

Northwestern Journal of International Law & Business

Volume 5
Issue 1 *Spring*

Spring 1983

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Recommended Citation

William Jr. Bodde, Lawyers and Diplomats: Some Personal Observations, 5 Nw. J. Int'l L. & Bus. 40 (1983-1984)

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Lawyers and Diplomats: Some Personal Observations

*William Bodde, Jr.**

The American experience has proven wrong de Tocqueville's contention that lawyers and missionaries make poor diplomats. Our diplomatic history is rich in successful and prominent lawyer-diplomats, demonstrating that even such a perceptive and sensitive observer of the American scene as the French historian could be mistaken.

Many nations, such as the Federal Republic of Germany, consider legal training so valuable that they require it as a prerequisite for entering the diplomatic service or at least give preference to candidates with law degrees. The United States has somewhat more liberal entrance requirements. American Foreign Service Officers are drawn from more diverse backgrounds, although some have been trained in the law.

Even though the majority of Foreign Service Officers are not lawyers, the influence of the legal profession on American foreign policy has been enormous. This is because a large proportion of presidential political appointments (in both Democratic and Republican administrations) to diplomatic assignments at home and abroad come from the legal profession. They bring with them a value system and an approach to problem solving which is grounded in American law.

Many years ago George Kennan commented on this phenomenon. He noted a tendency "to transplant legal concepts from the domestic to the international field: to believe that international society could and should operate on the basis of general contractual obligations, and hence to lay stress on verbal undertaking rather than on the exact man-

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ifestation of political interest.”¹ Kennan has touched upon a significant difference in the way diplomats and lawyers approach international negotiations. I was recently struck by the difference between what I would term the diplomatic-political approach and the lawyer-contractual approach. In preparing for a graduate seminar on South Pacific politics that I teach, I had an occasion to review the Compact of Free Association which was initialed by the United States and by Marshall-ese President Amata Kabua on behalf of three Micronesian governments (the Federated States of Micronesia, the Marshall Islands, and Palau)² in January 1980 (a later version of the Compact was initialed by the United States and the three Micronesian governments late in 1980³). The Compact, when finally approved, and numerous subsidiary agreements will regulate the political, economic, and security relations between the United States and the three Micronesian governments after the last remaining United Nations Trusteeship is terminated.⁴ Given the number of participants—as many as forty to sixty people from the four governments attended the negotiation sessions—and the different and sometimes conflicting interests of the four sides, it is not surprising these agreements took thirteen years to complete. To complicate matters, there were administration changes in the United States and fragmentation in the Trust Territory. The first to break away and sign a separate agreement with the United States for Commonwealth status was the Northern Marianas. The others originally negotiated as a single unit (The Congress of Micronesia), but later split into three separate political entities: the Federated States of Micronesia, the Marshall Islands and Palau.

The Compact of Free Association, a complex and lengthy agreement, is very much the product of the lawyer-contractual approach.⁵ There are a number of reasons why lawyers have played a central role

¹ Pfaff, *Books: Kissinger and Nixon*, THE NEW YORKER, Sept. 13, 1982, at 156 (quoting George F. Kennan).

² See DEP'T OF STATE, 1980 TRUST TERRITORY OF THE PACIFIC ISLANDS 3; U.N. Trusteeship Counsel, Note Verbale Dated 4 November 1980 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General at 3, U.N. Doc T/1827 (Nov. 5, 1980) [hereinafter cited as Note Verbale].

³ DEP'T OF STATE, 1981 TRUST TERRITORY OF THE PACIFIC ISLANDS 15. This later version contains many changes from the January version. Note Verbale, *supra* note 2, at 3. However, this draft, like the January draft, is a complex, lengthy document, *id.* at 64, and, thus, my observations about the January Compact apply equally to it.

⁴ See DEP'T OF STATE, *supra* note 3, at 15; Note Verbale, *supra* note 2, at 2. The United Nations Trusteeship was established by the Trusteeship for Former Japanese Mandated Islands, Apr. 2 - July 18, 1947, 59 Stat. 1031, T.I.A.S. No. 1665, 8 U.N.T.S. 123.

⁵ I was a member of the United States delegation to the Micronesian Political States Negotiations from 1977 to 1980, and have followed the negotiations since that period.

in negotiating the Compact. After thirty-five years of United States administration, the Micronesians have become accustomed to and have adopted the litigious ways of the United States. Consequently, the negotiations were characterized as adversarial and have had a long and often acrimonious history. The Micronesians made a decision fairly early that the best way to protect their interests and to obtain the maximum benefits from the United States government was to hire prestigious American law firms to conduct the negotiations. At the same time, the Micronesian political leadership kept all decisions of policy in their own hands but let their attorneys conduct the bulk of the negotiations.

Not surprisingly, given their experience, the lawyers set about creating a document that one attorney described as a model "trust indenture." The Compact attempts to account for every possible contingency, includes elaborate dispute resolution mechanisms, and is couched in legal terminology. The result is that the document is difficult to understand fully without considerable study and effort. Article II covering foreign affairs, which is one of the shortest articles in the Compact, takes up two pages of text. It attempts to enumerate the foreign affairs authority of the Micronesian governments as fully and as explicitly as possible.

In contrast, the Cook Islands Act,⁶ which established a free association between New Zealand and the Cook Islands, briefly expresses the relationship between the Cook Islands, New Zealand, and the Chief of State—The Queen:

5. External affairs and defence—Nothing in this Act or in the Constitution shall affect the responsibilities of Her Majesty the Queen in right of New Zealand for the external affairs and defence of the Cook Islands, those responsibilities to be discharged after consultation by the Prime Minister of New Zealand with the Premier of the Cook Islands.⁷

In actual practice, the authority and competence of the Cook Islands' government in foreign affairs through practice and interpretation has expanded to a point since 1964 where they are similar to what the Micronesian governments will have under the Compact.

This is not in any way to denigrate the Compact or to cast doubts upon the durability of the political relationship it describes. I am convinced that the underlying political bonds between the United States and the Micronesian people are very strong and that the United States will have a close relationship with them for decades to come. My purpose is to use the Compact as an example of the contrast between the

⁶ Cook Islands Constitutions Act 1964, [1964] N.Z. Stat. No. 69.

⁷ *Id.* pt. I, § 5.

two approaches. I would note that one disadvantage of the Lawyer-contractual approach is that the resulting document's complexity complicates the task of the Micronesian political leaders in obtaining the support of the Micronesian people which is necessary if the agreement is to receive majority approval in a United Nations-observed plebiscite. The complex nature of the Compact may also make it an easier target for critics in Congress, where it must be approved by both the Senate and the House of Representatives.

In contrasting the difference between the legal approach and the diplomatic approach, Ferdinand Tönnies' typologies *Gemeinschaft* (community) and *Gesellschaft* (society) are useful.⁸ The diplomatic approach shares the *Gemeinschaft* qualities of primitive or traditional law. That is, it is outcome-oriented: it attempts to balance conflicting interests and seeks consensus. The legal approach, on the other hand, shares the *Gesellschaft* qualities of English-speaking western societies. It is procedure-oriented and adversarial: it attempts to address all possible contingencies and is based upon the principle of *do ut des* (I give so that you will give). Some negotiations, such as trade, economic, and commercial agreements, are much more contractual and the lawyer-contractual approach is most appropriate. Others, such as arms limitation agreements and the law of the sea treaties, are a mix of the contractual and political. Still others are clearly more oriented towards the diplomatic-political approach.

In 1981, the United States, on behalf of the Multinational Force and Observers (MFO),⁹ negotiated an agreement with the small nation of Fiji in the South Pacific. The agreement established the conditions for Fiji's participation in the MFO in the Sinai. At the time, the United States was having a difficult time drumming up support for the MFO because many nations, including some of our closest allies, were afraid that their participation might anger the Arab nations. Fiji was already contributing to the United Nations peace-keeping Force in Lebanon (UNIFIL) and was willing to join the MFO, provided the costs of training, equipping, and maintaining the troops were underwritten by the MFO.

Most important decisions in the Pacific Island nations are made by consensus rather than through an adversarial process. When the nego-

⁸ F. TÖNNIES, *COMMUNITY AND SOCIETY* (Charles P. Loomis, Translator 1963).

⁹ The MFO was created in August 1981 as an alternative to the United Nations Forces and Observers. Its purpose was to help enforce the Egyptian-Israeli Treaty of Peace dated March 26, 1979. For the text of the Protocol establishing the MFO, see 81 DEP'T STATE BULL. No. 2054, at 44-50 (1981).

tiators from Fiji and the United States met, neither side presented a position from which they were prepared to fall back under pressure. Instead, the two sides went over Fiji's proposal point-by-point seeking ways to reduce the costs to their mutual satisfaction.

For example, Fiji's proposal called for equipping each of the 500 soldiers with a compass. We explained that it was United States Army practice to supply only one compass to each squad of eight infantrymen. The Fiji Government readily agreed, and so it went until an agreement satisfactory to both sides was achieved. Because of this approach and the shared interests underlying the negotiations, a consensus was reached. Given this consensus, the agreement is more likely to survive than if we had depended upon a contractual text to bind us.

Lawyers on both sides (the Foreign Secretary of Fiji is a lawyer) made sure the text of the agreement was clear, reflected the intentions of both delegations, and was consistent with international law. However, legal considerations were not the driving force in the negotiations.

Some years ago, when working on the text of an international agreement with an extremely able State Department lawyer, my attorney colleague turned to me in frustration and said, "The problem with you Foreign Service Officers is that you do not believe words have meanings." He was wrong, of course, in the sense that the diplomatic profession, like the legal profession, lives by the written word. Policy options to the President or Secretary, instructions to the field, and interdepartmental policy decisions are conveyed, for the most part, by the written word. He who controls what is written has a major influence on policy, a lesson Henry Kissinger mastered early. Anyone who has ever tried to obtain concurrence in the State Department for an outgoing message can testify to the importance diplomats place on words.

But in a more important sense, my attorney colleague was right. Diplomats, in contrast to lawyers, place more faith in the political underpinnings of international agreements than they do in their texts to ensure the durability of the agreements. This is especially true in the case of agreements between sovereign nations. Diplomats are more likely to be concerned with cultural and linguistic differences among nations and thus more aware of the limits of what can be accomplished by the written word alone. In some cultures, the very concept of a contract is different from the Western legal system's and not necessarily binding on both parties if conditions change. In other cultures, the symbolic and emotional quality of language is more important than its role as a conveyor of fact, so that even standard American legal formulations such as "act of God" cause difficulties.

Experienced diplomats, being aware of the relative lack of international judicial machinery to enforce agreements in the event one of the contracting parties fails to abide by them, look to political solutions. That is, they operate in the belief that political will is the key to adherence. This political will depends upon the perception of both sides on how an agreement affects their national interests.

Obviously, the contents of the Compact of Free Association and the United States-Fiji Agreement on MFO troops are much different. The former is a fundamental political act which establishes the future political status of the people of Micronesia, while the MFO agreement is a relatively short-term agreement between a sovereign nation and an international organization. The history and dynamics of the Micronesian status negotiations, as mentioned earlier, were such that any approach other than the lawyer-contractual approach was unlikely. However, the two agreements provide examples of the two approaches.

As George Kennan has stated, relationships within the international framework are considerably different from relationships within the national framework.¹⁰ To attempt to transplant the practices of one to the other is likely to cause problems. A lawyer as a diplomat, in my view, has been the most successful when he or she has made the transition from the *Gesellschaft* values of contractual law to the *Gemeinschaft* values of international negotiations.

It has been my experience that a creative tension between the two-value system provides the best means of assuring durable and effective international agreements. That is, the lawyers on a negotiating delegation must keep the non-lawyers' feet to the fire to assure that agreements conform with international law and the texts convey what their drafters intended. At the same time, it is the diplomat's responsibility to ensure that the agreement reflects the underlying political balance of competing interests critical to the survivability of any international agreement.

¹⁰ See *supra* text accompanying note 1.