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## Commentaries

Monroe Leigh

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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.