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Commentaries

Marcel Cadieux

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The following remarks by Monsieur Cadieux were prepared in advance but were not delivered at the conference.

Marcel Cadieux, c.r.

As I am now engrossed in negotiations involving our maritime boundaries and our fisheries with the United States, I have not had time to do the detailed research that I might otherwise have done into the legal aspects of how Canada and the United States have resolved their bilateral disputes. However, I have some comments arising out of my experience on the practical side of these relations as to how our two countries have resolved their disputes through the years. No inference should be drawn from my remarks, however, that would anticipate the results of my present work.

It strikes me that both Canada and the United States have preferred over the years to resolve their disputes through negotiation rather than through adopting a strictly legal approach to the resolution of their problems. It is for this reason that agreements between Canada and the United States seldom contain compulsory provisions for referring disputes to the World Court or provide for other arbitration proceedings in the event of disputes arising. Although I am not certain, and I recognize that there are two opinions on this point, I think things might have been very different if our two countries had found it possible to accept without reservation the compulsory jurisdiction of the International Court of Justice. The actual practice of these two countries discloses a true reluctance to litigate or arbitrate our differences if a negotiated settlement is possible.

In addition, the practical nature of the problems that confront Canada and the United States and the political nature of many of these problems encourage negotiated settlements. References to the World Court or to arbitrators can create problems at a political level since the decision can be rendered at a time that is politically disadvantageous to one or the other of the states. There always seems to be an election in prospect. However, from time to time it has proved useful to make such a reference, and I would cite as examples of this the Trail Smelter, the I'm Alone and the Gut Dam cases.

Another reason our two countries prefer to negotiate a settlement in the absence of a joint commitment to arbitration is simply the very great importance of the issues that can arise between us and the Americans. Neither government in these circumstances wants to risk everything, and concessions and compromise are distinctly less risky and often a less time-consuming process.

Through the years it has proven safer for both states to compromise on a solution to their problems. This process is safer, and each side can usually salvage enough of their position so as to protect their state's basic position. Arbitration puts everything at risk, and our political leaders have generally not preferred the proposition of risking what you have for what you might obtain through a successful legal action. Moreover, many of the issues that

have arisen between us and the Americans have involved questions of policy rather than the interpretation of treaties or points of international law. This is another reason that compromises have seemed to be a more appropriate solution for both of us.

The issues that have arisen between Canada and the United States are so important for each country that experience has demonstrated an accumulated preference for a negotiated settlement that is now almost overwhelming. Times vary, however, and it is possible that in the future greater reference will have to be made to third party arbitration or the World Court.

On both sides of the border there has been a tradition of friendship and reasonableness that has assisted in the successful resolution of disputes. The leaders of both countries are concerned that good sense be applied to our problems so as to arrive at an equitable solution for the other partner. This goal is broadly met through negotiation rather than by reference to a third party. Furthermore, the political leadership in both countries, perhaps particularly in Canada, is judged in part by their ability to govern the relations between our two countries in a mutually satisfactory manner.

If my impression is right as to our broad preference for the political as opposed to the juridical approach concerning the settlement of disputes, there is a related but important additional point to be made. The political avenue disposes not only of articulated issues and problems through concessions and mutually acceptable arrangements. The essence of the political approach involves anticipating problems and managing things in such a way that issues are avoided. Situations are now allowed to develop in such a way that in the end there is an issue. The value of the political approach is thus enhanced: it can claim credit for solving *and* reducing the number of issues. The image of the iceberg comes to mind in terms of the issues formally solved through this process and those which have never emerged and thus have remained invisible. They were part of the iceberg and should be noted when the question of dispute settlement is considered.

In conclusion, I would like to refer to a personal experience that I had in 1968 when I went with Ministers and other officials of our Government on an extended tour of Latin America. We visited Venezuela, Peru, Chile, Argentina, Brazil and Mexico. I had an opportunity to speak with officials of these governments, and I was impressed by the interest they had in how Canada had succeeded through the years in developing and maintaining successful relations with the United States. They wanted to know how we had been so effective in managing such an important international relationship. They were also interested in how so large and diverse a country as Canada had succeeded in creating and maintaining a unified position on national objectives and on the tactics that our country should adopt in resolving these disputes, and how we had succeeded through negotiations in protecting our basic position and arriving at mutually beneficial results. They cited as examples the Columbia River Treaty, the St. Lawrence Seaway and the International Joint Commission, among other successful agreements. While their own relations

with the United States were important for them, their national experience had not been the same.

I could only suggest that it was through negotiated settlements that we were able to achieve fair and equitable results. I do not think we can lick every problem in this manner; some problems, because of their legal nature or for some other reason, lend themselves to reference to a third party or the World Court for resolution. The maritime boundaries and fisheries questions might be an example of a case where a different approach is necessary. It seems clear now, however, that we have demonstrated a definite preference for the resolution of our problems with the United States through diplomacy rather than through legal procedures. In the eyes of these foreign observers, this effort has seemed to be worthwhile.

I hope that these brief remarks will throw some light on the course of Canadian-American relations and the method that we have used most often through the years to resolve our mutual problems.

The following commentary was delivered by Monsieur Cadieux at the conference.

Monsieur le président, je sais que le temps qui nous est imparti est court. Je vais donc essayer de faire vite dans l'espoir que je réussirai, en même temps, à faire bien.

J'ai été très impressionné par l'incident qui a marqué le début de cette rencontre. J'envisage avec effroi ce qui pourrait se produire un jour, si on me présentait sur la base de la biographie d'un Cadieux qui fut décédé. J'imagine la tête des gens dans l'auditoire lorsqu'on arriverait à la fin de la biographie et qu'on annoncerait que le conférencier est décédé depuis quelques années.

Etant fonctionnaire, naturellement, je me suis préparé à ce débat. J'ai procédé de la façon pessimiste qui est caractéristique de ceux de ma génération. C'est à dire, j'ai supposé que les documents et les conférenciers ne seraient pas disponibles avant l'ouverture des débats et que je me trouverais dans cette situation que les fonctionnaires craignent par dessus tout. Avoir à improviser, sans texte et sans avoir obtenu l'autorisation des quatorze autres ministères qui doivent toujours dire: Oui, avant que vous puissiez dire quoi que ce soit. D'ailleurs, je manifeste aussi une autre caractéristique qu'on leur attribue d'ailleurs très généralement aux fonctionnaires cette naïveté de ceux qui ne sont pas exposés à l'influence quotidienne et directe des contribuables; j'ai supposé que vous auriez lu les notes que, dans mon pessimisme, j'avais préparé d'avance. Je vais, donc, procéder sur ces deux hypothèses et vous livrer quelques-unes des idées, des impressions que m'ont suggérées les deux présentations extrêmement intéressantes qui ont été faites tout à l'heure.

Sur un détail, je me permets une observation au sujet des commentaires du professeur Baxter concernant la Commission internationale conjointe. Je suis d'accord avec lui. C'est l'instrument ou l'institution la plus importante dont nous disposons pour ce qui est du règlement des questions de frontière.

Mais, je crois que le facteur essentiel pour le règlement des différends entre le Canada et les Etats-Unis tient à l'attitude des deux peuples à l'endroit l'un de l'autre, l'attitude du Parlement et du Congrès à l'égard des relations entre les deux pays et surtout l'attitude des deux gouvernements quant aux relations qu'ils veulent entretenir. Fondamentalement, les deux pays désirent avoir de bonnes relations et les conséquences se manifestent dans la façon dont nous abordons le règlement de nos différends ou de nos disputes.

Je suis d'accord en particulier avec le professeur Baxter, que ce que nous avons fait essentiellement c'est non seulement de régler nos différends, mais de les régler par la voie politique, ce qui entraîne comme conséquence que l'élément essentiel dans nos relations c'est la gérance de nos relations et c'est la prévention des différends et des disputes. Ça, je crois, c'est l'élément caractéristique.

Les propos du professeur Macdonald m'amène à souligner un autre point. La question du règlement de nos différends par l'intermédiaire de juges ou d'arbitres, c'est à dire, la voie judiciaire. Sur cet aspect, je ne veux pas généraliser parce que je n'ai pas eu le temps avant de venir participer à vos travaux aujourd'hui, d'entreprendre des recherches prolongées. Vous comprendrez que dans les circonstances actuelles, cela m'a été impossible. Mais si je me réfère à mes quinze années de pratique à Ottawa, puis à mes cinq années et demie à Washington, je crois que les différends entre le Canada et les Etats-Unis sont généralement importants et qu'ils sont surtout de caractère économique et politique. Les chefs politiques ne sont dès lors pas très disposés à laisser des différends qui sont importants et politiques dégénérer au point où ils sont articulés, et au surplus, où il faut les soumettre à la décision d'une tierce partie. Il existe aussi le problème, le risque, que les chefs politiques doivent envisager. Remettre un différend important entre les mains d'une tierce partie, crée dans le public l'impression que les procédures nationales et les relations avec les Etats-Unis ont échoué et vous prenez ainsi le risque de tout perdre ce qui, dans une matière d'importance du point de vue politique, peut-être extrêmement dangereux. J'en arrive à la conclusion, tirée à de la pratique (qu'on peut, peut-être, pas documenter de façon académique. .) que le recours à l'arbitrage, dans le cas des différends entre le Canada et les Etats-Unis n'a que l'apparence d'un règlement judiciaire. En réalité, il s'agit toujours d'une décision politique. Une décision politique de ce genre ne sera prise que si la cause est relativement peu importante. Si elle était importante par définition, il serait presque impossible de la confier à un tiers pour en décider. Autrement dit, comment un leader, sur une question qui a des implications politiques vitales pour lui et pour son pays, pourrait-il abdiquer sa responsabilité de deux façons en disant. J'ai échoué dans mes relations avec notre important voisin pour trouver la solution et maintenant que les juges s'arrangent et qu'ils appliquent la loi. Et ceci dans un contexte particulier. Il faut bien reconnaître que, dans bien des secteurs, le droit international évolue—je m'en félicite, personnellement—mais si vous avez à conseiller un gouvernement quant à la politique qu'il doit suivre, vous devez reconnaître qu'il devient de plus en plus aléatoire, difficile, dangereux, de prédire quel va

être le résultat de l'intervention d'un juge. Jusqu'à un certain point, le règlement judiciaire peut jouer un rôle, mais je ne suis pas tout à fait d'accord avec les conclusions du professeur Macdonald. Mais je le rejoins, d'une certaine façon, à cause des négociations dans lesquelles je suis engagé. À cet égard, comme disent mes compatriotes de langue anglaise, j'ai des nouvelles pour vous. Le rapport intérimaire va paraître demain. Ce rapport, pour la première fois, fait état de l'accord entre le gouvernement du Canada et celui des Etats-Unis au sujet du règlement arbitral des différends qui pourraient survenir entre nos deux pays dans tout le domaine qui nous est imparti. Pour ce qui est des pêcheries, en particulier, vous pourrez lire les détails demain, nous prévoyons l'établissement d'une Commission avec deux sous-commissions de six membres chacun pour les deux pays. Au dessus de ces deux sous-commissions il y aura deux co-présidents choisis conjointement par les deux gouvernements. Voilà une chose intéressante déjà. Il y a moyen de répudier ces co-présidents au bout d'un certain temps si vous n'êtes pas satisfaits, à condition de les remplacer avec l'accord de l'autre partie. Ces deux co-présidents ont pour tâche naturellement de présider les commissions. S'il n'y a pas accord, ils se saisissent du différend, cherchent à persuader les deux gouvernements, ils sont liés. Voilà une autre chose intéressante. Si les deux co-présidents ne s'entendent pas, la décision est confiée à un arbitre, choisi d'avance. Un autre point est lui aussi extrêmement intéressant, je crois qu'il est nouveau. Nous prévoyons distribuer les stocks, et les espèces de poisson sur nos deux côtes entre trois catégories. Il y a une catégorie qui intéresse les poissons, les ressources marines, qui sont dans la région frontalière, il s'agit d'un domaine où les intérêts économiques des états membres sont substantiels. Or vous avez, je crois pour la première fois, un accord entre gouvernements pour confier à deux co-présidents et, éventuellement, à un arbitre, des décisions dans un domaine qui affecte leurs intérêts permanents et substantiels. L'idée des co-négociateurs, en suggérant des co-présidents qui assistent aux réunions des commissions, c'est que tous les différends, qu'il s'agisse d'interprétation, d'allocation de stocks, et ceux qu'on peut décrire essentiellement comme des différends politico-économiques soient soumis au règlement arbitral. Il s'agit d'avoir des hommes qui soient au courant, qui aient suivi les délibérations, et qui puissent intervenir avant la prochaine campagne de pêche. La préférence des hommes politiques et la logique de notre système démocratique veulent que ce soient les chefs politiques qui prennent les décisions vitales dans l'intérêt du pays. L'importance d'avoir des bonnes relations entre le Canada et les Etats-Unis qui conditionne éventuellement l'attitude des chefs politiques, conduit, à un système où, normalement, on cherche à régler les différends avant qu'ils soient articulés et on les règle par la voie politique. Je m'empresse d'ajouter que dans le cas des pêcheries, sur nos deux côtes et dans le cas du développement des ressources d'hydrocarbures, il est possible qu'il ait désormais une exception assez substantielle. Il ne faut pas que vous considériez que l'accord sur cette procédure judiciaire pour les différends qui pourraient survenir entre nous soit acquis définitivement. Il peut très bien rester lettre morte, si nous ne nous entendons pas,

dans un deuxième temps sur l'allocation des stocks, sur les pourcentages de pêche à attribuer à chacun des pays et, surtout, sur la question des frontières maritimes que nous allons aborder ces jours prochains. Je suis professionnellement et personnellement porté à l'optimisme. J'espère que nous allons réussir dans le temps qui nous a été attribué. Si nous réussissons, lors des prochains congrès nous pourrons parler d'un nouveau développement pour ce qui est du règlement arbitral ou judiciaire de différends entre le Canada et les États-Unis dans un domaine qui, jusqu'à maintenant, je crois, a été réservé aux mécanismes politiques.

Je sais que vous êtes à court de temps. Je pense que j'ai souligné quelques points qui me semblent essentiels. J'aurai peut-être l'occasion, au cours des débats subséquents, d'intervenir de nouveau.

Monroe Leigh

I would like to disavow, at the very beginning, the notion that my comments will be launched from an American perspective. I recognize that the program makers, for legitimate reasons, had billed Professor Baxter as speaking from an American perspective, and Dean Macdonald as speaking from a Canadian perspective. I mention this because it illustrates one of the conclusions I have come to in preparing for this section: in nearly all cases there is no peculiar Canadian point of view on a matter of principle. Of course, if you are in a dispute about territory, you are worried about where the line is. But the principles which have to be applied are not matters of dispute.

This was vividly impressed upon my mind when I was a young lawyer in Washington in 1948. I was given the assignment of reviewing all of the dockets of the International Joint Commission from 1909 until that date. Our firm had been retained in the canal waters dispute between India and Pakistan, and so I spent a number of weeks in the archives of the United States. It was a very lonely business going through every docket up until that time; I think there must have been fifty or sixty. And I was struck by the fact that in nearly all cases, there was no important nationalistic principle involved, either on the American side or on the Canadian side. This has led me to believe that what is really needed in the whole array of dispute settlement mechanisms is a guarantee of impartiality by the adjudicators who have the ultimate decision-making responsibility. If the issue cannot be settled by discussion, then what is needed is simply a guarantee of impartiality on the part of the ultimate adjudicator. While the International Joint Commission has done wonderful work in the field of developing the facts in a particular dispute—and so often the dispute has been settled just from the mere exercise of bringing out all the facts—nevertheless, it seems that in most of these matters, things would go more rapidly if it were known that there could be a compulsory adjudication at some point in the future if negotiations fail.

That is one of the principal observations I wish to make about this problem. I do not know that I would agree entirely with Professor Baxter. His

paper is very lucid and comprehensive. But I think his sense of tidiness, which is very great, leads him to suggest sweeping away all of the existing machinery. I doubt whether that is really worth the trouble it would take in securing agreement. I would leave most of the machinery in place since much of it can be used from time to time. But I would like to see some form of compulsory dispute settlement adopted between the countries in advance. While it may have to have some limitations, I think it would contribute greatly toward the momentum of negotiations for a diplomatic settlement which is to be preferred in all cases.

One of the difficulties in not having a fixed timetable, or some sort of pressure towards negotiation, is the fact that in our two countries constituencies develop around any particular point of view. We have had this throughout our national experience together. And once the constituency develops, the arguments soon tend to be phrased in terms of slogans rather than in terms of truly acceptable legal principles. We in the United States have had our share of slogans, of course. "Fifty-four forty or fight" is one of the most notorious. I had an amusing example of this a year or so ago when I was involved in discussions with Canadian officials regarding the Gulf of Maine dispute. Someone sent to me (whether Canadian or American I do not know, because it came anonymously) a clipping from a Canadian newspaper which described the twentieth anniversary gathering of a high school class in your province of New Brunswick. As a part of their celebration, the group went out and planted a Canadian flag on one of the disputed islands. This shows the tendency of popular opinion to coalesce around a particular point of view.

Let me turn to another point which seems to be very important. The volume of issues developing between the United States and Canada is now growing by leaps and bounds. It is extremely difficult for the diplomatic machinery of the two countries to keep up with it. For example, when Maurice Copithorne and I were working on the Gulf of Maine dispute, I found it difficult to schedule times when we could meet to discuss this problem. From this I conclude that Professor Baxter is correct in that we might profit from extending the Commission's use in our bilateral relations.

The International Joint Commission has, of course, been an enormous success in dealing with boundary water problems. We might have commissions in other areas. The United States has set up a great array of commissions with the Soviet Union, various Soviet-bloc countries, and also with various Middle Eastern countries. The existence of such commissions serves the purpose of giving an institutionalized priority of attention to problems that ought to be dealt with before they develop hardened constituencies. Such constituencies may make it more difficult, politically, to resolve the dispute. I would venture to say that in the field of antitrust law, a commission which met periodically between Canadian and American antitrust enforcers would be a salutary step. I say this because my own limited experience within the United States government in antitrust matters serves to confirm how difficult

it is to handle this kind of problem through diplomatic channels. For example, one of my dubious successes as Legal Advisor was in persuading the Department of Justice not to name Canadians as co-conspirators in the celebrated potash case. It was considered a victory that I got the Justice Department to agree that the Canadians would be named as "unindicted" co-conspirators. Well, that was certainly a very modest success.

Let me try and describe to you the bureaucratic situation within the United States government. You go over to the Justice Department to see, let us say, the new head of the antitrust division. He has probably never heard of prior notification arrangements between the State Department and the Justice Department, so you must first convince him that this is a sound policy. Even if he knows about it, he may say that we have a new Attorney General who feels very strongly about these matters so he will have to go and talk to him. There is nothing that happens automatically to secure the kind of notification that is needed. In the celebrated Bechtel case, that was very important from the American point of view. The State Department received virtually no notification of this case which had enormous consequences for our relations in the Middle East. Instead, it was treated at such a high level that the word came by telephone on a Wednesday afternoon before Thanksgiving, and the letter asking for our comments was sent over that afternoon. It was not seen by anyone on our staff until early Monday morning. By Monday afternoon, high officials in the Justice Department were already telling the press that the State Department was delaying their program of bringing suit against Bechtel. This is the reality of what goes on in bureaucracy. Consequently, I feel very strongly that we could profit greatly by increasing the number of joint commissions that are set up for special subjects such as antitrust litigation.

Let me return to the suggestions that have been offered. As I listened to Professor Baxter and Dean Macdonald, it seemed to me that there is general agreement that further steps in the direction of compulsory adjudication are necessary. I feel very strongly that the threat of compulsory adjudication is the strongest possible incentive for a rapid movement toward a negotiated settlement. I am especially grateful to Dean Macdonald for pointing out with such particularity and so much clarity the new possibilities that exist in securing the adjudicatory mechanism of a panel of the International Court of Justice, with the assurance that the panel will be of a composition which is satisfactory to both the United States and Canada.