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## Discussion

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## Discussion

### *Chairman van Roggen*

Before we begin the general discussion, I would like to comment briefly upon one of Dean Macdonald's points. He noted there are some sixteen or eighteen arrangements, such as the International Joint Commission, between Canada and the United States, and that naturally, between two federal jurisdictions, these arrangements are only entered into between the two federal authorities. However, in doing our study on Canada-United States relations, we came across an American study that had been done which had discovered a total of seven hundred and sixty-six agreements, understandings and arrangements between Canadian provinces and northern states which had been arrived at without the intervention of either federal government.

### *Anne-Marie Jacomy-Millette*

I would like to pursue Senator van Roggen's comment further and ask Dean Macdonald whether this federal dimension should be brought into the picture. There are not only questions of agreements. There are conferences, for example, between the governors of New England states and the eastern provinces. There is also the conference between the Great Lakes premiers and governors who met before the agreement of 1972. I was wondering whether this specific problem of provincial participation would provide something less formal and grow in the direction of Professor Baxter's advocacy for less formal solutions. There are so many questions that cannot be put to a formal institution that the solution would be a little different if one were to consider this practical aspect of provincial participation.

### *R.St.J. Macdonald, Q.C.*

I think the problem may be that the activity of the provinces in what has been regarded as largely an international domain has, to put it mildly, complicated the relationship between the federal government and the governments of other countries with which the federal authority must deal. One has only to look, for example, at the statement the provincial premiers issued after their meeting last August, in which they indicated very strongly that they were asserting a desire for a role in the Canada-United States relationship. They mentioned trade, agriculture and a number of other activities. I was simply suggesting that while we have had this problem in the past, it is infinitely more difficult and more awkward at this moment, when our internal situations seem to be less than fully settled. Therefore, one would have to give some thought as to what the role of the provincial authorities would be in a comprehensive dispute settlement agreement. I agree with Professor Jacomy-Millette that there would have to be a role, if only for constitutional and practical reasons, because so many areas of concern fall within provincial jurisdiction so that the authority of those units would have to be involved.

The question is how is this to be done? Under the old system, it presumably was done here. It was done, as Professor Baxter said, through a

process of pretty sophisticated intrafederal negotiation between Ottawa and the provincial leaders. A position was hammered out, agreed upon, and then a front could be presented. The fabric of this, however, seems to be coming apart. I think my simple point was that this would have to give one pause for some concern before thinking about this wider kind of agreement.

Finally, as the Chairman quite correctly reminded us, this agreement would be one between the federal authorities here and the federal authorities in Washington. But what is this agreement to do and in what areas? That is one of my main points. I think that the remedy—or the procedure—has to be specifically tailored to the problem.

*Marcel Cadieux, c.r.*

The differences between our legal systems, our constitutional systems, may have a bearing on the attitude of the two countries concerning judicial settlement. For instance, in the United States, a treaty that is approved by two-thirds of the Senate is binding on every part of the country. In our country, unless it is within federal jurisdiction—and the boundaries of that are not always clearly specified—we are left with a problem. Consequently, there are hesitations and inhibitions as to how far we can travel this route. Then, in the United States, the three branches of government have positions that do not correspond to the ones in this country. In the United States, the judicial branch plays a role that is essentially different from the one judges play in this country. Traditionally, in the United States, political leaders—for reasons which I leave to your imagination—have been tempted to ask the courts to give legal answers to political problems. I think the approach is different in this country. In the United States there may be a readier disposition to call in the law and leave it to the judge than there might be in Canada. This may be a factor. I think this may lead to attitudes which may differ on both sides of the border.

*Chairman van Roggen*

Certainly, on your first point Mr. Ambassador, it has been said by some that Canada is not a sovereign state. This is a little hard to get into one's mind, but it comes very close to that when you think of the inability of the federal government to bind our provinces in matters of international treaties. In our study of these seven hundred and sixty-six arrangements, we satisfied ourselves that ninety-nine percent of them are logically entered into between the provinces and the states. They involve firefighting apparatus crossing the boundary between Maine and New Brunswick and things of that sort. If you ever attempted to achieve such an arrangement through the federal powers, it would never happen. It is practical to do it at a lower level, so do not be taken aback by that.

*Gabriel Warren*

Perhaps it is too early to ask this question of Dean Macdonald, but I will plant the question in his mind now and follow up closer to Christmas. Dean

Macdonald is the Canadian representative on the United Nations General Assembly legal committee, and I was wondering whether he has become frustrated when his somewhat far-reaching ideas on the evolution of peaceful dispute settlement begin to clash with the somewhat more pragmatic views of the Canadian government. My somewhat limited personal experience confirms the points made by Ambassador Cadieux. The Canadian and United States positions appear to be rather pragmatic. I think that both governments are wary about entering into general obligations whereby perhaps any type of legal dispute can be drawn into a compulsory system. I would say the position of the two governments is rather cautious but pragmatic. If one is going to proceed with the evolution of more and more compulsory jurisdiction, it is appropriate to choose specific areas—fisheries, hydro-carbons and maritime boundary areas, for instance—and develop machineries to suit these particular matters and then build upon these until more and more matters are covered.

I had the rather unique experience of being in Geneva during the working phase of the conference on security and cooperation in Europe. One of the subjects discussed a great deal was a proposal by Professor Binshelder of Switzerland to have a convention on the compulsory settlement of disputes that would bind all the countries of Europe and the United States and Canada. The whole situation was complicated because it would not only have bound the individual states; it would also have bound the countries of Eastern Europe. And we all know their position on compulsory jurisdiction. In that forum, Canada took the view that in order to be realistic, the European Security Conference should find two or three areas, set up machinery and build upon that. We were accused by Professor Binshelder of taking an Anglo-Saxon pragmatic view. That proposal is still on the table, and I predict that if anything is ever going to happen with it, Professor Binshelder will have to take a rather pragmatic view. So my question remains to Dean Macdonald: is he starting to get frustrated yet, or is that something that will come later?

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

Still optimistic; not frustrated. But I think I am aware, as I am sure everybody in this room is, of the innate conservatism in Canadian society and of our very small "c" conservative reaction to so many of these questions.

I started out by saying that because of this article which John Holmes wrote, we have to look at the mechanisms that have been established at the international level. They are very rich, and there are a great many of them. Then I brought it down to what the situation now is between Canada and the United States. And there you and I are probably very much *ad idem* in this regard. I went on to think about identifying some of the problems that we now have. Perhaps that is where there is a divergence of opinion. With regard to some of these problems, I think we ought to be fairly imaginative. Why do we always hold back?

I can be as pragmatic as the Canadian government in some ways. I do not want to find a procedure that is totally inappropriate for the particular dispute. Nor do I believe that we ought to make a gesture for the promotion of a peaceful settlement or to promote international law which is totally against our interests and totally inappropriate. I am not in favor of that at all. However, governments need to find some kind of reassurance. They need to be told that there are procedures that are not going to embarrass them and are not going to lead them to feel, after the event, that they have been ill-advised. The procedures must give the appearance of rationality and reasonableness and must provide a way of handling a dispute in a proper way. If that happens to be a method that is also rational from the international lawyer's point of view, then why do we not do it?

The idea of a chamber of the court should be looked into. I know that our president is looking into this, and I want it to be clear that there is some problem about the role of the selection of the named judges. There is no question about the number; the parties control the number of the judges. There may be some question as to the actual personalities because both parties would want to be fairly certain about the strength of the tribunal. Here, I agree with what Professor Baxter was saying. He was implying that the tribunal in the Beagle Channel case was a very strong tribunal. One of the great advantages of arbitration is that you can control the thing. I do not think we should close our eyes to the fact that other countries are thinking about the possibilities before them. We should not be confined by our own past experience, which has been extremely pragmatic but to some extent unimaginative. So, I continue to be optimistic.

#### *Donat Pharand*

Mr. Chairman, I would like to follow up on the question of the composition of the chamber of the Court. If I am to understand Dean Macdonald correctly, shall we say that the practice of the Court is really nonexistent. I do not think that a chamber has ever been chosen. Now, however, shall we say that the disposition or attitude of the President of the Court is simply this: although the rules of the Court do not provide for the parties to be able to choose the members of the panel, the Court, or at least the President, would be well-disposed toward accepting a panel chosen by the parties.

If the parties were to have that assurance in advance, this would make a considerable difference. Theoretically, if the rules are followed and if I understand them correctly, the only thing the parties can do is to say that we want three or five judges. And, theoretically, the rules provide for the judges to elect five among themselves. That is the theory. If the practice is different, or would be different, this would be excellent because the parties might be much more disposed to submit a dispute for settlement by a chamber of the Court. In that case, we would have the great advantages outlined by Dean Macdonald. The infrastructure is there, but the greatest advantage would be in having a decision of the Court as if it were a decision of the full bench.

One could rely on that as constituting a precedent in the loose sense. Perhaps that panel would follow more closely the previous decisions of the Court than an arbitral tribunal such as the Anglo-French tribunal. That tribunal seemed to have paid lip service, more than anything else, to the 1969 North Sea Continental Shelf cases, and then proceeded to depart considerably from that decision.

I would appreciate it if Dean Macdonald could comment upon this aspect a little more. I want to make sure I fully understand what he said about the possibilities of the parties producing a list and having it accepted. As I understand it, what you have said is that if the Court does not accept the list which is presented, the parties could have agreed in advance to withdraw.

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

I think you have summed it up, Mr. Pharand. The rules clearly provide that the parties control the number of judges. In my testimony before the Senator's committee, I expressed the view that the parties also controlled the composition of the panel. I think that is important in view of the fact that there are fifteen judges from different backgrounds. The quality is not uniform, and the expertise in particular areas of the law varies somewhat. Therefore, the parties have an interest in getting the best judges they can. As an aside, I assume that is one reason for the route that was taken in the Beagle Channel case which came up with a very powerful panel. However, in his article in the *American Journal of International Law*, the current President of the International Court stated categorically that the parties controlled the composition of the Court. Doctor Rosenne, whom I think we would regard as one of the great authorities in this area, has reaffirmed that view in his article in the *Israeli Law Review*. In the *American Journal* article, the President of the Court gave, as the reason for his statement, the fact that the parties would simply refuse to go ahead. They would have made an agreement before hand that if they did not get the judges they wanted, they would not proceed. The implication is that the Court would, within the context of its procedures, give effect to the wishes of the parties.

The difference between what I said in the Senator's committee and what I am saying now, which is a result of having had an opportunity to look at it in detail, is that, admittedly, this is important. The parties are in the hands of the Court which, itself, makes the selection of the judges. Consequently, only one of two possibilities exist. Either the Court will elect the judges whom the parties have requested, or it will not. If it does, the case will go forward into chambers with all of the advantages that have been identified. If the Court does not elect the requested panel, and either Ottawa or Washington believes the bench is not sufficiently powerful, let us say, it does not have law of the sea judges on it, then they can go to arbitration or drop it completely.

*Myres McDougal*

I hate to be a troublemaker and raise delicate questions, but I think we have gotten into too much relatively trivial detail before we have clarified the major problems. I think Dean Macdonald hit the right note when he suggested that perhaps dispute settlement was much too narrow a focus for what we are concerned with here. There are some very fundamental problems. We are neighbors on a large continent in a large world, and we are afflicted with interdependencies whether we like them or not. I cannot help but believe that our fundamental problems are how we handle the major areas, such as the environment. They are not going to go away with the settlement of a few particular disputes. These are continuing activities requiring continuing administration. We should think about the problems of prevention and deterrence, rather than attempting to settle a dispute once it has occurred. We must have a much more detailed clarification of the policies to which we both admit. Most of these policies concern administration.

This brings me back to some very distressing things that I have heard here. It was suggested that perhaps Canada was not a sovereign state and that there are some powers beyond the compass of the federal government. My thoughts happened to go back to 1968, in Vienna, where Ambassador Wershof and I were members of the United States and Canadian delegations to the Vienna Convention on the Law of Treaties. Someone had come forward with a federal state clause, and Ambassador Wershof said that he would like some support even if we went down with flags flying. We supported him to the bitter end, and we did go down with flags flying. There is no federal state clause in the Convention on the Law of Treaties. I think it would be a rash man who would suggest that that Convention is not now the customary law of the world. Under international law, a state is sovereign whether it knows it or not. My country has, on occasion, plead the federal clause, but it can no longer do so. There is nothing beyond the scope of the treaty power in our country. Even the American Bar Association has finally learned this. I am curious to know what you can do and what you cannot do. Can you really cope with some of these great problems? What is the scope of your treaty power?

A second thing that disturbed me greatly was all this talk about the difference between political questions and legal questions. These words are very vague and ambiguous and have different meanings in constitutional law and international law. In my country, the difference between political and legal is simply: when the question is so hot, and the Supreme Court does not have the guts to handle it, it calls it political and heads for the door. As I had understood it, on the international level, the difference is that it is political when a state is unwilling to submit a dispute to the processes of law; it is legal when a state is willing to submit it to the processes of law.

I remember a book by Judge Lauterpacht published in the 1920's, in which he examined this for five hundred pages and concluded that there was

nothing that was not inherently legal. This distinction between political and legal on the international level is completely illusory. If you think, for a moment, that the main function of the law for five thousand years has been to enable the members of a community to clarify and secure their common interests, this distinction makes absolutely no sense as far as our two countries are concerned. However, if Canada has some distinction between political and legal in its Constitution that we have to be aware of, I would be grateful if you would let us know what it is. Therefore, the main theme I would suggest is that our job is much more deep and fundamental. Dispute settlement is a matter of how we cooperate and work together on problems that we cannot possibly escape.

*Marcel Cadieux, c.r.*

I would just like to say a word about this distinction between legal and non-legal problems. Specifically, one of the things that might be difficult to negotiate between Canada and the United States is who gets what proportion of scallops on the east coast. This is worth many millions of dollars. At the moment, Canada is taking about eighty-seven percent. There is going to be a problem if anybody wants to change that, either now or in later years. I submit that the resolution of that problem, which is at the center of our dispute with the United States, may not be possible on legal grounds. This will involve a good deal of horse-trading, and I do not know what the criteria might be. If the arbitrator were to be called in to settle this, he would have to go beyond considerations of general equity and make an assessment of what will carry the communities on both sides of the border.

*Myres McDougal*

Is the Ambassador familiar with the Anglo-Norwegian Fisheries case?

*Marcel Cadieux, c.r.*

You may assume that I am familiar with it.

*Myres McDougal*

The issue was whether the English or the Norwegians got the fish. The Court gave it to the Norwegians because they were hungrier. And this was settled on purely legal grounds. Ultimately, everything in law comes back to reasonableness. Canadians can show that eighty-seven percent is reasonable. The only question is whether you are willing to submit it to a third-party decision?

*Blair Hankey*

I would like to refer to two points made by Ambassador Cadieux. First, judges have a somewhat different role in American society than they have in Canadian society. There is a greater willingness on the part of American political leaders to refer to the courts what we would regard as essentially political questions. Second, there is a certain reluctance on the part of the

Canadian government to refer Canada-United States issues to third-party settlement because the political leaders regard it as a failure if they are unable to manage these questions through negotiation.

This would seem to reflect a rather different role and different attitude toward litigation in our two cultures. I remember reading an article comparing the role of lawyers, courts and litigation in British as opposed to American society. The article noted that there were twenty times more high court judges in the State of New York than there were in the entire United Kingdom and many more lawyers in the American Congress and in the Cabinet than the House of Commons or the British Cabinet. Generally, there was a very different attitude towards litigation in the United States than in the United Kingdom.

Canada would appear to stand somewhere between the United States and the United Kingdom, or perhaps between the United States and France, in its attitudes toward litigation. I think there is a much greater reluctance in Canada to refer matters to litigation than there is in the United States. One almost has the feeling that in the United States there is a certain element of fashionableness in going to court. I wonder whether Dean Macdonald's enthusiasm for going to court on international matters might not be related to what I think is his American background.

#### *Chairman van Roggen*

Several of you have referred to the different role of judges in our two societies as though it stems from a possible cultural difference or a difference in attitude toward courts: a more litigious attitude in the United States. I would suggest, however, that it is rooted in our respective constitutions. There is a very fundamental difference between our two systems. In England, where Parliament can make a man a woman, there is no constitution or Bill of Rights as there is in the United States. Consequently, there are not the same restrictions acting upon Parliament if it wishes to enact certain legislation.

In the United States, Congress must stay within the jurisdiction given to it under the Constitution. Canada, as somebody mentioned a moment ago, is halfway between the two. One can go to court if a provincial legislature impinges upon federal jurisdiction and vice versa. However, as long as Parliament and the provincial legislatures stay within the area of jurisdiction assigned to them under the British North America Act, they, too, can make a man a woman. Canadians do not have the same ability, with which Americans are endowed, to correct abuses by Parliament and the legislatures through recourse to the courts. Americans do. Therefore, it would appear that it is more of a constitutional concept than a cultural distinction which results in the different use of our courts. This, at least, is my judgment, and it convinces me that we must have an entrenched Bill of Rights in our Constitution in Canada to protect ourselves in a similar manner.

*W.C. Graham*

I wonder if the panel could elaborate a little more on this problem of the lack of communication or consultation, for those of us who are not as familiar with international law. I bring that up because Professor Baxter's colleague, Professor Soame, has made a great point of that in the meetings between the United States and Canadian Bar committees, where they are discussing the same subject with which we are concerned here today. As an outsider, I found it very difficult to believe there was a lack of consultation or communication. I wondered whether it is realistic to propose another tier of administrative bureaucracy to provide communications which I thought should already be there by virtue of the traditional channels. I would be very interested if the members of the panel would aid us by identifying the reasons for that lack of communication and whether an alternative tier communication is going to solve the problem. In an area such as the antitrust laws, is it really the lack of communication or prior notification? Do we not have to recognize that there are some areas where, without an arbitration mechanism to deal with these problems, states cannot be forced even to communicate? This takes us back to Mr. Leigh's point: the United States Department of Justice does not talk to the State Department when it is deciding whether to prosecute, and the same problem exists in our own society. Without the arbitration mechanism, the communication is not taking place because it is not necessary. I do not think it is because of the lack of a communication mechanism. However, I would be very interested if the panel would tell us if the mechanism is there for that communication.

*Marcel Cadieux, c.r.*

Based on some years of experience in government administration, I think that the process of making decisions is getting to be more complex than it used to be. There is more participation, and it takes a little longer for the political leadership to assess the various implications of a policy decision. This leads to the very delicate problem of determining at which point you relate to the other side of the border, and here, because of differences in size, I must confess that the Americans are very worried if we intervene in their process before they are through.

*Chairman van Roggen*

Thank you, Ambassador Cadieux. I think I am going to declare this meeting adjourned.