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THE CONVERGENCE OF LAW AND DIPLOMACY IN  
UNITED STATES-CANADA RELATIONS: THE PRECEDENT  
OF *THE GULF OF MAINE CASE*

*Davis R. Robinson, Esq.\**

I. INTRODUCTION

I want to thank the Canada-United States Law Institute and the Case Western Reserve University School of Law for this opportunity to appear on a panel with a man who I faced in the International Court of Justice with a good degree of trepidation, but always with an enormous amount of personal respect. Like the two great neighboring States, who we had the privilege of representing as Agent, Leonard Legault and I were, at the end of the day, fast friends as well as fierce fighters on behalf of the interests of our nations and our peoples. In both cases, as one would expect, internal political forces shaped and defined those interests.

I wish also to thank Henry King for bringing about this reunion between Ambassador Legault and I. Indeed, the first time that I had contact with Henry was nearly twenty years ago when Len was the Legal Adviser in Ottawa and I was the Legal Adviser in Washington. We were under pressure from the Canadian and American Bar Associations to accept a draft of a bilateral treaty to improve dispute resolution with respect to cross-border environmental pollution. While neither government saw the time as ripe for such a measure in our joint management of bilateral relations in this sensitive and important area, the exercise was an example of how American and Canadian private sector organizations are active in areas that unusually implicate this bilateral diplomatic relationship, way beyond the norm that is common in most of the world.

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## I. WHERE DIPLOMACY AND LAW COME TOGETHER

### A. Introduction

Today Len will discuss the International Joint Commission (IJC) of which he is the current Canadian Chairman. The IJC is a leading example of how Canada and the United States, as inheritors of a common dedication to the rule of law, have developed a highly sophisticated system for fairly and efficiently addressing trans-border problems that, in the case of many other neighboring States around the globe, fester and engender growing hostility. Indeed, in some cases, these travails have even lead to military conflict. Fortunately, the United States and Canada are mutually committed to advanced conflict management techniques. The International Joint Commission is thus testimony to the whys and wherefores of the longest undefended border in the world.

Because I do *not* share this IJC experience with Ambassador Legault, I will instead devote my time to the experience that he and I intensively *did* share together for more than a three-year period, and that is the *Gulf of Maine Maritime Boundary Delimitation Case*.<sup>1</sup> The United States and Canada in late 1981 brought this longstanding controversy to the World Court by special agreement, for submission to the first Chamber ever established under the Statute of the Court.

### B. The Shared Commitment of the United States and Canada to Government by Law

Before turning to the *Gulf of Maine Case* itself and to its broader implications for future dispute resolution between Canada and the United States, I would like to make some general comments about the extraordinary shared commitment of these two States to government by law. I will also make some general comments about the art of diplomacy and the role that submission of bilateral disputes to third party adjudication before an international tribunal can play as a part of that art.

Thanks to our imbedded traditions, Canada and the United States are blessed in the governance of the conduct of human and governmental affairs by the presence of highly developed legal systems. We are mutually determined that law rather than human whim and caprice, is the standard that will rule our existence. Similarly, in the international sphere, we take seriously the dictates of both conventional and customary law. Indeed, in the

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<sup>1</sup> See *Delimitation of the Maritime Boundary in the Gulf of Maine (Canada v. United States of America)* 1984 I.C.J. 246 (Oct. 12).

conventional law area, the United States has entered into more bilateral treaties and executive agreements with Canada than with any other nation. As of early 1999 there were, according to *Treaties in Force*, 265 such agreements in effect (the United Kingdom, not surprisingly, came in second, with 225 bilateral agreements with the United States as of the same date).<sup>2</sup>

As is natural, the foreign policies of the United States and Canada reflect our respective domestic circumstances and all the “special interest groups” that go with them. The shared societal commitment to the rule of law unfortunately is not widely evident in the bilateral relations of many other States around the world, but in the case of these two States, this legal orientation affects all aspects of our bilateral relationship. Our respective perceptions of the “law” in an international setting can and do often vary significantly, as witnessed by the many bilateral battles over what Canada perceives as the unlawful “extraterritorial” reach of United States statutes and regulations. Thus, while we are both committed to the rule of law, there remain in a number of cases that reflect significant differences as to what that law is and what that law should be. Nonetheless, where treaties are involved, we both expect adherence to our binding word and, similarly to our domestic law setting, we expect fair treatment on a transparent basis.

Because of this unusual commonality in attitude, the United States and Canada have an important responsibility to demonstrate to the rest of the international community that two neighboring States (however difficult and even acrimonious the issues that they face and need to address may be) can, if the political will exists, manage and resolve those issues in a rational and civil manner. Because the United States and Canada are fortunate in this regard, our governments should always do their best to set an example by going the extra mile to avoid confrontations that, with additional effort, need not take place. Indeed, very early on in our *Gulf of Maine* experience, Len Legault and I personally agreed that, however rough it might get in our written pleadings or in the courtroom, both sides would conduct ourselves with the decorum and the decency, and with the regard and the respect that the world should expect from these two leading exemplars of neighbors without fences.

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<sup>2</sup> See *Treaties in Force: A List of Treaties and Other International Agreements in Force as of January 1, 1999* (visited July 21, 2000) <[http://www.state.gov/www/global/legal\\_affairs/tifindex.html](http://www.state.gov/www/global/legal_affairs/tifindex.html)>.

### C. Diplomacy and Recourse to Third Party Dispute Resolution

Recourse to an international forum to resolve a hotly contested bilateral controversy is *not* a step that political leaders, even in law-bound societies such as ours, will take lightly. The national constituencies in democracies like those in the United States and Canada, standing behind any given dispute, are *not* likely to favor a “roll of the dice” in the hands of outside third parties unless and until either the management of the problem becomes so fraught with difficulty and peril or the chance of reaching an acceptable negotiated settlement becomes so minimal and elusive, that resort to third-party dispute resolution is literally the only option left, short of military confrontation, which the United States and Canada mutually abhor and refuse even to acknowledge as a remote possibility in the almost family relationship that our two States have crafted with such supreme effort over such a long period of time.

International law is not separate from diplomacy but is an integral part of it. Submission of a bilateral dispute to an international tribunal is but one “arrow” in the quiver of “weapons” that a Secretary of State or a Minister of Foreign Affairs has available in his or her exercise of the art of diplomacy. Isaac Goldberg once defined this art as “. . . to do and say the nastiest thing in the nicest way.” Edmond Rostand has described the “realpolitic” of diplomacy by referring to an old Chinese legend that reports on a meeting between a bear and an elderly Chinese woman. The bear asks: “How do you know I am a diplomat?”; to which the woman replies: “Why, by the skillful way you hide your claws.” For a foreign policy leader in any State to hand over the exercise of this delicate and all too serious art to outside third parties almost amounts to an act of desperation because such an action either provides public proof of the lack of success that leader has had in managing or resolving the “nasty” issues between the two “nice” governments or such an action means the victory of internal, domestic pressures in the short-term over the odds of a satisfactory negotiation in the long-term. By the time the two governments agree to submit a dispute over Georges Bank to a Chamber of the World Court, they have, in my opinion, jointly reached the necessary level of desperation on both counts.<sup>3</sup>

Before leaving this issue to go to the *Gulf of Maine Case* itself, I should add that submission of any dispute between sovereign States to an international tribunal may confront the Secretary of State or the Minister of Foreign Affairs with another major headache, and that is the commonplace

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<sup>3</sup> See Fredric M. Serchuk & Susan E. Wigley, *Assessment and Management of the Georges Bank Cod Fishery: An Historic Review and Evaluation*, 13 J. NORTHWEST ATLANTIC FISHERY SCI. 25 (1992).

internal governmental battle over “turf.” If you are in charge of the agency that is responsible for a nation’s foreign relations, then not only are you loathe to hand over a highly publicized dispute to a group of foreign judges, but you are darned if you will give up internal control over the controversy to some other cabinet officer.

In both the United States and Canada, the issue of control over cases before State-to-State international tribunals has raised “nasty,” not “nice,” jurisdictional disputes between the agency responsible for the conduct of foreign affairs, on the one hand, and the agency responsible for the administration of justice, on the other hand. Indeed, in my first six months in office as the Legal Adviser to the United States Department of State, the biggest single file that I accumulated related to an all-out turf war over whether the Department of State or the Department of Justice would control United States representation before the U.S.-Iran Claims Tribunal in The Hague. It took a decision by the President himself to confirm the tradition of the United States that the Secretary of State was in charge of international tribunal matters. The incumbent Attorney General of the United States was so mad about this perceived “loss” to the State Department that he refused to deal with me ever again!

Why was this decision in favor of the foreign affairs agency so important? Because otherwise it is doubtful that a Secretary of State will ever select, as a policy option, the submission of a dispute to third party adjudication unless overruled by the President which, in such an instance, a President is not likely to do. These issues of power and control are, for better or for worse, the practical facts of life in the corridors of government. In Canada, as I understand it, the issue has not been as clearly resolved, with the Canadian Minister of Justice making the opening statement for Canada in the *Gulf of Maine Case* and with Len Legault and his outstanding team carrying the load from then on. I can only surmise that the matter is even dicier in Ottawa than it is in Washington.

In conclusion, even though both the United States and Canada are societies ruled by a legal octopus with ubiquitous tentacles, the two nations have in fact submitted relatively few disputes to outsiders for decision-making. Yes, we have our NAFTA and our IIC, but these are in our hands and *not* in the laps of foreigners. For example, we have three other American-Canadian maritime boundaries that remain in dispute, but both countries remain committed to managing the controversy rather than to “rolling the dice” in the alien and uncontrolled environment of an international tribunal. And why is this so? Well, the necessary level of desperation does not exist and the Secretary of State and the Minister of Foreign Affairs are more interested in maintaining their agencies’ power and

control over the Straits of Juan de Fuca, the Dixon Channel, and the Beaufort Sea than in risking an unknown resolution by outside third parties.

D. *The Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*

The seeds of the *Gulf of Maine Case* really go back as far as the Revolutionary War against Great Britain. This is so because, even then, the issue of fish and fishing rights was a major source of contention. For history buffs, it is good to recall that an important article in the 1784 Treaty of Paris, Article 3, confirmed that “the People of the United States shall continue to enjoy unmolested the Right to take Fish of every kind on the Grand Bank . . . and at all other places in the Sea, where the Inhabitants of both Countries used at any time heretofore to fish.” This focus on fish as a significant source of controversy remains a witness the ongoing struggle over Pacific salmon.

The dispute over Georges Bank involved not only major fishery interests but also rights to the continental shelf, the petroleum and the other resources that go with it. The continental shelf aspect of the dispute began with the issuance of the Truman Proclamation in 1945 and escalated as the two governments began to award competing concessions. With regard to fish, it was only after World War II that Canadian fishermen began to venture into these waters in significant numbers, more than a century after the Americans. With the advent of huge fish factory ships from third States and the growing concern of coastal States over the increasing depletion of fishery resources off their shores, movement began towards the declaration of exclusive fishing zones out to 200 nautical miles from the coast. In 1977, both the United States and Canada took this step, but then immediately had to deal with conflicting claims to these zones. It soon appeared that, in the case of Georges Bank, over 9000 square nautical miles of maritime space were in dispute between the two States, which then adopted a regime of flag-State enforcement in order to manage the controversy during the pendency of its resolution.

During this period, issues concerning sea law and fisheries appeared on the agenda of nearly every meeting of the President and the Prime Minister. By the time of Jimmy Carter’s inauguration as President, it was clear that the two neighbors had a real problem on their hands in the case of Georges Bank. It is well-recognized that private oil and gas interests have a lot of political clout in both Washington and Ottawa, but fishermen are in a category unto themselves. Man for man and woman for woman, it is hard to find a more determined, more vocal, and more politically savvy group than those who make their living on the sea. In the corridors of Halifax, Boston, Providence,

and Augusta, the matter of Georges Bank was as much a siren song as it was in the nations' two capitals.

So President Carter and Prime Minister Trudeau named special negotiators to tackle the behemoth and, after much ado, the two sides signed one agreement that allocated various percentages of catch over a wide range of species and another agreement that sent the maritime boundary, including continental shelf jurisdiction, to a Chamber of the World Court. Please note, all those World Court aficionados, that it was President Carter who insisted on this latter angle, *not* President Reagan. Indeed, it was clear from the outset that fishermen would *not* stand for submission of the dispute by special agreement to the vagaries of the full fifteen-member Court.

In the middle of the negotiations over this bifurcated arrangement, Canada took a step that deeply angered many Americans enmeshed in the controversy. That step was an expansion in Canada's claim line as a result of the 1976 decision in the *Anglo-French* case.<sup>4</sup> For purposes of its equidistant line, Canada now said that Cape Cod and Nantucket were aberrations that deserved no effect in the application of the equidistance method. For reasons that remain unfathomable to me, the Carter Administration chose not to respond in kind by expanding the U.S. claim.

When Ronald Reagan assumed office, the matter had reached crisis proportions because, as soon as the Carter Administration submitted the two agreements to the U.S. Senate for advice and consent to ratification, it was clear that they were "dead on arrival." The New England fishermen would have none of it. In response, the Reagan Administration unilaterally proposed to send the entire boundary dispute to the Chamber of the International Court of Justice and to let the chips fall where they may, be they fish or oil.

Len Legault and I had our hands full as soon as I assumed office in the summer of 1981. Not only did we need to agree on the terms of such a submission, but we also had to renegotiate our mutually desired composition of the Chamber because of the death of two judges, upon whom the two governments had previously agreed. We soon found that one of our new choices was not a favorite among his colleagues on the Court and, as a result, we spent a number of months concerning ourselves with compensation issues with the United Nations bureaucracy in New York! Then, to top it all off, after we finally were in a position to submit the special agreement to the Court in late 1981, we discovered that the first establishment of a Chamber, and the composition upon which the two States insisted, caused such dyspepsia among certain members of the full Court that we were later told

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<sup>4</sup> Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decision of 30 June 1977, 18 R. Int'l Arb. Awards 3, *reprinted in* 18 I.L.M. 397 (1979).

that only the last-minute arrival of a Judge whose wife was on her deathbed broke the deadlock and thereby allowed these two nations, which between them contribute nearly thirty percent of the United Nations budget, to have their case heard.

Thereafter began the exciting but exhausting work of preparing three rounds of simultaneous written pleadings and of conducting about five weeks of oral argument. The whole experience was grueling, but both Len and I were fortunate to have strong and dedicated teams behind us. For our part, we changed the United States' claim in the *Gulf of Maine Case* from the Carter Administration's "thalweg" theory to the notion of an "adjusted perpendicular." Our purpose was to respond to the 1977 Canadian expansion of its claim. This move by the Reagan Administration received some welcome cheers from the New England fishing community. It also caused considerable consternation in Ottawa. While the new American line was different in theory, it still at heart depended on the Northeast Channel.

When judgment day finally came in 1984, the Chamber basically split the difference between the two sides, but unfortunately, in my opinion, in a way that encourages extreme claims by other States in future maritime boundary cases. I learned much about the World Court in the process of this case. For example, after the decision was rendered, the Chamber held a reception for the two delegations where a member pulled me aside and said, "Now my dear Robinson, don't upset yourself with the decision because we had only one objective from the very beginning of the case – equal disappointment, equal disappointment."

So what do we learn from all of this? First, Georges Bank is no longer on the agenda of meetings between the President and the Prime Minister. So "throwing the matter to the lawyers" was a success in this regard. That is, a controversy that proved incapable of a compromise negotiated by diplomats was instead compromised by five judges, allowing the political bosses of both States to place any dissatisfaction with the result at the feet of the Chamber rather than at their own. This then is the "realpolitic" point of conjunction between international tribunals and diplomacy where mutual desperation proved such a potent internal political force in both States that our masters decided to grant the legal establishment the opportunity to "do its thing." So, that is what we did and the problem went away. The only sadness is that the fish appear to have gone away as well because in the years since, constant overfishing has depleted the stocks to such an extent that portions of Georges Bank are closed to fishing.

Second, it appears that submission to third-party dispute settlement remains a choice of last resort, unless required by treaty. Both sides would rather try to manage and resolve problems on their own and only submit

them to outsiders when the requisite level of desperation is unmistakably reached in both Washington and Ottawa. With all of our highly refined legal processes and mechanisms, this does *not* seem an illogical result for our two States.

Third, much of the rest of the international community does *not* possess these internal resources, it is incumbent upon the United States and Canada to share our wealth of dispute management and dispute resolution experience with others. Here may arise a project worthy of attention by this Institute, that is, to make an inventory of those processes and mechanisms which have proved satisfactory to both States and to describe those attributes which both regard as the most effective and the most conducive to satisfactory settlement.

Thank you for this opportunity to have once again shared the podium with my distinguished brother from the North with whom I did battle, learned many lessons, and formed common bonds of commitment to the advancement of United States-Canada relations.

