The Use of the Waters of International Rivers*

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When I proposed this subject last fall to the International Law Association I was aware of its large potentialities, but I must admit that its development has been more rapid and extensive than I had anticipated. One can hardly pick up a newspaper without finding a story of river development somewhere—not necessarily an international river, but always illustrative of the problem involved. It is a subject in which Canadians and Americans have a common interest, so I thought it would be a good subject on which to talk to you. My idea was to lay before you some general principles of law, or action—principles which, if not now law concerning the use of waters in international rivers, might be regarded as the foundations of a law to be built on that subject.

Except for navigation, little attention has been paid to the international law for rivers. Among the writers on the subject, there have been various theoretical approaches, but these writers were thinking in terms of navigation, and not of the new problems which have recently appeared to concern us. There is no doubt as to the importance of navigation; I gather from reading English cases that a navigable stream is one on which a canoe can float—perhaps even a punt! But the law with regard to navigation is better developed than it is for other uses of rivers, and I therefore bring it into my study only where necessary as part of the total picture.

The earlier writers like Grotius, or codifiers like Fiore and Bluntschli, were inclined to think of rivers as God-given highways which must be open for the use of all men; or that they were merely extensions of the sea and must therefore, like the sea, be free to

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all. They felt, generally speaking, that rivers were not subject to sovereignty or to ownership by states.[1]

This generous viewpoint of course did not prevail in practice, and states have in fact claimed sovereignty over the waters within their territories. This, however, is no more vexing to the international lawyer than the assertion of so-called sovereignty in other fields of international law; the problem here, as elsewhere, is to determine the extent to which rules of law have grown up to limit sovereignty as regards the use of waters in international rivers.[2]

These positivistic views were developed, as I said, in connection with navigation; today, there are many other problems connected with international rivers, and there are many rivers which are not navigable in the sense of an international interest. Water is needed for domestic and sanitation purposes on a far larger scale than formerly was true; it can be used for hydroelectric power, for irrigation, for flood control; fishing rights may be affected, and pollution and other matters are now becoming important. Navigation does not greatly injure or exhaust the flow of water, but diversion of water for irrigation or other purposes may have far-reaching effects upon others. As regards navigation, the upper riparian states were at a disadvantage as compared with the lower state, which controlled the outlet to the sea; but with regard to other uses of the water, the lower riparian is usually at a disadvantage as compared with the upper state, which is able to control the flow of water—though occasionally a lower state may damage the upper one through backing up the waters.

The ramifications of the use of river waters by one state may be very far-reaching. The construction work needed for control of waters is costly: can a state afford to invest millions of dollars in such work without being sure that it has a legal right to do so? These are comparatively new questions, but they involve large interests. There are practically no cases decided by international tribunals.

I have looked back over experience as shown in domestic law

[1] Grotius, Bk. II, chap. II, ss. 12, 13; Vattel, Bk. II, chap. IX, ss. 117, 126-129; chap. X, s. 132; Bk. I, chap. XXII, ss. 272-273; Fiore (Borchard tr.), art. 983; Bluntschli, art. 314.

[2] Hall, in his first edition (secton 39), summarized the practice and decided that states had control over the waters within their territories. See also Heffter, s. 77; Kluber, s. 76; de Martens, I, pp. 507-8; Oppenheim (Lauterpacht ed.), I, s. 176: "each state owns that part of the river which flows through its territory"; Rivier, I, p. 225; Hyde, I, s. 183, pp. 565-571; Rousseau, Titre III, Ch. I, pp. 389-405; Sibert, I, ss. 565-568, pp. 830-832.

cases, in treaties and disputes, and in theoretical writings, and have attempted to derive a few general principles upon which we might build an international law for rivers. I could argue that two or three of these are accepted as law at the present time; others might be regarded as sources from which law could be developed.

1. *Sovereignty is not unlimited.* Sovereign title, or dominion, over territory must of course be conceded; there is no supranational authority which can direct the use of the waters of an international river, unless it is set up by the consent of the states concerned. But this sovereignty is not an absolute right, giving an unassailable right to the sovereign to do whatever he pleases and without regard to its effect upon others; in no case where a settlement has been reached, judicial or otherwise, has this been admitted. Of course the claim has often been made. There is the famous statement of Attorney General Harmon of the United States in 1895 that "in my opinion, the rules, principles and precedents of international law impose no liability or obligation upon the United States" with regard to the waters of the Rio Grande within the United States.[3] India, I believe, has made similar statements to Pakistan concerning the Indus River; Dr. Gieseke, who is the Director of the Institute of Water Rights at Bonn University, told the Edinburgh Conference of the International Law Association of the Austrian claim to sovereignty in the Rissbach dispute with Bavaria. It is to be noted, however, that the United States did make a treaty with Mexico and did concede some obligations to her; that India and Pakistan are still negotiating; and that, in the treaty which settled the Rissbach dispute, it was prescribed that each state must pay regard to the interests of the other state.

Continuing this point, I refer to cases and treaties. Lacking cases before international tribunals, I turn to cases between the quasi-sovereign members of a federal system. Thus, in the case of *Wurtemburg* v. *Baden and Prussia,* the Staatsgerichtshof asserted that relations between German states, in so far as they had an independent status, were regulated under international law, which required each state to refrain from any interference with the natural distribution of the water that would damage the other.[4] In the United States, Colorado has twice made this claim of sovereign right of non-interference and both times the claim was denied

[3] 21 Opinions Attorneys-General 274; Moore, Digest of International Law, Vol. I, p. 653.

[4] 116 Entscheidungen des Reichsgerichts in Zivilsachen, p. 1; reported in Annual Digest, 1927-1928, Case No. 86.

by the Supreme Court; the court has by implication denied it in many others.[5]

There has been a number of treaties through which states have sought to adjust their differences over a common river, and each treaty sets some limitation upon sovereign control—this, indeed, is the *raison d'être* of any treaty. It may begin with the words that each state is absolute master in its own territory, but the words that follow immediately thereafter will set limitations upon that sovereignty. Thus, in the treaty of May 11th, 1929, between Norway and Sweden, the question whether and under what conditions an undertaking on a river may be carried out is to be decided by the laws of the country in which it is located; but this is "subject to compliance with the provisions of this Convention", which thereafter sets a number of conditions: for example, "effects in both countries shall be taken into consideration"; damages must be paid, in accordance with the law of the country in which the damage is done; before one country may undertake works which would do detriment to another, agreement must be reached.[6]

The recent treaty between Austria and Yugoslavia, concerning the River Drava, dated April 14th-16th, 1954, does not bother with claims to sovereignty, but comes to the point, setting the methods and conditions for dealing with their common problem.

It seems safe, then, to state as a general principle of international law that, while each state has sovereign control within its own boundaries, in so far as international rivers are concerned, a state may not exercise that control without taking into account the effects upon other riparian states. This is a negative statement, which I can as confidently put into positive form in the old maxim *sic utere tuo ut non alienum laedas*. This, it seems to me, is a very good foundation upon which to build; but it is very general and I must inquire now whether we can be any more definite.

2. *Equitable apportionment.* Assuming that disputes concerning the use of waters in international rivers can be settled upon

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[5] *Kansas* v. *Colorado* (1907), 206 U.S. 46; *Wyoming* v. *Colorado* (1922), 259 U.S. 419. Other cases are cited later.

[6] L.N.T.S., Vol. CXX, p. 263. Other treaties: Finland-Russia, Vol. XIX, p. 154; Rumania-Yugoslavia, December 14th, 1931, Vol. CXXXV, pp. 31-143; South Africa-Portugal, July 1st, 1926, Vol. LXX, p. 315; France (Indo-China)-Siam, August 25th, 1926, Vol. LXIX, p. 313; France-Switzerland, August 27th, 1926, Vol. LXXI, p. 63; Spain-Portugal, August 11th, 1927, Vol. LXXXII, p. 113; Austria-Czechoslovakia, December 12th, 1928, Vol. CVII, p. 137. From the U.N.T.S.: United States-Mexico, November 14th, 1944, Vol. 3, p. 313; United States-Canada, November 10th, 1941, Vol. 23, p. 275; Iraq-Turkey, March 29th, 1946, Vol. 37, pp. 226, 281.

a legal basis—and the argument in such disputes always includes appeals to what the interested parties regard as the law[7]—upon what principles of law could the court reach a judgment? There have been various theories in the past, but they all seem now to be coalescing into the doctrine of "equitable apportionment".

The earlier English cases—of uncertain value to us, since they deal with private property rights in a unitary state—laid down a doctrine of riparian rights under which the upper owner must allow the water to go down in its natural flow to the lower owner, and in its ordinary channel, though he could make reasonable use of the water while it was in his territory.[8] This rule appears to have gone to English courts from the Roman law, via Kent and Storey in the United States, and was followed in some of the Eastern States of the United States. It was stated, though not followed, by Chief Justice Taft in *North Dakota* v. *Minnesota*[9] in the peculiar situation where the upper riparian was letting too much water flow down to the lower. Connecticut, in another case, relied upon the common-law doctrine, but the Supreme Court said that it did "not necessarily constitute a dependable guide or just basis for the decision of controversies such as that here presented".[10]

While the doctrine of riparian rights may be taken as a starting point, it is easy to imagine situations in which the requirement that the water must come down unlimited to lower riparians, and in the same channel, could be wasteful of a natural resource, give undue advantage to one or other of the states concerned, and make it possible for the lower riparian to block beneficial use of the water while doing nothing with it himself.

In the "Wild West" of the United States, another doctrine appeared called "prior appropriation". It was accepted and employed in some state courts, and was considered by the Supreme Court in cases between two states both of which accepted the prior appropriation rule. It was regarded as particularly applicable for arid lands and for hydraulic mining. Under this theory,

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[7] Legal Aspects of Hydro-Electric Development on Rivers and Lakes of Common Interest, U.N. Document E/ECE/136 (1952). This document (for which M. Sevette is responsible) is of much importance to those studying international rivers. A great deal of material has been gathered and digested in it.

[8] *Embrey* v. *Owen* (1851), 6 Exch. 353, 155 E.R. 579; *Mason* v. *Hill* (1832), 3 B. and Ad. 304, 5 *ibid.* 1; *Wood* v. *Waud* (1849), 3 Exch. 748; *McCartney* v. *Londonderry and Lough Smedley Railroad*, [1904] 1 A.C. 301; *Pride of Derby and Derbyshire Angling Assn. Limited and Another* v. *British Celanese Ltd. and others*, [1953] 1 All E.R. 179.

[9] (1923), 263 U.S. 365.

[10] *Connecticut* v. *Massachusetts* (1931), 282 U.S. 660.

the first user establishes a prior right to the water: a California court said that he who first invests labour on a stream deserves its benefits; a Colorado court held that riparian property rights should not be permitted to block the necessary or beneficial use of water.[11]

But it is obvious that strict adherence to this rule might equally as well block possible and beneficial improvement and be unfair to a later user on the river. It was becoming increasingly apparent that river systems and the potentialities and needs of each varied so much that no one rule could apply equally to all of them. The Supreme Court then developed (I would not say originated) the doctrine of equitable apportionment to which I referred a moment ago. In the case of *Kansas* v. *Colorado*, the court rejected the Colorado claim of sovereign rights and denied as well the Kansas claim of riparian rights; it said that the injury to Kansas was slight in comparison with the benefit of the reclamation of large areas in Colorado. It dismissed the complaint of Kansas but authorized Kansas to apply again if the use of the water by Colorado should go to the extent "of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river". The doctrine was further developed in *Wyoming* v. *Colorado*, *Connecticut* v. *Massachusetts*, *New Jersey* v. *New York*, and other cases.[12]

The doctrine of equitable apportionment, it seems to me, lays down a solvent principle for all cases—though it is far from providing a final solution. It can employ the riparian rights theory where that seems equitable, or prior appropriation where that seems appropriate, or find another answer, always by balancing the needs and benefits of one state against the harm done to the other. This principle was followed by Sir Benegal Rau in his report on the Indus River; and the various treaties which have effectuated settlements of river disputes have in fact attempted to follow this principle, even though their drafters never heard of the words "equitable apportionment". No other theory will cover the wide variety of situations.

It seems to me a principle equally as applicable between nations as between states of the United States; but here, of course,

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[11] *Atchison* v. *Petersen* (1874), 20 Wall. 507; *Coffin* v. *Left Hand Ditch Co.* (1882), 6 Colo. 443.

[12] *Wyoming* v. *Colorado* (1922), 259 U.S. 419; *Kansas* v. *Colorado* (1907), 206 U.S. 46; *Connecticut* v. *Massachusetts* (1931), 282 U.S. 660; *New Jersey* v. *New York* (1930), 283 U.S. 336; *Nebraska* v. *Wyoming* (1944), 325 U.S. 589, and see 345 U.S. 981.

a difficulty is encountered. Within a nation, a court may give a judicial answer to the question, What is an equitable apportionment in a given set of circumstances? In international law, unfortunately, this would rarely be the case. The provision of compulsory jurisdiction over sovereign states is beyond the range of my task tonight, which is merely to lay down legal principles which might be applied; and this doctrine might, I think, be regarded as such a principle. After all, it reaches little beyond the first proposition I offered—*sic utere tuo*. . . . It is still a rather general principle, and we must now see if we can proceed a little further.

3. *Compensation or indemnity is in order.* In the Report of the Committee on Electric Power, to which I have referred, I find the following statement, made after an examination of various settlements made between states:

> To sum up, we find that whenever damage is caused, the State prejudiced is entitled to compensation proportionate to the extent of the injury. Such compensation is usually made in the form of power supplies, as one might expect.[13]

That study is limited to electrical power developments, and there are other forms of compensation. Most, if not all, of the treaties which have been made concerning international rivers contain some provision for compensation to those in the other state who have been or may be injured by changes produced in the water.

The practical situation today is that a riparian state takes a risk in initiating works in its own territory which can do harm to another state on the river. Where judicial recourse is available, such a state might find itself enjoined from proceeding further; but this is not often the situation in international disputes. Where judicial means of settlement are not available, the usual methods employed by states to assert their rights against others will surely be called upon—diplomatic protests, demands for reparation, retaliation, even war—the Pakistani talked of war when India cut off the water supply for their irrigation. There is an ample supply of such disputes, from which it may easily be concluded that an injured state will not concede the sovereign right of the other riparian state to do the injury and will demand reparation.

4. *Agreement is prerequisite.* Thus far, I could claim that I have been talking existing international law; at this point, I am going off into the *lex ferenda*, but I think that, if I am, I am not departing very far. What I now suggest is that a state which proposes construction that would affect the flow of the water to the possible

[13] *Loc. cit.*, p. 181.

injury of another riparian state must, before undertaking the construction, secure the agreement of the other state. This is not at all an original idea. The *Institut de Droit International* proposed it long ago, at its Madrid meeting in 1911; and Fauchille, after examination of many proposals, concluded likewise that states should set up joint commissions through which agreement should be reached on each projected undertaking.[14] Many of the treaties to which I have referred contain a definite pledge to consult before undertaking works affecting the river; quite a number of them set up commissions through which continuous consultation can be had. (While non-riparian states may have an interest in the navigation of these rivers, they do not appear to have any rights in connection with other uses of the water.) The fact that such promises are made is evidence that the states consider this agreement to be important; and manifestly it is, for a state might spend great amounts of money and energy and then find itself engaged in a dangerous controversy with another state which felt itself injured. To make an agreement beforehand relieves them of this risk; it also leads to the possibility of a joint effort, less expensive to each and more beneficial to both.

I cannot state it as a rule of law that a state planning to divert the waters of a river must, before doing so, seek the agreement of other states on the river; but it seems to me that this principle should be encouraged, and that it is not far from acceptance now.

5. *Priorities.* In a number of cases and treaties something is said concerning certain uses of the water to be regarded as more important than other uses, and consequently to be given priority of rights. The establishment of such priorities in each situation belongs, I think, to "equitable apportionment". There seems to be general agreement that the most important use of the water is for domestic and sanitary purposes; but I doubt if any others are established, or can be established in the sense of a general rule, for situations vary too much. Doubtless navigation would be given priority in the minds of many persons, but this may be largely due to its historical position; it is conceivable that a dam which blocked navigation might be of industrial importance and benefit far greater than that derived from shipping or transportation. Irrigation might be more useful in one situation, hydraulic power in another.

[14] Annuaire de l'Institut, Vol. XXIV, p. 365; J. B. Scott, Resolutions of the Institute of International Law (Carnegie Endowment, 1916) p. 170; Fauchille, Vol. II, p. 451, s. 522 (11). Compare Grotius II, II, s. 13: "Now between these two extremes there is a middle course, requiring a free passage to be first asked. . .".

Pollution might have the greatest attention if it destroyed the possibility of domestic use of water; on the other hand, even domestic use, if few people were involved, or another supply of water could be found, might be subordinate to larger needs. Whole towns, indeed, sometimes have to be moved for river improvement, as I believe is to happen in the current development of the St. Lawrence River.

So I doubt that we can lay down a rule establishing priorities, unless it be for domestic use; later, with experience, it may be possible to establish them for certain classifications.

6. Pollution must be *controlled.* Pollution is a different sort of a problem of importance today because of the increasing deposit of waste materials in rivers, due to such factors as greater density of population, development of motorized shipping, and the larger number of industrial plants making use of river water. Indeed, Dr. Gieseke told us at the Edinburgh conference that the riparian states of the Rhine river are now negotiating upon this problem, and that an International Association for Water and Waste was to be founded in Zurich last September. Pollution affects health and is therefore of vital importance; it may also have damaging economic consequences. It should by now be acceptable to states to assert that a state must control pollution in its river waters which may affect other states, and that a state may be held responsible for its failure to do so. In this connection, I noticed in the paper the other day that an enterprising firm announces that it is prepared to solve pollution problems of all kinds, excepting atomic radiation! Thus science makes it possible for laws to operate.

7. *Administrative machinery for control is essential.* I have long ago reached the conclusion, and I think what has been said already is evidence for it, that law or judicial action alone is not able to provide a permanent solution to the continuing and changing problems of a river system. This was illustrated by some words of Justice Roberts, speaking for the dissenters in the recent case of *Nebraska* v. *Wyoming:*

> . . . the Court now undertakes to assume jurisdiction over three quasi-sovereign States and to supervise, for all time, their respective uses of an interstate stream on the basis of past use, including, over a ten-year term, the greatest drought in the history of the region, admitting, in effect, that its allocation of privileges to the respective states will have to be revised and modified when that drought ceases and more water becomes available for beneficial use.[15]

[15] *Nebraska* v. *Wyoming* (1944), 325 U.S. 589.

The Supreme Court, as its judicial doctrine has developed, has found it more and more necessary to set up administrative controls for its "equitable apportionment"; and the court is not equipped for this.

It would appear that administrative machinery needs to be set up separately for each situation, in order to provide the continuing control needed to assure equitable use of the waters of a river. This, of course, has been done in the past for international rivers: the Rhine, the Danube, the Elbe and others in Europe; the United States-Mexico, and United States-Canada arrangements; many treaties set up commissions of one kind or another, or, at the least, provide some joint method of measuring the flow of water. I would assert positively that an administrative body is a necessary part of the solution of the problems concerning the use of waters of an international river; but I cannot say that international law requires such a body to be set up—much less that it should be an international body, above the states concerned. When disputes over rivers are negotiated or referred to judicial decision, however, the result is apt to be the creation of such a joint administrative body. It can only be done, thus far, by agreement between the states concerned, and at present political considerations—such as those affecting the Indus or Jordan rivers—outweigh common sense.

8. *Integrated river administration.* I have one more question to put before you: Can we lay down in some way a legal principle that each river must be treated as a unified system? This involves a number of subsidiary questions, of which I mention three.

In a territorial sense, an integrated river system would mean the whole river, regardless of national boundaries. The Supreme Court of the United States might be able to give orders which would lead to such a result (I wonder), but the community of nations cannot. Scientific and technical studies now move in this direction, as do some treaties; the realization of common benefits may lead to recognition by states that boundary lines should not stand in the way of such development.

When one speaks of a unified river system, should the term include tributary waters entirely within one of the states? It seems to me that the logical answer must be yes, for the deprivation of the waters from a tributary may have a very damaging effect upon the states below, on the main flow of the river.

And, finally, when one speaks of an integrated river system in a functional sense, does one refer to systematic correlation of all the possible uses or misuses of a river? When a dam or a reser-

voir for, say, electric power, is planned at great expense, should it at the same time be planned to fit in with other uses, such as irrigation, or control of floods, or pollution? An ECAFE report[16] observed, in connection with the study before it, that money spent on flood control alone would be extravagance, but that if combined with irrigation and the production of power, the money would be well spent. The use of water for manufacturing might result—unless it is properly taken into consideration—in pollution which would damage human health, injure fishing, or ruin a recreational resort.

Should there be some sort of a requirement that all such factors, looking toward unified and total use of a river, should be taken into consideration by the riparian states concerned and achievement sought without regard to national boundaries, but rather for the gain of the peoples affected? The principle involved here is "full utilization", a phrase of which Mr. Garland made use in his very interesting preliminary report to the Canadian Branch. Similarly, Dr. H. Fortuin of the Netherlands Branch told the Edinburgh Conference of work through which his country hoped to make the "fullest possible profit" of the waters from the upper Rhine. It seems to be a principle with which no reasonable person should disagree; but, in national matters, persons are not always reasonable, and I do not see how it can at present be made into a rule of international law. We might recommend that it should be regarded as an obligation of all states, in their dealings with another state on a common river, to respect and promote this principle, so far as it is possible.

These are the general propositions I wished to lay before you, all rather tentative; but I do think that the International Court of Justice, if confronted with an appropriate case, might make use of most, if not all, of them.

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Now, let us turn to Canadian-American relations and see how developments concerning their common waters can be fitted into the propositions offered. In one of the more recent textbooks of international law, by Sibert,[17] I find the statement, with regard to the St. Lawrence River, that no attention has been paid to non-riparian states, that ships of war are not permitted to enter, and

[16] Economic Commission for Asia and the Far East, U.N. Doc. E/CN.11/263, p. 15.

[17] M. Sibert, Traité de Droit International Public (Paris, 1951) s. 550, p. 823; see also C. Rousseau, Droit International Public (Paris, 1953) p. 405.

that the idea of a common administration of the boundary waters as a unified regime is lacking; in general, Professor Sibert thinks that solutions for North American rivers lag far behind those for European rivers. He may be right as to navigation but, as to the administrative regime, I feel sure that he is wrong. On the contrary, the relations of the two states working through the International Joint Commission is a remarkable example of co-operative river care and development.

The Boundary Waters Treaty of 1909, characteristic of the treaty-making of which I spoke, makes a great effort to reconcile sovereign control with the fact that neither party can have sovereign control. Thus, by article I, navigation is to be free and open for the inhabitants of the two countries, but it is subject to "any laws and regulations of either country"—but these laws and regulations must not be inconsistent with free navigation, and they must be applied without national discrimination. Article II, in good sovereign style, reserves to each party "exclusive jurisdiction and control over the use and diversion" of waters on its side of the boundary; but if the exercise of these rights results in injury on the other side, legal remedies are made available, and neither side gives up its right to protest against what is being planned on the other side. Article III says that the foregoing provisions are not intended to limit the right of each to carry out construction works on its side—but the same article says that no further works (beyond those already provided for) may be made affecting the natural flow or level except by authority of the state having jurisdiction and with the approval of the International Joint Commission; and there is a further proviso that the works shall not materially affect the level or flow of boundary waters on the other side of the line or interfere with domestic and sanitary uses. Subsequent articles limit further the rights of each party, and provide (article VIII) "for the protection and indemnity against injury of any interests on either side of the boundary".

So, our treaty reserves exclusive control and at the same time admits that neither party can have exclusive control. The result is a compromise arrangement through which co-operation is made possible, and a great deal of administrative control through the Joint Commission, subject always to agreement between the two parties. I observe also that a dispute may be referred to the International Joint Commission if the two parties agree to submit it; there is no compulsory settlement of the dispute, though in those cases in which the parties have submitted a matter to the commis-

sion and the commission is unable to reach a decision, then the matter must be referred to an umpire. The process for the settlement of disputes arising under the treaty does not seem to be complete.

To complete the picture, I observe that the Senate of the United States added an "understanding", which is incorporated into the Protocol of Exchange, that the treaty is "without prejudice to the existing rights of the United States and Canada, each to use the waters of the St. Mary's River, within its own territory".

Now, I grant you that in this description of the Boundary Waters Treaty I have somewhat mistreated that instrument. Actually, of course, the parties were making a careful legal statement of rights reserved and permissions and restrictions given, and it was a great advance over past uncertainties. Nevertheless, it illustrates very well my first proposition, which was that, while sovereign title and control may be claimed, the right to claim cannot mean that a state is free to do anything it wants to do with the waters under its control, quite regardless of the injury it might do to other riparian states.

The next proposition was "equitable apportionment", and these words are not found in the documents dealing with our boundary waters. It seems to me, however, that the continuing adjustment always going on aims at equitable apportionment of our water resources. Article VI of the treaty says that the St. Mary and Milk Rivers are to be apportioned equally, which is not necessarily "equitable apportionment"; but it then goes on to say that more can be taken from one river and less from another "so as to afford a more beneficial use to each". And article VIII says that the parties are to have "equal and similar rights to the water", but immediately goes on to allow the commission to suspend equal division where it cannot be made advantageously. The rights established under the treaty are not rigid and precise: flexibility is allowed toward the end of the most beneficial use. In practice, there have been several exchanges of notes allowing temporary diversions or variations from equality.

The obligation to compensate for injury done on the other side of the line is clearly stated in articles II and VIII of the treaty of 1909, which apply to all boundary waters; but article IX of the 1950 treaty (on uses of the Niagara River) disclaims responsibility "for physical injury or damage to persons or property in the territory of the other". The International Joint Commission always, so far as I have observed, insists upon provisions for repair of

damage: thus, the very first point of the order of approval for power development in the International Rapids section of the St. Lawrence (October 29th, 1952) says: "All interests on either side of the International Boundary which are injured by reason of the construction, maintenance and operation of the works shall be given suitable and adequate protection and indemnity in accordance with the laws in Canada or the Constitution and law in the United States respectively. . ."; and one of the preambular "whereases" asserts that the commission has found both sides able to make such indemnity.

While compensation appears to be provided for in practice, it is not clear how the process works. May an injured person on the United States side sue in a Canadian court for damages occasioned by works on the Canadian side (article II of the treaty of 1909)? If so, under what authority did the War Department issue permits concerning the "Gut Dam", which said that Canada should pay compensation "as may be awarded the said parties in the proper court of the United States before which claims for damage may be brought"? Apparently, there have been a number of suits in New York courts against the Dominion of Canada, and even against "Her Majesty, Elizabeth, Queen of Canada". The Ambassador of Canada claimed immunity from such suits on November 10th, 1952, and I do not know what has happened since. There should be—and perhaps there is—some better way than this for handling claims, perhaps by reference to the International Joint Commission itself.

My fourth suggestion was a rule that agreement must be obtained between riparian states before one of them could undertake works which might do harm to the other. Canadian-American practice seems to be in accord. When Ontario sought to divert water from two rivers into Lake Superior, with the possible result of raising water levels in the Great Lakes, she sought the consent of the United States, and consent to use at Niagara the power made possible by this diversion; the United States has asked consent to build the Libby Dam, which would back up the waters of the Kootenai River for forty miles into Canada; vigorous efforts from Illinois are made to get permission to divert more water for the Chicago Drainage Canal—the President vetoed one such bill at least partly because of objections from Canada, but I hear that some twenty bills to that effect have been introduced! And the beautification of Niagara Falls called for another treaty between the two states. Discussions last year in connection with the St.

Lawrence Seaway led to an exchange of notes, in which each party agreed to consult with the other concerning future works, laws and regulations, and further agreed that each could demand and get consultation concerning regulations already in force. It seems to be true in our practice, then, that no use of boundary waters can be made by one state without obtaining the consent of the other.

As to priorities, the treaty of 1909 provides a definite order: (1) uses for domestic and sanitary purposes; (2) uses for navigation; and (3) uses for power and for irrigation purposes. No use is to be permitted materially conflicting with another which is given preference in this order. If the treaty were revised, it could be made less inflexible in this respect and, if priority is to be stated, power and irrigation should be distinguished and other uses included. There are various boundary waters and the problems of each are different.

With regard to pollution, article IV of the treaty of 1909 provided that waters flowing across the boundary should not be polluted; and the prohibition would seem to follow also from the priority given in article VIII to domestic and sanitary purposes. The commission has issued a large volume on pollution which impressed me with its thoroughness.[18] I imagine if you were to ask about any particular square foot of water, they could tell you exactly what was in it and where it was going!

There is little use in discussing my seventh point, which put forward that law and judicial decision are not enough and that also there must be administrative machinery. The effective work of the International Joint Commission is one of the best proofs of that statement. There are many questions which can be raised about the functions and powers of such a body, but I shall not enter upon them tonight.

Finally, should a river system be treated as a unified whole? We have various boundary waters, and even the Great Lakes-St. Lawrence system is a unique problem. Yet it seems to me that the whole development in this area is moving steadily in the direction of an integrated system. The commission, I understand, is not authorized to develop an overall plan to cover all the different phases of water control and use, but the possibility is there. And surely it could be done for individual waterways along the

[18] Report of the International Joint Commission, United States and Canada, on the Pollution of Boundary Waters (Washington, Ottawa, 1951).

border. What an opportunity for such a planner the Columbia River system presents!

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Against that last outburst of enthusiasm I now set two or three reflections by way of conclusion. Earlier, I spoke of the necessity of securing agreement before new works are undertaken. The State Department called my attention to the fact that our boundary-waters improvements are effected by legislation. In this connection I am reminded that Mr. Donaldson at Edinburgh explained that Northern and Southern Ireland handle their joint waterways through parallel legislation.[19] Our joint efforts have succeeded fairly well so far, it seems to me; but I wonder if this ability to agree will always continue and whether it would work so well between countries which had not developed the habit, as we have, of getting along together. It does seem to be a slow and uncertain process to get agreement through the Congress of the United States where local interests can heckle and bargain and delay—witness the foolishness over the St. Lawrence Seaway. I would not think—not for a while, anyway!—of a supranational administration with power to decide such matters; but it should be possible to devise some more efficient method of moving ahead than the joint legislative process. Perhaps the answer is a national unit on each side, a port-authority type of thing, to which local or national interests could be presented and argued, and which could then decide what is the best thing to do on behalf of each nation. My purpose of course is to sidestep Congress, and this is plain heresy! It would be even more heretical to suggest that the International Joint Commission—which, after all, represents each nation separately and equally and jointly—should have the right to decide what developments would be best for all concerned. This, doubtless, is visionary talk. But perhaps some more practically minded person can devise a better method.

Another thing that interests me—perhaps because I once wrote a book on it—is the responsibility of the two states. It seems clear from the various instruments and practice that indemnity must be made for injuries caused; each party, then, must be able to control local and private enterprises so as to be able to meet its obligation, and I observe that bills have been introduced in the House of Commons of Canada to provide controls. I remarked earlier that I was puzzled how a claim for damages should be presented; I cannot make out whether article II of the treaty of

[19] The proceedings of the Edinburgh Conference of the International Law Association should be available by the time of this publication.

1909 is a statement of the rule that local remedies must first be exhausted or an extension of it; and I do not know whether diplomatic interposition would be in order if a denial of justice were claimed. Congressman Keating also seems worried, for he has introduced into Congress a bill[20] asking that the treaty of 1909 be amended to require the commission, among other things, to say who is responsible for payment of damages and the means of making claims for damages, and to provide assurance that the responsible person will be able to pay.

Two more points in two more sentences. I wonder if it would be possible to make improvements not only self-liquidating but able to bring in an income for the governments executing them? And, finally, I note again that the provision for settling disputes under the treaty of 1909 is not adequate.

Whether a revision of the existing instruments in a new treaty is at present desirable I do not know; but a great many new possibilities, a great many new needs and difficulties, and a number of new ideas, have appeared since 1909 and should be taken into consideration in planning for the future. The potentialities of water systems such as those along our boundary are enormous; if handled properly, they could add greatly to the productiveness and prosperity of both our countries.

Co-ordination of United States-Canadian Legislation

The research centers in comparative law in this country and in Canada, concentrating as they do on differences in the civil and the common law, have given little if any attention to problems of unification or co-ordination of legislation in Canadian-American law. Interest has, indeed, only rarely been shown in the civil law jurisdictions of both countries when the civil law has been considered. The number of comparative law studies in Canadian-American law is negligible. Yet a more promising field of research is difficult to think of. Even considering the special problems presented by Quebec and Louisiana law, the researcher familiarizes himself relatively easily with the other system. Thus the negative attitude of some of our comparative law teachers as exemplified by a recent committee report registering little enthusiasm for work in American-Canadian law is much to be regretted and probably does not represent the views of the profession at large. Perhaps the establishment of a special research center in United States-Canadian law at one of our leading schools would be a good solution. The times are certainly favorable to ventures of this sort and results, which will be mutually useful, can be anticipated. They may lead to co-ordination or unification of legislation in sensitive areas of the law on both the federal-dominion and state-province level. (Kurt H. Nadelmann, Unification of Private Law (1955), 29 Tul. L. Rev. 328, at pp. 338-339)

[20] H. Con. Res. 6, January 5th, 1955.