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A Primer on the Boundary Waters Treaty and the International Joint Commission

Peter Pantaleo

NOTE

A PRIMER ON THE BOUNDARY WATERS TREATY AND THE INTERNATIONAL JOINT COMMISSION

I. INTRODUCTION

The problem of salinization of the Souris River flowing into Canada, has brought the Garrison Diversion Project to the attention of officials in Canada. The Canadians have made it clear that they want no degradation of water flowing into Canada.[1] This has brought to the fore the Boundary Waters Treaty of 1909 and the International Joint Commission.[2] It is time then to examine the Treaty and see what applications, if any, it has to problems which may result from trans-boundary pollution arising out of the Garrision Project.

This note will examine the applicability of the treaty to Canadian objections to Garrison Diversion by outlining the history of the Treaty, and the reasons for its formulation. A detailed analysis of the organizaion, functions and procedures of the International Joint Commission established by the treaty will follow. The availability of the Commission to the problems of individuals will be examined in the last section of this note.

Nations enter into treaties with other nations to further their own interest in a particular area.[3] A treaty has been defined as "a written agrreement by which two or more States or international organizations create or intend to create a relation between themselves operating within the sphere of international law."[4] Absent such a specific agreement, there is no reason to believe that nations would conduct their affairs in a manner not detrimental to neighboring states. As Alexander Hamilton stated in *Federalist, No. VI*:

> To look for a continuation of harmony between a number of independent unconnected sovereignties, situated in the same neighbourhood, would be to disregard the uniform course of human events and to set at defiance the accumulated experiences of ages.[5]

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1. *See* Grand Forks Herald, Oct. 19, 1973, at 3, col. 1; Grand Forks Herald Sept. 17, 1973, at 1, col. 2.
2. Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, 36 Stat. 2448 (1910), T.S. No. 548.
3. *See* H. MORGENTHAU, POLITICS AMONG NATIONS (1951).
4. MCNAIR, THE LAW OF TREATIES 4 (1961) (footnotes omitted).
5. A. HAMILTON, J. MADISON, and J. JAY, THE FEDERALIST 25 (M. Beloff ed. 1948).

Treaties are contracts of necessity, made with the intention of avoiding the type of disagreements that lead to war.[6] It is from this perspective that we shall examine the Boundary Waters Treaty of 1909.[7]

II. HISTORY OF THE TREATY

In April of 1906, Mr. George Gibbons, the Canadian representative to the International Water Ways Commission[8] suggested to his United States counterpart, Mr. George Clinton, that a treaty be drafted to facilitate settlement of disputes between the two countries with respect to international water.[9] Negotiations were conducted in 1907-08 and were extremely trying to both parties.[10] Despite difficulties,[11] the negotiations resulted in terms that were not totally agreeable to, but nonetheless were accepted by, the Canadians.[12]

Two questions of equal importance that arise are: (1) Why did the Canadians accept a treaty that varied considerably from what they had originally hoped for; and (2) Why did the more powerful United States see the need for a treaty at all?[13] To fully understand a treaty, its origin and terms, one must understand the motivation of framers.[14] As the treaty is essentially a political document, it is necessary to explore the state of relations between the two powers[15] concerning water rights and other political issues[16] at the time it was drafted. To understand the Canadian motives, it is necessary to consider the relative power of Canada vis-avis the United States in 1909.[17] As Canada had no Ministry of External Affairs, it was subject to the bargains negotiated by the British

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6. *See* Speech by Benjamin Disraeli in the House of Lords, July 18, 1878, II SELECTED SPEECHES OF THE LATE RIGHT HONORABLE THE EARL OF BEACONSFIELD 199-200 (T.E. Kebbel ed. 1882) (on the Berlin Treaty).

7. Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, 36 Stat. 2448 (1910), T.S. No. 548.

8. For a collection of the letters of George Gibbons relating to the Treaty, see Gibbons, Sir George Gibbons and the Boundary Waters Treaty of 1909, 34 CAN. HIST. REV., No. 2, at 124 (1953).

9. L. BLOOMFIELD & G. FITZGERALD, BOUNDARY WATER PROBLEMS OF CANADA AND THE UNITED STATES 11 (1958).

10. Gibbons, *supra* note 8, at 125.

11. *Id.*

12. L. BLOOMFIELD & G. FITZGERALD, *supra* note 9, at 48. Sir Wilfred Laurier (Canadian Prime Minister) was always convinced that the treaty was a generous concession to the United States. He wrote to Gibbons in 1909:

> If I were to follow my own inclinations at the present time, we should decline the treaty. Article II has always seemed to me a very serious source of trouble, but in view of other concessions, I have been disposed to accept.

Id.

13. The Canadians believed that the United States would benefit from an *ad hoc* approach to dispute settlement, in the absence of a treaty. *See* Gibbons, *supra* note 8, at 24.

14. MCNAIR, LAW OF TREATIES 6 (1961).

15. *See* A. BURT, CANADA (1942).

16. *See* L. BLOOMFIELD & G. FITZGERALD, *supra* note 9, 1-13, for a detailed history of Canadian-American relations in regards to water prior to 1909.

17. A. BURT, CANADA 1-9 (1942).

Foreign Office.[18] Canada's desire to bypass the British Foreign Office and deal directly with the United States was emphasized in a letter to Prime Minister Laurier:[19]

> Once the Americans come to deal directly with us they will play the game fairly. It is only because we have got John Bull around that they bully us. Once we get him out of the game there will be no prestige in tackling a little fellow who will kick their shins.[20]

Canada's desire not to lose negotiating ground or be forced to rely on British intervention in international problems put them at a disadvantage in the bargaining process .This allowed the Americans to be agressive in seeking terms that were favorable to them.

At the time the Boundary Waters Treaty was negotiated, the Americans had a nationalistic interpretation of international riparian law—generally referred to as the Harmon Doctrine.[21] This doctrine states:

> [T]hat the rules. . . of international law impose no duty . . . upon the United States of denying to its inhabitants the use of the water of that part of the Rio Grande lying entirely within the United States, although such use results in reducing the volume of water in the river below the point where it ceases to be entirely within the United States. The recognition of such a right is entirely inconsistent with the sovereignty of the United States over its national domain.[22]

The doctrine was in direct conflict with the existing precepts of international riparian law, and represented an extremely nationalistic position.[23] The prevailing interpretation of both international[24] and common law[25] in regard to control of water by riparian owner was ignored and the Harmon Doctrine was validated by the Boundary Waters Treaty of 1909.

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18. *Id.* at 248, for an interesting history of the development of the Ministery of External Affairs.
19. Letter from G. Gibbons to W. Laurier, P.M., Sept. 24, 1907, portions quoted in Gibbons, *supra* note 8, at 128.
20. Gibbons, *supra* note 8, at 128.
21. Judson Harmon was United States Attorney General from 1895-1897.
22. 21 OP. ATT'Y GEN. 274 (1895).
23. *See* 1 L. OPPENHEIM, INTERNATIONAL LAW 321 (1920).
24. Note, *The Development of International Law with Respect to Trans-Boundary Water Resources: Co-operation for Mutual Advantage or Continentalism's Thin Edge of the Wedge?* 9 OSGOOD HALL L.J. 261 (1971) *citing* Sir R. Borden, *House of Commons Debates*, III Sess. 11th Parl., 1910-11 Vol. 1, at 903-04.

> Just as the independent territorial supremacy does not give a boundless liberty of action . . . a state is in spite of its territorial supremacy not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighboring state, for instance to *stop or divert the flow of a river which runs from its own into neighboring territory.* (emphasis added).

Id. at 264.

25. 33 HALSBURY'S LAWS OF ENGLAND, 599 (1939):

> Every riparian owner may divert the water of a stream for purposes in connection with his land, or for other purposes, but he is bound to return the water which he has diverted into the stream again before it leaves his land substantially undiminished in volume and unaltered in character. . . .

While an important part of the contracting parties' motivation to enter a treaty is their individual self-interest, there must also be a common ground of mutual self-interest. The boundary line between the United States and Canada is 3,500 miles long; at least 2,000 miles of the boundary are marked by navigable and non-navigable waters.[26] Neighbors with a common boundary of this length are bound to have occasional disputes. Establishing a system for the resolution of conflicts benefits both parties and provides the necessary common ground for an agreement. The Treaty of 1909 was "the last step in the development of techniques for the avoidance of such controversies."[27]

III. THE INTERNATIONAL JOINT COMMISSION: HISTORY, FUNCTIONS AND PROCEDURES.

The Boundary Waters Treaty provided for the creation of a commission to facilitate the enforcement of its terms[28] which appears to have been a Canadian idea.[29] As the purpose of the Treaty was to "prevent disputes between the contracting parties"[30] the Canadian representive felt that if the treaty was to mean anything, and the rights of Canadians were to be protected, there would have to be a commission to settle disputes and enforce the terms of the treaty.[31] The only alternative to a permanent commission that was discussed was a system of *ad hoc* commissions made up of local politicians, a system rejected by the Canadians, but favored by the United States.[32] After vigorous negotiations, the idea of a permanent commission was finally accepted and included in the treaty.[33]

The commission has a double function under Article VIII:

> [a]dministrative, in the application by a system of permits, of a legislative rule to particular cases as they arise; judicial, in its procedure and in the adjustment of conflicting interests on the basis of equity.[34]

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26. L. BLOOMFIELD & G. FITZGERALD, *supra* note 9, at 1.
27. *Id.*
28. Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, art. VII, 36 Stat. 2448 (1910), T.S. No. 548.
29. *See* Gibbons, *supra* note 8, at 125.
30. Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, 36 Stat. 2448 (1910), T.S. No. 548.
31. Gibbons, *supra* note 8, at 127. In a letter to the Prime Minister in 1907, Gibbons said:
> [t]here is only one way in which we will get fair play, and avoid a conflict with them [Americans], and that is by a permanent joint commission which will play the game fairly, and whose conclusions will be so justified by public opinion, even in the United States as to compel their acceptance.

Id.
32. *Id.* at 125.
33. Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, art. VII, 36 Stat. 2448 (1910), T.S. No. 548.
34. *See* McKay, *The International Joint Commission Between the United States and Canada*, 22 AM. J. INT'L. L. 292, 293 (1928).

In other words, the commission is empowered to pass upon all applications for the use or obstuction or diversion of certain waters along the international boundary,[35] and in doing so "shall be governed by. . . rules or principles which are adopted by the High Contracting Parties for this purpose."[36] Further, they are judicially empowered to formulate remedial or protective works and to provide for the protection and indemnity of adversely affected interests.[37] The procedures used by the commission when considering applications are essentially judicial.[38] The Commission has the powers of investigation under Article IX and arbitration under Article X.[39] To fully understand the International Joint Commission, its functions will be examined separately, following a brief survey of its organization.[40]

A. ORGANIZATION OF THE COMMISSION

The International Joint Commission is composed of six members, three from the United States and three from Canada.[41] Also, both the United States and the Canadian sections have appointed secretaries who act as joint secretaries at the Commissions' joint sessions.[42]

Due to the technical nature of the work, the Commission normally appoints a board of experts which serves in an advisory capacity.[43] The usual procedure is the for the contracting parties to assure the Commission that all the agencies and personnel of their respective governments will be available as needed during the course of the investigation.[44] The authority to appoint a board is usually found in the terms of the reference.[45]

B. FUNCTIONS OF THE COMMISSION

The functions of the commission may be divided into four areas:

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35. *Id.*
36. Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, art. VIII, 36 Stat. 2448 (1910), T.S. No. 548.
37. *Id.*
38. *See* McKay, *supra* note 34, at 294.
39. Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, arts. IX, X, 36 Stat. 2448 (1910), T.S. No. 548.
40. *See* CHACKO, THE INTERNATIONAL JOINT COMMISSION (1932); HACKWORTH, DIGEST OF INTERNATIONAL LAW, Vol. I, 593-94, 617, 756-58, 760-62; Vol. II, 342-43, 344; Vol. VI, 4-5 (1944).
41. Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, art. VII, 36 Stat. 2448 (1910), T.S. No. 548. The favored occupations of the commissioners seems to be law and engineering. *See* McKay, *supra* note 34, at 304.
42. McKay, *supra* note 34 at 314.
43. Note, *The International Joint Commission (United States-Canada) and the International Boundary and Water Commission (United States-Mexico): Potential for Environmental Control Along the Boundaries*, 6 N.Y.U.J. INT'L L. & POL. 499, 507 (1973).
44. Letter from the Secretary of State to the United States Section, International Joint Commission, April 1, 1946 (reprinted in IJC, Report on the Pollution of Boundary Waters 13 (1951)).
45. Reference is the name given to documents submitted to the Commission for a decision.

jduicial, investigative, administrative, and arbitrative.[46] These functions with the excepon of the administrative function will be discussed individually from both a procedural and substantive perspective.

1. *The Commission as a Judicial Body*

Under Article VIII of the treaty, the commission:

> shall have jurisdiction over and shall pass upon all cases involving the use or obsrtuction or diversion of the waters with respect to which under Articles III and IV. . .the approval of this Commission is required.[47]

This Article gives the Commissin broad jurisdiction, which they have had to define on occasion.[48] The Treaty sets out certain rules that the Commission is to follow when passing upon an application involving the use or obstruction of boundary and trans-boundary waters.[49]

The rules provide that the Commission shall observe the following priority of uses in which both countries have equal and similar rights on their own side of the boundary: (1) domestic and sanitary purposes, (2) navigation, and (3) power and irrigation. The Commission may in their discretion, suspend the requirements for equal division if it is not advantageous, because of local conditions or if the division diminishes the amount available for use on the other side. Approval from the Commission can be withheld for any use or diversion until remedial or protective works are constructed for the protection and indemnity against injury of any interests on either side of the boundary. In cases which involve the elevation of the natural waters on either side of the boundary, suitable and adequate provision for the protection and indemnity of all interests on either side of the line which may be injured is mandatory.[50]

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46. L. BLOOMFIELD & G. FITZGERALD, *supra* note 9, at 17, 38, 53, 55.

47. Treaty with Great Britain Relating to Boundary Waters Between tre United States and Conada, Jan. 11, 1909, art. VIII, 36 Stat. 2448 (1910), T.S. No. 548. The Preliminary Article defines boundary and trans-boundary waters:

> For the purpose of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the internationol boundary between the United States and the Dominion of Canada passes, including all bays, arms and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

Id.

48. *See* McKay, *supra* note 34, at 295 *citing* Application of Greater Winnipeg Water District, Sept. 8, 1913, conditional approval, Jan. 14, 1914. Jurisdiction over obstructions in water flowing from boundary waters, the tendency of which is to raise the level on the other side of the boundary, is expressly delegated to the commission, while jurisdiction over uses or diversions of such waters which would lower levels on the other side of the boundary is not expressly included. The Commission settled the question by expanding their jurisdiction to cover the problem.

49. Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, art. VIII, 36 Stat. 2448 (1910), T.S. No. 548.

50. L. BLOOMFIELD & G. FITZGERALD, *supra* note 9, at 19-20.

The Commission has jurisdiction in regard to both "boundary waters,"[51] and "waters flowing from waters and waters at a lower level than the boundary in trans-boundary rivers."[52] This note will concentrate on the Commission's jurisdiction over the trans-boundary waters.[53]

A summation of the various references which form the basis of the Commission's jurisdiction is necessary.[54] The Commission has considered many applications under Article IV, the only article in the Treaty which specifically mentions pollution.[55] Virtually all the applications have been submitted by one of the governments or the other.[56] Apparently the Commission has been swayed by the argument that its jurisdiction is limited to considering applications of the governments only and not those of private interests.[57] A suggested reply to this argument is that the development of water power is in private hands for the most part in both countries, and such restrictive interpretation of the Treaty would frustrate the development by the parties of an important source of wealth and this could not have been the meaning or the purpose of the treaty.[58] The Commission dismissed the one reference made by a private party (not made through his government) for lack of jurisdiction.[59]

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51. Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, 36 Stat. 2448 (1910), T.S. No. 548.

52. *Id.*

53. The reason for this is that the primary purpose of this note is to examine the remedies of Canadians aggrieved by changes in their environment caused by Garrison Diversion's effect on two trans-boundary waterways, the Souris and Red Rivers.

54. For a complete analysis of the jurisdiction of the International Joint Commission, see L. BLOOMFIELD & G. FITZGERALD, *supra* note 9, at 21-28.

55. *Id.* at 24. Under Article IV the Commission has considered applications concerning such matters as the adjustment of differences between drainage districts, dams and reclamation works. *Id.*

56. *Id.* at 26.

57. *Id.*

58. Kottenay Lake Storage, No. 27, *cited* in L. BLOOMFIELD & G. FITZGERALD, *supra* note 9, at 125, 127. The Canadian Government argued this point before the Commission. They contended:

> The Commission had jurisdiction to deal with an application by a private enterprise. A contention to the contrary would defeat the whole object of the Treaty. In most of the states bordering on the international boundary line and in most of the Provinces of Canada, the economic development of boundary waters and waters flowing across the boundary was in the hands of private interests and corporations. An interpretation of the Treaty which excluded from its operation the development of power and irrigation resources would frustrate the development of very substantial areas in both countries. There was nothing in the Treaty to indicate that development by private interests was excluded from its provisions and the fact that both governments had for more than twenty-one years acquiesced in and acted upon rules of procedure authorizing applications by private interests would seem to be conclusive.

Id. at 127.

59. Madawaska Company Docket No. 31, *cited* in L. BLOOMFIELD & G. FITZGERALD, *supra* note 9, at 142-43:

> The Saint John River Power Co., in reply, alleged that the Commission had no jurisdiction in the matter, and that the Madawaska Co. was not a competent party. Private citizens [they] . . . argued, can appear before the commission only in certain cases. Therefore, the Madawaska Co. was not able to appear before the Commission under Art. IV, unless through its government and the Company had not done so.

Id. at 143. The application was denied for lack of jurisdiction.

The problems individuals have under the Treaty shall be discussed in depth at a later point.[60]

A reading of the treaty and the references made pursuant to it seems to indicate that the jurisdiction of the Commission is indeed limited to those "cases" brought to it by the contracting parties.[61] What remedy does an injured party have when the cause of his injury is located in the terrority of the other party?[62] Perhaps the best example of this type of situation can be found in the Trail Selter Dispute.[63] This dispute between Canada and the United States lasted 13 years, from 1928 to 1941.[64] A Canadian company located on the Columbia River in British Columbia, a short distance from the boundary, was emmitting tremendous amounts of sulphus dioxide gases into the air, which drifted across the boundary and caused damage in the State of Washington.[65] The problem that the United States faced in trying to find relief for its citizens is explained by Read:

> The subject-matter of the dispute did not directly concern the two governments; nor did it involve claims by United States Citizens against the Canadian government. It did not seem to come withing any of the ordinary categories of arbitrable international disputes. It consisted rather of claims based on nuisance, alleged to have been committed by a Canadian corporation and to have caused damage to United States citizens and property. . . . The United States proposed to refer the questions at issue to the International Joint Commission, . . .and the Canadian government concurred; . . .[66]

The dispute was referred to the Commission under Article IX, which provides for investigation and recommendation, but not decision.[67] The Commission issued a unanimous report, assessing damages against Canada, which Canada accepted, but the United

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60. *See* text accompanying note 120, *infra.*

61. L. BLOOMFIELD & G. FITZGERALD, *supra* note 9, at 26.

62. If the party is able to convince the Commission before it grants a permit that he will suffer a loss, the Commission may under Art. VIII:

> subject its approval of the proposed works to certain conditions, including the construction of remedial or protective works and making suitable and adequate provision for the protection and indemnity against injury of any interests on either side of the boundary.

Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, art. VIII, 36 Stat. 2448 (1910), T.S. No. 548.

63. Reports of Int's. Arbitral Awards, vol. III., 1905-82.

64. For an analysis of the Trail Smelter Dispute, see Read, *The Trail Smelter Dispute,* 1 CAN. YEARBOOK OF INT'L. L. 213 (1963).

65. *Id.* at 213.

66. *Id.* at 213-14.

67. Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, art. IX, 36 Stat. 2448 (1910), T.S. No. 548, states:

> The International Joint Commission is authorized in each case (of disputes between the U.S. and Canada) . . . to examine into and report upon the facts. . . . Such reports . . . shall not be regarded as decisions of the questions or matters submitted either on the facts or the law and in no way have the character of a arbitral award.

States rejected.[68] This dispute led to the creation of a convention which established a tribunal to settle the matter.[69]

It can be seen from the Trail Smelter Dispute that the Commission can perform in an unbiased manner when called into an International controversy, and is not susceptable to the usual squabbling that is normally present when representatives get together to determine the rights of their respective countries under an international agreement.[70]

Once judicial jurisdiction has been obtained by a contracting party, what procedures does the Commission follow in "adjudicating" the rights of the parties involved? There is a published set of procedural rules,[71] but it has been suggested by one authority that these rules are not in fact the actual procedures followed by the Commission; that the actual procedures can be found in the dockets opened since 1958.[72] According to this authority, the rules pertinent to handling applications under Articles III and IV of the Treaty read as though the Commission operates much like a court of law with pleadings, pre-trial conference, a hearing at which the witnesses are examined and cross examined by counsel, and a written disposition of the application. After reading a transcript of a hearing, however, one concludes that the Commission's hearings resemble those of a legislative or administrative body rather than a judicial one.[73]

In 1912 when the Commission first met, administrative procedure was not yet a refined art and the framers of the rules of procedure were lawyers, who naturally wished to work in the procedures with which they were most familiar.[74] Reviewing applications in a manner usually associated with the adversary process would tend to identify the parties as winners and losers rather than to create an attitude of cooperation. Such an atmosphere is not conducive to international negotiations.[75]

The procedure laid out in the rules is a simple one.[76] An application is presented to the Commission from either government[77]

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68. Reports of Int'l Arbitral Awards, vol. III, 1905, 1918-19.
69. *See* Trail Smelter Arbitration, 3 U.N.R.I.A.A. 1905 (1941) printed in 35 AM. J. INT'L. L. 684, 713 (1941).
70. *See* A. McNair, International Law in Practice, XXXII THE GROTIUS SOCIETY TRANSACTIONS FOR THE YEAR 1946, 154-164 (1946), *cited* in MORGENTHAU PRINCIPLES AND PROBLEMS OF INTERNATIONAL POLITICS 112-20 (1950).
71. INTERNATIONAL JOINT COMMISSION, RULES OF PROCEDURE & TEXT OF THE TREATY, OTTAWA, CANADA-WASHINGTON, D.C. (1965).
72. Waite, *The International Joint Commission—Its Practice and Its Impact on Land Use*, 13 BUFF. L. REV. 93, 101 (1963).
73. *Id.*
74. *Id.*
75. *See* R. Neibuhr, *The Myth of World Government*, THE NATION, March 16, 1946, at 312.
76. *See* Waite, *supra* note 72, at 102-17 for a detailed contrast between the written rules of procedure, and what appears to be the actual procedures used, as revealed by the Dockets.
77. Rules of Procedure, 12(1), *supra* note 71.

on its own initiative or as the result of an individual[78] submitting an application to his government to be forwarded to the Commission on his behalf.[79] The Commission retains jurisdiction after granting an order approving a particular use.[80] Rule 13 deals with the technical nature and formal requirements of the application.[81] Rule 14 deals with authorization of the project by the sponsoring government when this is appropriate.[82] Rule 15 is important in that it requires newspaper publication in both countries "in . . . localities which, in the opinion of the Commission, are most likely to be affected by the proposed use, obstruction or diversion."[83] Rules 17 through 22 deal with statements in reply,[84] supplemental or amended application and statements,[85] time allowances,[86] interested persons and counsel,[87] consultation and witnesses and production of documents.[88] Actual hearings are scheduled by the chairmen of the two sections, written notice sent out to the parties involved and all hearings are open to the public.[89] The rules require that time be provided for briefs and arguments by counsel.[90] It is discretionary whether testimony be under oath,[91] but the safeguard of cross-examination is mandatory.[92] Questions of admissibility of evidence are decided by the Commission.[93]

Reading the rules gives the impression that hearings are very formal, but a description of a hearing dispels this notion.[94] As one commentator pointed out:

> The Commission made it easy for anyone in attendance to be heard. At the start of the meeting, the secretaries canvassed the audience for persons desiring to be heard, to assure them they would be called on to speak.[95]

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78. *Id.* at 12(1)(2).
79. The rule notes that:
> Transmittal of the application to the Commission shall not be construed as authorization by the Government of the use, obstruction or diversion proposed by the applicant. . . .

Rule 12(2).
80. *Id.* at 12(3).
81. The rule calls for at least two duplicate originals and 50 copies of all documents. Rule 13(1).
82. Rule of Procedure 14(1), *supra* note 71.
83. Rule of Procedure 15(2) states:
> [t]he notice shall state that the application has been receied, the nature and locality of the proposed use, obstruction or diversion, the time within which any person interested may present a statement in response to the Commission and that the Commission will hold a hearing or hearings at which all persons interested are entitled to be heard. . . .

84. Rule of Procedure 17, *supra* note 71.
85. *Id.* at 18.
86. *Id.* at 19.
87. *Id.* at 20.
88. *Id.* at 21, 22.
89. *Id.* at 23(1),(2),(3).
90. *Id.* at (4).
91. *Id.* at (5).
92. *Id.*
93. *Id.* at (6), (7), (8).
94. See text accompanying note 73, *infra*.
95. Waito, *supra* note 72, at 108.

It is perhaps good that the Commission hearings resemble more a town meeting than a judicial proceeding since it would encourage interested individuals to present their point of view.

2. *Investigative Function*

Article X of the Treaty states that questions or matters of difference between the parties:

> shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.[96]

It is useful to compare the source of the Commission's investigative powers (Article IX) to the provisions of Article VIII; both specifically state that applications from either government can go directly to the Commission.[97] On its face, Article IX does indeed seem to allow the same type of unilateral application to the Commission. However, in practice, one government may not obtain an investigation under Article IX without the concurrence of the other government.[98] According to one commentator, this is to "prevent either government from using the Commission as a means of prying into the domestic concerns of the other."[99] Nevertheless, this modification seems contrary to the intent of the drafters.[100]

Article IX does not make reference to individuals. It is possible, however, for individuals in either country to exert pressure on their governments to intervene on their behalf.[101] The obvious problem with this approach from an environmental perspective is that pressure is a double edged sword, that is, if the government can be pressurad to act one way, it must be assumed that it can be pressured to act another way.[102]

When the Commission receives a reference, it appoints an advisory board, consisting of the type of experts who would be best able to deal with the particular problems of the reference.[103] Their work is of a highly technical nature, often encompassing such fields

96. Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, art. X, 36 Stat. 2448, (1910), T.S. No. 548.

97. Waite, *supra* note 72, at 108.

98. *Id.*

99. *Id.* at 107.

100. A. MCNAIR, THE LAW OF TREATIES 365 (1961). (Must look to the language and surrounding circumstances when seeking to judge the intent of a treaty).

101. Waite, *supra* note 72, at 111, *citing* Letter from Douglas McKay, then Chairman of the United States Section of the IJC, to Carl F. Campbell, Baudette, Minn., April 28, 1959 (in General Correspondence File, Docket 73, Rainy River and Lake of the Woods Pollution Reference).

102. For examples of Governments acting contrary to the public interest see M. GREEN, B. MOORE, & B. WASSERSTEIN, THE CLOSED ENTERPRISE SYSTEM (1972).

103. Waite, *supra* note 72 at 112. The terms of the reference usually suggest appropriate fields of expertise from which to select board members. *Id.*

as geography, hydrology, and geology.[104] The board, once appointed, works unobtrusively, without public hearings,[105] possibly to free them of public pressure.[106] The principle of protecting advisory boards from public pressure is long establisehd in international practice.[107]

The importance of the investigative role of the Commission has increased over the years. Prior to 1944, 50 "cases" came before the Commission, 39 were applications for approval of various works, and 11 were references for investigation and recommendation.[108] However, since 1944 "references for investigation have outnumbered applications by 21 to 13."[109]

It would appear that the investigative function of the Commission is adequate to cope with the tasks that are properly assigned to it.[110] Of course, it should be remembered that the reports of the Commission on references submitted to it are not decisions. They are utilized by the two governments as a "basis for negotiations of treaties, agreements or concurrent action to accomplish the desired purposes."[111]

3. *Arbitrative Function*[112]

Article X details the arbitrative function of the Treaty.[113] It allows for the bringing of differences that arise between the two parties to the Commission for arbitration, if requested by both parties.[114] Under Article X, the Commission has investigative powers as in Article IX, but goes further in that "once a reference is made under Article X, it is made for 'decision' and not only as in the case of Article IX, for 'examination and report.' "[115]

If the Commissions' decision is split, then the Article calls for an umpire, "chosen in accordance with the procedure prescribed in the fourth, fifth, and sixth paragraphs of Article XLV of the

104. Note, *supra* note 43, at 506.

105. Canadian House of Common Debates, Oct. 29, 1962, answer by Prime Minister to Question No. 467; Official file, Docket 77 *cited* in Waite, *supra* note 72, at 115.

106. Waite, *supra* note 72 at 115.

107. *See* H. GIBSON, ROAD TO FOREIGN POLICY 77 (1944).

108. International Joint Commission; International Conference on Water for Peace, Matthew E. Welsh, Chairman of the United States Section of the International Joint Commission, Washington, D.C., May 23-31, 1967.

109. *Id.*

110. *See* Trail Smelter Arbitration, 3 U.N.R.I.A.A. 1905 (1941), 35 AM. J. INT'L. L. 684 (1941).

111. Webar, *Proceedings of the American Society of Civil Engineers*, JOURNAL OF THE POWER DIVISION, 177, 179 (No. 1968).

112. An examination of the Commission's administrative function under Article VI, is not necessary due to the fact it pertains to measurement and apportionment of the St. Mary and Milk Rivers.

113. Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, art. X, 39 Stat. 2448 (1910), T.S. No. 548.

114. The Treaty uses the words, "may be referred", which indicates that the submission of the disputes to the Commission for arbitration is optional and not compulsory. *Id.*

115. L. BLOOMFIELD & G. FITZGERALD, *supra* note 9, at 55, 56.

Hague Convention for the Pacific Settlement of International Disputes. . . .[116] The umpire is given the power to decide the question.[117]

This Article has never been used. It appears that neither country wishes to bind themselves to a procedure that might work to their disadvantage. For Article X to have any "teeth" it would have to make arbitration possible at the request of one of the countries, not both.[118]

IV POSSIBLE REMEDIES FOR INDIVIDUAL CANADIANS INJURED BY THE GARRISON DIVERSION PROJECT.

> On the study of law, Oliver Wendel Holmes said:
> The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.
> The means of the study are a body of reports, of treatises, and statutes, in this country and England, extending back for 600 years. . . .[119]

There is no vast body of law to fall back on when attempting to predict what the Commission will do in a given set of circumstances. What little "law" the Commission has established must be analogized to the given facts, while keeping in mind the intent of the Treaty and the Treaty itself.

A. THE PROBLEM

Garrison Diversion is a vast irrigation project in the central part of North Dakota with an interesting history[120] and questioned utility.[121] Without discussing the environmental pros and cons of the project,[122] the basic Canadian objection shall be examined.[123] The salt level of the Red and Souris Rivers is being increased because of the project,[124] causing possible injury to residents of Manitoba.[125] Assuming that the problem is real and that the Garrison project is the cause of a riparian owner suffering a loss—what recourse has he under the Treaty?

The 1909 Treaty was concerned primarily with navigation and diversion of waters along and flowing across the boundary.[126] This

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116. *Id.*
117. Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, January 11, 1909, art. X, 36 Stat. 2448, (1910), T.S. No. 548.
118. *See* O. YOUNG, THE POLITICS OF FORCE: BARGAINING DURING INTERNATIONAL CRISIS (1968).
119. Holmes, *The Path of the Law*, 10 HARV. L. REV. 61 (1879).
120. Note, *Selected Environmental Law Aspects of the Garrison Diversion Project*, 50 N.D.L. REV. 329, 332 (1974).
121. G. SHERWOOD, NEW WOUNDS FOR OLD PRAIRIES (1972).
122. *See* U.S. BUREAU OF RECLAMATION, INITIAL STAGE GARRISON DIVERSION UNIT FINAL ENVIRONMENTAL IMPACT STATEMENT 1-80 (1974).
123. Note, *supra* note 120, at 332.
124. *Id.*
125. Grand Forks Herald, Sept. 17, 1973, at 1, col. 2.
126. McCaffrey, *Trans-Boundary Pollution Injuries: Jurisdictional Considerations in Private*

is one reason[127] that the only mention of private remedies is found in Article II, which "authorizes free use and diversion of inland waters, but creates private rights of action for extraterritorial injuries caused by such diversions.[128] Suits have not been filed under this provision.[129]

It is well established that aliens have free access to American courts in pollution matters.[130] Cases involving pollution damage to land outside the jurisdiction have found the land owner's suits to be "personal and not local."[131] On the subject one commentator said:

> Implicit in his holding is the suggestion that since the action for damages was founded upon a nuisance theory, it did not claim a trespassory invasion of property rights, but a non-trespassory interference with defendants' use and enjoyment of their land.[132]

In other words, since damages were sought from the defendant personally, the judgment would be effective without control over the injured property.[133] It appears that Canadians aggrieved by pollution originating in the United States which detrimentally affects them would have no problem suing in an American court on a nuisance theory.[134]

An obscure avenue that an injured Canadian might explore in his suit against an American polluter is the jurisdiction given to Federal District Courts:

> The District Court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.[135]

The Trail Smelter Arbitration decided pollution violates the law of nations.[136] Regarding pollution, it said:

> [N]o State has the right to use or permit the use of its territory in such a manner as to cause injury . . . in or to the territory of another, or the property of persons herein. . . .[137]

Litigation Between Canada and the United States, 3 CALIF. W. INT'L. L.J. 191, 203 (1972-73) It was at the insistence of the United States that pollution was menioned only once in the whole treaty. Jordan, *Great Lakes Pollution: A Framework for Action*, 5 OTTOWA L. REV. 65, 67 (1971).

127. McCaffrey, *supra* note 126, at 204.

128. *Id.* at 203.

129. Letter from John Crook, Counsel for the United States Section of the International Joint Commission and Attorney, Office of the Legal Advisor, Department of State, November 10, 1972, *cited* in McCaffrey, *supra* note 126 at 204.

130. Takkahashi v. Fish & Game Comm., 334 U.S. 410 (1948).

131. Ducktown Sulphur, Cooper & Iron Co. v. Barns, 60 S.W. 593 (Tenn. 1900).

132. McCaffrey, *supra* note 26, at 226.

133. *Id.*

134. *Id.* at 224.

135. 28 U.S.C. § 1350 (1970).

136. Trail Smelter Arbitration, 3 U.N.R.I.A.A. 1905, 1963 (1941) *cited* in 35 AM. J. INT'L. L. 684 (1941).

137. *Id.*

It is established by Article IV that trans-boundary pollution violates the treaty.[138] It would appear then that a United States District Court would have jurisdiction in a pollution suit brought by a Canadian as a result of pollution caused by Garrison Diversion.

Another alternative a Canadian might pursue would be securing the intervention of this government on his behalf[139] for as noted earlier,[140] individuals do not have standing before the Commission. If the government does intervene for its citizens, two possible alternatives are available. The first is securing the investigation of the alleged pollution by the Commission under Article IX,[141] as was done by the United States in the Trail Smelter dispute.[142] The second alternative would be to attempt to secure the consent of the other government to arbitration under Article X.[143] Under this alternative, both countries would be bound by the decision.[144]

CONCLUSION

Many people in the United States and Canada have the impression that the Boundary Waters Treaty of 1909 is a panacea for trans-boundary environmental problems. This simply is not the case. The Tereaty was created out of specific political needs of the two governments: Canada's desire to handle its own intra-continental affairs instead of being subject to Britain's desire to intervene on their behalf on a conflict by conflict basis; the United States' desire to enter into an agreement with Canada so that it might find a home for its very nationalistic interpretation of international ririparian law, the Harmon Doctrine. While the desire for a workable system of conflict resolution played an important part inducing the parties to come to an agreement, it was secondary to the above mentioned political ends that both countries were desirous to achieve.

The International Joint Commission was a product of the Treaty and the political desires that brought that Treaty into being. In analyzing the functions and procedures of the Commission, especially the requirement that governments, not individuals, initiate actions, the conclusion that conflict resolution was not that important to the drafters seems inescapable.

The Boundary Waters Treaty, like many such agreements, solved

138. Treaty with Great Britain Reloting to Boundary Waters Between the United States and Canada, Jan. 11, 1909, art. IV, 36 Stat. 2448 (1910), T.S. No. 548.

139. McCaffrey, *supra* note 126, at 205.

140. See text accompanying note 56, *supra*.

141. Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, art. IX, 36 Stat. 2448 (1910), T.S. No. 548.

142. Trail Smelter Arbitration, 3 U.N.R.I.A.A. 1905 (1941 *cited* in 35 AM. J. INT'L. L. 684 (1941).

143. Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, art. X, 36 Stat. 2448 (1910), T.S. No. 548.

144. O. YOUNG, *supra* note 118, at 4.

some of the immediate difficulties between the parties at the time of its inception, but clearly is not the final answer to settling transboundary water problems.[145]

PETER PANTALEO

145. The Commission itself recognized that the framework which it is currently operating under is not adequate to cope with current pollution problems. *See* Communique on Canada-United States Ministerial Meeting on Great Lakes Pollution, Washington, D.C., June 10, 1971, in which two proposals are made to strengthen the Commission. (1) An agreement should be entered into by both countries establishing common water quality control by objectives and the agreement should impose binding commitments on both countries to construct treatment facilities to reduce pollution levels on the lakes. (2) The parties agreed that more power and authority should be given to the Commission to assist the governments in protecting the water quality of the Great Lakes. *Id.* at 3.

These steps if implemented by the governments would make the Commission a "more effective international agency for achievemnt of water quality control . . ." Jordan, *Great Lakes Pollution: A Framework for Action*, 5 OTTAWA L. REV. 65, 81-2 (1971).