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Dispute Resolution Between Governments: The Canada/United States Environmental Context

*Michael Phillips**

INTRODUCTION

Canada and the United States have developed a number of ways for dealing with government-to-government environmental disputes. The processes which have emerged between the two countries have contributed substantially to the development of international law in the environmental context.

The handling of environmental disputes is not entirely codified. To supplement the written procedures, those charged with actually resolving the disputes have constructed a great deal of machinery. These seemingly ad hoc gears which turn the diplomatic machinery tend to defy codification. Although it has been observed that some of this machinery appears to rust in unused warehouses, and oftentimes parlour diplomacy must become megaphone diplomacy, with only a little lubrication, all of these tools are used effectively to resolve the problems we confront.

Dispute avoidance is an integral part of dispute settlement, and therefore will be given equal emphasis with the more acknowledged elements of dispute settlement.

Two angles will be used to address the state of Canadian/American environmental dispute resolution. First, the formal machinery for both dispute avoidance and dispute settlement will be addressed. Second, the less formal machinery - that which we have bolted together for identifying and settling issues before they become "full blown" disputes - will be considered.

While it may seem odd to refer to a series of lectures given sixteen years ago, I find what Professor Richard Bilder said in the Hague back then still relevant and very helpful in focusing on the subject of Alternative Dispute Resolution (ADR). Bilder set out a series of techniques adopted by states for avoiding and settling disputes. The ones used in the Canada/United States context to settle disputes may be summarized as follows.

- (1) Settlement by negotiation between the parties.
- (2) Settlement procedures employing specialized agencies such as joint commissions (e.g. the Internal Joint Commission).

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- (3) Resort to more traditional means of binding judicial settlement through the agency of ad hoc arbitration or an international court (e.g. the Trail Smelter Case is an example of ad hoc arbitration).

Techniques to avoid disputes include the following.

- (1) Environment assessment procedures and impact statements intended to take account of the international consequences of domestic programs.
- (2) Prior bilateral agreement on relevant environmental rules.
- (3) The establishment of procedures for notice, exchange of information and consultation in advance of national actions which might have transboundary effects.
- (4) The establishment of arrangements, institutions or procedures for monitoring, identification of risks and the public spotlighting of environmental problems.
- (5) The establishment of ongoing informal or formal arrangements, or the establishment of specialized regulatory and administrative agencies capable of avoiding and adjusting problems on a continuing basis.

All of these techniques are present in one form or another in the Air Quality Agreement.

HISTORICAL OVERVIEW

A quick look at the past shows that Canada and the United States have solved environmental disputes mainly by resorting to non-legal channels. The preferred means of dealing with such disputes has been to avoid international claims and adjudication. Flexible procedures have been developed which allow us to balance interests and seek compromise where necessary. In fact, the United States and Canada have never resorted to the classical international judicial agencies in environmental disputes, and there appear to be no compelling reasons which would suggest that the two states should begin to do so now.

The Boundary Waters Treaty has played an important role in how dispute settlement techniques have evolved. That treaty established the International Joint Commission (IJC). Resort to the IJC has been an often used technique in dealing with our bilateral environmental problems. The drafters of the treaty had the foresight to include pollution disputes within the treaty's ambit. This has provided a basis for international cooperation on transboundary environmental problems on a scale much grander than even the provision's proponents imagined.

SETTLEMENT OF DISPUTES

Regarding the area of dispute settlement, it is important to remember some of the cases between the United States and Canada and the techniques they employed to achieve resolution. The Trail Smelter case

involved both the use of a joint commission (the IJC) and an ad hoc tribunal. The IJC set the sum in damages while the ad hoc tribunal was reserved for any remaining questions. Another air pollution example is the Detroit-St. Clair River problem. Again the IJC was involved with the expert body it created. The initial referral to the IJC dealt with pollution caused by vessels on the Detroit river. Some years later, the scope of the reference was expanded to allow the IJC to investigate pollution in the entire Detroit-St. Clair river area. The comprehensive IJC report on this case suggested a list of remedial and preventative measures. The report triggered much broader action by the two governments in dealing with transboundary air pollution.

One of the Commission's biggest undertakings in recent years has been its investigation into the Great Lakes pollution problem. This exhaustive study led to negotiations which resulted in the Great Lakes Water Quality Agreement. The IJC investigation laid the foundation for the agreement. Subsequently, the IJC was accorded a very wide-ranging role in the implementation of the agreement.

DIPLOMATIC CHANNELS

The examples mentioned thus far relate to disputes which were handled by using either machinery in place or through the use of techniques such as third party arbitration. There is, however, a large amount of work which is done through diplomatic channels - problems which never need to go beyond diplomatic channels for resolution. Because the diplomatic agenda is always full, these problems end up taking the time of quite a number of officers, crossing many desks before finally being put to rest. For example, the United States General Relations Branch has a division which devotes most of its time to Canada-United States environmental issues. The Canadian Embassy in Washington devotes considerable time - from the Ambassador on down - to environmental issues, as do Officers in the consulates. Seldom does a week go by without some new issue surfacing which has the potential to become a dispute. The most recent example is Washington State's concern about the City of Victoria's dumping of raw sewage into the ocean. Washington State has gone to the State Department with this concern. The State Department has asked the Canadian Department of External Affairs to address these concerns. The Department of External Affairs will prepare a reply following consultation with Environment Canada, the province of British Columbia, and the city of Victoria. If the reply adequately addresses the concerns, a dispute will have been avoided. If it does not, we will need to decide what further action must be taken to deal with the problem. In most cases, the next step would be to convene a meeting with the U.S. State Department, probably with provincial and state officials included, in order to confront the matter face to face. If the problem is still unresolved at this point, the parties might well consider whether there is

any machinery in place which might help; the IJC would be an obvious place to start.

In addition to dealing with the large number of individual cases which arise, the Canadian Embassy in Washington and its consulates across the country keep a constant watch out for activities which could raise transboundary environmental problems. American diplomats in Canada also watch for activities which could have transboundary effects. This provides an overlapping network seeking the earliest possible detection of problem areas, which in turn facilitates the earliest possible amicable resolution of the disputed area.

PUBLIC ADVOCACY

Often referred to as "megaphone diplomacy," public advocacy is high profile debate of an issue in which the embassy, consulates, press, and public all participate. Public advocacy often plays a useful role. In the case of acid rain, public advocacy was used to stress to the United States that there was a transboundary problem that both countries needed to work together to solve.

There are also lower-profile activities which play a part in avoiding disputes, or in some cases starting one. For example, Canadian governmental agencies track draft legislation in the United States - whether at the federal, state, or municipal level - which has direct environmental implications in Canada. Because of its location, the Canadian consulate in Detroit is constantly involved in environmental issues. Oftentimes, this involvement is to attempt to ensure that the two countries avoid disputes or mitigate the negative transboundary effects of heavy industry. The Detroit incinerator problem is an example of where the consulate has been in the forefront, both in the run-up to the construction and in its aftermath. The consulate has been very active in discussing the conditions upon which the permit may be issued for the operation of the incinerator with the Michigan and Detroit authorities. After a lot of work with various levels of government, the consent order covering the incinerator was changed in ways which are a significant improvement. This is a prime case of successful early identification of a potential environmental problem and its subsequent resolution by avoidance.

The Detroit consulate has also been very active in the proposed Detroit City airport expansion - a case of potential noise pollution. In this case, Canadian officers in Detroit play a central role in our attempt to ensure that any airport expansion does not result in Windsor receiving the bulk of the noise pollution. Here again is a dispute that Canada would like to avoid by working through diplomatic channels.

AIR QUALITY AGREEMENT

The Air Quality Agreement was recently signed by President Bush and Prime Minister Mulroney. Although the acid rain issue may not be

the mother of all bilateral environmental disputes, it does have a special place. In the not so distant past, this dispute was described as the major irritant in the Canada-United States bilateral relationship. Over the past twelve years or so, both governments have devoted a great deal of energy to this problem. The two governments may not always have been heading in exactly the same direction, but the search for solutions did not lack attention. A few of the mileposts:

- (1) In 1978, there was an exchange of Notes agreeing to discuss informally the negotiation of an Air Quality Agreement;
- (2) in 1978, the Bilateral Research Consultative Group became operational, consulting on long range transport of airborne pollutants;
- (3) in 1979, it was announced that negotiations would proceed beyond the informal stage;
- (4) the Memorandum of Intent was signed in August of 1980. This was seen as a preliminary step to an Air Quality Agreement; and
- (5) several Bilateral Summits between the President and Prime Minister served to re-energize the search for solutions.

The Shamrock Summit, in 1985, appointed the Special Envoys. The 1986 Summit endorsed this report, and the 1987 Summit further emphasized that the acid rain dispute needed to be solved. Soon after President Bush announced his initiative to amend the Clean Air Act, the last chapter in the negotiations was opened. First, a number of informal rounds of negotiations were held while the legislative process was unfolding in Congress. The informal rounds led to agreement on the broad elements which would be included in the Air Quality Agreement. These elements were set out in an announcement in July 1990. In August 1990 the formal negotiations began, resulting in the signature of the agreement on March 13, 1991. With the accord now in place, Canada and United States have entered a new phase in cooperation concerning transboundary air quality problems. Both governments envisage this agreement as the basis for a very active relationship concerning air quality issues in the future.

During the negotiations, time was taken defining proposals on how to cooperate with each other in future environmental disputes. I think we have succeeded in defining a process that will be flexible enough to handle future problems without tying each governments' hands.

Many elements in the agreement will play a role either in dispute avoidance or dispute settlement. To highlight some of them:

- the consultation process;
- the public consultative process to be undertaken by the IJC;
- the internal assessment process in each country of actions which may cause significant transboundary pollution;
- the referral process; and

— the dispute settlement process.

In approaching the question of dispute settlement the parties did not head straight down the middle of the road, particularly in their decision to include a referral process. During the negotiation of the dispute settlement aspects of the agreement it became clear that there could very well be issues which the two nations would want to refer to a third party. These are most likely the issues which would not fall squarely within the ambit of the Settlement of Disputes Article. Thus, what the Air Quality Agreement contains is:

- (1) provisions relating to avoidance of disputes;
- (2) provisions relating to a wide-ranging consultation procedure; and
- (3) a two pronged approach to settling issues which arise between the two countries through the Settlement of Disputes Article, or the article relating to Referrals.

CONSULTATIONS

The Consultation Article is short. It provides that each party can request consultations on any matter within the scope of the agreement. The consultation process can have many uses. One of its primary purposes is as a dispute avoidance technique.

The agreement is silent on how the consultations will be carried out and by whom. That leaves a lot of useful flexibility. The subject matter may dictate the level at which the consultations are carried out.

The Air Quality Committee could be used for some consultations, but it might not be the first choice in all cases. If the very basis of the agreement was threatened, for example, part of the consultation process might well be at the Ministerial level. If consultations do not dispose of the subject under discussion, then one of two things happen. First, if it is a matter of interpretation or implementation of the agreement, it will be dealt with under Settlement of Disputes Article XIII. Second, if it is a matter other than one falling under Article XIII it will be dealt with under the Referrals Article.

REFERRALS

The two countries concluded during the negotiations that they should make a provision, in addition to a Settlement of Disputes Article, for a procedure to refer issues between the two nations to an appropriate third party. These referrals will deal with issues concerning actions in one country causing, or likely to cause, significant transboundary air pollution. The agreement places an obligation on the Parties to refer the dispute to a third party if consultations do not resolve an issue. Because the types of issues which may arise vary greatly, the terms of reference for any referral are left to be agreed upon in each specific case. Binding adjudication might be appropriate in one case but not in another. For

example, we might be seeking only the adjudication of a technical disagreement, which certainly does not necessitate an elaborate preordained procedure.

SETTLEMENT OF DISPUTES

The Settlement of Disputes Article follows the more or less standard route of consultations followed by negotiations. When the parties discussed what should follow if negotiations fail, it was agreed they should first consider if the dispute should be referred to the IJC under the procedures set forth in the Boundary Waters Treaty. The IJC was designated to this role because of the long and credible history of the Commission in assisting in the resolution of bilateral environmental disputes. It is the most obvious machinery to be utilized. If, for whatever reason, the Parties do not elect to utilize the IJC, that does not end the matter. Either Party can request that the dispute be submitted to another agreed forum. This flexibility allows us to choose the proper machinery for the job.

CONCLUSIONS

Geography has bequeathed us a difficult inheritance. There is so much in a transboundary situation which can go wrong. The potential for irritants is so great that it is surprising that there have not been more "acid rains." However, the relationship between the United States and Canada is unique. They are two friendly countries who share common values, a common border and the largest volume of trade in the world. It is nevertheless important that they manage their relationship on the basis of the rules of international law. The dispute settlement mechanisms currently in place may seldom be used, but they are important as a reassurance to Canada that, if necessary, a dispute with its large and powerful neighbor can be referred to an independent body.

In many ways the two nations have been pioneers in dealing with transboundary environmental problems. At the multilateral level, in organizations such as the Organization for Economic Cooperation and Development (OECD), countries are now attempting to establish dispute avoidance and/or dispute resolution mechanisms for transboundary problems similar to those which Canada and the United States have long had recourse. Other countries would do well to learn from the tradition of consultation and from the instruments the United States and Canada have developed.

