

The Inductive Approach Revisited¹, by Anthony D'Amato, 6 Indian Journal of International Law 509 (1966) Code A66d

A significant theoretical dispute has been opened between Georg Schwarzenberger² and C. Wilfred Jenks³ over the former's inductive approach to international law,⁴ which first appeared in an article in 1947. It is too early, and perspectives are too short, to assess the issue in its entirety, but at least three questions may be asked of the debate between Schwarzenberger and Jenks: (1) Is the inductive method inherently limited in its usefulness? (2) Given the use of an inductive approach, is there any room left for creativity in international law? (3) More basically, is Schwarzenberger's self-styled inductive approach really inductive? The first of these questions was argued extensively by Jenks and partially countered by Schwarzenberger; the second was raised but left largely unresolved; and the third seems to have escaped the direct notice of both sides. Let us consider each of these problems in turn.

(1) Jenks' basic criticism of the inductive approach is that, by relying on one logical methodology to the exclusion of others, all the limitations of that logical approach as outlined by philosophers and logicians become incorporated in the resulting view of international law. This criticism seems justified, as far as it goes, despite Schwarzenberger's renunciation of exclusivity of method,⁵ for certainly has a restrictive view of the role of deduction:

Even the most experimental of sciences use the deductive method. Scientists in these fields, however, are usually aware of the fact that, unless and until verified, such deductions are but provisional. Similarly, there is no reason why an international lawyer who relies primarily on the inductive method should not bear in mind the many and often contradictory doctrines at which naturalists, Grotians, and voluntarists have arrived by using deductive or eclectic methods. He will, however, be well advised to reserve judgment whether such speculations are rules of international law until they have been confirmed by the application of inductive methods.⁶

This typical statement tends to confirm Jenks' charge that the inductive method leads to great conservatism toward the scope of international law. By insisting on inductive proof, one might be unwilling to apply the results of a copper smelting pollution case to radioactive pollution of the atmosphere resulting from nuclear testing, or the law relating to unoccupied territories on

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²See Schwarzenberger, *The Inductive Approach to International Law* 115-64 (1965) ("The Inductive Approach Refuted?").

³Jenks, *The Prospects of International Adjudication* 617-62 (1964) ("Inductive and Deductive Reasoning in International Adjudication").

⁴Schwarzenberger, "The Inductive Approach to International Law," 60 Harv. L. Rev. 539 (1947); reprinted with minor changes in Schwarzenberger, *The Inductive Approach to International Law* 8-42 (1965).

⁵Schwarzenberger, *The Inductive Approach to International Law* 38 (1965).

⁶*Ibid.*

earth to questions of sovereignty over the moon or the planets. The temptation may exist, moreover, to enshrine certain inductively verified principles such as sovereignty over the possible inroads resulting from international treaties relating to a nation's treatment of its own nationals (such as the Genocide Convention or the use of the Hague Conventions in the Nuremberg trials).⁷ These, and many other examples that could be adduced, illustrate the psychological bias toward conservatism that may very well be implicit in the insistence upon confirmation by inductive methods.

Secondly, Jenks is on firm ground in characterizing Schwarzenberger's concept of induction as *opposed* to that of deduction, despite the latter's concession that the inductive method does not mean a complete renunciation of the deductive method.⁸ Historically, insistence upon the one has often meant rejection of the other.⁹ Moreover, as Jenks amply demonstrates, rigid insistence upon the logical process known as induction—the derivation of generalizations from a number of specific instances—can be inherently restrictive. To paraphrase Jenks, what can be said about the truth of a generalization of international law when there is a majority of cases in support of the generalization but also a number of specific disconfirmatory instances? A logician would have difficulty, whereas an international lawyer could find a generally accepted practice.

On the other hand, the logical exegesis of induction elaborated by Jenks seems to launch an attack upon Schwarzenberger with altogether too refined instruments. There is no reasonable need to use the apparatus of logical induction to criticize Schwarzenberger's blunt use of the terminology. For, the so-called inductive approach seems a healthy if rather belated in terms of the history of international law doctrine—corrective to the naturalistic and self-assured deductions of the classical theorists. It puts the emphasis where it belongs—on the actual practice of states, rather than on the metaphysical speculations of publicists. It is not excessively, or even primarily, concerned with the notion of induction *per se*, and therefore criticism on this particular aspect of the inductive approach is, although relevant, rather academic.

(2) But it is not at all academic to inquire whether the inductive method, *as used by Schwarzenberger*, would not stifle creativity in international law. According to Jenks, if the prudent judge...declines to accept any proposition as valid unless it can be inductively verified, he abdicates his creative function, crystallizes all the inadequacies of the law of yesterday, and becomes a destructive rather than a constructive influence.¹⁰ Schwarzenberger replies simply that it is the judge's duty to apply the law as it is and not as it should be; that the World Court is not a law-creating but a law-determining agency; and that the inductive method may prove the

⁷*E.g.*, Schwarzenberger's treatment of *apartheid*, *id.*, at 166-69.

⁸*Id.*, at 37-38.

⁹Jenks, citing Lord Keynes, finds the first instance in a work of Jevons of 1870. *See* Jenks, *op. cit.*, 644n. (1964). However, a much earlier instance is found in Hobbes' *Leviathan*, Chap. 5, where Hobbes writes that the process of reasoning can only be accomplished by "conceiving of the consequences of the names of all the parts, to the name of the whole; or from the names of the whole and one part, to the name of the other part."

¹⁰Jenks, *op. cit.*, 622 (1964).

more durable in the long run in that it guarantees that the Court's decisions will be firmly embedded in the near-universally expressed will of organized world society..."¹¹ Thus, the broad lines of the debate are clearly drawn.

The sole attempt at finding a common ground is Jenks' assertion of a profound difference between the international lawyer and the international judge; the prudent lawyer should stick to inductively verified propositions in advising a client, whereas the judge or arbitrator may, in exercising his creative function, go beyond clearly established law.¹² This position might be a starting point for analysis if Myres S. McDougal's *dedoublement fonctionnel* concept were invoked, for the functional duality in nation-state officials who are alternatively claimants and external decision-makers passing upon similar claims of others may very well require an amalgam of inductive verification and creativity.¹³ However, the problems involved in sorting out the dual functions and assigning weights to each are of great magnitude, and international lawyers can hardly be said to have more than scratched the surface with respect to the scientific examination of the psychological processes of *dedoublement fonctionnel*. In any event, it is clear that Jenks does not have this particular concept in mind when he draws his distinction between the international lawyer and the judge. Yet, with respect to the traditional distinction actually invoked by Jenks, there appears to be a basic inconsistency. If the prudent lawyer agrees with Jenks that the international judge should be creative and go beyond inductively verified legal propositions, then the lawyer himself should advise his client that the existing law anticipates creative modification. The lawyer would neither be prudent nor wise if he fails to predict what the judge in fact will do. Of course, Jenks may have realized this contradiction even though he says nothing about it. But if he has realized it, then his attempt to meet Schwarzenberger half-way by conceding the validity of induction as applied by the lawyer but not by the judge is far more damaging to his position than if he had not said anything at all. For his position would appear to amount to a concession that international law is predictable and grounded in the practice of states only insofar as states refrain from giving jurisdiction to international courts and tribunals. For as soon as the international judge or arbiter steps into the picture, the law could take any random turn depending on the judge's view of what is creative. Such a view would indeed encourage states to resist international adjudication, and Jenks' creative judge would find himself with a rapidly diminishing number of cases to be creative about. From time to time, Schwarzenberger hints that this may very well be what is happening to the International Court of Justice.

The remedy is not to insist on distinctions between the lawyer and the judge or between induction and creativity. Rather, an open-minded view of the inductive process might very well find that State practice itself is highly creative. State diplomats, officials, attorneys-general, and so forth, have cited and continue to cite in their memoranda and opinions very creative views of what is permissible under international law. This is indeed almost assured by the fact that when two states exchange differing views about the legality of a given act, one side or the other will almost invariably take a creative position which the opponent must refute on its own terms and

¹¹Schwarzenberger, *op. cit.*, 126 (1965).

¹²Jenks, *op. cit.*, 622 (1964).

¹³McDougal & Associates, *Studies in World Public Order* 774 (1960).

not merely by a reiteration of conservative doctrine. Just as the International Court of Justice is increasingly regarding as relevant the substantive content of treaties not signed by the parties to a dispute, so too state officials in their correspondence and in their justification of state acts are increasingly citing rules derived from bilateral and multilateral treaties which are not directly binding upon the opponent. Furthermore, state officials, like judges, are prone to make a sweeping analogies from other areas of the law to reinforce their legal position on any given issue. Creativity is, therefore, part of the inductive process; it is inductively required by state practice. Even Schwarzenberger seems to realize this when he addresses himself to historical, as opposed to contemporary, questions about the rise of rules of international law.¹⁴

(3) Few if any international lawyers today would probably find fault in the notion of an inductive approach if it is taken to mean the derivation of rules of international law from the actual practice of states (allowing, of course, for an intelligent and not a narrow-minded or myopic view of what state practice is). Such a view of induction is advanced by implication in Schwarzenberger's writings when he criticizes the classical, deductive, or naturalistic approaches. However, some difficulty arises when Schwarzenberger spells out in a positive way what he means by the inductive method. Here, a close examination might reveal a much more controversial definition of the inductive approach.

The essence of Schwarzenberger's approach to the sources of rules of international law seems to be that we should make a hierarchy of sources according to their *probable reliability* in yielding a truly universal rule of international law. Thus, we should consider the relative disinterestedness of a given source, its relative broad-mindedness (*i.e.*, an element that is connected exclusively with any one subject of international law is less likely to represent a detached view of rules of international law than one that is common to several subjects of international law or independent of any ¹⁵), and its skill and technical qualifications as a law-determiner. Applying these criteria, Schwarzenberger finds that the World Court deserves its rating at the top of the law determining agencies, that bilateral tribunals rank below because they have not achieved universality of outlook, and that national courts follow behind then because they are neither disinterested nor as international-minded as the others. Farther down the scale Schwarzenberger lists the views of states, emanating from foreign offices, on questions of international law; these are more suspect of bias and subjectivism. ¹⁶ Writers are accorded an even lower status; Schwarzenberger finds them, as a whole, very biased indeed.

One may of course quarrel with the rankings that Schwarzenberger adduces, or with the reasoning he uses to justify them. But the real question, which Jenks does not raise in his critique, is whether Schwarzenberger is really using an inductive method. For, Schwarzenberger *assumes* that on any given issue or conflict situation in international relations, a rule of

¹⁴See Schwarzenberger, *The Frontiers of International Law* (1962). He seems curiously conservative when looking at present-day practice, probably because of his general bipolar view of international relations and his impression, as Jenks puts it, that contemporary international law is thereby "narrowly circumscribed by the contingencies of power politics." Jenks, *op. cit.*, 617 (1964).

¹⁵Schwarzenberger, *The Inductive Approach to International Law* 22 (1965).

¹⁶*Id.* at 28.

international law *exists* which may only elude us because of the relative subjectivity, parochialism, or technical incompetence of various law-determining agencies. Presumably, if we search hard enough, taking appropriate account of the degrees of bias and lack of skill in the various hierarchy of sources, we will eventually succeed in isolating the immutable rule that will be determinative of the issue.

Of course, this procedure is nothing other than Platonic Idealism: the ideal Rule exists of which the philosopher-king (the World Court) or the lesser observers (national courts, writers, *etc.*) Have varying degrees of accuracy of perception. This is indeed, as it is in Plato, a deductive not an inductive pattern where the major premise (the rule of law) is assumed. Moreover, the major premise is itself used to justify the criteria of explication. For, these criteria (disinterestedness, broad-mindedness and skill) are in turn only logical consequences of the original non-inductive assumption that a rule of law exists for every situation. If this major premise were questioned, then one could question as well the criteria of determination. For example, how do we know that most writers are biased, unless we assume that an independent rule of law exists which these writers only infrequently arrive at in the course of their essays? Or, what is the relevance of subjectivity and narrow-mindedness in assessing state practice if the practice of states is what international law is really about? For despite its subjectivity, state practice constitutes the raw material out of which rules of international law are fashioned, irrespective of what more rational or disinterested bodies might have chosen if they had had the power and occasion to do so. Thus, ironically, Schwarzenberger's actual technique of induction may lead us into a position of relative insensitivity to the actual practice of states, according it a law place on the hierarchy of sources even though Schwarzenberger initially promised that state practice was to be the keystone of his inductive approach.