noted the risk to securities under the proposed regulations of liquidating a client's account without the customer's consent. It asked for freezing rather than termination through forced liquidation. The Clearing House asked for guidance on the potential conflict of legal

requirements that might face the non-U.S. branch of a U.S. bank that is required to close an account under the new Treasury regulations but is required to continue offering the account under local law.

Not surprising, the trade association representing the regional and community banks, Independent Community Bankers of America, noted the potential increased costs that their members face in serving local customers. The community banks urged that existing reporting requirements be utilized to satisfy the new statutory requirements for certification and information exchange.

For those familiar with United States regulatory processes, it is hardly surprising that there would begin to be some debate over the scope of the U.S. response to terrorism and, in particular, over the costs and benefits of particular measures. There is always a risk that the price of preventing future terrorist attacks will become too high and, in particular, will interfere with the very freedoms that terrorists threaten. If the fight against terrorism is about anything, it is in my judgment about the preservation of democracy and the freedom on which a functioning democracy relies. One hallmark of democracy is surely the free and open give-and-take surrounding specific proposed governmental action. This means that proposed measures of the United States may well give rise to a robust dialogue among the interested parties, including various segments of private industry. While the Administration would undoubtedly have many advantages in a court challenge, it knows that failure to follow required procedural rules or weaknesses in articulating the justification for particular action could provide the basis for a suit challenging specific measures. Even if it won in the end, U.S. government officials know that such a dispute would not be healthy in their effort to secure consensus and cooperation in the fight against terrorism. That is the reason why they will listen to submissions of the kind mentioned here and others that will surely be forthcoming in the months ahead. Further, while the U.S. courts will and should give the Administration great leeway in designing anti-terrorism measures, our courts will never write a blank check in such circumstances and every Executive official knows that to be the case. Further, Congress' continued cooperation depends heavily upon the Administration's acting within a framework that does not lose support of key segments of the business community or the American people generally.

To date, the Bush Administration has found certain of its actions outside the regulatory field to be highly controversial (e.g., the treatment of prisoners captured during the conflict in Afghanistan after September 11). There has been less reporting about the U.S. regulatory measures that followed September 11 and a higher degree of cooperation because the Administration shared information with its principal trading partners and the United Nations. I recently met with an official who has played a central role in the designation of terrorists organizations. That official

referred to the intensive internal investigation and dialogue that occurs within the U.S. government before terrorist designations occur. I believe that process has helped to minimize the number of controversial designations. In addition, and although I have no specific evidence to support this point, it is likely that U.S. embassies abroad and the State Department have acted promptly upon creditable complaints by other governments about mistaken designations. I am led to this belief by the prompt disappearance from the press of the few stories that have appeared regarding foreign governmental protest over particular designations. As noted above, however, it is possible that issues of this kind are beginning to emerge with some U.S. trading partners.

The late Abram Chayes wrote in *The New Sovereignty* about the need for multi-lateral, cooperative responses to global problems in the fields of trade, environmental matters and other non-security matters and argued that these could not for a variety of reasons be addressed through unilateral regulatory action. At the time of his untimely death, he was writing another book on the importance of similar global responses in the national security field. Professor Chayes did not live to see the horrors of September 11. I am confident that, if those events had occurred prior to publication, Professor Chayes and his co-author wife, Antonia Chayes, would have appropriately devoted a chapter of their book to the blocking, anti-money laundering, financial and other regulatory actions that are contributing to the global response to fighting terrorism. Since September 11, we have learned that they were correct in believing that their thesis applies equally in the security field and explains the critical role of regulatory cooperation among nations in support of the measures necessary to combat the greatest security threat to the United States since the end of the Cold War.

The World After September 11, 2001 – Has Everything Really Changed?

MASANOBU KATOH*

At 9:40 AM on September 11, 2001, I was on an airplane headed towards Reagan National Airport from Chicago. The captain announced in a shrill voice, “Due to a national emergency, this plane has been ordered to immediately land at Dulles International Airport located in the suburban Washington D.C. area.”

After my plane landed at Dulles International airport, all airports in the United States were officially closed. Subsequently, an emergency evacuation of the Federal government offices in D.C. was ordered, turning the streets of the nation’s capital into chaos.

I wanted to know immediately about the safety of my office (located three blocks from the White House) and my son, who attends college in New York City.

In the week following the dreadful event, I mainly used e-mail to communicate with friends to find out about their safety. I also relied heavily on the Internet, including the websites of the US government and the Embassy of Japan, to get useful information.

In those days after September 11, the Internet felt like a lifeline connecting me to the rest of the world. At the same time, I was aware that this great communications medium could be used by terrorists to plan their next attack. I also knew that the Internet itself could be a target, or a means for an attack on computers attached to the Internet.

In the aftermath of September 11, many people in the U.S. repeated the refrain that everything had changed. People felt that America’s sense of invulnerability to attack was forever shattered. People also felt that the openness of American society, and the great freedom of movement within the country, were also gone forever.

Additionally, many people in the IT sector believed that September 11 would bring about fundamental changes to our industry. Now that almost half a year has passed since September 11, we can more objectively assess whether there will be a long term impact on the IT sector. My general conclusion is that there will be a greater emphasis on network security, but fundamental features of the industry will remain unchanged.

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The Legislative Response

Immediately after September 11, the U.S. Congress began considering anti-terrorist legislation. The legislation contained provisions that made it easier for law enforcement authorities to monitor electronic communications, including Internet usage. Civil liberties groups attacked the proposals as major threats to privacy and personal freedom that could lead to reduced Internet use. However, as the legislation moved through Congress, some of the more extreme provisions were deleted or modified, and other provisions became better understood. The legislation that finally emerged, the so-called USA-PATRIOT Act, strengthens law enforcement powers in a relatively moderate way that does not appear to threaten civil liberties or the Internet. Other countries are also in the process of reviewing their cyber-security laws. Hopefully these laws will maintain the right balance between government and personal interests.

The Technological Response

After September 11, great attention was suddenly paid to network security. For example, in November 2001, ICANN (The Internet Corporation for Assigned Names and Numbers), which manages the Internet's domain name and IP number system, held a meeting where it conducted an in-depth examination of security problems relating with the Internet as a whole.¹

At this meeting, Mr. Kenji Kosaka, the Japanese Senior Vice Minister of the Public Management, Home Affairs, Post and Telecommunications and also a Member of the Japanese House of Representatives of Japan, delivered a keynote speech where he spoke on the importance of security, Japan's views on security, and the need for international cooperation.² Next, Mr. Steven M. Bellovin of AT&T summarized security problems in relation to ICANN. In addition, he spoke about how there are various security problems in the Internet which ICANN alone cannot solve. The ICANN meeting then proceeded with the various groups that make up the Internet reporting to each other on their respective viewpoints and concerns about security.

The first group, the DNS Root Name Servers which are the backbone of the Internet, summarized how even if several of the thirteen root name servers dispersed around the world were physically destroyed, the domain name system should still be able to operate normally. Although it could not be proven that the DNS's built-in redundancy would work perfectly, many of us in the audience were nonetheless reassured.

¹ <http://www.icann.org/mdr2001/schedule.htm>

² <http://cyber.law.harvard.edu/icann/mdr2001/archive/pres/KosakaSpeech.html>

The various operators of the registries for global top level domain names, such as .com, have a strict system managing their security. However, many of the over 200 country code registries do not conform to ICANN's uniform standard and regulations. The level of security at these registries, therefore, is unknown. Furthermore, the data protection standards of the registrars that maintain so-called WHOIS databases is also not very clear. These discussions made it obvious that more cooperation on an international level is needed. Taskforces need to be established and standards developed to improve network security. Significantly, ICANN can't do this alone; it must work with other groups responsible for different aspects of the Internet and the telecommunications network.

Using this November meeting as a springboard, ICANN created a standing committee on security. This committee was formed to exchange information and perspectives between the various groups relating to the Internet.

In sum, at the ICANN meeting we learned that the basic architecture of the Internet is extremely secure – after all, it was built to withstand a nuclear holocaust. On the other hand, we were educated about the many vulnerabilities that exist. These vulnerabilities can be addressed if people are willing to cooperate at an international level.

The Economic Response

Another immediate impact of September 11 was its affect on the world economy in general, and IT sector in particular. Prior to September 11, the high tech industry was already in disarray. In March, 2000, the NASDAQ composite index hit a peak of 5048. Then the IT “bubble” burst, and the NASDAQ went into a serious free fall, at one point dropping to one third of the high. (I know this from personal experience. I invested in technology stocks in March, 2000.) The September 11 attack caused financial markets around the world to drop another 10 % or more, and consumer confidence plummeted.

U.S. telecommunication giants such as AT&T and MCIWorldcom have regularly been posting financial losses. Internet service provider PSINet had to file for Chapter 11 bankruptcy protection. Investment in the communications sector are expected to decline from \$117 billion in 2000, to \$84 billion in 2002.

The unemployment rate for the United States in the year 2000 was a record low 3.9%. Recently it has climbed to around 5.6%. In Silicon Valley, where a great number of high tech companies operate, the unemployment rate is now said to be over 6%.

High-tech companies in Japan are in even worse shape. The 1990s were called “The Lost Decade.” Compared to the United States' economy in the 90s, Japanese companies had very little growth (or negative growth) and gains are expected to be

even lower this year. The demand for cellular phones and computers, which expanded greatly up to two years ago, has declined sharply, and as a result, the demand for semiconductors and electronics has also decreased. Competition from South-East Asia has strongly increased, causing the price of semiconductor memory parts to fall enormously. The unemployment rate in Japan has also risen to a post-war high of 5.6 %.

In the months after September 11, many people wondered whether the world economy would recover in the near future. Would the IT sector, which had been an engine of growth throughout the 90s, resume running on all cylinders anytime soon? I believe there is a good chance for recovery. As a result of the unprecedented terrorist attacks, three phenomena have occurred in the IT industry. First, security in the computer and telecommunications fields are now being re-examined very closely. Government and industry wonder whether the computers and communication systems, which are now so essential to society, are safe enough. From now on, massive investment in this field can be expected.

Secondly, as a result of the terrorist attacks, the demand for virtual communications such as E-Commerce, E-Learning, TV, and Internet conferences likely will increase. Rather than travel by plane to meetings, people will participate in video conferences. Rather than risk "snail mail" being delayed as envelopes are irradiated to prevent anthrax, people will communicate electronically. Rather than taking their chances at crowded malls that might be terrorist targets, people will shop online. Even though there were concerns that year-end consumer sales would drop, the statistics indicate that online shopping actually increased by 10% over the previous year. We can look forward to similar turnabouts in the future. I am not suggesting that people will stop traveling for business or pleasure, or will stop visiting malls. However, I believe that there will be a shift in consumer behavior, and we can expect greater use of IT for business, commerce, and pleasure. (Researchers have discovered that consumers are willing to spend up to twice as much for purchases using credit cards rather than cash. It will be interesting to see whether online shopping eliminates even more psychological resistance to purchasing.)

Third, President Bush has declared a war on terrorism. The war will require a dramatic increase in the U.S. government's ability to collect and process information, and the development of "smart" weapons increasingly dependent on information technology. In the coming years, the U.S. government will spend billions of dollars on high tech R&D. These three factors acting together should lead to robust growth in the IT sector, which hopefully will pull up the rest of the economy.

Indeed, in the United States, since late last year there are signs that the economy is recovering. Among "dotcom" companies which symbolized the bursting of the IT bubble, profits are starting to be reported. Amazon.com, Internet merchant

extraordinaire, which had previously never posted any quarterly earnings, has finally reported profits for the last quarter of 2001.

Conclusion

So, has the IT world changed completely since September 11? I don't really think so. We have learned that our networks are vulnerable, and that we need to take security much more seriously. We can no longer leave security just to the engineers! Many security issues concerning the Internet need to be addressed internationally, with a spirit of goodwill and cooperation. At the same time, we have learned that the networks are extremely resilient – that many security concerns were properly anticipated by the engineers, and that the underlying architecture of the Internet is sound.

New laws have been passed in the U.S., and other countries are also considering new legislation. These new laws grant additional powers to law enforcement to monitor Internet use. At the same time, they are just incremental changes over existing laws, and will not curtail civil liberties or affect Internet use.

The IT sector, like the rest of the economy, is beginning to recover from the shock of September 11. Moreover, September 11 will increase investment in IT security and IT weaponry, which will benefit the sector significantly. At the same time, September 11 will change consumer behavior in ways helpful to the high tech industry.

An important lesson of September 11, therefore, is not to overreact to events, even events that are horrific. The world economy, the IT sector, and the human spirit are far stronger than we think. Often only minor adjustments are all that is needed to restore equilibrium.

At the same time, we must be careful not to underreact to events. With the defeat of the Taliban in Afghanistan, and the absence of serious follow-up attacks since September 11, perhaps the greatest danger we face is complacency. Some may feel that we don't need to invest in network security since al Qaeda is defeated. Of course, we don't know that al Qaeda in fact is defeated. Moreover, even if it is defeated, there are many other disaffected people in the world. A smart, motivated hacker with a laptop can inflict a great deal of damage.

In short, after September 11, life goes on. We must not forget that it occurred, and we must take network security more seriously. At the same time, we cannot become hostages to our fear.

Profile / Profil

Shepard Forman

CESARE P.R. ROMANO*

Shepard Forman is my hero. Granted, he is the Director of the Center on International Cooperation at New York University, where I work, but that has absolutely no affect on my judgment. Quite the contrary, working with Shep for the past five years, seeing him in times of crises (such as September 11) and in times of celebration has given me the opportunity to get to know him on many levels.

Shep's approach to international problems reflects his ability to interact with people on a very personal, human level. Like ancient medicine men, Shep can whisper to horses; he can heal with words. These might be innate qualities, but in my opinion they are the result of a life spent talking to people and listening. To me his greatest quality is his gift for putting human beings and their problems at the center of his focus.

I met Shep in the Fall of 1996, when he had just left the Ford Foundation and was about to establish the Center. I remember I came back home from the NYU Law School and there was a message from a person I did not know asking whether we could meet for lunch to discuss certain ideas. I met this tall, distinguished gentleman, who spoke clearly and smoothly. He told me about how he wanted to shape the Center and that he planned to develop, together with Philippe Sands, then at University of London and NYU School of Law, a project to study the phenomenon of the multiplication of international judicial bodies and the issues, in particular those of financing and access, arising therefrom. He asked me whether I could carry out some preliminary research and sketch a project-development plan. Five years later, that plan has become the Project on International Courts and Tribunals (PICT), and I am still proudly managing the New York end of that endeavor.

When I was asked to write Shep's profile, I was excited by the opportunity to share, not only the accomplishments of a friend, but such an unexpected story as well. Indeed, when asked how he became involved in international relations and law, and what shaped his curriculum, he gives a surprising and unstudied answer: serendipity. His walk towards international law and international relations has been,

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indeed, long and rather circuitous, but listening to his account of his own life, one cannot but doubt his modest self-portrayal. One must recognize fortune when it passes by.

Shep was born in 1938, in Boston, Massachusetts. The son of East European Jewish refugees (from Ukraine and Latvia), Shep is in essence a first generation American. These origins have played a central role in his life, giving him a sense of history as well as an understanding of the devastating effects of conflicts and the importance of fundamental human rights that have oriented his career.

He did his undergraduate work at Brandeis University, in Waltham, Massachusetts. During Shep's sophomore year, James Duffy, a scholar teaching the history of Portuguese Africa, asked him to carry out research on a little known Portuguese colony in Southeast Asia: East-Timor. The assignment sparked in him a keen interest in colonialism and politics, and raised the question of how larger economic and political forces affect marginalized peoples. That was the beginning of a life-long relationship with the island and her people, but it was not until later on in his life that he met them.

In 1960 he moved to New York. While working towards an M.A. in comparative literature at New York University, Shep applied for a National Defense Foreign Language grant to study Portuguese and Brazilian language and literature. He received the award; however, because of a clerical error, was instead assigned to social sciences which led to an M.A. in Latin American history and a subsequent Fulbright Fellowship to study a 1930s labor dispute in Sao Paulo, Brazil. The day before he was supposed to leave for Brazil, he met a woman named Leona Shluger, who had lived in Brazil before moving to the United States. Leona was herself the daughter of Jewish refugees, who had fled first Russia, through Siberia and Manchuria, settled in China, lived through the Communist revolution and eventually were resettled in Brazil. She gave him the contact information for her parents in Rio de Janeiro. Seven years later, the two were married. They have been together ever since, and traveled throughout the world together with their two children.

Once in Brazil, Shep lost his scholarly zeal and, as he tells me with a broad smile, "got distracted by the lure of the beaches of Rio." Eventually, the Fulbright Commission decided to call him back because he was not fulfilling the provisions of the grant. While he contemplated a sudden and melancholic return home in one of the bars of Copacabana, Charles Wagley, a professor of Anthropology at Columbia University, walked in. That was another of his life-changing flukes. Wagley asked Shep to accompany his expedition to the Northeast of Brazil to conduct anthropological research.

Shep joined the mission and found his first vocation. Wagley advised him to apply to Columbia for a Ph.D. in Anthropology and Latin American studies, a

suggestion Shep was quick to heed. He returned to New York, completed his curriculum requirements, and set sail again for the Northeast of Brazil to write his dissertation about a community of fishermen in Coruripe, in the state of Alagoas. His focus was the complex of economic, legal, socio-political and ecological factors that effected decision-making in peasant communities. Much of 1961 was spent with peasants. These were the years of tense social conflict immediately before the military coup of 1964; land reform was opposed by land-owners by way of killing squads. The experience pushed Shep more strongly in the direction of a specialization in social and economic conflicts and the implications of U.S. foreign policy on the protection of human rights around the world.

After finishing his research in Brazil and publishing his dissertation (*The Raft Fisherman: Tradition and Change in the Brazilian Peasant Economy*, Indiana University Press, 1970), Shep started an academic career in Anthropology, teaching first at the Indiana University (1967-69), and then at the University of Chicago (1969-1973), and finally at the University of Michigan (1973-1980). During that time, he wrote an historic account of The Brazilian Peasantry, Columbia University Press (1980). Yet, the call of the field was too strong to resist.

In 1973, Shep received a telephone call from the Portuguese consulate. They found an application he had filed ten years earlier for a visa to go to East Timor and asked him if he still wanted it. Once again, Shep followed fate's suggestion. He moved to East Timor with his family and lived there from 1973 to 1974 studying the relationship between Portuguese colonial rule and the cultural traditions of the Makassae, one of East Timor's major indigenous ethno-linguistic groups. This was the beginning of his flirtation with law and his chance to learn about the decolonization process from within.

Yet, while Portugal was swept by the Carnation Revolution, East Timor was invaded by Indonesia. Many of the people with whom Shep and his family lived and worked suffered the brutality of military occupation or moved into hiding to fight a guerrilla war. Obviously Shep could not return to the island to help. Instead, he testified before the Congressional Committee on International Affairs on the situation in East Timor and become a long-time supporter of the exiled independence movement.

In 1977, Shep was asked by William Carmichael of the Ford Foundation to go to Brazil to provide support to Brazilian universities in the social sciences and economics. Shep and his family had just begun to resettle in Ann Arbor and did not plan to move again. Though he resisted, Shep finally agreed to go to New York to discuss the matter. Shortly after, he and the family were en route to Brazil again. Ford's Representative in Brazil at the time, an international lawyer by the name of James Gardner, had just completed a book entitled "Legal Imperialism" and

together they began to carry out work on the rule of law and the process of democratization as the country was contemplating its first tentative steps away from military rule.

Three years later, he was asked back to New York to advise the Foundation on programs in Latin America. At that point, he gave up tenure at the University of Michigan and started a 15 year stay at the Ford Foundation, eventually rising to Director of International Affairs Programs. He brought to the Foundation all his humanity and experience in the field among the peasantry and the marginalized.

In 1981, he was invited to start a new division on Human Rights and Governance at Ford, which included the Foundation's programs in domestic civil rights, and, when the Cold War ended, to refashion the Foundation's International Affairs program, as well as to oversee the Foundation's emerging portfolio of work on Russia and Eastern Europe. Shep also started the Foundation's first program on HIV/AIDS. In 1990, as the new Director of Ford's International Affairs program, he assumed responsibility for the Foundation's work in international law. In that capacity he received several visits that shaped his next course. Two in particular should be mentioned: one by the UN Secretary General, Javier Perez de Cuellar, and another by the President of the International Court of Justice, Sir Robert Jennings. Perez de Cuellar was seeking the Foundation's financial help to implement the painstakingly negotiated peace agreements in El Salvador. Similarly, Jennings visited him while seeking funds to help the Court carry out its functions. Shep was struck by the idea that, in both instances (and in many other cases he witnessed) the provision of an essential public good, such as peace, was not adequately assumed by the community of states, which could field enormous resources, but was ultimately depending on the good will of a private, philanthropic organization.

With this in mind, and a generous grant, he left the Ford Foundation in 1996 to establish the Center on International Cooperation to study the economic, political, legal and institutional foundations of effective international cooperation. The Center, which was established under the auspices of NYU, focuses on such diverse sectors as international justice, humanitarian assistance, development aid and peace-building, assessing current needs and financing sources and, as necessary, exploring the appropriateness and feasibility of alternative sources of funding and institutional arrangements.

Since Shep started CIC, he has not stopped writing. In addition to the Paying for Essentials policy paper series on the management and financing of multilateral commitments, Shep has co-edited with CIC colleagues: *Promoting Reproductive Health: Investing in Health for Development* (Rienner); *Good Intentions: Pledges of Aid for Post-Conflict Recovery* (Rienner); and, most recently, *Multilateralism and US Foreign Policy: Ambivalent Engagement* (Rienner).

While Shep believes that international law is the bedrock of international relations and the surest guarantor of equity amongst nations in a very imbalanced world, he sees much room for improvement. Indeed, to carry out fully its beneficial effects, international law needs to be more widely understood. Knowledge of it should be enlarged beyond the current elites and power groups. Moreover, there is still much to do to open up the process of the formation and implementation of international law to non-state entities. International law, in his view, should be the language of people, not simply of inter-state relations.

When I asked him what he plans to do in the future, I got a big smile and he told me that, besides seeing the Center fully and firmly established, he has two plans that, in a way, epitomize his incredible life. First, he intends to go to East Timor on the day independence will be declared (May 20, 2002), and celebrate with his friends the victory of democracy and the conclusion of the long march of those people from colonialism to the family of nations. Second, he wants to write the social history of his farmhouse in Ashfield, Massachusetts, which has been owned by eight families in 240 years.

Work in Progress / Travaux en cours

Compte-rendu du Colloque de Genève du 23 mars 2002 sur les “Réparations et crimes de l’histoire : le droit dans tous ses états”

ERIC WYLER*

Le but du colloque intitulé “Réparations et crimes de l’histoire : le droit dans tous ses états”, organisé par le Département de droit international public de la Faculté de droit de l’Université de Genève en coopération avec l’Unesco, l’Auberge de l’Europe et Pierre Hazan, était de s’interroger sur la signification de la vague récente des demandes de réparation fondées sur la notion de “crime de l’histoire”. Depuis quelques années en effet, la pratique témoigne de la mise sur pied de mécanismes permettant à des personnes victimes – ou leurs proches – de faire valoir des réclamations contre des Etats ou des entreprises privées¹ à raison de traitements inhumains subis lors d’événements historiques dramatiques (pour la seule seconde guerre mondiale, on compte déjà plus d’une vingtaine de “programmes de compensation” depuis 1996).

Que cette problématique dépasse le domaine juridique est une réalité mise d’emblée en évidence par le Colloque.

Féconde, en particulier, se révèle la confrontation des vérités “historique” et “judiciaire”, aux exigences différentes par-delà l’intimité de leurs relations – songeons au procès de Nüremberg – la recherche de la première n’admettant aucun des obstacles consubstantiels à la seconde, dont le visage est modelé par l’effet d’une multitude de règles procédurales, telles la prescription, les fins de non recevoir ou les diverses contraintes relatives à l’administration des preuves. Ainsi, l’innocence judiciairement établie n’exclut pas une culpabilité devant le “Tribunal de l’Histoire” et réciproquement.

Sur le terrain spécifiquement juridique, on éprouve des difficultés à fonder une responsabilité pour les “crimes de l’histoire”.

En droit international, le principe de la continuité de l’Etat, qui invite à admettre une responsabilité étatique dans l’hypothèse où le Gouvernement d’un Etat reconnaît

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¹ Si le colloque s’est focalisé sur l’Etat, une réflexion relative à la responsabilité des entreprises mérite d’être engagée.

publiquement la criminalité d'actes commis par un précédent Gouvernement et s'en excuse, peut se heurter à un autre principe, celui de la non-rétroactivité des normes. A cet égard, deux situations méritent d'être clairement distinguées.

Lorsque les comportements en cause pouvaient déjà être qualifiés de "crimes internationaux" à l'époque de leur perpétration, le problème de leur réparation semble se réduire à celui de la justiciabilité actuelle des prétentions, notamment leur transmissibilité. C'est le droit interne qui fournit les données pertinentes, par exemple en prévoyant qu'une créance pécuniaire dérivant d'un droit personnel peut passer aux héritiers. Si la réclamation parvient sur la scène internationale, grâce en particulier à la protection diplomatique exercée par l'Etat national de l'ayant-droit, le principe de la continuité de l'Etat permettra d'imputer au Gouvernement actuel les crimes de son prédécesseur.

S'il s'agit en revanche, ainsi que l'expression "crime de l'histoire" incite à le penser, d'actes non criminels à l'origine, mais qualifiés de cette manière selon le droit contemporain, force est de reconnaître que le droit positif n'offre guère de concept de responsabilité adéquat. La question a été posée de savoir si le droit positif est la cristallisation d'un droit naturel préexistant ou s'il s'agit d'une oeuvre normative de pure création. Evoquée à plusieurs reprises, elle n'a pu être discutée de manière approfondie, faute de temps.

L'éventuelle "réparation" offerte apparaît dans ce cas comme le fruit d'un geste gracieux de l'Etat, consenti en dehors de toute obligation juridique, donc de toute responsabilité, le principe de non-rétroactivité s'opposant à toute incrimination rétrospective. On peut douter que les revendications découlant du douloureux passé d'esclavage de populations africaines, par exemple, puissent se satisfaire de cette réparation *ex gratia*.

D'un autre point de vue, il faut se demander si la relation personne privée (Demandeur) / Etat (Défendeur) épuise tous les aspects du problème, la responsabilité "pénale" de l'individu se trouvant davantage ancrée dans la pratique internationale que celle de l'Etat, et l'articulation de leurs rapports encore partiellement obscure. Ainsi les tribunaux japonais, saisis dans les années 1990 par des "comfort women" coréennes rescapées de la deuxième guerre mondiale ont-ils rejeté les demandes en se retranchant derrière le caractère interétatique des rapports juridiques en jeu.

Fondamentalement, l'inconnue première de l'équation proposée par le "crime de l'histoire" se rapporte au contenu de cette notion, encore incertaine. Si l'imprescriptibilité des "crimes contre l'humanité" permet au droit d'étendre son empire sur le passé, reste à déterminer les critères de sélection des "crimes historiques" – sont-ils au demeurant tous des crimes contre l'humanité? – susceptibles de donner lieu à des actions judiciaires. Le problème, crucial, déborde les frontières du droit

étatique comme du droit international.

C'est par exemple la pression politique qui rend le mieux compte de la création d'un tribunal suisse pour les "Fonds dormants en Suisse" destiné à allouer des réparations à des personnes condamnées aux travaux forcés en Suisse entre 1939 et 1945.

Si l'on sait que la réinterprétation de l'Histoire impliquée par nos nouvelles aspirations à la Justice n'ira pas jusqu'à l'admission de réclamations basées sur *tous* les comportements passés susceptibles de relever aujourd'hui du "crime de l'histoire", nul ne peut prédire l'avenir.

Finalement, le "crime de l'histoire", dans sa quête de reconnaissance juridique, doit s'accommoder à la fois de sa propre indétermination et des limites intrinsèques aux différents systèmes juridiques. Tendue entre conflit et réconciliation, réparation et punition, le droit est, en apparence, l'instrument privilégié pour donner corps aux revendications nouvelles d'une justice "reconstructive".

Mais les débats à la récente Conférence mondiale de Durban contre le racisme reflètent bien les divergences à cet égard. D'aucuns ont contesté que des dommages-intérêts puissent réellement compenser le sang versé et favoriser la réconciliation, dénonçant plutôt dans cette pratique un risque d'aviver les animosités. N'attend-on pas en définitive toujours trop du droit ?

Il est encore trop tôt pour le savoir, ainsi que l'a parfaitement prouvé le Colloque de Genève, fructueux jalon sur la voie d'une réflexion qui mérite incontestablement d'être poursuivie.

Conference Scene / Le tour des conférences

Internationalised Criminal Courts and Tribunals: Practice and Prospects

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Not since the Nuremberg Tribunals of 1945 has international criminal law had so much global appeal. The establishment of the Ad Hoc Tribunals by the Security Council, in 1993 and in 1994, facilitated the revival of global interest in international criminal law.¹ The establishment of the Tribunals also helped to cement the idea that individuals can be held personally responsible for international crimes. Although individual responsibility is an established aspect of domestic criminal legal systems, it is a recent development in international law. It was always assumed historically that states were the only subjects of international law, having rights and duties under it.² Having established that individuals can be personally liable for international crimes, international criminal law is currently looking at more effective ways in which such responsibility can be the subject of legal proceedings. The effectiveness of international criminal law rests in its ability to hold individuals personally accountable.

On 25 and 26 January 2002, a conference was convened in Amsterdam to look at a new system of personal accountability through internationalised courts or tribunals.³ The aim of the conference was to assess their practice and prospects.

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¹ The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were established pursuant to Security Council Resolutions. Under the UN Charter the Security Council can create subsidiary judicial bodies, under Article 29, as a response to its efforts to restore peace and security as a non-military measure under Chapter VII Article 41. See: Prosecutor v. Tadic Decision on the Defence Motion on Jurisdiction ICTY, at <http://www.un.org/icty/tadic/trialc2/decision-e/100895>.

² For more on individual responsibility and international law see: R. Higgins Problems and Processes International Law and How We Use It (1994, Clarendon Press) p. 39.

³ The Conference was organised by the Amsterdam Centre for International Law (ACIL), the Project on International Courts (PICT) and No Peace Without Justice (NPWJ), with the support of the University of Amsterdam.

Internationalised courts and tribunals follow a new hybrid or mixed system that combines both domestic and international elements. This new system involves the use of domestic legal structures that are interwoven with international facets. Tribunals or courts operating under this system are located in the territory of the state concerned, where the acts in question were committed. They are composed of both international and national judges and prosecutors, whose ratio is dependent upon the individual tribunals' statute. Funding for these courts is most likely international.

It is arguable that the political cost of creating fully internationalised tribunals is too great, as witnessed by the apparent reluctance of states to fully subscribe to the new International Criminal Court (ICC). On the other hand, doubts have also been raised about the possibility of effective proceedings in domestic courts, be that for reasons of corruption or lack of a working judicial system. Accordingly, the solution may lie with internationalised courts. By playing a role in the establishment of these mixed courts, either through unilateral Security Council action or through negotiations with the states concerned, the international community can help end impunity. The conference looked in detail at four such courts that have been or are in the process of being established in Cambodia, East Timor, Sierra Leone and Kosovo.

Following from the opening speech by the President of the University of Amsterdam, Professor Cassese (University of Florence) addressed the differences between international tribunals and these mixed courts. He also examined the reasons for the establishment of mixed courts and, new areas in which they could be set up. In concluding, he reminded the participants that international criminal law is a highly complex branch of international law that cannot rely on one single solution, rather, there must be a whole gambit of responses suited to individual situations. In many situations, mixed courts may provide the necessary alternative to national or wholly international tribunals and, as a result, prove to be more effective in the long term.

After Professor Cassese's introduction, presenters examined the four courts, analysing in detail their strengths and weaknesses and raising various concerns. A particular issue of interest was the effect these special courts would have on a state's ordinary courts. With a special court in operation, a state may end up with a two-tier system of justice. A specialised court may be seen to be meeting international standards in a way that its national counterpart is perceived to have failed. Another issue raised was the disparate remuneration rates between judges in national courts and those in the mixed courts and indeed within these mixed courts themselves. Tensions are bound to arise where judges listening to the same cases are paid differently with international judges getting more money than their domestic counter-

parts. The lack of experience of some of the international judges was a concern raised with regards to past experience in East Timor where, as a result of severe budget constraints, low salaries failed to attract more experienced judges. Lack of cooperation between the mixed courts and the domestic courts, more often domestic courts of neighbouring states, was another important matter which was considered. This was particularly so with regards to the court in Kosovo. There is a definite lack of cooperation between it and the courts in Serbia, consequently, suspects residing in Serbia appear to be out of its reach. How the local population view these courts was another important aspect explored. Where a court's temporal jurisdiction is limited to acts committed after a specific date, it may be inferred that crimes committed before that particular date are not criminal, or perhaps, are not of the same importance. This was a problem the Sierra Leone court highlighted regarding its temporal jurisdiction which is limited to after the date of the signing of the first peace agreement.⁴

The independence of these courts was another very important point mentioned. The Cambodian court provided a good example of the potential problems in this respect. It was noted that judges for the court are to be elected by the Supreme Council of Magistracy, a body not independent of the executive. There is, therefore, cause for concern that judges so elected will be influenced by the executive thus rendering the court weak. The court's potential lack of partiality, independence and objectivity is certainly cause for concern. Serious concerns were also echoed in the UN's recent decision to withdraw its support for the court. The UN's official withdrawal occurred after the conference, but the issues that lead to this course of action were reviewed. It was argued that failure to address the political issues surrounding the acts the Khmer Rouge was accused of committing weakened the Cambodian court's moral authority. The involvement of other states during the Khmer Rouge period, and the amnesties granted to its high-ranking officials are factors that lead to this weakened moral position.

By the second day, analysis of procedures for the establishment, funding, and composition of mixed courts, together with the discussion on substantive and procedural legal issues kept the participants absorbed. On a broader framework, presenters outlined the relationships between these courts and international tribunals, in particular the Ad Hoc Tribunals for Rwanda and the Former Yugoslavia and the newly established ICC. The perceived limitations of the Ad Hoc Tribunals, especially their expensive nature, lead to the conclusion that there is certainly room for mixed courts, if only for crimes committed prior to the ICC coming into force. It

⁴ The first peace agreement was signed on the 30 November 1996

was suggested that the ICC could play a role in internationalising courts jurisprudentially once it comes into force, although total consensus as to the exact definition of internationalised courts was not reached. Are, or will, these courts be internationalised by the mere presence of international judges and prosecutors, or will the application of international jurisprudence internationalise domestic courts? There was obviously a lot more to discuss and two days were certainly not enough to cover every relevant issue.

Furthermore, the examination of internationalised courts in this conference failed to satisfy fully the unease that these courts will prove to be the Ad Hoc Tribunals' poor relations. This concern was, perhaps further enhanced during the conference as evidence was presented regarding their extreme financial restrictions. But the concern is not only financial, as reference to the Sierra Leone model's lack of force in third states as well as its lack of guarantee of extradition proved worrying. But with this particular court in mind there was a note of hope that the interaction between the international and national elements of these courts will help foster wider prosecutions by states of perpetrators of crimes against humanity. In summing up, Professor Condorelli (University of Geneva) was optimistic that these mixed courts will act against impunity and help reconstruct national legal systems that are in decay or have broken down.

The conference gave valuable insights into the potential role these courts and tribunals may have in the future. However, one cannot help but be aware that even though there is an international element within these courts and tribunals, they are still very much dependent on the domestic legal and political framework. Where tensions arise between the international and national elements it is not always possible to predict the outcome. There was a distinct lack of clarification as to how any discord between the international and national factors can be allayed. Nor was the general effect of such friction on the new system of international justice fully explored. However, the conference enlightened its participants as to the existence of and the problems arising from the new system of international justice. The question still remains as to whether there is a real future for these courts in international criminal law: time can confirm.

Conférence de l'Association Suisse de l'Arbitrage : « Investment Treaties and Arbitration », Zurich 25 Janvier 2002

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L'arbitrage fondé sur les traités d'investissement est sur toutes les lèvres. Depuis que les investisseurs privés ont réalisé l'étendue de la protection qu'ils pouvaient tirer de ces traités, cet arbitrage ne cesse de se développer rapidement et spectaculairement. L'originalité de l'arbitrage fondé sur les traités d'investissement est qu'il ne repose pas sur une convention d'arbitrage (clause compromissoire ou compromis), mais résulte d'un consentement abstrait exprimé par l'Etat dans un traité international d'investissement, bilatéral (généralement un traité bilatéral de protection des investissements) ou multilatéral (comme, par exemple, l'Accord de Libre Échange Nord Américain « l'ALENA »), puis d'une saisine unilatérale de l'investisseur étranger prétendant que les droits qu'il tire de ce traité ont été méconnus.

Ce phénomène décrit par la formule célèbre, difficilement traduisible en français, de « *arbitration without privity* »¹ a fait l'objet d'une conférence organisée par l'Association Suisse de l'Arbitrage à Zurich tout au long de la journée du 25 janvier 2002. La conférence a donné lieu à deux séances de travail au cours desquelles des arbitres, des avocats, des représentants des institutions d'arbitrage et des universitaires se sont exprimés.

Le programme de la conférence ne fait pas apparaître de lien logique direct entre les différents thèmes abordés. Hormis les deux dernières communications qui ont examiné la transparence de l'arbitrage fondé sur les traités d'investissement, il est très difficile de trouver une idée de synthèse intelligible qui rassemble les exposés successifs. Cela se comprend rapidement : l'arbitrage fondé sur les traités d'investissement suscite des problèmes interdisciplinaires importants, la contrainte du temps ne doit pas être oubliée et on ne peut pas attendre des organisateurs de traiter, dans une seule journée, ce phénomène dans tous ses aspects d'une manière détaillée et approfondie.

Ce sont ces raisons qui expliquent, certainement, le fait que les communications des différents intervenants furent très brèves, sommaires et parfois même non actualisées. A titre d'exemple, la communication de M. William W. Park qui était intitulée « *Investment arbitration under NAFTA Chapter XI : Transforming investor*

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¹ Paulsson (J.), *Arbitration Without Privity*, 10 *ICSID Rev.- FILJ* 1995, p. 232.

nations into host States » n'a semblé prendre en compte que quatre procédures d'arbitrage engagées sur le fondement du chapitre 11 de l'ALENA alors que ce chapitre a donné lieu à au moins 15 affaires². De plus, l'exposé était surtout axé sur la position américaine vis-à-vis de l'arbitrage du chapitre 11. L'attitude canadienne n'était qu'accessoirement analysée et celle du gouvernement mexicain totalement absente. De même, M. Francisco Orrego Vicuña, président du tribunal arbitral dans le litige opposant devant le CIRDI, Emilio Agustín Maffezini au gouvernement espagnol³, a répondu dans sa communication, à la lumière de cette affaire, à la question de savoir si la clause de la nation la plus favorisée couvrait les mécanismes de règlement des différends. Il s'est contenté de reprendre les arguments développés par les deux parties au litige et la solution ébauchée par le tribunal arbitral, sans s'arrêter plus longtemps sur ses implications. Il était souhaitable qu'un jugement plus critique par une partie neutre soit porté sur cette sentence qui est la première à admettre, explicitement, que la clause de la nation la plus favorisée vise en sus des dispositions matérielles, les règles procédurales.

A part cette communication qui a été réservée à l'analyse de cette sentence révolutionnaire, et dont l'intérêt est incontestable, la majorité des intervenants (pour ne citer que quelques exemples : la contribution de M. Wolfgang Kühn intitulée « *Practical Problems related to Bilateral Investment treaties in International Arbitration* » et celle de M. Horacio A. Grigera Naon intitulée « *Bilateral investment treaty disputes and general international commercial law* ») n'a pas donné à la jurisprudence arbitrale, notamment la plus récente, la place qu'elle mérite. Or, il est très difficile en cette matière d'isoler le cadre légal de la pratique jurisprudentielle. La compréhension de ce phénomène nécessite non seulement l'étude des dispositions des traités d'investissement mais exige également une analyse minutieuse de la jurisprudence arbitrale interprétant ces dispositions. Il est regrettable que l'apport de cette jurisprudence n'ait pas été souligné d'autant que plusieurs sentences arbitrales relatives au chapitre 11 de l'ALENA et à certain nombre de traités bilatéraux de protection des investissements sont non seulement rendues publiques mais sont facilement accessibles. L'approche instrumentale a amené les intervenants à traiter séparément l'arbitrage des traités bilatéraux des investissements en général, l'arbitrage de l'ALENA et l'arbitrage des traités suisses d'investissement. Il aurait été préférable d'adopter une approche thématique permettant à chaque intervenant de traiter un aspect particulier caractérisant cet arbitrage sous l'angle des différents instruments

² Voir les sentences relatives au chapitre 11 sur le site www.naftaclaims.com.

³ *Emilio Agustín Maffezini c/ Espagne*, décision du 25 janvier 2000, *ILM*, vol 40, 2001, p. 1148, accessible également sur le site du CIRDI www.worldbank.org/Icsid.

conventionnels et de la jurisprudence arbitrale. Cette démarche aurait évité certains recoupements et redites entre les différentes communications et permis une appréciation d'ensemble du phénomène.

Le riche débat de l'après-midi sur la transparence de l'arbitrage des traités d'investissement doit être souligné. C'est un sujet d'actualité. Plusieurs organisations non gouvernementales reprochent à ce mécanisme, par lequel les investisseurs étrangers n'hésitent pas à contester le pouvoir des Etats de légiférer pour la protection de l'environnement et la réalisation du bien-être des citoyens, le manque de transparence et l'opacité. Dans deux sentences récentes⁴, les tribunaux arbitraux se sont déclarés compétents pour accepter l'intervention des *amici curiae* dans des procédures d'arbitrage engagées sur le fondement du chapitre 11 de l'ALENA. Sur ce point les avis sont partagés : si certains soutiennent l'ouverture de cet arbitrage à la société civile par l'abandon de la confidentialité et l'admission des *amici curiae*, (M. Nigel Blackaby : « *Public Interest and Investment Treaty Arbitration* »), d'autres sont plus réservés. La rupture de l'égalité, l'absence de véritables représentants de la société civile et l'imbrication du politique avec le juridique vont affecter l'efficacité du mécanisme (M. Thomas Wälde : « *Evolving dilemmas in investment arbitration : amici curiae briefs ; treaty based vs. investment contract based arbitration ; mediation* »).

L'initiative de l'Association Suisse de l'Arbitrage vient à son heure et il convient de la saluer. L'intérêt et l'actualité du sujet n'échappent à personne. La conférence a eu le grand mérite de mettre en lumière bon nombre de problèmes posés par ce nouvel arbitrage. Les aspects politiques et sociologiques du phénomène ont été largement discutés. On ne peut pas attendre des intervenants de répondre à toutes les questions complexes posées. Les critiques formulées à l'encontre de l'arbitrage fondé sur les traités d'investissement, par certaines ONG, la médiatisation politique dont il fait l'objet, éloignent le débat de son contexte juridique. La nouveauté de cet arbitrage, son évolution rapide, son caractère interdisciplinaire appellent, avant tout, une conceptualisation rigoureuse du phénomène.

⁴ *Methanex Corporation c/ États-Unis d'Amérique*, décision du 15 janvier 2001 et *United Parcel Service of America Inc c/ Canada*, décision du 17 octobre 2001, disponibles sur le site www.naftaclaims.com.

The Bookshelf / La bibliothèque

Of Eduardo Valencia-Ospina*

“No hay libro tan malo que no tiene algo bueno”¹

– Cervantes, *Don Quixote*, Part II, Chapter 3

To select the two or three books on my bookshelf that have had the most impact on my conduct in life inevitably brings me back to the formative period of my late teens and early twenties. At that time, while primarily occupied with intellectual and physical fitness pursuits, I could embark on a course of personality development beyond the narrow confines of the social and cultural environment prevailing in my native South American land. Such a course had, of necessity, to be grounded in a process of inner discovery, that I could rapidly advance with precious help from the writings of Herman Hesse, the Swiss/German Nobel Literature Prize winner. Specially meaningful proved to be his *Demian*, *Siddhartha* and *Steppenwolf*, read in sequence in the same order of progressive self-knowledge in which he had written them.

To the extent that, as some critics have argued, Hesse might be characterized as a fantasy writer, albeit an interior one, it is no coincidence that another such writer, Miguel de Cervantes, would have exercised, through his immortal *Don Quixote*, as marked an influence on the mind of the youthful reader. For Hesse and Cervantes utilize fantasy as the most effective expedient to invite attention to a grim reality, acutely observed and recorded, covering the whole range of manifestations of human frailty. In this sense, both preferred authors become kindred spirits with a living novelist favorite of mine, also a winner of the Nobel Prize for Literature, my countryman Gabriel García Márquez. His “oeuvre”, with “One Hundred Years of Solitude” at the core, has indeed been regarded as the most representative of that distinctive contemporary literary genre aptly labeled “magic realism”.

I first became acquainted with the works of those three authors in my mother tongue, Spanish – the romance language of Cervantes and García Márquez.

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¹ “There is no book so bad but has some good in it.”

Significantly, theirs are the only books I have re-read in English. In so doing, I have not lost sight of the well worn Italian maxim: “Traduttore, traditore”. Nevertheless, it is with the help of authoritative translations in other languages that the deeply human message of my chosen writers achieved its truly universal dimension. Obviously, such was the case for the three of them when it was a question of reaching a far wider audience. Thus, as late as 1956, Colin Wilson could still complain in “The Outsider” how “the magnitude of Hesse’s achievement is hardly recognized in English-speaking countries, where translations of most of his works are difficult to come by”. But equally, if not more important, it was the case for Cervantes and García Márquez – those most intensely national yet cosmopolitan of writers – as a purely linguistic matter, also through the English versions of their texts, English being more economical and more readily expressive of abstract thought than Spanish. In the hands of skilled and receptive English translators, many a passage of the original text disclosed further depths of meaning, opening yet richer vistas into what already was a familiar landscape.

Paradoxically, Hesse’s rather “terre à terre” rendition into English facilitated his transformation from a sophisticated European who had written under the ominous shadow of the two World Wars into the voice of the counter-culture Movement of American youth in the 60s and 70s, at the height of the Vietnam War. Like every social Movement which has sought guidance in the works of inspired authors, America’s counter-culture, including its “Flower Generation”, adopted Hesse as one of their own and anointed him as a spiritual leader, due in part to the blessing of Timothy Leary, the Movement’s “Guru”. Leary, who was an instructor at Harvard when I arrived there in 1962 to do graduate work at its Law School, wrote lucidly the following year about Hesse in his now classical essay “Poet of the Interior Journey”. However, as Hesse himself had noted in 1961 in his Author’s note to *Steppenwolf*, “Poetic writing can be understood and misunderstood in many ways”. Though misinterpreted more often than not, he became a beacon to a whole generation for whom *Siddhartha* and *Steppenwolf* embodied “The Word”.

My own dialogue with Hesse having begun before I departed for America, it was *Demian*, the earlier and more personal of his books, which touched me the most. I read it in the Spanish edition by the *Compañía General de Ediciones* of Mexico and in the English by Peter Owen and Vision Press of London. In both versions, Emil Sinclair’s discourse was inspirational throughout. But *Demian*’s insight, when recounting to Emil the story of Cain, into the meaning of the symbolic “sign” on the forehead, struck me as a revelation, repeatedly tested and confirmed all along the experience of my adulthood when sizing up those I would connect with.

The present notice being more in the nature of a reminiscence than that of a book review or a literary essay, it would be presumptuous to attempt to reflect here, even in the most summary fashion, the many and varied ways in which Don Quixote can be approached and has been read over the centuries. After all, except for the Bible, no other book has been so widely diffused and critically commented upon in the Western World. And it remains as easily accessible today as it was four hundred years ago, owing to Spanish being the European language to have suffered the least change since the seventeenth century.

While recognizing that humour, in its noblest sense, permeates the entire work, I first appreciated Don Quixote, in the edition with notes published in Madrid in 1913 by Francisco Rodríguez Marín of the Royal Spanish Academy, as a parable on the perennial struggle between the ideal and the real. Not unlike the polemic between nature and spirit in Hesse's *Demian*, that tension is the ever-present tension of life, and both authors drew from life. For them, the ultimate wisdom was to be attained through living. And what could be more true to life than the human traits epitomized by Cervantes' two opposite yet complementary main characters, Don Quixote and Sancho Panza? Their exchanges are rich in aphorisms on Sancho's part, conveying in the simplest and shortest of terms the wisdom that results from the knowledge of human nature. Those aphorisms constitute, without doubt, one of the most distinctive features of the book. They give it its quintessential Spanish flavour, encapsulating a genuinely popular philosophy of life. Couched as axioms they have, up to present times, been endowed in the Hispanic World with attributes akin only to those carried by juridical maxims in Ancient Rome.

But while there is much of truth concealed in Sancho's proverbs, it is Don Quixote, no less a wit than his squire, in spite of his apparent madness, who imparts the ever-lasting lessons. And none more timeless than the counsel offered to Sancho before he is to assume his duties as governor of the illusory island of Barataria. I find no better way to emphasize its value to my modern reader, than to quote from that penetrating advice, in Charles Jarvis' translation, first published in London in 1742. As to the formation of character, Don Quixote exhorts Sancho to:

“First, my son, fear God; for to fear him is wisdom, and, being wise, you cannot err

– Secondly, consider who you were, and endeavour to know yourself, which is the most difficult point of knowledge imaginable

– ... if you take virtue for a mean, and value yourself upon doing virtuous actions, you need not envy Lords and Princes; for blood is inherited but virtue acquired; and virtue has an intrinsic worth, which blood has not.”

And, more specifically, as one who is to administer justice, Don Quixote admonishes Sancho to:

“Be not governed by the law of your own will, which is wont to bear much sway with the ignorant, who presume on being discerning

– Let the tears for the poor find more compassion, but no more justice, from you, than the informations of the rich

– Endeavour to sift out the truth amidst the presents and promises of the rich, as well as among the sighs and importunities of the poor

– When equity can, and ought, to take place, lay not the whole rigour of the law upon the delinquent; for the reputation of the rigorous judge is not better than that of the compassionate one

– If it happens, that the cause of your enemy comes before you, fix not your mind on the injury done you, but upon the merits of the case

– Let not private affection blind you in another man’s cause; for the errors you shall commit thereby are often without remedy, and, if there should be one, it will be at the expense both of your reputation and fortune

– Him you are to punish with deeds, do not evil-entreat with words: for the pain of the punishment is enough for the wretch to bear, without the addition of ill language

– In the criminal, who falls under your jurisdiction, consider the miserable man, subject to the condition of our depraved nature; and, as much as in you lies, without injuring the contrary party, show pity and clemency; for, though the attributes of God are all equal, that of his mercy is more pleasing and attractive in our eyes, than that of justice.”

My sketchy survey would be incomplete were I not to mention a more recent book, “Touch” by Gabriel Josipovich, published by Yale University Press in 1996. It has illuminated my very own approach of long standing to the central theme of interpersonal communication. Drawing from a wealth of literary and other cultural sources, he confirms my conviction that while sight makes us spectators, touch transforms us into actors in the drama that is life. Even though his description and assessment of the disparate subjects covered do not appear as the logical development of a thesis, his very choices and the sensitive treatment he gives them, demonstrate the soundness of his underlying premise. It is a recomforting discovery.

In the first contribution to the *Forum's* Bookshelf (Zero Issue of July 1998), Sir Robert Jennings affirmed at the outset that “no one can become a good lawyer, least of all a good international lawyer, by reading law books”. Agreeing with him in this, as in so many other of his perceptions, I have singled out some of my favorite non-legal books, even at the risk, also pointed out by him, of disclosing much that is personal. But to reveal one’s personality, more telling than the books one reads is the company one keeps. In Don Quixote’s words: “Dime con quien andas, decirte he quien eres” (Part II, chapter 10).²

I am quite happy in Sir Robert’s company.

² “Tell me what thou keepest, and I’ll tell thee what thou art.”

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