



Canada-United States Law Journal

Volume 1 | Issue

Article 19

1978

Reports on Seminars: Boundary and Resource Issues

Charles B. Bourne

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

 Part of the [Transnational Law Commons](#)

Recommended Citation

Charles B. Bourne, *Reports on Seminars: Boundary and Resource Issues*, 1 Can.-U.S. L.J. 154 (1978)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol1/iss/19>

This Speech 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.

cedures were referred to in the animateur's report. The speaker pointed out that some disputes, such as boundary disputes can, by their very nature, be drawn out whereas others require prompt settlement. Those disputes requiring quick settlement need a bilateral solution. The comment was also made that GATT procedures may be problematic for countries which are not economic superpowers.

The point was then made that the area of dispute settlement in Canada is made more complex by reason of the nature of the Canadian Constitution. This was supported by a comment that Canada may not have signed the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States for constitutional reasons. Finally, it was suggested that some major issues of provincial concern should not be channeled through the federal government for settlement.

In summary, the discussion was both lively and well-informed. However, time did not permit consideration of many important areas, including the Foreign Investment Review Act, disputes and dispute settlement procedures between private individuals or corporations and the state or its subdivisions, and the effect of recent Canadian provincial actions and proposals on the evolution of international law. It was as if we had only quickly snatched a few pieces of fruit from a fully laden tree. I do hope that the opportunity will arise to reap the full harvest.

Charles B. Bourne, Boundary and Resource Seminar

The task of my group was a rather narrow one. It was to examine the problem of the settlement of disputes of a particular kind; that is, boundary disputes. We focused particularly on marine boundary disputes. Our discussions were influenced by the actual existence of a number of difficult disputes of this sort at the present time.

The particular disputes were referred to in some detail by Professor Emanuelli, who presented the paper opening the discussion of the group. First, the problems in the Gulf of Maine were mentioned, where the boundary for the continental shelf and the fishing zone is in dispute. Associated with this is the problem of the sovereignty over Machias Seal Island. Second, there is the dispute concerning the boundary line for the continental shelf purposes and fisheries off the coasts of Alaska and Canada in the Arctic. Third, we have the problem of drawing the boundary between the two countries off Dixon Entrance, and of the A-B line within Dixon Entrance, itself. Finally, our attention was drawn to the boundary line off the Strait of Juan de Fuca. In addition, there are some serious disputes about fisheries, especially the salmon fishery.

In his paper, Professor Emanuelli outlined the traditional methods of settling international disputes and, in general, came to the same conclusions that were reached by the panelists in the opening session yesterday. That is to say, he recognized the advantages of negotiation, conciliation and good offices, but he admitted it was not likely that these would be used by Canada and the United States. Ultimately, the submission of a dispute to third-party

settlement, either by an arbitration board, or by the International Court of Justice or any one of its Chambers, was viewed as a possibility. Negotiation was viewed as the best means of solution.

The conclusion Professor Emanuelli reached was that, failing negotiation, third-party decision was the sensible thing to do. On this point, he seemed to draw a distinction between submission to the Court and to an arbitration tribunal, mainly on the ground that the arbitrators would, he thought, have more flexibility. In the discussion that followed his paper, however, this was critically examined.

The view that emerged was that the law was essentially the same in both types of tribunals. More importantly, in these boundary disputes the result is likely to be the same. The special nature of boundary problems was emphasized. The task of the Court or arbitral tribunal would be to draw a line. This would involve the exercise of a legislative function, because there would be no rules of law to aid in determining where to draw the line. This is especially true in the case of drawing a line which divides resources, where the rule requires that it be done on the basis of equitable principles. There may be criteria that should be taken into consideration, but it is ultimately a subjective judgment. This subjective factor in drawing boundary lines—the uncertainty about the result—was recognized as discouraging states from submitting such disputes to third-party settlement.

Professor Emanuelli also suggested a distinction between drawing a boundary line based on treaty interpretation or occupation, and a line of apportionment of resources. In the latter case, he saw the need for a procedure that would involve the use of experts. In the discussion following his paper, however, the opinion was expressed that the need to involve experts should not influence the decision whether to submit the matter to the International Court of Justice or to an arbitral tribunal, because the Court could also utilize experts in its consideration of the case.

Professor Emanuelli also expressed the opinion that each issue, each particular boundary line, should be looked at individually and that the appropriate form of settlement for the issue should be chosen. He was against referring all of these questions to the Court or to arbitration in one package. He thought the particular terms of reference, and the particular technique used, might vary from case to case. For example, if one is dealing with a fisheries problem, perhaps there would be a need for a different procedure and even a different type of tribunal, than would be required if we were dealing with the seabed. Each case should be considered on its own basis.

The general discussion following the paper produced little dispute. The consensus was that the Canada-United States maritime boundary disputes were justiciable, and if no agreement could be reached, they should be submitted either to the Court or to an arbitration tribunal. However, no clear opinion emerged concerning which particular tribunal is to be used. The feeling was that there is not any essential difference between these tribunals, although it was asserted that the use of a chamber of the Court was more appropriate than using the full Court. It was also the opinion of the group that

the decision on the matters in dispute should be reached soon, as it would be a serious complicating factor if some valuable resources were discovered in the disputed areas, and were ready for exploitation, before the boundary line was drawn. If one knows what is there, it is more difficult to contemplate giving up or losing your right to it. There was, then, a feeling that the issues should be dealt with soon, and if negotiation does not produce any immediate solution, there should be quick progress to third-party determination.

Myres McDougal, Pollution Seminar

In the seminar on pollution issues, we organized our inquiry with reference to: first, what are the specific problems which exist between our two countries in relation to the environment; second, what fundamental policies might be relevant to, and acceptable for, the solution of these problems; and finally, what legal processes, both national and international, might be available for the solution of such problems. We attempted to place emphasis upon both the substance of the law and upon the procedures or remedies that might be available. We did not approach the subject for the purpose of coming up with solutions to a very comprehensive, important, continuing set of problems. Rather, we attempted to outline a framework of inquiry for future study and future recommendation. We felt that the mandate of the committee was not to concentrate upon some narrow conception of pollution, but to consider the whole range of environmental problems.

When we began to reflect upon these problems, we saw that damage to, and changes in the environment could come from almost any source—from the land masses, from the waters, and from the atmosphere—and that all of these sources comprising the environment were completely interdependent. Much of the pollution affecting the land masses came from the ocean. In turn, much of the pollution of the oceans came from the land masses. Similarly, many of the activities of the land masses pollute the atmosphere and affect both the waters and the land masses. I recall the remark of Professor John McHale, in which he pointed out these interdependencies very graphically by noting that the atmosphere over Tokyo, one day, will be over Ottawa and New York thirty days later.

What we are really concerned with, when we are talking about environmental protection, is the protection of our whole resource base: land, water and air. Professor de Mestral itemized all of this in very considerable detail. A number of specific problems were reviewed, including the Head Harbour Passage, the Cherry Point Oil Refinery, the drilling for hydrocarbons in the Beaufort Sea, the legality of the Arctic Waters Pollution Prevention Act, river pollution, the Poplar River, the Garrison Diversion, the implementation of the Great Lakes Water Quality Agreement, and the Detroit-Lake Saint Clair air pollution. Mr. Epstein also pointed out that the building of a nuclear submarine base and nuclear installations will have great impact.

It was not, however, this specific itemization that most concerned us; rather, it was the whole complex problem, of which these itemizations are but momentary manifestations. We did, of course, anticipate urgent, continuing