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STRUCTURING IMPARTIALITY IN INTERNATIONAL THIRD-PARTY LAWMAKING

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To what extent can impartial third-party decision-making play a meaningful role in disputes between states? The question is scarcely a new one and its age is perhaps exceeded only by that of the familiar answer: that in most international quarrels the legal merits "have nothing to do with the case," that political issues cannot yield to litigious proceedings. The contention is succinctly illustrated by Professor Julius Stone:

The current Soviet-Western dispute concerning Berlin, for example, could seemingly be reduced to a series of legal questions eminently suitable for adjudication by the International Court. Some of these would be: What is the extent of any obligation of the USSR to permit traffic of German personnel and goods between the Federal Republic of Germany and West Berlin under the Jessup-Malik agreement of 1949? What limits, if any, are there to the Soviet obligation to permit Allied military (a) rail, (b) motor vehicle, or (c) air communications between West Germany and West Berlin? This would have some nice sub-questions about an alleged agreement based on correspondence of 1945 that was not replied to, although it was apparently acted upon; an alleged agreement by practice; and alternatively an agreement arising from technical day-to-day agreements reached in committees of the Kommandatura, especially the Committee on Air Travel. Further, what rights of passage, if any, did the Western Powers or the Federal Republic acquire under customary international law concerning ways of necessity to enclaved territory? Is the Soviet Union entitled under international law to transfer to the German Democratic Republic the legal responsibility for performance of its obligations with respect to Western access to West Berlin?²

Stone maintains that adjudication would produce answers "rather distant from the realities of the dispute as seen by the states in conflict" and that the "real concerns of Moscow and Washington would not be before the Court at all."² Their real concern would be with Realpolitik: Berlin as

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2. Id. at 8.
the “show-window of the West,” Russia’s desire to wrest recognition for East Germany from the West, and so on. Thus, the court’s answers, being given to the legal rather than the political questions, would be of little value in settling the dispute. Indeed, its decision might make matters considerably worse.

Noting such conflicts as those over the right of passage of Israeli ships through the Suez Canal, and the India-China border dispute, Stone concludes that the world “is veritably plagued with disputes threatening the peace which could in theory be submitted to the International Court or to arbitral settlement. The reasons why they threaten peace are likely to be the very reasons why the disputants regard them as non-justiciable; and the judgment or award is as likely to aggravate as it is to mitigate the intransigence of the situation for at least one disputant state.” In other words, a decision based upon law and made in response to legally framed issues will generally not only be unresponsive to the real or “political” problem, but cannot be enforced against the loser. While such decisions harden the victor with false faith that his case has somehow been strengthened or even vindicated, that attitude hinders settlement by negotiation.

In substance Professor Stone’s point is that certain kinds of disputes, indeed most important international disputes, are really political and not legal at all—that legal arguments merely obfuscate and do not get at the political heart of the matter which can only be reached by political methods. His position implies that there are certain types of disputes which are by nature inappropriate to settlement by third-party decision-making. Such a thesis contradicts the postulate that all disputes should initially be subject to two-party methods of conciliation and negotiation, but that any dispute unresolved in this way is appropriately the subject for an impartial decision. The question can best be settled by attempting to prove that there are certain disputes which are inherently political, and for which a third-party legal solution would be the wrong answer.

I. Are Certain Disputes Inherently Unyielding to Third-Party Decision-Making?

What is a “political dispute” that the courts must shun it? There have been many attempts at definition, one of which was applied recently in the case concerning whether special costs incurred in the United Nations’ Suez and Congo operations could be assessed against all the

3. Id. at 9.
members in the same way as ordinary dues. In his dissent, the Soviet Union's Judge Koretsky insisted that the International Court should refuse to decide:

Political issues [have in this case] prevailed over juridical considerations. First and foremost we have there a political question, the question of financial policy in peace-keeping matters and, connected with it, a question of the powers and responsibilities of the principal organs of the United Nations, the political essence of which can hardly be denied. As the political aspect of the question posed to the Court is the prevailing one, the Court, to my mind, ought to avoid giving an answer on the substance and ought not to find unwillingly that its opinion may be used as an instrument of political struggle. I think there are "compelling reasons" for not giving an answer. . . .

Can an issue have a "political essence?" "Judicial accidents?" Surely there is nothing "essentially" or inherently "political" about financial policy, particularly not in the context of an allegedly ultra vires peace-keeping operation, and, e.g., surely not any more than in a business scheme to destroy competition and fix prices. Are the anti-trust laws "legal" or "political?" Could it be that in Russia all fiscal policy, having been concentrated in the hands of government, is "political" in the sense that it is beyond the reach of law? Surely not.

Of course all really important laws, as well as all landmark judgments of courts, are "political" in that they address themselves to major issues of policy. But that means very little. The cavalier use of the "political disputes" rationale has drawn the eloquent ire of Judge Lauterpacht who characterizes it as "a well-meant attempt to lend the authority of a legal principle to an attitude of States inimicable to any recognition of the sovereignty of law." He points out, "The State is a political institution and all questions which affect it as a whole, in particular its relations with other States, are therefore political. As such, they are deemed to be important." But if all "political" or "important" matters were removed from the calendar of the International Court, this "would mean a speedy and radical liquidation of the

5. Id. at 254.
7. Id. at 153.
activities of the Court." 8 Certainly, if "important" issues are inherently inappropriate for adjudication, the nations of the world have burdened the third-party process with a remarkable preponderance of the inappropriate. The Honduras-Nicaraguan, Holland-Belgian, British-French, Thailand-Cambodian, and British-Norwegian litigation before the World Court, not to mention numerous arbitrations, all concerned disputes over ownership of undeniably "important" tracts of land or sea. 9 In some cases, as in the Honduras-Nicaraguan dispute, thousands of square miles have been at stake. In others, such as the case concerning the ancient Temple of Preah Vihar, the prize has been one of great sentimental value. It is certainly true that in the past two decades more boundary disputes have been settled by adjudication or arbitration than by negotiation or conquest. Yet, there are few matters more fraught with "political essence" or of greater national importance.

Professor Hans Kelsen has cut through the "political dispute" mystique with incisive clarity. The legal or political character of a dispute depends on the nature of the norms to be applied in the settlement, and not on the nature of subject matter of the dispute as the traditional doctrine seems to assume. "A dispute is a legal dispute if it is to be settled by the application of legal norms . . . just as a Christmas tree is a tree decked like one, be it fir, cedar, or plastic fiber." 10 Furthermore,

If the statement that a political dispute is not justiciable means only that it cannot be settled by the decision of an international tribunal, then every dispute is not justiciable if the parties do not agree to submit it to a tribunal competent to settle it in accordance with existing international law. If, however, the statement that a dispute is not justiciable means that existing international law cannot be applied to it because of the very nature of the dispute, then there is no dispute which is not justiciable. 11

While it is not necessary to maintain that all disputes are equally amenable to judicial process, it is readily observable from current usage of the term "political dispute" that it does not define an identifiable category of disputes. It merely restates what is or is not being done

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8. Id. at 155.
11. Ibid.
about solving a dispute and is of no help in deciding what to do, except as an excuse for perpetuating the status quo. In essence it is a device for perpetuating political hegemony, as distinguished from the rule of law, in the domain of international settlement. Thus used, the concept of the “political” dispute is of no value in selecting those cases which ought not be litigated from those which should, although there is nothing wrong with describing a dispute as “political” so long as the term is used solely as description and not as prescription.  

II. WHICH DISPUTES ARE AMENABLE TO THE JUDICIAL PROCESS?

If no logical test can be found for treating certain disputes as unyielding to third-party settlement, it does not necessarily follow that every dispute not resolved by the parties themselves should be determined by a court of law. Adjudication is only one method by which the services of impartial third-parties can be brought to bear, and courts are not always the most suitable forum for settlement. What is necessary is a reasoned examination of the types of issues which require settlement in a non-third-party forum. That analysis, however, is itself a part of the judicial function to make reasoned use of the court’s right hand to operate the scales of justice and of its left hand to stay, upon occasion, its right.

When the British judges of the court of equity exercised their discretion to refuse jurisdiction over an issue, they tried to reason and explain why a petitioner was not to be allowed to plead his case. The shorthand for these explanations is by now well formulated: the petitioner did not come before the court “with clean hands,” or he assumed his risks as a “volunteer,” or the court feels itself unable to provide an effective remedy. If certain types of disputes should not be decided by international courts because the judicial remedy is somehow inappropriate, then it is for those courts similarly to develop a reasoned jurisprudence of abstention in accordance with an analytical and consistent theory of their function and jurisdiction. And it is for the judges to apply the tests so devised to each dispute which falls within

12. The national legal system still reflects the same fuzziness. The Supreme Court of the United States has on a number of occasions refused to decide an issue simply because it was “political” as if that were a sufficient reason in itself. The most notable instance was the refusal, now reversed, to consider the “political” question whether legislative districts must be of roughly equal population to comply with the constitutional guarantee of “equal protection” for the voter. One can therefore scarcely manifest the shock reserved for exposure to an unfamiliar human frailty when Judge Koretsky tries to invoke the same formula. But the fact that the Supreme Court has sometimes laced its candor with formal polemic is no excuse, much less an example, for the International Court. For example, compare Colegrove v. Green, 328 U.S. 549 (1946) with Baker v. Carr, 369 U.S. 186, 223-24 (1962).
their jurisdictional option because the parties have been unable to devise a solution.

A workable formula for determining when a dispute is unsuitable to judicial determination is not readily laid to hand. Attempts to devise one have occupied generations of international legal philosophers with indifferent success. The majority of states have not accepted the compulsory jurisdiction of the International Court under Article 36(2) of the Statute of the International Court of Justice. Some of those which also provide useful, contemporary definitions of jurisdiction by expressly excluding from the purview of the court such matters as disputes between members of a familial grouping of states (e.g., the British Commonwealth), and disputes as to territorial status, national security or particular treaties or events. These may roughly be grouped as disputes for which the parties have themselves made settlement provision and disputes concerning "essential matters."

No particular significance attaches to the first category, so long as the alternative procedure meets the minimal standards of good public order. It is the "important" or "essential" matter which affects "national security" or "national honor" that has provided the philosophers, and the International Court of Justice with the substance of most objection to adjudication and which has traditionally been the real significance of the meaningless term "political dispute." He who believes that a court should not determine political matters usually means, if anything at all, that a court should not decide anything of real importance to either or both of the litigants.

He may simply mean, however, a dispute in which one of the

13. LAUTERPACHT, op. cit. supra note 6, at 6-21.
14. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature of the reparation to be made for the breach of an international obligation. STAT. INT'L CT. JUST. art. 36(2).

By July 16, 1962, the following states had deposited declarations accepting the compulsory jurisdiction: Australia, Belgium, Cambodia, Canada, China, Columbia, Denmark, Dominican Republic, El Salvador, Finland, France, Haiti, Honduras, India, Israel, Japan, Liberia, Liechtenstein, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Philippines, Portugal, Somalia, South Africa, Sudan, Sweden, Switzerland, United Arab Republic (Egypt), United Kingdom, United States of America, Uruguay. See [1962-1963] I.C.J.Y.B. 237-59. The declaration of the United Arab Republic is that dated July 18, 1957, regarding the operation of the Suez Canal, and is not a general acceptance of the compulsory jurisdiction, as are the others. See ROSENNE, THE WORLD COURT 96 (1962). More recently, Uganda has accepted compulsory jurisdiction.
parties is wrong in law but believes the law to be wrong. Professor Corbett explores the philosophical potential of this argument: where "what one party is demanding, and will go on demanding, is a change in the existing position," there is "some justification for classifying as 'non-legal,' 'political,' or 'nonjusticiable,' [such] disputes which cannot be substantially disposed of without a change in the legal position."\(^5\)

In support of dispensation of cases involving a dispute not as to the law but the wisdom of the law, Professor Corbett reminds us that, within the state structure, the losing litigant may try to rally sufficient political support to bring about a legislative change in the law while in the international community such a remedy is not generally available. Yet, are the citizen-litigant's opportunities for reversing a court by legislation really better than a state's chances of reversing a court by treaty or convention? And besides, why is a litigant before the International Court, any more than one before the Supreme Court of the United States, precluded from urging a judicial reconstruction of an unjust, inappropriate or obsolete precedent? Also, if there really is a relative paucity of decided international case law, then the judge is in a particularly favorable position to do right without being led by the "dead hand of precedent," especially since the International Court is not even formally bound by its prior decisions.\(^6\)

Might it not better be argued that legal reform in the light of evolving circumstance is more likely to receive a sympathetic hearing in the cool detachment of a court of law than in the heat and pressure of a legislative chamber? Certainly the cause of constitutional reform in the area of civil liberties has had far more assistance from the United States Supreme Court in recent decades than from the United States Congress. Courts, freed of weighed majorities, unanimity rules, committee chairmen, filibusters or any of the delaying and retrenching procedures which sometimes characterize legislatures are, in fact, well organized to consider and effect intelligent reform. But it is not necessary to answer the question, for in international as in national affairs, the two methods exist side by side, allowing the reformer some latitude to select his recourse. A bad decision by an international court can be repealed by multi-lateral treaty or convention. Moreover, in international even more than national law, a widely unacceptable judicial determination may sometimes tend to be ignored in practice rather than enforced.

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These efforts to define the limits of adjudicability are praiseworthy in that they represent attempts to devise a more meaningful formula for judicial abstention than is apparent in the bold phrase "political dispute." Yet, they are unsatisfactory in that they employ special pleading to explain a readily-observed phenomenon: not the "political" quality of the dispute but the nature of the disputant who will not litigate, especially the powerful state. To neutralize that familiar but frustrating obstacle, the international lawyer summons his tape measure and saw to cut a hole in the court's jurisdiction that will allow the obstacle to pass, no matter how offensive this may be to the symmetry of logic. He might better summon historical perspective. The Supreme Court of the United States had to wait fully fifty years after its birth before the average annual number of cases submitted to it rose from 10 to 70. Some forty years later, its annual docket bulged with 1,500 applications to litigate.\(^{17}\) The International Court, too, needs patience and time. More, it needs reform that will attract customers. Instead, it is offered theories which would simply classify as "political" and "non-justiciable" the sorts of things the consumers have been refusing to buy: "important" issues, issues where they know the law to be against them, and so on. To elevate the patterns of national resistance against law to law is to avoid rape by consenting to be ravished.

Surely it is the important issues and the issues in which a recalcitrant knows the law to be against his immediate interest (as distinguished from long-range or real interests to which he may for the moment be blind) which are most in need of judicial intervention when two-party lawmaking fails. In the wise words of Professor Lauterpacht, "It is impossible, in a scheme of things devised to secure the reign of law, to provide machinery calculated to enable a state to disregard the law in a manner binding upon the party which is willing to abide by the law."\(^{18}\) Likewise, Professor Corbett agrees that there would be little respect for the law if the courts were to be heard to tell a litigant, "We are sorry, but it is clear to us that your opponent is not going to accept a judicial determination of your respective rights as a settlement of this case. We therefore refuse to try it."\(^{19}\) It is less the role of lawyer-publicist to create a judicial structure according to the lowest specifications of existing conduct than to plan a structure that will encourage growth and development.

18. Lauterpacht, op. cit. supra note 6, at 372-73.
Judicial abdication there must be; not every case posed to a court need be decided by a court. But the test must not be whether the issue is too "hot" to handle, too difficult or too "important." It should be whether some better alternative method of settlement can be found in the instant case, that is, whether the judicial remedy is inappropriate as judged solely by the standards of good order, creation and problem solving. The test ought not be whether the issue is too big, or the defendant too stubborn, but whether the question posed is one which a court is properly equipped to answer. The word merits stressing: to "answer," not to "enforce." In deciding whether to decide, a court must look to the issues and not to the clients. It must not be swayed by the power, sensitivity or bellicosity of the parties; otherwise it is not a court worthy of the name.

To evolve such a test requires a re-examination of the third-party lawmaking function. Professor Lon Fuller has had occasion to approach a comparable question, the role of the arbitrator in collective bargaining between unions and employers, by venturing the following working definition: the "adjudicative process [is] a process of decision characterized by a particular form of participation accorded to the affected party, that of presenting proofs and arguments for a decision in his favor."20 What are courts all about? What are judges, lawyers, witnesses, plaintiffs and defendants all doing in their assigned roles and even their assigned positions in the courtroom? Third-party lawmaking, its particular genius, encourages both parties to a dispute to construct rival cathedrals of contention supported by massive flying buttresses of evidence and thrusting aloft towering spires of logic, thus presenting a neutral third party with the most dramatically clear and evident choice possible: "yes" or "no;" "right" or "wrong;" "win" or "lose." The onus is on the parties to construct the choice, to be the principal mover in the process. The court must watch and, at the end, choose. According to Professor Fuller, "the question then becomes, in what kinds of cases can this participation be meaningful?" This is the "basic question of the kinds of problems that are amenable to solution by the adjudicative process."21

The simple "yes or no" issue that falls most squarely within the competence of third-party decision-making is illustrated by the Brazilian-French "Lobster War." A treaty to which both states are parties pro-

21. Ibid.
vides that every nation shall have jurisdiction over the continental shelf which extends beyond its territorial waters to a certain depth. Such jurisdiction shall not, however, give it the right to control navigation, fisheries or any other activity save for "exploiting its natural resources." Natural resources are defined by the treaty as "mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or subsoil."22

A disagreement has arisen concerning lobster fishing by French ships on the Brazilian continental shelf. Brazil has ordered the French to leave and has arrested some French ships. Claiming to be merely "fishing" for lobsters, the French sent a destroyer. Are lobsters fish, or are they "sedentary species?" A court is splendidly equipped to answer such a question, after hearing expert evidence on the locomotive proclivities of lobsters and, perhaps, evidence on the state of mind of the negotiators of the treaty, if not of the lobsters themselves. It is even conceivable that other interested states might ask to be heard on the larger economic implications of the issue. But, in the end, the court need only say "yes" or "no," although it is unlikely to deprive the parties of the privilege of a more elaborate exposition. Courts, in other words, are excellent at "true-false" exams, competent at answering "multiple-choice" questions, but generally not prepared for essay-type tests.

Obviously the interpretation of treaties is most frequently going to face courts with issues stated in clear alternatives because treaties constitute a narrowing of the issues by the parties. The court is limited to the relatively clear, simple choice of whether lobsters are "fish" or "sedentary," because the dozens of other issues which otherwise might go to make up a lobster war—the status and scope of a "continental shelf," the right to exploit "traditional" fishing grounds, conservation versus exploitation, strategic considerations—have been removed from the dispute by the agreement of the parties to the treaty. Indeed, it is the parties who have agreed that all species be either sedentary or not. Absent such an agreement there might have been a hundred categories of various degrees of sedentariness. In this important sense, international legislation helps courts to function by narrowing the issues the court must decide, and not merely or primarily by telling the court what the law is.

Issues perfectly suited for adjudication do, however, present themselves in a non-treaty, "common-law" context. For example, consider

an international lawsuit resulting from a collision on the high seas of two ships operating under rival codes of signals. One uses a green light to port, the other starboard. Neither is party to a relevant treaty. Which is wrong? A court would no doubt examine evidence presented by the parties as to which is the older, the prevailing, the more widely followed custom. But the substance of the dispute scarcely matters; the important thing, no doubt the overriding reason for taking the case to litigation at all, is to settle finally the question of shipboard directional signals—to get a clear and final “yes” or “no.” To the community at large it matters little which way the court decides; the decision is the thing.

What makes a judicial determination of the status of lobsters and nautical signals relatively easy for a court is the duality of choice. Only two solutions are possible; there is no undistributed middle ground, no complex web of inter-relation. A simple adversary system is thus likely to yield excellent results. But what if there are three possible solutions, or ten, or a thousand? In 1962 Britain undertook to transfer three British colonial possessions, including North Borneo, to the Federation of Malaysia. Relying upon the claim of the Sultan of Sulu, the Philippines maintained that North Borneo should revert to her. Indonesia, on the other hand, urged that the principles of territorial integrity should operate to unite North Borneo with Indonesia’s island of Borneo. Certain nationalist leaders of North Borneo and neighboring Brunei and Sarawak claimed that the principles of self-determination entitled them to complete independence. Had such a dispute come before the International Court, it would have necessitated the interpretation of treaties, resolutions of the General Assembly and customary international law, a task the court is well-equipped to execute. The fact that feelings of the parties might be running high, that the issue is one of great importance to most of the states involved, and that the parties are of unequal size and power should not divert the court from its determination to go about its business. On the other hand, this dispute obviously did not present a simple choice between two possible contentions strongly urged by two contending parties. Here there were five contenders, each urging a different solution. Since each contender in an adversary proceeding must meet the case of each of the others, there would have been not two but twenty alternatives being argued before the court.23 This, in itself, may not stop a court. But the nature of the subject-matter might also involve clearly

23. Indonesia would have had to answer and present a better case than Britain, the Philippines, Malaya and the North Borneo Nationalists. Britain would have had to meet the arguments of Indonesia, Malaya, the Philippines and the North Borneo Nationalists, and so on.
discernible problems of preference. Despite its claim to annex, the Philippines might actually have preferred the territory to be independent, but felt her case to be legally stronger than that of the advocates of self-determination. The North Borneo nationalists, if they thought that they were going to lose, might have preferred the territory to go to Indonesia rather than to Malaya. All five parties might have preferred North Borneo to be under United Nations rule for a time, like West Irian, rather than see it go directly to any of the other contenders. Or a partition, buffer-zone or condominium might have been mutually agreeable. Unfortunately, none of these preferences could be expressed in the adversary process of a court nor could they be weighed by judges.

A court can decide such a twenty-sided case, though a decision is not always a solution. In a British-Netherlands agreement of 1654 it was stipulated that if the arbitrators had not reached an agreement by a certain day they should "be shut up in a room separate from all other persons, without fire, candle, meat, drink, or other support, till they have agreed." Today we would prefer to proceed more circumspectly, for it is realized that a judicial decision reached simply for the sake of resolving a dispute may be fine for problems involving nautical signals but not for the future of North Borneo.

The "North Borneo-type" problem illustrates what Dr. Polanyi has called "polycentric" and Professor Fuller "many-centered" issues. It is many-centered in the sense that it cannot be adequately laid to rest by a simple "yes" or "no" answer based upon the maximal polar arguments of both sides. Not only are there many alternatives before the court, there are many alternatives before the parties, some of which they may not have even discovered. With so many moving parts, the case has a potential flexibility which may facilitate a solution different from any of the maximum contentions put forward by the parties, or one incorporating parts of all of them. This flexibility is not generally best exploited by a court of law; it calls forth a different sort of institutional, structural or procedural genius, yet one not depriving the clients of the third-party function.

Refer to Professor Stone's example of the Berlin dispute as a typical "political" issue and assume it came before an international court. It would be relatively simple to decide that, "yes," the London Agreement of September 2, 1944, is still in effect; that, "yes," the November 22,
1945, memorandum of approval by the Allied Control Council of three air corridors was a binding international agreement, and that, "yes," access had been confirmed by the May 4, 1949, agreement ending the Soviet blockade. While such questions and answers are ideal for adjudication, how far do they advance us towards a viable solution to the Berlin dispute? The court could have established that allied traffic into Berlin, of undefined quantity and quality, has been sanctioned by Soviet agreement. It might even determine whether the Soviet obligations could be unilaterally transferred to another authority such as the government of East Germany. But thereafter the questions become more nearly insoluble by a court. How much traffic must be allowed? What kind of planes may be used? And what cargoes may the planes carry? Does the right of passage preclude all control? If not, how much control is excessive? May Soviet military maneuvers take precedence over allied civilian traffic? These are the real issues which arise between the allies and the Soviets in the day-to-day operations of the Berlin occupation and the application of the access accords. It is very doubtful whether the World Court, for example, could usefully be drawn into these bottomless quicksands of day-to-day administration. A special administrative tribunal set up expressly for that purpose might usefully supplement a system of negotiation and conciliation, whereas a formal and nonspecialized forum like the International Court of Justice would be an extremely cumbersome order-creating mechanism for this purpose. A blockade could be made quite effective by simply requiring the right of passage of every plane, barge, bus and truck be established by time-consuming litigation before a world court.

The adversary process of a court of law is best suited to disputes in which there are a limited number of questions that are dispositive of the dispute, each of which can be posed in terms of two clear alternatives. The process is least amenable to an issue which by virtue of its complexity is better regarded as a matter of degree or synthesis, or in which the number of questions to be answered is not limited. Courts are not generally well-equipped to determine questions of degree or to effect synthesis—especially the International Court, under-equipped as it is in pre-trial procedures, or such devices as juries, assessors, or even the compromis by which the parties distill the essence of the case for the tribunal.

Boundary disputes best illustrate the problem of issue-framing. Any court can answer a straightforward question like: "Does the boundary

29. DEP'T STATE BULL. 631 (May 15, 1949).
follow the St. Croix River?" Given a limited number of options, it might even field such an inquiry as "Which river is the St. Croix?" The United States Supreme Court\(^{30}\) and the International Court in recent cases between Honduras and Nicaragua,\(^{31}\) Belgium and Netherlands (1959),\(^{32}\) and Cambodia and Thailand (1962)\(^{33}\) have done so with success. But the success of the court's work in boundary cases depends upon there being a clearly discernible and limited number of factors which are exhaustive or determinative. Such a limitation may be imposed by the parties through prior agreement, or by the court's applying legal precedent. Where no such limitations are imposed, the work of impartial determination becomes difficult within the formal framework of a court of law. If the boundary is not at the St. Croix River, then where is it? Court solution of the dispute would be unsatisfactory to the parties and harmful to its image of impartiality. The court would not be equipped to designate the determinative factors, e.g., the wishes of the inhabitants, the topography, contiguity, the flow of the rivers or climate. Before a case is truly justiciable, that is, before it is subject to adversary process, there must be agreement as to the controlling factors: "what the case is all about." A court can answer boundary questions framed in specific alternatives; it cannot go over vast uncharted and disputed tracts with a judicial divining rod.

In proceedings before an arbitral tribunal this agreement takes the form of a *compromis* which structures the issues for determination. Most arbitration treaties bind the parties to negotiate such an "agreement on the disagreement." The World Court, too, insists on a clearly framed set of issues, since before the court will hear a case "diplomatic negotiations between the parties must have been carried to the point of a mutual confrontation of their opposing views."\(^{34}\) Where no such confrontation can be arrived at by the parties, the court may be able to help by eliminating those factors which by precedent, treaty, custom or even world public policy have been deemed clearly irrelevant. Yet where the parties do not agree and the court is insufficiently assisted by ascertainable principles of factor-exclusion, it may wisely refuse to be drawn into unframed litigation.

\(^{31}\) Case Concerning the Arbitral Award Made by the King of Spain, [1960] I.C.J. Rep. 249.
\(^{34}\) Hudson, *op. cit. supra* note 24, at 84, citing the court's failure to entertain, for lack of such confrontation, a claim advanced by Belgium against Bulgaria in the Electricity Company Case, P.C.I.J., ser. E., No. 15, at 98-104 (1938-1939).
An example of an issue which "is not a repository of judicially manageable standards" can be supplied by the stalled disarmament negotiations. Suppose the nations agreed to circumvent the inspection issue by including in their agreement a clause to the effect that there shall be "as many inspections as are deemed necessary to the purposes of this agreement, as determined, in the event of disagreement among the parties, by the International Court of Justice." Thereafter, a dispute arises in which the United States disagrees with a Soviet contention that an inspection of Oak Ridge, Tennessee, is "necessary to the purposes of the agreement." How would the court handle such a dispute? "Necessary" according to what perceivable standard? "Necessary" in the light of what agreed factors? The number of variables makes such an issue not merely polycentric but "infinicentric." It is a case a court might rightly shun, insisting instead that the number of inspections, or at least a set of standards by which the necessity of inspection may be determined, be specified by political negotiation. Nevertheless, in the absence of specific international legislation, courts can yet frequently proclaim law by reference to the public intent of the international community, though the public intent cannot be determined where the parties have not even agreed on the nature of the issue between them, or where the failure to isolate the nature of a dispute indicates a lack of any common Weltanschauung. By leaving to court determination whether there shall be inspection without the benefit of any standards, the disarmament agreement is less an agreement than evidence of a fundamental inability to agree. Generally, courts ought not attempt to rise above such lack of agreement by fabricating and imposing on the parties the common intent which they in fact do not have.

The World Court has on occasion taken just this attitude. In the Case Concerning Certain German Interests in Upper Silesia of 1926, the judges accepted jurisdiction but rejected the plaintiff's petition that they inform Poland that its treatment of German assets was unlawful, and, moreover, that they instruct the Poles as to the minimal requirements of legal conduct. In effect, petitioner asked the court not only to determine specifically whether a given course of conduct was illegal, but also to prescribe a legal course of conduct in general terms. In justifying their refusal to grant the petition, the judges declared that "the claimant had failed to formulate definite claims calculated to establish the character of the conclusion in question as an application for a judgment on the point

To return to an earlier simile, the question whether conduct X is legal can be compared to a "true-false" question, while an attempt to define what constitutes legal conduct would resemble an essay. Similarly, in the Guardianship of Infants Case of 1958 between the Netherlands and Sweden, the court itself reformulated and narrowed the issue as it emerged from the pleadings of the litigants in such a way as to eliminate the broadly polycentric issue of *ordre public* (loosely defined as public policy) by substituting a simple "yes" or "no" proposition of statutory interpretation. It is, of course, likewise not at all unusual for a United States court to refuse to answer a broad question posed by a litigant in favor of a narrower one framed by the judges.

While the International Court probably does not technically have the authority to refuse to decide a litigious case on the ground that its polycentricity precludes effective adjudication, it can and has refused to render an advisory opinion in the Eastern Carelia Case because it did not consider the issue appropriate. A wider discretion on the part of the court to refuse to determine a case would be helpful if there were functionally more suitable methods of third-party intervention available in situations where two-party lawmaking has failed but where formal adjudication does not offer the best possible recourse to third-party law. The dispute which is "political" in the sense that it is inappropriate to the judicial method of settlement may yet yield to some other form of third-party intervention. It is for the international lawyer to devise such methods of settlement which utilize the impartiality syndrome without necessarily taking the adversary form.

III. THIRD-PARTY INTERVENTION: SOME ALTERNATIVES TO FORMAL ADJUDICATION

What structural form such alternatives should take is a subject for extensive further research, the outlines of which can only be sketched here. Courts themselves can, of course, perform various functions which do not feature the adversary process but which nevertheless involve a third-party function. In the Behring Sea Arbitration of 1892-1893, the American-British arbitral tribunal not only solved a specific dispute but acceded to the parties' request to draft a set of regulations governing all sorts of future exigencies. A Greek-Turkish tribunal in 1897 actually

37. This assessment is by the clerk of the court. HAMMARSKJOLD, op. cit. supra note 17, at 78.
40. HUDSON, op. cit. supra note 24, at 125.
drafted a text for a consular convention after negotiation had failed.\(^41\) In 1910 another British-American tribunal, in the *North Atlantic Fisheries Case*,\(^42\) also drafted a set of rules to govern future conduct. These are, however, very exceptional extra-judicial activities for a court.

The International Court is authorized to decide issues not according to law but *ex aequo et bono*—that is, on the basis of right and merit.\(^43\) The *ex aequo et bono* power has never been used, although it has been proposed by Guatemala in the Belize dispute. One may, however, turn to domestic law for a demonstration. In describing, for example, the work of India's Industrial Tribunal under the Industrial Disputes Act of 1947, Mr. Justice Mukherjea of the Supreme Court of India contended that:

> In a judicial proceeding the judge has got to apply to the facts found the law of the land which is fixed and uniform. The quasi-judicial tribunal on the other hand gives its decision on the differences between the parties not in accordance with fixed rules of law but on principles of administrative policy or convenience or what appears to be just and proper in the circumstances of a particular case.\(^44\)

Special tribunals like the Industrial Tribunal of India and not the regularly constituted courts generally exercise such powers. Various international tribunals have also been given power to decide in this way.\(^45\) The failure of the International Court to find customers for its *ex aequo et bono* services—available only if both parties to a dispute agree—may indicate that it offers the worst of both worlds: broadly unframed litigation confined to narrow adversary procedures. A more informal system of justice warrants a more informal adjudicative structure than the World Court or most arbitral tribunals can provide. Besides, there is something unacceptable about requiring the judges of an established, formal court to draw a line between their search for the *law* and a search for *right* and *fairness*. Just as law suffers from being set apart from fairness, so fairness suffers from being counterposed to philosophical consistency. There is something slightly distasteful about the notion that a court might "if it deems such a course desirable . . . go outside the bounds of law [and equity] to reach a decision on objective grounds of

\(^{41}\) *Id.* at 80.

\(^{42}\) *Id.* at 125.

\(^{43}\) *STAT. INT'L CT. JUS.T.* art. 38, para. 2.


\(^{45}\) *LAUTERPACHT*, *op. cit. supra* note 6, at 41.
fair dealing and good faith." It presupposes, rather old-fashionedly, that there are objective standards of fair dealing and good faith which a court of law might reasonably be expected to ignore in favor of some word-formula from the ancient past. Surely, if law is a form of philosophical, as distinguished from mechanical, consistency, then fairness is incorporated into it by right reason and courageous pleading. There may, of course, be instances where parties might wish to free themselves of past mutual legal undertakings and resolve a dispute as if those undertakings did not exist. That purpose might be served by \textit{ex aequo et bono} litigation, but possible illustrations do not come readily to mind since the past conduct of the parties is generally an essential and beneficial part of the pleadings. More readily, perhaps, one shares the suspicion alluded to by Judge Hudson that \textit{ex aequo et bono} is a device for "adding up the claims on both sides of a dispute and dividing the sum by two." There may well be occasions when a dispute can be solved in just this way, or when it is desirable to have decisions made which are wholly consistent with a political or administrative policy—one which may change from day-to-day in response to trial and error. But again, courts are probably not the best forum for that sort of work. In our domestic experience, we have found it more functional to create so-called independent administrative agencies like the National Labor Relations Board, and, in an earlier era, separate courts of equity. The same men should not be asked to be experts both in impartiality and in a particular partiality. And the adversary structure is not necessarily best suited to a different kind of law-making, even one which remains loosely within the impartiality syndrome.

Some of the instruments of compulsory or assisted settlement which may be evolved to round out the armory of international third-party problem-solving ought to so modulate the third-party element that the coercive factor is disguised. Some ought to functionally synthesize elements of two-party and third-party lawmaking. Indeed, such a synthesis can already be observed in the postwar development of neutral states with a preponderance of voting power in the United Nations General Assembly and with important roles in many international conferences. While Russia and the United States would almost certainly refuse to leave the key decisions on, for example, questions of disarmament to a court, and while a court might in any case be ill-equipped to deal with the matter effectively, both countries have not insisted on pursuing the issue strictly in a unilateral or two-party context but have agreed to negotiate in a room full of "neutral" (or "third-party") states. True, the "third-party"

46. \textit{Hudson, op. cit. supra} note 24, at 103.
states at Geneva and in the General Assembly technically possess no power to bind either Russia or the United States; yet their presence and participation has undoubtedly compelled both countries to present more reasoned, consistent and moderate arguments supported by evidence and to behave towards the neutral participants almost as to a jury, no matter how often they might have felt like slamming the book, uttering an oath, and walking out.

The selectively representative world conference in which a neutral caucus holds the balance may superficially resemble historic European congresses in which nations like Britain, France and Russia each in turn attempted to wield the balance of power. Even though there was a balance of powers at the Congress of Vienna, the resemblance is misleading because each of the parties was beneficially concerned as an interested party with each of the issues before the Congress. This is not true of the neutrals at the disarmament conference. As non-atomic and even small weapons powers, they have no direct stake in the major issues; their presence has two entirely different functions. First, it acknowledges the vested interests of the entire world community in seeing that a peaceful solution is achieved, because the costs of failure would be assessed against all the nations and not only the disputants. Second, it harnesses the relative disinterest and impartiality of the neutral states in the process of devising a settlement. They both judge the cases put forward by the nuclear powers and add initiatives of their own. It is at once apparent that such a conference incorporates certain of the advantageous aspects of the third-party syndrome without submitting to the formal rigidity of the judicial process.

IV. CONCLUSION

There is no such thing as an inherently legal or inherently political dispute—just disputes which have been settled by legal or political methods. No dispute, if it fails to respond to two-party lawmaking, is inherently incapable of solution by the third-party method. However, this is not tantamount to saying that every such dispute can best be settled by the adversary process of a court of law. Fortunately, a court is not the only forum in which impartial decision-making can take place. It cannot be beyond the ingenuity of the international community to emulate the national community by devising more informal or flexible third-party decision-making processes to which, in appropriately polycentric disputes, the parties could themselves repair, or to which they could be referred by the courts.