

“PUBLIC AND PRIVATE ACTORS IN INTERNATIONAL LAWMAKING”

OFFICIAL OPENING

Mr. Bernard Bot, former Minister of Foreign Affairs of The Netherlands

In his word of welcome, Mr. Bot emphasised the forward-looking nature of the 2007 WLF conference on ‘Effective International Dispute Settlement for Public and Private Actors’, referring to the credit crunch. He brought forward the identification of The Hague as the Legal Capital. The private sector has developed standards of behaviour, but although these standards are effective, they lack legitimacy.

Hence the question follows whether it is possible to channel the proliferation of private sector standards into internationally acceptable standards. And also: how can soft law be transformed into hard law, to elevate it to international standards, e.g. through jurisprudence?

There are several relevant sub-questions: 1) is it possible to have companies to agree on soft law agreements, to put these into formal regulations 2) is self-regulation in emerging markets even possible? 3) can the sector impose formal rules when self-regulation is not in place?

Mr. Michail Wladimiroff, Chairman of the World Legal Forum Foundation

The World Legal Forum Foundation has been established in the summer of 2008. It initiates activities to advance the role of international law and international norm setting for society. World Legal Forum believes that private actors have an essential role to fulfil in bringing the effectiveness of international law further. The private actors present today all run multi-faceted corporate social responsibility programmes. The Hague is, in the words of Boutros Boutros Ghali, a legal capital with a multitude of judicial institutions and academic training institutes and think tanks. On the interface of business and international law, there is much to be discovered or developed further. The Hague is an excellent host for judicial institutions, international corporations and academic institutions. We hope that today’s debate will contribute to a more intensive exchange of ideas and cooperation in more effective international lawmaking.

Mr. Jozias van Aartsen, Mayor of The Hague

A short history on the Peace Palace and of the international community, the latter formerly consisting solely of sovereign states, shows a change: nowadays non-state actors are evenly important. Grotius had predicted this in 1609 in his book “Mare Liberum”. The Hague could play a role in the process of reconciliation as described by Francis Fukuyama, due to the variety of actors active in The Hague. There is a renewal of international cooperation. Of particular interest for this seminar is the Permanent Court of Arbitration. World Legal Forum is an excellent example of an innovative initiative, which combines academic sphere with sound business sense.

KEYNOTE SPEECH

Mr. Francis Fukuyama, Professor John Hopkins University

Without a legal background, but as a political scientist, with a focus on power and incentives, Mr. Fukuyama addressed the audience in his keynote speech. The phenomenon of globalization has created a multiple of interdependencies that increase economic and social transactions across borders. However, there is no matching political and legal authority to oversee this interdependence. Greater public regulation of the financial sector is needed after the credit crunch. As a means of understanding how cooperation comes about, Mr. Fukuyama recommends Scott Barrett's "Why Cooperate". He further states that the US have taken itself out of the game of supporting international organizations.

The political leadership is now coming from the EU, creating a lot of new public international law. In this vacuum between the US and the EU, the vacuum has been taken bottom-up, by smaller initiatives from private actors.

Legitimacy comes from democratic accountability of governments. Internationally, this system creates conflicts because decisions may come from less democratic (legitimate) states, which thus may influence the legitimacy of the decisions. On the other hand, if a body/institution would be 100% democratic, it would be hopelessly slow and bureaucratic. Hence, the need for efficiency is pressing.

Mr. Fukuyama also refers to the book of Anne-Marie Slaughter, *A New World Order*, in which she identifies transnational networks of government officials as an increasingly important component of global governance. An example is the coalition of the willing, as applied by Bush, which basically is a private initiative to gain legitimacy for their intervention in Iraq. As well as the ICANN (Internet Corporation for Assigned Names and Numbers), which is an example of the creation of big formal internationally based organizations.

Collaborate Standards Initiatives are at the far end of the formal – informal scale. There is a major growth area for public-private partnerships. Thus far, it has been impossible to make an international environmental organization, so private organizations are filling this gap. On the other hand, existing sectoral international organizations, e.g. the ILO on labour standards, are weak as they have no enforcement powers.

There is however, a danger of overlapping standards, inconsistency, and contradictory standards in self-regulation, which lack enforcement powers/taking punitive actions. There is also non-transparency on the part of the people who set the standards. For instance, who is a stakeholder? An example is the Bujugali Dam in Uganda. This is not a democratic process of legitimacy, because biased groups often set the agenda. The standards need to connect with formal rules and have a greater unification of rules. The future will be a migration of these rules in international settings. Mr. Fukuyama is writing a new book, "The origin of the rule of law".

There is a need to look at the political players, which are the US and China, when looking at formalizing private international law. Otherwise it will fail.

PANEL DISCUSSION

Public actors:

Hans van Loon, Secretary General of The Hague conference on Private International Law
Mr. van Loon is of the opinion that the body of treaty-based soft law has been effective. A global network of 3,000 authorities in 130 countries is in a continuous dialogue. Of course institution building and more discussion about further cooperation, for example in the field of migration, is necessary. Technical assistance programs and coalitions of the willing might be effective in this regard. The alternative is not legitimacy versus effectiveness, the solution is to find a combination.

Hertbert Kronke, former Secretary general UNIDROIT, Professor for Private Law, Commercial Law and Private International Law, University of Heidelberg, Germany
Mr. Kronke explains that HCCH and Unidroit do not work like the UN. Both are small organizations with scholarly freedom, which allows them to involve the private sector in lawmaking. HCCH and Unidroit do not see the private sector only as consumer but also as co-developer.

Do we still depend on hard law or should we develop more soft law? The answer is that we need both. Unidroit has found out where soft law is useful; this is wherever public or 3rd party interests are involved, we will continue to need hard law (binding / treaty). This law can be developed in co-operation with private actors. This implies support of private actors and enforceability of the hard law's instruments.

Ellen Kiersch, Head of the Private Law Department, Dutch Ministry of Justice

Ms. Kiersch wants to share some experiences of Dutch public law-making. The Netherlands is a top-down country. The civil code regulates and defines all relationships between actors. This has changed law into a public policy instrument; it does leave room for private actors. The information society is too fast and too complex for the civil code. A corporate governance code was set up by business and investments. The government's role has been to enable this development. The Netherlands finds it important to set up a monitoring system and to make all actors comply with relevant standards. You need some kind of representative parties, interdependence between public and private actors and long-term involvement of all actors. Government and politicians feel some kind of restraint towards private actors taking over too soon. These considerations leave law makers with certain thoughts:

- protect weaker parties
- Who is responsible for a satisfying outcome if private actors come in? Is the minister responsible?
- What is a satisfying outcome? Who decides what good value is and what is not worthwhile?
- With regard to transparency, how exactly do we know where and what rules there are amongst private actors?

The European Commission has called for a common frame of reference. This research was conducted by European universities. The outcome is much better than the product resulting out of official public negotiations in Brussels. What should we do with it, what will the

Commission do? Ms Kiersch expects that the European Court of Justice will step in. In general it is legitimate to pose the question who will step in when public lawmakers step down?

Comments and discussion:

- There is a transition going on from Pax Americana to a troika-system with US, China, India and Russia. Is there space for an alternative system, to move away from hegemony theory?
- Power politics are very much based on economical power. Where does economical power fit in?
- What is the (future) role of NGO's in this world? (Question to Fukuyama, Akzo and Nokia)
- Ad hoc mechanisms like the G8 are to solve specific problems such as disarmament of weapons of mass destruction. An example in this respect is the container security initiative launched in 2002 by the US. This initiative is translated into UN Security Council Resolution 1540. It is an important and new phenomenon that governments, NGO's and industry together develop new useful regulations.
- How can we include private regulation into a public legal framework? Through transparency: companies report which regulations they follow.
- Kyoto is a total failure in Prof. Fukuyama's opinion. What is to Prof. Fukuyama's opinion the failing character of the protocol and how does he see the future?
- The rule of law is based on a centre of political authority. The two major powers in this world do not accept rule of law, will we go forward without them?

Prof Fukuyama emphasises the complexity of this area. It is difficult to grasp all the fields involved, like in the WMD example. Prof. Fukuyama proclaims that he did not mean to say that the UN is not the right forum. It depends on the particular issue. On the question regarding commercial, political power and hegemony, Fukuyama believes that commercial power brings a party in the position to pose demands and influence law and politics. Entrance to the EU market and the environmental, technological standards and conditions the EU poses present a kind of power. Whoever has a large market is able to be a big player and has extra-territorial power.

Without NGO's the world and debate would be biased on geopolitics, economy and corporate interests. Thanks to NGO's power is divided amongst e.g. environment, human rights. NGO's form a counterweight, monitoring and holding people accountable, representing the less powerful. This is an important function. One can ask how legitimate their action is, sometimes NGO's actions do not even comply with their own democracies (Greenpeace is an example) and can therefore hardly be seen as reflecting international public opinion or civil society.

Standards for transparency and public reporting: nobody will instantly take care of better provisions. Better standards will be introduced eventually. Reports are only valuable if their content can be checked. We are speaking of a natural process that needs to evolve. There are so many different voices, which one to trust? We are not at a point that we can trust the information provided.

Private actors:

Jan Eijsbouts, recent General Counsel Akzo Nobel NV, Co-chair CSR Committee and member Advisory Board Corporate Counsel Forum IBA

Mr. Eijsbouts explains the Akzo Nobel perspective. With Akzo, internal rulemaking serves to align different (business) cultures. From the perspective of the international business community it is important to see that private measures are facilitated by public actors. Due to the credit crunch, there is a tendency to more protectionism. Protection mechanisms should ensure a firm establishment of the rule of law internationally. The OECD took over measures to combat bribery introduced in the US. The transformation of this soft law into hard law came about by introducing these anti-bribery measures in OECD member states. There is also an adverse effect of measures. Measures should be established not to pay bribes in the Far East together with a monitoring system to ensure that companies comply with these measures. Corporate governance is a co-decision process. Meta standards have to be introduced in a flexible way in states' legislation. John Ruggie addresses human rights in transnational business, defining the responsibilities of states and corporations, one of them being to avoid any harm. We will have to wait and see what the impact of Ruggie's assessment is and whether his recommendations will turn into customary law.

Kaisa Olkkonen, Vice President – Legal, Nokia Corporation

Ms. Olkkonen puts forward that she has a practical and operational view. Nokia faces the following two challenges; How to deliver products to 150 countries with different regulations in different fields such as telecom, broadcasting and internet? The second challenge is how to set a good benchmark and global standards that help people to communicate. The risk of fragmentation exists due to different technical standards. Concerning standardisation, Ms. Olkkonen emphasizes the EU regulatory framework. It should work for internet availability, and compliance with human rights standards. More movement towards harmonisation of customs duties would be welcome. Currently the development of new devices is being slowed down by red tape. To combine or complement public with private regulation will provide room to find solutions for current problems.

Fernando Pombo, President of the International Bar Association

Mr. Pombo puts forward what the International Bar Association and national bar associations can contribute to this debate. They can play a role in promoting the rule of law and respect for human rights. At IBA level there is a focus to improve the justice system and rule of law by education (of lawyers and judges). IBA supports making it compulsory for lawyers to have respect for the rule of law. Respect for and knowledge about the rule of law is important; law firms, bar associations and individual lawyers should fully realise this.

How to combine the rule of law and economic development?

- human rights institute
- corporate social responsibility, internal compliance systems
- support the work of e.g. Unidroit, Uncitral by certifying their regulations (valuable for international law)
- in the war against corruption; IBA teaches and trains lawyers about their responsibility

The IBA is a moderate institution, in which academic skills are highly appreciated. It represents international organisations and firms. These characteristics make the IBA the right place to discuss the rule of law.

WORKSHOPS 1 & 2

1. NEW INSTRUMENTS FOR INTERNATIONAL DISPUTE RESOLUTION IN FINANCIAL MARKETS?

Chair:

Mr. Edward Murray, Derivatives and Structured Finance Group, Allen & Overy and Head of the International Swaps and Derivatives Association (ISDA) Financial Law Reform Group

Mr. Christophe Bernasconi, First Secretary of the Hague Conference on Private International Law

- “Effective international lawmaking in international financing: the example of the 2006 Hague Securities Convention”

Mr. Jeffrey Golden, Partner Allen & Overy, Co-Head of US Law Group, Chair American Bar Association Section of International Law; recent chair of the American Bar Association and author of the article “Do we need a world court for financial markets?”

Mr. Erik Legendijk, Executive Vice-President and General Counsel AEGON NV

Panellists' interventions:

Chair Edward Murray introduces the topic by explaining that in the financial markets sector, the general theme of the conference holds ground: the private sector renders legitimacy in terms of substance, while the public sector provides legitimacy in terms of public lawmaking.

Christophe Bernasconi mentions the example of the 2006 Hague Securities Convention; this is a perfectly efficient way of lawmaking. He hopes it will soon be effective as well.

The approximate value of indirectly held securities around the world is 50 trillion USD. Mr Bernasconi refers to the following question in his presentation: how to find the right law to govern these properties? How to determine the applicable law for indirectly held securities?

Jeffrey Golden identifies a number of challenges in the current situation:

- legal uncertainty, different norms in different markets
- inefficiency
- legal certainty that some courts will get things wrong, this is potentially harmful for the industry and the world
- complexity of financial markets, the market evolves and is complex
- new products are subject to old laws

To have efficient, effective and certain results you need sufficient competence in the court. Currently there is the possibility to request expert testimonies. However, it is important to take the following question into account, who are these experts? Are they willing to testify, are they neutral, are they up-to-date competent? Amicus curiae briefs present another possibility, but these always represent interests and therefore not all courts accept these briefs.

When thinking about the systemic implications of any judgment/solution, are judges and/or arbiters sufficiently aware of the responsibility? The bulk of the derivatives sector, worth approximately 500 trillion USD, is underpinned by ISDA master agreements.

The solution to the problems at hand would ideally be an international instrument that responds to the following requirements:

- common law, civil law and Islamic or other non-Western legal traditions
- language issues
- comprehensive procedure.

Why should The Hague be favoured over London or New York? Exactly to respond in a comprehensive way to these conditions while at the same time taking into account The Hague's assets: infrastructure, international organisations already here such as the PCA and ICJ, available legal expertise in the academic institutions and tribunals and courts.

Erik Lagendijk states that there is a tendency to underestimate all what is happening in the world today. It started with world.com and Enron, followed by the credit crunch, what will be the next step? The whole thinking about corporations has changed in the last couple of years. Currently there is so much confusion; we might not completely understand what is happening around us. Because of internet the world is connected and small things can influence our behaviour. Will we still be able to afford disputes? Can we satisfy all stakeholders? He puts forward that formal laws and rules belong to the past. All current problems are related to behaviour in the past. Are we doing the right thing? If we get questions from society at large, what is our answer? Mr Lagendijk states that we should focus more on corporate responsibility as being the only way forward.

Jeffrey Golden explains that WLF is trying to make the talk into something more tangible. We should not spend too much time looking back but instead focus on the way forward.

We should try to make history, think out of the box, and bring in new perspectives.

- Regulation in the market place: preventive medicine has not been sufficient; we need quality-hospitals in the form of courts. Are courts prepared or can we do anything to support them?

- Rules that were designed to protect the client may now push the risk to the bottom at the client's cost
- In criminal law we accept societal interest, why would we not do likewise in private international law? The systemic implications of wrong decisions could be detrimental. Why would we accept that?

Mr Golden asks: how do we get a settled body of law for financial markets? There is almost a sociological problem (not theoretical); if we do not move on, we have a generation of people about to resign who know these issues. We should engage them in a common international effort before we lose them. They are problem solvers and we should protect the positive aspects of their legacy. Furthermore we should inspire and convince them of the societal interest.

Comments and discussion:

A participant notes that we seem to have a trade-off between consumer interest and legal certainty. There are mechanisms in place, such as expert determination, mediation, expert testimony, and formal litigation. What we do not fully understand is the impact of litigation. Summarising, are the procedures that are in place good enough? Is there a proper evidence base for talking about a new entity?

A second person confirms that indeed the current mechanisms are of the past. The questions posed by panellists Lagendijk and Golden are not so different. Experts should set the standard for the whole branch.

The chair of the session, Edward Murray, lists all possibilities once more: under the heading of alternative dispute resolution there is e.g. mediation, expert determination, conciliation. Otherwise there is litigation. Murray asks if we are talking about arbitration or an open and transparent court. With arbitration, the judgment is often not made public although it might be in certain cases (when the case is between a broker and his client or a state and its agent). We should in any case not assume that one of these is automatically the best.

One of the participants puts forward that the credit crunch might be compared to the fear that existed for the millennium threat. In the end, it was not nearly as bad as expected. Another participant is intrigued by the remark 'not to look back'. Could history teach us something? Furthermore, to his knowledge banks did not arbitrate fifteen years ago. Is this no longer the position of financial institutions?

Chairman Murray has noted that the past ten years have seen an increased willingness to arbitrate on the part of the banks. The traditional fears of a lack of sufficient expertise and a lack of neutral arbiters have (so far) not been proven correct.

Another participant notes that The Hague as a 'legal capital' has a clear advantage, however arbitration could take place anywhere in the world.

Jeffrey Golden mentions that a study is taking place into the practicalities of different scenarios, paying attention to experts and procedure. As an example of the frailty of a traditional court he brings forward the Parmalat example.

Erik Lagendijk puts forward that he believes the new world court is the general public and media.

A question posed to chairman Edward Murray concerns what ISDA's official view to regulation is. Should ISDA not lobby with the G20 and other fora to draw attention to the problems it perceives in the financial world? Murray confirms that in any case ISDA will maintain its dialogue with WLF.

A participant puts forward that companies have been very inward-looking in the past. They focused on technology and reorganising. Nowadays companies are completely reversed and significantly more outward looking. One exception is the financial world; this world should reconsider its role in society. Therefore, we have to come up with a new situation that is driven by the outside.

Conclusions and recommendations:

In short, the panel and the participants conclude:

- The current mechanisms for dispute resolution in the financial markets are outdated:
 - We need sufficient competence in court
 - We must get a settled body of law for financial markets
- Experts should (be involved in) set(ting) the standard for the whole branch
- There should be a clear focus on corporate responsibility, also in the financial sector
- The Hague with its excellent legal facilities has a clear advantage for hosting a new instrument to deal with complex financial products' dispute resolution

Recommendations or issues to be discussed more extensively:

- Is there a proper evidence base for talking about a new entity?
- In criminal law we accept societal interest, why would we not do likewise in private international law?

2. ENVIRONMENT AND EFFECTIVE INTERNATIONAL LAWMAKING

Chair:

Mr. Wouter Veening, Chairman of the Institute for Environment Security

Firstly, Mr. Veening puts forward that he is not a lawyer by background, but an environmental/political scientist. A preferred approach of an effective legal regime is desired instead of 'paper tiger' laws. The present challenges are among others, climate change, loss of biodiversity, and overfishing. With regard to these issues the role of private actors is obvious, such as private actors polluting the sea, but private actors are also in the position to bring about solutions.

Mr. Bradnee Chambers, Head Inter-Linkages and Synergies Unit, United Nations Environment Programme (UNEP)

The specifics of environmental law make effective international lawmaking more challenging than in other areas. There is a necessity in environmental law to have a multilateral system. With global environment issues there is no other means to solve the problem and no country can work alone. It is very difficult to establish what harm one had done or contribution one has made in comparison to other polluters. There are many best practices or examples of soft law, but there is a need for more hard targets that are legally binding. Regarding implementation, matters are not there yet: with 200-500 ratified treaties, many are still not being implemented.

The coherence crisis reflects on the lack of harmonisation and codification. Without coherence, loopholes and escape routes are found, which can lead to “forum shopping”.

Interlinkages of international institutions related to environment mean that there is large civil society involvement, but global institutions are lacking. More integrated and comprehensive agreements are needed, but it is a very complex matter. There is a trade off between effectiveness and legitimacy, but this trade off point is often not clear.

The core question is: *How can the legitimacy of traditional international law be combined with the efficiency and effectiveness of private regulation?* Mr. Chambers notes that while we talk about increasing effectiveness, what exactly is “effectiveness”? There are several working definitions, which conceive the concept very differently. A similar situation exists regarding the concept of “sustainable development”. For many companies it is difficult to understand what they can do and what their role is. The final question for discussion today should be: “How can we strengthen, review and redesign existing institutions?”

Mr. Manuel Teehankee, Chairperson Committee on Trade and Environment, WTO

The WTO has no specific agreement dealing with the environment, but in 1991, a dispute between Mexico and the United States, now known as the Tuna-Dolphin case, attracted a lot of attention on the linkages between environmental protection policies and trade. The focus of the Committee on Trade and Environment is to promote sustainable development. Furthermore, it investigates whether environmental measures will domestically influence trade flows.

Mr. Mike Wilkinson, Vice President Sustainable Development, Royal Dutch Shell

While providing some background information on the company Shell, Mr Wilkinson explains that Shell has the most extensive regulations on environmental issues. Legal compliance alone is not sufficient; Shell also sets internal operating standards, reviews how these are managed and what challenges they bring. The internal standards need to meet external requirements and restrict delays in implementation.

Some brief topics to discuss are the challenge of monitoring and implementation; liability: what are the consequences?; where, when and how does Shell participate?; what are the practical implementations; the role of external voluntary codes, e.g. the development of the OECD Guidelines

Comments and discussion

- One of the participants complimented Shell on its incorporation of an NGO review. How does Shell work in an area which does not have certain environmental or other CSR standards and possibly also an absent civil society? How do you deal with free riding in an environment of states with weak governments?
- What is the basis for the development of Shell's internal standards? What happens when branch standards are higher than Shell's internal standards? Are Shell's standards common across the world?
- What was Shell's involvement in getting China's oil producers on board?
- Who do you listen to in less democratic states?

The Mr Wilkinson responds to the queries by saying that Shell maintains global standards and these are sometimes even higher than those at government level. However, it is not a specific aim to be "above average" everywhere.

Shell also contributes in a sustainable manner, by donating roads and hospitals etc. This sometimes results in criticisms for not being experts on these particular matters, while all they solely make a sustainable contribution.

Shell maintains the same level of standards in Nigeria as they do elsewhere.

When Shell comes into a new country, they do a human rights assessment to ascertain whether they can work according to their own principles. If this is not possible, they refrain from going in to the country. (EITI - Extractive Industries Transparency Initiative)

WORKSHOPS 3 & 4

3. EFFECTIVE INTERNATIONAL LAWMAKING IN DEVELOPMENT COOPERATION

Chair:

Mr. Paul Arlman, Chairman Plan International and of the Dutch Brand of Transparency International

Mr. Arlman notices that normally this discussion only regards the relationship between NGO's and governments, but that it will be much broader in this workshop.

Examples of hard law in this field are the UNCRC (Convention on Rights of the Child) and OECD (fighting corruption), and soft power (naming & shaming)

Mr. Louk de la Rive Box, Rector of the Institute of Social Studies

In agreement with Mr. Fukuyama's comment that this is not only development cooperation, but international cooperation, Mr. de la Rive Box puts forward that a global civil society, which provides checks & balances, is needed. Civic driven changes are the signs of the times. As a tool for observing the change in international law, Fukuyama's typology can be applied to the situation in The Hague.

Three separate institutions will be reviewed in this regard, namely the Permanent Court of Arbitration, the International Court of Justice and the International Criminal Court.

The Permanent Court of Arbitration's confidentiality is almost automatically linked to arbitration. This international organisation is for the resolution of disputes involving states as well as non-states. The International Court of Justice can be described as having high legitimacy, while at the same time having low efficiency, low effectiveness. The ICJ only deals with issues between states. The International Criminal Court is a combination of low/high legitimacy perception (e.g. low in Serbia). Thus far the ICC has high formality, low efficiency and uncertain effectiveness. This institution is however strongly supported by civil society.

Several comments/conclusions can be made. The matter of effectiveness and efficiency is not an either/or discussion. It is a process of forming a notion of an international community, with more players than just states, for example civil society, as was predicted by Grotius. One can witness a total failure of the financial arrangements between banks, total absence of trust; and a failure of the self-regulatory system.

Transformation of state and interstate organisations; new global order: intergovernmental arrangements. However: where is the state? Where is civil society?

Mr. de la Rive Box gives a short prognosis: the PCA is taking important cases, settling important disputes. The ICJ is stabilising/declining, as NGOs are not welcome yet. The court needs to accept the new notions of sovereignty. The ICC has growth potential – though the US and China are still not signatories. There is a high risk for the ICC, as it is based on feeble legal ground. The conclusion is that The Hague can serve as a fascinating laboratory for ideas such as described by Fukuyama.

Ms. Kaisa Olkkonen, Vice President – Legal, Nokia Corporation

Nokia's vision is a world in which everyone can be connected. The vision aims for telecommunication industry and regulators to improve wealth in emerging markets. Mobility is important for (emerging) markets. But simultaneously in many emerging markets, there is a big problem in acquiring correct licences. Also, there is a vital role for multi-stakeholder cooperation.

Comments and discussions

The notion of multilateralism is very strong.

Even though Fukuyama is high on democracy and legitimacy in the US, outside the US this is very weak, though it is increasing. Rules are made by other players. Sometimes it is difficult to distinguish between public and private regulation, it is really merging together. However, Nokia does not see that this is a problem. In countries without effective government, one has to look at the situation case by case.

4. BIO-SECURITY AND EFFECTIVE INTERNATIONAL LAWMAKING

Mr. Richard Lennane, Head of the BWC Implementation Support Unit

Mr. Guy Roberts, Deputy Assistant Secretary General for NATO Weapons of Mass Destruction Policy

Mr. Gary Burns, Global Biosafety Manager, AstraZeneca UK Ltd.

Panelists' interventions:

Chair Richard Lennane introduces the topic by explaining about the 1540 United Nations Security Council Resolution that aims to prevent the proliferation of weapons of mass destruction. Kindly refer to Richard Lennane's presentation and those of Gary Burns and Guy Roberts.

Guy Roberts from NATO states that the 'bio-threat' is regarded one of the main threats to the transatlantic alliance. This threat is an interesting phenomenon, on which all intelligence groups agree that it is highly current. We recognise that not only non-state actors and nations are trying to acquire this kind of weapons. There is a market for laboratories and equipment is completely unregulated. In response NATO aims to

- reduce the biological risk
- enhance a quick response
- work together with other organisations

Take note of the following ad hoc initiatives that deal with the bio-threat:

- G8 Global Partnership against WMD
- Export control groups, Australia group
- Interpol, bio-forensics capability, bioterrorism program
- Regional initiatives, such as the Ready Center in Singapore or the Bucharest bio-preparedness centre.

NATO's work in responding to WMD goes back to its establishment in 1949. The North-Atlantic Treaty binds all 26 members to a legal framework in biosecurity. Next to this framework there are:

- conferences / summits
 - WMD centre
 - Senior group on proliferation
 - Defensive capabilities, particularly with NATO partner countries
 - 2002 Prague summit, prepare for future operations
 - o NATO response force
 - o Agreement on biological (nuclear and chemical) defence. It is now a taskforce to support civilian infrastructure in case of a WMD attack.
 - 2004 Istanbul summit
 - 2005 Riga summit
 - 2006 Bucharest summit
- } The bio-threat is considered one of the principal threats
- } NATO has to deal with

The European Union is also active in this area; it has developed a strategy to reinforce WMD regimes and promotes multiple networking outlets. The EU combines economic incentives with non-proliferation.

NATO's joint assessment team is immediately deployable. It has three deployable analytical laboratories and its disease surveillance unit is almost operable (Munich March 2009)

Mr Roberts puts forward that all NGO's and international organisations working against illicit trafficking in e.g. cars, WMD materials, human beings and drugs can share intelligence and expertise without duplicating. NATO reaches out to all other organisations.

Gary Burns from AstraZeneca Pharmaceuticals presented the Industry perspective. He stated that industry makes use of pathogens, toxins and related genetically modified micro-organisms (GMMs) for legitimate purposes for example in the discovery of new medicines and vaccines. Many countries have implemented biosafety legislation but fewer have regulated related security issues intended to make it difficult for those with intending to use these for harmful purposes to access these materials. In particular, the US and UK have introduced legislation setting out security requirements for specified pathogens and toxins and associated GMMs. Export control restrictions for relevant materials are applied much more widely.

Dr Burns noted that biosafety and biosecurity oversight have come under close scrutiny in the last couple of years. In the United Kingdom for example, the government had accepted the recommendations of the Callaghan review conducted in the wake of the Foot and Mouth Disease Virus escape in 2007 including the need to develop a single regulatory framework for human and animal pathogens and GMM's. He drew attention to a recent US Congressional Commission report on the prevention of WMD proliferation and terrorism published at the beginning of December 2008 which included recommendations for tightening of oversight of high containment laboratories and which stressed the need for biotech and pharma companies to foster a bottom-up effort to sensitise researchers to biosecurity issues and concern.

Dr Burns noted that many stakeholders including governments, intergovernmental organizations and non-governmental organizations were concerned at the lack of awareness by researchers of the potential dual-use implications of their research.

Dr Burns said that industry supported regulation where it was risk and science-based and he stressed the importance of consultation with industry and other organisations in ensuring that developing legislation is risk-based, proportionate and clear. He also referred to the benefits that can be derived by industry and professional organisations working together with others. He referred to the recent International Laboratory Biorisk Management Standard as an example.

Comments and discussion:

Francis Fukuyama notes that what seems very clear, is to never use a top-down international approach. The issue is too fragmented to think that such an approach is the solution. You need different ways to get to the problem.

Mr Roberts adds that it is hard to determine the intent of what you are working against. Furthermore there is a huge lack of awareness (dual use).

Richard Lennane mentions that during the past 2-3 years the academic community has become more alert regarding their own responsibility, codes of conduct have been developed and the Inter Academy Panel has issued a statement of principles.

The Chairman of the Seminar, Bernard Bot, asked the panelists whether it is very hard to identify the target. How do you do this? There are a lot of measures and initiatives in this field. Mr Bot has the feeling that they are very disparate measures, what is applicable and what is not? How do you protect yourself? How can we create a clear uniform body of law that is internationally applicable?

Conclusions and recommendations:

In short, the panel and the participants conclude:

- Awareness of researchers needs to be developed.
- A top-down international approach is on its own unlikely to provide a solution to the bio-threat
- The private sector supports risk-based and proportionate regulation
- How can we create a clear uniform body of law that is internationally applicable?

CONCLUSIONS AND WRAP-UP

Ed Murray

The first workshop primarily focused on three questions:

- 1) Do we need a world court for dispute resolution for cross border complex financial transactions?
- 2) If so, why?
- 3) Where should it be?

Ed Murray outlined the topics that were discussed in this session.

Christophe Bernasconi started the session by setting the scene on the process of international lawmaking, focusing on the interaction between private and public actors, degrees of (in)formality in this process and the role of private actors in providing content. He emphasized the need for the actors to understand the market process and to understand the global nature of the issues that the financial markets face.

Jeffrey Golden continued the session by summarising his article '*Do we need a world court for the financial markets?*', thereby scoping the scale of the issue, with 80% of the agreements based on standard ISDA contracts. However, there is havoc because of different decisions in different courts across the world, despite aforementioned agreements. There are (dis)incentives that lead domestic courts away from disputes in financial markets. There is a need for an arbitration model or other dispute settlement models.

Erik Lagendijk provided some provoking questions. He questions whether the correct questions are being asked in the first place. He suggested to also look at behaviour in addition to the norms.

All in all, a lot of difficult and interesting questions arose from the presentations, too many to answer. ISDA will be taking forward the idea of centralising a dispute settlement court or institution.

Wouter Veening

Mr. Veening pointed out that there were excellent presentations and interesting discussions in workshop 2, focusing on the need for public-private cooperation in environmental law, turning soft law into hard law and with an identified challenge for the World Legal Forum to take this movement forward.

There are some clear conclusions that can be drawn from these discussions:

- States must work together.
- Many multilateral environmental treaties are empty shells; with nothing happens regarding either implementation or enforcement. Private actors such as Shell are setting their own standards.
- Many agreements are paper tigers, nothing happens with regard to implementation. Fortunately there are some private actors that develop their own standards.
- Some treaties and protocols do work. There are the emission-trade mechanism (by private sector interaction) and Kyoto. With regard to the transfer of technology (solar panels): the WTO works to remove trade barriers such as tariffs on trade in this technology.
- Environment is a global public good, therefore international public law should be the prime regulator; there is a need for a public law body assisting the private sector.

Chair Bot notes that with the effective transfer of rules (or elements of rules) into formal regulations or harmonisation, everybody should know what the minimum norm is.

Paul Arlman

This workshop firstly redefined the subject, and identified new topics for the discussion.

The premise was the involvement of NGO's;

- A number of treaties and conventions (hard law) form the basis of NGO work. NGO's can push the message through, in that way creating soft law. NGO's have issues of democracy, legitimacy and they also compete amongst each other in transparency and accountability.

Nokia's Ms. Olkkonen emphasized:

- The speed of development and the impact on the economy and other sectors, such as health, that private actors can have.
- Most countries do not have regulations, but the private sector feels that the private and public sector have merged, with which the private market is comfortable.
- That it is quite difficult to establish what exactly is soft law and what is hard law.

The following three areas should be taken into consideration:

- 1) NGO's push their message through by using soft law. For example with regard to the resettlement of refugees and Shell's acting in response to World Bank policy. This policy has its origins in NGO measures. These measures have transformed into hard law.
- 2) If we analyse the three courts in The Hague, how would they develop the coming years according to Fukuyama's theories? How do Americans look at the legitimacy of

international organisations? In a certain way this is a narrow view. The impact of US dependency on the outside world is such that it might decide or be forced to review its views.

- 3) When discussing human rights and business, it was noted that in some companies human rights function as hard law because they are enshrined in corporate values.

Chair Bot furthermore adds that soft law is not necessarily *private* and hard law is not necessarily *public*. This equation does not run parallel. Hard law can be private while soft law can be public.

Richard Lennane

In workshop 4, there was a discussion about an overarching legal framework, such as the Biological Weapons Convention etc. The conclusion was that the established norm is sound and absolute: biological weapons and all who employ them cannot be tolerated.

However, we must be careful with dual usage, since there are so many peaceful applications in biology. All those who are involved should be aware of:

- Public health
- Animal health
- Interpol
- Branch organisations
- Scientific institutes and universities
- International governmental organisations
- Non-governmental organizations

Therefore it is important to facilitate public-private partnerships.

Francis Fukuyama: reflecting on workshop conclusions

- The problem is not globalisation itself, but rather the sheer complexity of the underlying problem of some sectors and the regulatory lagging behind to the fast developments.
- Furthermore, we need to institutionalise ways to consult private actors and smaller countries as well.
- Harmonisation of privately generated rules is desperately needed. With regard to the hierarchy of private rules, the complexity of underlying things that need regulation is moving so fast that if regulations become formalised this happens in most cases only months or years after their reason for existence was current. At the moment of the transformation into hard law, the reason to exist might well not be current anymore.
- American participation in institutions is essential, in order to try solving global issues such as climate change. It is important to understand US background.

Bernard Bot: final conclusions

Chairman Bot concludes that we can be optimistic about the possibilities of moving forward:

- Private regulation is necessary; in spite of the bewildering amount of rules that is being developed, private regulation is credible.
- Despite the multitude of private initiatives, the bottom-up freedom and willingness to arrive at a body of rules are no less effective and important. The important question is how to channel this body of rules into a higher 'level' of law?

- What is the aim of harmonisation? Is the final aim to set a formal standard? How should this standard relate to informal regulations?
- How do you ensure compliance and enforcement, how should we bring these about and how to facilitate them?
- Starting at a low level, and elevate to status of a treaty, e.g. through legislation is possible.
- The usage of existing international organizations is encouraged, such as the Hague Convention on Private International Law (HCCH).

World Legal Forum Foundation can work in various ways to discuss these issues in a more substantive or specialised forum.

- To have legal instruments that see to it when there is a problem to harmonise, to observe rules?
- To create a supervisory organisation that observes compliance, for example in the fields of bio-security or financial markets

---RECEPTION---