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# Settling Our Canadian-United States Differences: A Canadian Perspective

*Ronald St. J. Macdonald, Q.C.*

**T**HERE HAS BEEN EXTENSIVE EXPERIENCE in the use and application of international law in Canada-American relations. In the past, the two countries have occasionally resorted to arbitration which has produced, in Percy Corbett's words, "a treasury of precious experience in the solution of international disputes." At present, there are more than two hundred bilateral treaties and agreements on more than thirty different topics governing relations between the two neighbors. International law has served the interests of governments and individuals well. The establishment of an international regime for the Great Lakes is one of many examples. Contacts between the two countries are multiplying. Genuine differences are bound to increase, and it is inevitable that the rules and principles of international law will be looked to in the future.

Obviously, there is a need for a variety of procedures to meet situations of actual and potential disagreement. These procedures must be suitable for the highly technical and scientific issues raised by such situations. In searching for the appropriate procedures, it may be useful to review existing possibilities within the United Nations framework and within the historically conditioned patterns of Canadian-United States relations. An examination of one particular modality, a chamber of the International Court, might then reveal advantages that are at least equal to those available under other means. I begin with the international plane because, as Mr. Holmes remarked, relations between a super power and a medium power in the later twentieth century ought to be based upon the principles of the Charter.

The obligation to settle disputes promptly is reiterated in Article 33, which also enumerates the various procedures available for this purpose. It further recognizes the freedom of the parties to resort to any procedure of their choice for securing peaceful resolution of their differences. This is a reflection of the concept of the sovereign equality of states: the implementation of the legal obligation to settle disputes peacefully is predicated on the consent of the parties involved in the dispute.

The question of peaceful settlement was considered by the General Assembly during the early years of the organization. In 1949, during the third session, the Assembly adopted a revised version of the Geneva General Act of 1928. Although it does not establish permanent machinery for dispute settlement, the revised Act formulates procedures for the establishment of commissions and arbitral tribunals on specific disputes involving parties to the Act. In the same session, the Assembly also adopted resolutions which provided for the establishment of panels of inquiry and conciliation. During the eighteenth session, the procedure of factfinding, including the criteria and methods to be used for this purpose, was considered by the Assembly. In

1967, the Secretary General proposed a register of experts whose services, by agreement between parties to a dispute, might be utilized for fact finding. On the nongovernmental level, many valuable suggestions have been made, including the proposal that more publicity should be given to the facilities available in the Bureau of the Permanent Court of Arbitration.

In 1970, the General Assembly adopted a declaration on seven principles of international law. This was the culmination of its undertaking to formulate, in the light of developments since the adoption of the Charter, principles of international law covering friendly relations and cooperation among states. The declaration reaffirms the provisions of Article 2(3) of the Charter, and provides that states shall seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort of regional agencies, or other peaceful means of their choice. It further provides that the parties have a duty, in the event of a failure to reach a solution by any of these methods, to continue to seek a settlement of the dispute by other peaceful means that are agreed upon by them.

The declaration does not purport to set up machinery for peaceful settlement, or to significantly enlarge the scope of charter provisions on this matter. It clearly favors the freedom of the parties to choose any peaceful means for settlement of their differences. However, the declaration represents a very important set of modern legal standards which are expected to have a positive influence upon the international settlement process, whether the dispute falls under the auspices of the United Nations or is outside the organization.

The question of the adequacy and scope of the charter provisions on peaceful settlement is currently being discussed in the Special Committee on the Charter of the United Nations, with reference to factfinding, establishment of panels of inquiry and the strengthening of the powers of investigation of the Council under Chapter Six. The views of member states are divided on the adequacy of the provisions of Articles 2(3) and 33(1). While many states believe that these provisions reflect the political reality of present day international relations, other states believe that the wording of Article 33 is unsatisfactory. As it now stands, Article 33 is a list of possibilities—a framework lacking specific modalities for implementation. Accordingly, in 1976, the Secretary General suggested that Article 33 be redrawn to provide a specific procedure for moving sequentially from two-party negotiations to higher levels of party involvement.

What emerges from all of this is twofold. First, the principles of the Charter, and the subsidiary rules developed around them, provide a normative apparatus which is used by both judicial and non-judicial bodies in carrying out settlement tasks. Second, the existing choice of means is rich. Much inventiveness has been displayed in seeking new modalities, and it is clear that the choices open to states are greater than they have ever been before. Of course, matters of procedure are always interwoven with matters of substance. The remedy must be one adapted to the nature of the dispute.

But the fact remains that the parties to the dispute have a wide range of modalities from which to choose. This source should not be overlooked.

With respect to Canadian-American relations, it is obvious that the nature and extent of that relationship has resulted in something more than the usual arrangement for the conduct of affairs between two neighboring states. Since the days of Mr. King and President Roosevelt, there has been a continuing exchange of views and information over a wide range of issues. There is an extensive network of personal contact between officials at many levels of government in the two countries. Joint bodies have been created by treaty and by executive action. Among the bodies established by treaty, the International Joint Commission is perhaps the best known. Those established by executive agreement include joint committees on trade, domestic affairs and defense. The Canada-United States interparliamentary group provides a measure of direct consultation between Parliament and Congress. This enumeration could, of course, be extended. Indeed, one commentator has listed eighteen permanent institutions established through treaties and agreements, which does not include the many subcommissions, committees and research monitoring and regulatory agencies spawned by these eighteen organizations.

The importance and utility of these bodies varies with the circumstances. Their activities supplement the scores of daily contacts maintained by officials, departments and agencies. What is apparent, however, is that there is a unique, extensive communication between Canada and the United States. In many, although certainly not in all, areas there is also appreciation for the fact that good relations are encouraged and promoted by the intensive interaction of the bureaucracies, advanced consultation where possible and desirable, and sensitivity to potentially adverse impacts of impending action on one side of the border. This does not mean that Canada always gets what it wants; e.g., exemptions from United States restrictions on the flow of investment capital. But it usually means that Canada is aware of the issues and has an opportunity to meet with the officials concerned. In short, it seems that existing mechanisms of communication and consultation, informal as well as formal, go a long way in providing for prompt and efficient access and for continuous exchanges of views over an impressive range of existing and developing problems.

Of course, the process of adjusting the interests of the two countries is never complete. It is inevitable and very necessary that the search continue for improved means of managing all problems, or for any means of managing new problems, especially in the scientific, commercial, and economic fields. For example, innovation and imagination will be required for the handling of such issues as nuclear energy and the disposal of nuclear waste materials.

The question then arises as to whether our approach to dispute settlement ought to be more formal and structured. In practical terms, as far as lawyers are concerned, the problem is that of attempting to map out in advance a workable system of compulsory settlement in specific areas of international activity such as the law of the sea. Detailed proposals are presently

under consideration which would aid in giving effect to the obligations contained in Article 2(3) of the Charter of the United Nations. The question remains, however, whether states should be encouraged to enter into agreements in advance for the settlement of disputes with other states with whom they have frequent contacts.

The issues are too well known to require review. Suffice it to say that the legal approach to third party settlement relies on establishing a common ground of principles to which both sides can adhere. An essential element in this process is to suggest general standards which have a legal quality, either as an accepted norm of international law or as a rule which is implied by, or closely related to, a principle of law. The legal approach attaches importance to the steady growth of institutional frameworks and to their adaptability to changing circumstances.

One possibility would be to extend our commitment to the rule of law beyond the present level of occasional adherence to compulsory arbitration clauses in multilateral treaties, and enter into a bilateral agreement with the United States, accepting a general obligation to settle all disputes by peaceful means. The United Nations survey of treaty provisions described by the Pacific Settlement of International Disputes, 1928 to 1962, provides a wealth of information on treaty obligations which pertain to the settlement of international disputes by adjudication, arbitration, conciliation, and ingenious combinations of coordinated and interlocking procedures. In addition to modes of settlement, the survey contains useful examples of provisions dealing with the composition and procedures of the agencies to which disputes were submitted, the effect to be given to decisions of international bodies established by the treaties, and other relevant matters.

Several of these treaties contain provisions that could serve as models for a general dispute settlement agreement between Canada and the United States. However, it is rather fascinating to observe that the vast majority of general treaties on Pacific Settlement were concluded between 1924 and 1959. Since the end of the Second World War, the number of such treaties has decreased sharply. The more favored area of development involves obligations to resolve, not necessarily judicially, differences arising out of particular treaty arrangements, such as communications, transportation, economic matters, commodity agreements, councillor arrangements, frontier disputes, boundary waters and so forth.

A standing body with powers of inquiry, mediation and conciliation and, at the upper limit, judicial or arbitral settlement, would reflect a desire fully understood by lawyers, for rationality and an abandonment of ad hoc decisionmaking. Presumably, it would reflect the views of those in favor of institutional ordering; more precisely, those who believe that United States-Canadian relations are not presently being handled with sufficient rationality and effectiveness. Such an arrangement could provide readily available guidelines for the early and orderly consideration of differences of opinion. The theory is that the incredibly complex interaction between our two societies would, in this way, be managed better.

On the other hand, there seems to be little receptivity at the present time to proposals for creating new comprehensive institutions. Some argue that it would be impolitic to create new agencies with the appearance of locking Canada further into United States problems. Others contend that existing institutions like the International Joint Commission function very satisfactorily and that new issues could be referred to them. It is suggested, in addition, that permanent institutions create rigidities and hamper the flexible arrangements that, from a bargaining point of view, are more advantageous to a small state vis-a-vis a super power. There is, in this regard, apprehension in some quarters that the establishment of such a body would be either a small rationalization of what now exists, or that it would lead to a loss of flexibility. Within a general framework, issues might be carried over into linkages, trade-offs, stand-offs and escalations, rather than reductions or adjustments of differences. Finally, there is the attitude that the argument in favor of such an agency has not yet been fully established. To paraphrase the language of *Heydon's Case*, we might ask ourselves what is the ill which this measure is designed to cure?

There is also the question of timeliness. The increasing bilateral contact between provinces and states is, to some extent, affecting Canadian-American relations. Some provinces are acting internationally as quasi-independent states in their relations with the United States government and private entities. Other provinces appear to be challenging the very premises upon which the federal system is built. Clearly, the power of the federal government is under attack. In these circumstances it may be more prudent for us to set our own house in order before we begin to institutionalize a general dispute settlement agreement with the United States.

In regard to the arbitral or judicial settlement aspects of such a body, the fundamental questions would be those of applicable law and jurisdiction. On the question of the law to be applied by the court or tribunal, some treaties simply provide that the award should be rendered in accordance with international law. Others describe the applicable rules enumerated in Article 38 of the Statute of the Court. Still others provide for a decision *ex aequo et bono*. It might be possible to direct the tribunal in question to apply the fundamental principles recognized by the legal systems of the two countries. But the main issue, I believe, is that of jurisdiction. What precisely is it that such an agency would do? There are not that many disputes between Canada and the United States in the realm of consular and diplomatic affairs. And the kinds of specific arguments which we will be discussing in detail at this conference require a more specialized approach which I will mention presently.

All of this is not to suggest, of course, that we remain static. There are other ways of promoting the orderly management of Canadian-American relations. More can be done by way of reciprocal legislation. Regulatory measures adopted in one country are frequently copied in the other; at least they are copied in Canada. Executive action can cope with a range of problems, and bilateral treaty arrangements specifically tailored to the problems in confrontation remain highly satisfactory mechanisms of adjustment.

However, on the ultimate issue of the need for more comprehensive institutions, we must presently conclude that the jury is still out.

Finally, in the context of a meeting such as this, I would like to suggest that serious attention be given to the possibility of utilizing a chamber of the International Court of Justice in appropriate circumstances. It would be an attractive proposition for a nation to consider using a chamber to deal with a particular case, in view of the 1972 modification of the rules which, according to the President of the International Court, were introduced "in order to accord to the parties a decisive influence in the composition of the ad hoc chambers." If the parties are in agreement as to the desired composition of the chamber, and particularly if they are agreed that they will accept no other composition, they will file a request for its formation immediately after, or even simultaneously with, the document instituting proceedings. The President of the Court is then directed, under the rules, to "ascertain the views of the parties as to the composition of the chamber by consulting the agents." It is true that the Court is free to disregard the desires of the parties. If it does, the case will proceed before the full Court or the chamber in the composition selected by the Court. If the parties are dissatisfied, they are clearly free to discontinue the proceedings under Article 73 of the rules, and they may agree in advance that this shall be done if the desired chamber is not made available. It has been suggested by the President that the Court would be unlikely to disregard the wishes of the parties. This is presumably the justification for his statement in the *American Journal of International Law* that the parties now have "a decisive influence on the composition of the chamber." The procedure before the chamber is basically identical to that before the full Court, and a judgment of the chamber is to be given the same weight as if rendered by the full Court.

In deciding whether a dispute should go to the full Court, a chamber or arbitration, there are a few points which may weigh on one side or the other. There are practical advantages to a recourse to the Court: considerably less expense and the existence of a permanent and experienced registry. These advantages are not to be discounted. The budget of the Court is part of the budget of the United Nations and is provided for in advance. We have heard very high sums quoted for the cost of the arbitration tribunal in the *Beagle Channel* case, and it is said that the secretariat of the tribunal encountered problems in conducting the hearings—problems which the I.C.J. registry has had years of experience in resolving. Nor should we be influenced by the oft-repeated accusation that the Court is slow. In general, it moves at a pace dictated by the parties and can hasten the speed of disposition in any case in which there is good will on both sides.

Then there is the question of whether the parties will wish for a binding decision or one which will leave them a certain amount of room for maneuver. An arbitral decision is often regarded as more consistent with the latter desire. We are all aware of the special agreements in the *North Sea* case as a precedent for a means of obtaining a judicial decision and leaving matters in the hands of the parties for negotiation. However, it seems to me that the

claims made for this sort of technique may have been somewhat exaggerated. The dicta of the Court in the Free Zones case, to the effect that the Court cannot give a judgment that would be dependent for its validity on the subsequent approval of the parties, has not been superceded. The special feature of the North Sea case was that negotiation was, as it were, contained within the applicable law. In any domain in which the Court would be likely to find that the legal situation was objectively definable, a special agreement would have to be carefully drafted if any powers of application of the judgment were to be retained by the parties. On the other hand, the Court appears to be sensitive to the criticism that in recent cases—and I am thinking of the recent nuclear test cases—it has been inclined to avoid giving decisions on the real issues and is looking for opportunities to apply the Free Zones dictum.

With regard to the choice between the full Court and a chamber, one question which will no doubt be taken into account by the government concerned is that of the predictability of the rules and the criteria to be applied to reach the decision. This is a particularly ticklish problem in the area of the law of the sea.

I believe that a request for the formation of an ad hoc chamber comprised of judges selected by the parties would encounter some opposition within the Court, particularly in a case concerning the law of the sea. But I think, on the other hand, that the Court would be very reluctant to give the appearance of frustrating the wishes of would-be litigants and thus turning away work.

Finally, there are a few practical points to be noted. A chamber might be more prepared than the full Court to exercise the power to convene at a location other than the Hague; namely, in North America. Furthermore, if the chamber were composed entirely of judges competent to work in French or English, the proceedings might be somewhat simplified. In any event, the infrastructure of the Court is fully competent to deal with the two languages. In addition, the judgment of a fairly small chamber would probably be clearer and more direct in its expression. A judgment which must have the support of a majority of fifteen judges often has to be discreetly worded in order to accommodate varying shades of opinion.

In conclusion, Mr. Chairman, I would just say this: There has probably been more talking and more writing about the International Court of Justice in the United States and Canada than in any other two countries. Perhaps this is something for discussion during this day and a half. Perhaps the time has come when Canada and the United States should begin to use the institution whose excellence they have never tired of extolling.