

---

January 1983

## A Proposed Model for Dispute Settlement in North America

Rosemary A. McCarney

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>

 Part of the [Transnational Law Commons](#)

---

### Recommended Citation

Rosemary A. McCarney, *A Proposed Model for Dispute Settlement in North America*, 6 Can.-U.S. L.J. 89 (1983)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol6/iss/5>

This Comment is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

## COMMENT

### A Proposed Model for Dispute Settlement in North America

by Rosemary A. McCarney\*

**A**LTHOUGH THERE HAVE always been some differences in points of view and even an occasional clash on issues between Canada and the United States, of late it is difficult to pick up a newspaper or journal without reading of the demise of the good neighbour policy that has steered the course of the relationship to date. Wise persons may and do reasonably differ. Occasional conflicts inevitably surface in the pursuit of national interests and policies in a relationship as interwoven and complex as that of Canada and the United States. Despite repeated declarations on both sides and at all levels of the dawn of a new and more enlightened approach to the relationship, however, the two countries continue to be plagued by political flare-ups that are both inconvenient and costly.

The nature of these brush-fires in recent years is serious enough that the historic approach of cooperation and "exceptionalism"<sup>1</sup> may no longer be workable. This should be of concern to everyone in North America. The stability of the relationship is critical not only to those carrying on business across the border (and approximately 70 percent of Canadian exports go to the United States while 22 percent of U.S. exports come to Canada)<sup>2</sup> but also to those engaged in the multitude of practical, day-to-day encounters that occur along a border that is crossed more than 72 million times annually.<sup>3</sup>

The increasing pervasiveness of the interrelationship has brought with it a growing list of bilateral disputes. These may not be any more difficult, contentious, or complex than those encountered in the past, but the setting is not as conducive to a quick and amicable solution as it once

---

\* Associate, Squire, Sanders and Dempsey, Cleveland, Ohio. Formerly, Assistant Professor of Law, Coordinator-Canada-U.S. Law Institute, Case Western Reserve University, Cleveland, Ohio.

<sup>1</sup> Barry, *The Politics of 'Exceptionalism': Canada and the United States as a Distinctive International Relationship*, 60 DALHOUSIE REV. 114 (1980).

<sup>2</sup> Standing Senate Committee on Foreign Affairs, G. Van Roggen, II CAN. U.S. REL. 5 (1978).

<sup>3</sup> *Id.* at 3 (1975).

was. Growing nationalism in both countries together with a deepening economic stagnation in North America results in keen competition for success at the bargaining table, and this augers poorly for quick, constructive resolutions of bilateral issues.

In addition to the already high-profile issues including Acid Rain, the Auto Pact, Buy-American Legislation, the Fisheries Treaties, the Alaskan Gas Pipeline, Garrison, the Foreign Investment Review Act (FIRA), and the National Energy Program (NEP), there are also the less widely known issues such as non-tariff barrier restrictions to trade (like those complained of in the Michelin Tire case) and the extra-territorial application of U.S. Antitrust Laws (as experienced in the Uranium Cartel case). While there are as yet only verbal salvos being exchanged across the "longest, undefended" border, the action has in fact moved beyond mere rhetoric.

Canada is currently the subject of a U.S. complaint in the international arena alleging that certain provisions of FIRA constitute a violation of our duties under the General Agreement on Tariffs and Trade (GATT). Continued U.S. pressures in this forum as well as through the Council of the Organization for Economic Cooperation and Development (OECD) are likely to be brought to bear against the National Energy Program as well. The American form of government makes the Executive particularly responsive to agitation by members of the House and Senate who in turn are responding to strong oil, gas, steel, and auto lobbies. The Executive moves on these multi-lateral fronts are as much a response to some of the current House and Senate proposals aimed at Canada<sup>4</sup> as they are to the Canadian legislation itself.

Another significant example of the power and impact of the U.S. legislative branch on Canada-U.S. relations, less publicized than that of the non-ratification of the Fisheries Treaty is the Canada-United States Tax Treaty, signed by Finance Minister Allan J. MacEachen and U.S. Treasury Secretary G. William Miller on September 26, 1980, which was to replace the existing treaty in effect since 1942.<sup>5</sup> It is still awaiting U.S.

---

<sup>4</sup> H.R. 1294, H.R. 59 reissued as H.R. 4145, 97th Cong., 1st Sess. (1981) and S.289 97th Cong., 1st Sess. (1981) are aimed at increasing the margin requirements, in transactions involving the acquisition of U.S.-owned securities by non-U.S. persons financed by non-U.S. lenders to the same level as is required where U.S. sources of finance are used. The impetus for this legislation came during the rash of Canadian take-over attempts of corporations in 1980-81.

S.1429 97th Cong., 1st Sess. (1981) before the Senate Subcommittee on Securities, would impose a nine month moratorium on Canadian investments in energy resource corporations in the United States.

H.R. 4146, 97th Cong., 1st Sess. (1981) passed by the House Interior Subcommittee on Mining includes a moratorium on all foreign acquisitions of more than 5 per cent of any U.S. company holding mineral leases in federal land. Unlike S.1429, this Bill was not specifically directed at Canada.

<sup>5</sup> Can. Dep't of Finance, Information Division, Tax Treaty Signed by Canada and the United States of America (Press Release, September 26, 1980).

Senate ratification. A major issue stalling ratification is the exemption Canada negotiated in Article XXV, Paragraph 9, with respect to convention expenses. When President Carter moved to restrict tax write-offs for out of country conventions to a maximum of two per year, the Canadian tourist industry faced serious financial losses. Canada was successful in negotiating an exemption for itself. However, American broadcasting lobbyists are now seeking to link the tax exemption negotiated for Canada with the prohibition placed by Mr. Trudeau on corporate tax deductions for Canadian firms advertising on American radio and television; a source of significant financial loss for U.S. broadcasters.

This commingling of unrelated issues departs from the past practice of keeping issues "clean" in the interests of sound bilateral dispute resolution. One can imagine the difficulty if this technique of horse trading one issue for another prevailed — clear air for scallops, nuclear weapons for tax breaks, or pipelines for Florida real estate.

While a myriad of mechanisms and institutions have evolved to enhance the channels of communication and encourage formal and informal interchange between the two countries in an effort to avoid or manage these kinds of disputes, there is no effective provision available for those instances where disputes escalate and leave both sides with a legitimate position from which they are neither able or willing to move. While dispute avoidance and management procedures have historically been effective in circumventing many serious matters, they do not continue to serve us fully, as evidenced by the growing list of bilateral disputes.

While dispute avoidance generally seeks to short-circuit problems through advance notification or consultation procedures, many of the actions which have impacted most harshly on one nation or the other were not in fact intentional. The effects of such actions were not anticipated, and therefore advance consultation was never considered.

Dispute management through negotiation generally occurs after the identification of a conflict. While there are any number of channels available for negotiations between Canada and the United States, there is nothing to compel the parties to resolve the dispute. Consequently, problems are often left unresolved or are, at best, resolved through a political solution. Further, where negotiations flounder in a relationship as asymmetrical as the Canadian-American relationship, the smaller partner cannot be assured of coming out on the just end of tough negotiations. The other difficulty with this form of open-ended negotiations is the dangerous linking of unrelated disputes mentioned above.

Accepting the principle that Canadians and Americans are, in certain matters, partners in North America (and the more than 200 bilateral treaties and agreements existing between the two countries would seem to substantiate this principle)<sup>6</sup>, a partnership policy would seem appropriate

---

<sup>6</sup> See generally R. WILLOUGHBY, *THE JOINT ORGANIZATIONS OF CANADA AND THE UNITED STATES*, 3-5 (1979).

for dealing with both legal and non-legal issues. The non-legal issues are clearly the most difficult as they are often the most politically and emotionally charged. However, many matters that are currently treated in the political sphere are in fact legal issues; public and private. These should be the most easily resolved as they are set in a context with which we are most familiar. Yet, there is at present no North American model for dispute settlement.

Beginning in 1975, officers of the Canadian Bar Association and representatives of the American Bar Association met with the objective of creating a demonstration research project concerning dispute settlement. In September, 1979, the Joint Working Group composed of members of the two bar associations presented their Report, "Settlement of International Disputes Between Canada and the USA."<sup>7</sup> The Report consists of two draft treaties, one providing for the compulsory settlement of certain legal disputes between the two governments, and the second creating a regime of equal access and remedy in judicial and other proceedings relating to transfrontier pollution. The proposed treaties have been endorsed by both bar associations and steps are being taken to engender legislative support.

The draft treaty on transfrontier pollution<sup>8</sup> is being considered by the members of the Uniform Law Conference of Canada and the Commissioners on Uniform State Laws of the United States. The treaty in essence would provide persons in both countries equal access to judicial and administrative procedures for the prevention of and compensation for pollution damages. (Art. II(a)) The proposal would not change the substantive law of either country but rather certain procedural provisions so that citizens of both countries would be accorded equal treatment in the courts of the country where the pollution originated.

A similar principle was adopted by the OECD in 1977, to implement between Member countries a "Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution."<sup>9</sup> The North American treaty proposal is not as ambitious as the European model, however, in a bilateral context, where the two countries have a history of cooperation, the general framework of the proposal is adequate in seeking to allow litigants from either country to sue in the courts of the other.

As a general principle of law in both Canada and the United States, tortious actions for damages to property resulting from trespass, nui-

---

<sup>7</sup> The Report and Recommendations of the Joint Working Group are compiled in a document published by the Section of International Law of the ABA titled *SETTLEMENT OF INTERNATIONAL DISPUTES BETWEEN CANADA AND THE UNITED STATES*. [hereinafter cited as Bar A. Rep.]

<sup>8</sup> Bar A. Rep., *Draft Treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollution*. [hereinafter referred to in text as the *Draft Treaty*].

<sup>9</sup> OECD, *RECOMMENDATION FOR THE IMPLEMENTATION OF A REGIME OF EQUAL RIGHT OF ACCESS AND NON-DISCRIMINATION IN RELATION OF TRANSFRONTIER POLLUTION*, adopted 17 May 1977.

sance, or injury caused by negligence can only be pursued in the courts where the land is situated.<sup>10</sup> If the court cannot also exercise jurisdiction over the tortfeasor, proof of damages is a hollow victory. While long-arm statutes are helpful for American plaintiffs enforcing judgments in the various states of the United States, Canadian courts are unlikely to honour a judgment of a U.S. court based upon a long-arm statute. Similarly, Canadian plaintiffs could be barred from pursuing their claims in the United States as a result of the holding in *Livingston v. Jefferson*<sup>11</sup> which created the local action rule barring non-resident litigants from initiating actions in U.S. courts.

In the North American context, where individuals and corporations are in continual contact, to deny private remedies to persons with legitimate grievances against the persons of the other country can cause what would otherwise be private disputes to escalate to national policy levels where they are much more difficult to resolve. Recognizing this, the draft treaty seeks in one subject area only, transfrontier pollution, to facilitate access to the judicial and administrative remedies of the courts of the polluting source. Article III extends this principle by granting standing to public and private environmental groups in both countries which meet the prevailing standards of good faith and representation in the jurisdiction of origin. By allowing such representation, the proposal seeks to encourage the participation of environmental watchdogs in such forums as environmental impact hearings and rezoning hearings where they can play a dispute-avoidance role by identifying potential transboundary pollution problems.

Article IV is in keeping with dispute-avoidance principles in the Canada-U.S. relationship by requiring that mandatory notice be given by the country of origin to "persons exposed to a significant risk of trans-frontier pollution . . . to enable them to exercise in a timely manner the rights referred to in [the] Treaty." By requiring notice in all cases where there is risk of pollution, the proposal seeks to facilitate the transboundary exchange of information among individuals or groups that might otherwise be limited to domestic channels of communication. Article V simply reaffirms the principle contained in Article II, that the draft treaty is not designed to change existing substantive rights nor enhance the position of non-nationals over nationals.

By limiting the subject-matter to the environment and the workings of the Treaty to questions of procedure, the Joint Working Group in its proposal provides a practical and possible first effort to the problem of transboundary pollution.

Officials of both countries have already taken a cooperative posture with the establishment of the Bilateral Research Consultation Group on

---

<sup>10</sup> *British South Africa Co. v. Companhia de Mozambique* [1893] A.C. 602 (H.L.), *Albert v. Fraser Companies Ltd.*, [1937] 1 D.L.R. 39, 11 M.P.R. 209 [N.B.C.A.]

<sup>11</sup> *Livingston v. Jefferson*, 15 F. Cas. 660 (C. C. D. Va. 1811) (No. 8,411).

the Long-Range Transport of Air Pollutants in 1978. Originally created to provide a forum for the exchange of scientific information, the Consultation Group went further and in 1979 produced an account of the North American problem of acid precipitation in the "LRTAP Problem in North America: A Preliminary Overview."<sup>12</sup> At the same time U.S. and Canadian officials following an Exchange of Notes on November 16 and 17, 1978, began a series of meetings. On July 26, 1979, the two governments issued a Joint Statement on Transboundary Air Quality,<sup>13</sup> in which both governments pledged to initiate negotiations to culminate in a formal bilateral agreement on transboundary air quality. While a bilateral agreement has not resulted, a Memorandum of Intent concerning transboundary air pollution was negotiated between the two governments on August 5, 1980, which lays the foundation for treaty development.<sup>14</sup>

Although these initiatives are desirable at the national level, problems with negotiations and ratification in the U.S. Senate are probable given the current economic and political environment in the United States. Recognizing this problem the Uniform Law Conference of Canada and the National Conference of Commissioners on Uniform State Laws are considering the enactment of uniform laws to implement the principles embodied in the Joint Working Group's Report in lieu of the treaty format.<sup>15</sup> The result sought is the same: to change the local action rules and provide equal access to the courts of the jurisdiction where the pollution source is located, for victims of transboundary pollution.

The second area to which the Joint Working Group addressed itself was draft enacting legislation, in treaty form, providing for a system of third-party settlement of legal disputes between the two countries.<sup>16</sup>

The second draft treaty proposes both compulsory and optional jurisdiction where continuing disputes have failed to be resolved through direct negotiations after a reasonable period of time and have not been referred to the International Court of Justice (ICJ).

The Joint Working Group's proposal limits compulsory jurisdiction to only a small category of questions under Article I relating to ". . . any question of interpretation, application or operation of a treaty in force between them. . . ." "Treaty," in this context, is to be construed as applicable to any kind of international agreement to which the two governments are signatories, but not including agreements between states and

---

<sup>12</sup> United States-Canada Research Consultation Group on the Long Range Transport of Air Pollutants, the LRTAP Problem in North America: A Preliminary Overview (October 1979).

<sup>13</sup> DEP'T STATE BULL., Nov. 1979, 26-27.

<sup>14</sup> DEP'T STATE BULL., Oct. 1980, 21.

<sup>15</sup> Joint Drafting Committee of Uniform Law Conference of Canada and National Conference of Commissioners on Uniform State Laws, Uniform Transboundary Pollution Reciprocal Access Act (March, 1982).

<sup>16</sup> Bar A. Rep., *Draft Treaty on a Third Party Settlement of Disputes* [hereinafter referred to in text as the *Second Draft Treaty*]

provinces. Since the parties have already agreed to the rules contained in the treaty, issues such as incursions into state sovereignty should not arise so readily.

All legal disputes not subject to compulsory jurisdiction under Article I may be submitted to third-party settlement through special agreement by both parties. The draft proposal also suggests a nonexhaustive list of legal disputes which would be appropriate subjects for such special agreements including environmental issues, the management of natural resources of common interest, and transnational applications of civil and criminal law. (Article II)

Clearly, the stumbling block is for the parties to enter into this *ad hoc* agreement which would then trigger the third-party settlement provisions. What the Joint Working Group has proposed to encourage with the use of these provisions is to provide the parties with an orderly progression through various stages of dispute settlement. (Article III)

The second draft treaty provides firstly that a dispute would be submitted to a three-member *ad hoc* arbitral tribunal, but makes provisions for larger tribunals where the dispute is of a particularly complex nature or involves many regional interests on both sides of the border. The striking of the tribunal is flexible not only in that the size may be adjusted to the particular dispute, but also in that the qualifications of personnel to be appointed is flexible allowing for experts on particular subjects to sit as *ad hoc* members.

One national of each country would serve as a judge with the selection of the third judge left to agreement by the two countries. Where the parties are unable to agree on the choice of a third judge, the International Court of Justice under Article III(a), at the request of the parties, may make the appointment. If a tribunal is not able to be constituted under Article III(a), at the request of either party, the dispute may be submitted to the ICJ under Article III(b) and decided by one of its Chambers, established under the provisions of Article III(c).

Article III(c) provides for the use of a specifically constituted Chamber of the ICJ. Under the 1978 amendments to the Rules of Procedure of the Court,<sup>17</sup> the views of the parties to a dispute are solicited regarding the composition of the Chamber. Recognizing this, Article III(c) provides that under Article 26(a) of the Court's statute, when one of the parties submits a dispute to the Court, to be considered by a Chamber of the Court, the judges shall consist of one national of Canada, one national of the United States, and the third judge is to be decided by agreement between the parties. If the parties are unable to pick the third member, the Court has the power to elect a person from among its members and the parties themselves may request that this member be from a particular geographical region or legal system. By providing for the alternative facil-

---

<sup>17</sup> RULES OF PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE RELATING TO THE ESTABLISHMENT AND OPERATION OF A CHAMBER, arts. 16 and 17 adopted on 14 April 1978.

ities of the ICJ, the proposal ensures that the dispute itself is not losted in unresolved disagreements concerning the organization of third party settlement.

The tribunal or chamber under Article VIII would “. . . apply the principles and rules of international law, especially as reflected in the treaties and practices of Canada and the United States, as well as other relevant principles of substantive law in force in either of the two countries, particularly those manifesting their common legal traditions.” The significance of this provision is that it provides an opportunity for the development of what the Joint Working Group refers to as “North American Jurisprudence.”<sup>18</sup> In international dispute settlement, the courts in applying international law will look to customary international law as it has developed and become part of the practice of the international community. In this instance, the tribunal or chamber would be applying international law in light of the customary practices and traditions in North America. The applied principles therefore should be the most relevant and the most appropriate for the special problems of North America.

Finally, the Joint Working Group provides in Article X for advisory opinions in those instances where for political reasons the governments may hesitate to give final authority to make a binding decision to a tribunal. The clear benefit of such an advisory opinion is that it takes a dispute out of partisan hands and places it in those of a specially constituted tribunal with expertise in the particular area of the dispute. The tribunal is able to pursue its fact-finding task and then assess the issue for the two governments in a neutral forum. The advisory opinion may then serve as an impetus for further negotiation where a dead-lock has occurred and may provide a basis for more constructive negotiations. The model proposed by the bar associations has the advantage of combining the stability and institutionalized character of a court such as the ICJ with the flexibility of the *ad hoc* composition of an arbitral tribunal.

In providing for a flexible institution in terms of composition, the proposals enable that institution to make firm decisions in an escalating manner so that disputes are not allowed to go unattended, negotiations are not allowed to continue without end, and the destructive linking of issues is barred from the decision-making process. Given the interdependence of the two nations, it is surprising that we have managed for so long to avoid constructing such a binding procedure for the resolution of the many tough and often emotional issues that necessarily arise in such a relationship.

A dispute settlement mechanism is the first criterion denoting a successful partnership. If Canada and the United States are to live up to their world reputation as a model for international relations, then the increasing complexity and opportunity for conflict arising out of that his-

---

<sup>18</sup> Bar A. Rep., 85.

torically harmonious relationship must be recognized and accomodated accordingly. As the bilateral agenda grows this should be accorded some urgency by both governments.