THE CANADIAN BAR REVIEW

VOL. XXXVII SEPTEMBER 1959 NO. 3

CANADIAN-UNITED STATES PRACTICE AND THEORY RESPECTING THE INTERNATIONAL LAW OF INTERNATIONAL RIVERS: A STUDY OF THE HISTORY AND INFLUENCE OF THE HARMON DOCTRINE

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Introduction

North American history is the story of the exploration and development of a continent, carried on in their separate ways by two nations, Canada and the United States. The modern era however, is making it increasingly clear that a new theme is bound to take on the major role. The problem is no longer one of separate development but of common management of a continent in the best interests of both nations. This means that the whole sphere of Canadian-United States relations must take on an importance

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to both countries which it has never had before. In spite of Canada's expanded role in international affairs it is still true to say, as remarked by two Canadian writers of twenty years ago, that, "the problems of Canada in international law are largely the problems of Canada in her relations to the United States."[1] It is against this background that the present work is projected.

The purpose of this article is to outline one area of Canadian-United States relations—that of the regulation of international rivers—and in particular to trace the development and influence of one idea of international law—that of territorial sovereignty or the Harmon doctrine—and evaluate its status at the present time. This is not a study of mere academic interest. The uses of the waters of the Columbia River system and the claims on them are engaging the immediate attention of both governments. For the future there is the as yet unconsidered allocations of the Yukon River and other streams which flow from Canada into the state of Alaska. What are the established rights of both nations to the waters which flow from one country into the other? In a very real sense the economic futures of the Northwestern United States, and Western Canada, are tied up in the answer.

A discussion of the topic will involve close attention to two Canadian-United States treaties, the Boundary Waters Treaty of 1909,[2] and the Convention to Regulate the Level of the Lake of the Woods, 1925,[3] and incidental attention to a number of others. Among the United States-Mexico treaties to be referred to, the treaty of 1906,[4] and the treaty of 1944,[5] have especial importance. So far as authorities are concerned, primary importance is attached to an opinion given by Attorney General Harmon to the Secretary of State relating to proposed diversions of the Rio Grande,[6] and to the works of Professor H. A. Smith, Professor C. C. Hyde, Professor H. Lauterpacht, Professor C. Eagleton, Judge G. Hackworth, Dr. James Simsarian, Mr. P. Sevette, and Dr. C. J. Chacko.[7] Other writers will be cited throughout the article.

[1] MacKenzie and Laing, Canada and the Law of Nations (1938), p. xi.

[2] 36 Stats. 2141; Treaties and Agreements Affecting Canada, 1814-1925, p. 313; Redmond, Treaties, *etc.*, vol. iii, p. 2606; B.F.S.P., vol. 102, p. 140; Martens, *Nouveau Recueil Général de Traités*, series 3, vol. 4, p. 208; Malloy, Treaties, III, 2607, (1910), 4 Am. J. Int'l L. (Supp.) 239.

[3] L.N.T.S., vol. 43, p. 252; U.S. Treaty Series No. 721; Treaties and Agreements Affecting Canada, 1814-1925, p. 520; (1925), 19 Am. J. Int'l L. (Supp.) 128.

[4] 34 Stats. 1953; U.S. Treaty Series, No. 455; Martens, *Recueil Général des Traités*, series 2, vol. 35, p. 46.

[5] U.N.T.S., vol. 3, p. 313; 59 Stats. 1219.

[6] (1895), 21 Ops. Atts.-Gen. 274.

[7] H. A. Smith, The Economic Uses of International Rivers (1931);

I. *Preliminary Survey*

Before entering into an investigation of the Harmon doctrine itself it would be well to consider for a moment some initial matters concerning international rivers, such as definition, uses, and recognized general principles, in order to see Canadian-United States attitudes against a wider background of international law. This is what follows.

What is an international river? Is it solely a river which flows from one country to another or may rivers which form common boundaries between states also be included? What classification should be given to tributaries of either of the above which are wholly within the territory of one state? Broadly speaking, international law takes cognizance of two types of rivers, those which are national and flow through the territory of one state only, and those which touch on the territory of two or more states and are thus termed international. Only the latter category will be dealt with here.[8]

The term international river itself requires a subdivision because of a fundamental distinction between waters which are boundary waters, that is they form the boundary or flow along the boundary between two states,[9] and those which flow from one state

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C. C. Hyde, International Law Chiefly as Interpreted and Applied by the United States (2 ed., 1947); Oppenheim (H. Lauterpacht, editor), International Law (8 ed., 1955); Clyde Eagleton, Use of the Waters of International Rivers (1955), 33 Can. Bar Rev. 1018; G. Hackworth, Digest of International Law (1940); James Simsarian, The Diversion of International Waters (1939); P. Sevette, Legal Aspects of Hydro-Electric Development of Rivers and Lakes of Common Interest, U. N. Doc. E/ECE/136; C. J. Chacko, The International Joint Commission (1932).

[8] For a survey of the definitions of a number of continental jurists as well as the use of various terms in European treaties of the past 200 years see Sevette, *ibid*, pp. 5-14.

Though it is common for writers to deny the application of international law to national rivers, in the sense that a state bears no international responsibility for them, this must be understood as a generalization. It is clear that the acts of a state respecting a river totally within its own borders may have a serious effect on neighbouring states, as for example, pollution which would spread along a common sea-coast, or the destruction of fish which though spawned in one state form a high seas fishery of economic importance to two or more states.

[9] It is not within the scope of this article to deal with the problem of drawing boundary lines across boundary waters and international rivers. A list of European writers on the topic may be found in Sevette, *ibid.*, annex 2. A summary of practice is contained in Hyde, *op. cit., supra*, footnote 7, pp. 443-449. Also Professor Hyde in (1912), 6 Am. J. Int'l L. 902 *cf* Oppenheim (H. Lauterpacht, editor), International Law, (7 ed., 1948) vol. 1, pp. 484-485. Leading United States cases adopting the doctrine of the "thalweg", are *Louisiana* v. *Mississippi* (1906), 202 U.S. 1, at p. 48, *Vermont* v. *New Hampshire* (1933), 289 U.S. 593; *New Jersey* v. *Delaware* (1934), 291 U.S. 361, at p. 379. *cf* 5 Ops. Att.-Gen. 412. A Canadian case to the same effect is *Rainy Lake River Boom Corporation* v. *Rainy*

into another across a boundary line.[10] This is because principles may well apply to boundary rivers which will not apply to rivers flowing across a boundary. International practice indicates that states are more ready to accept rules governing the use of waters not wholly within their territory. Where however a state is possessed of both banks of an international river and control can be completely effective without the co-operation of another state, states have been unwilling to accept a weakening of their authority.

The simple definitions offered so far do not unfortunately carry us beyond generalizations.[11] Rivers of the types mentioned may have tributaries which are national or international in character and these tributaries may take the form of rivers, lakes, or even canals.[12] These facts raise a number of problems. Is the international character of a river shared by tributaries wholly within the territory of one state? It is clear that acts done by a state on tributaries wholly within their territory may have serious consequences to the uses of another state or states involved, and these consequences in a given river system could be far more influential than any inter-

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River Lumber Company (1912), 6 D.L.R. 401. The following treaties contain provisions concerning water boundaries: article 2 of the treaty of September 3rd, 1783 (Malloy's Treaties, I, 587); article 4 of the treaty of October 27th, 1795 (*Ibid.*, II, 1642); article 2 of the Ashburton-Webster treaty of August 9th, 1842 (*Ibid.*, I, 651); article 5 of the Treaty of Guadalupe-Hidalgo of February 2nd, 1848 (*Ibid.*, I, 1190); article 1 of the convention of Washington of November 12th, 1884 (*Ibid.*, I, 1159); article 2 of the treaty of April 11th, 1908 (*Ibid.*, I, 818).

[10] Many terms are used to describe this distinction. Sevette, *ibid*, p. 7, refers to boundary waters as "contiguous waters" and rivers flowing from one country to another as "successive waters". Professor H. Lauterpacht in Oppenheim, International Law, *op. cit.*, *supra*, footnote 7, pp. 464-465, puts rivers into three categories, "national rivers" (rivers in one country only), "not-national rivers" (those flowing from one state into another), and "boundary rivers" (those which form or flow along an international boundary). The necessity of a distinction between boundary waters and waters flowing across international boundaries is widely recognized. See for instance the *Annuaire de l'Institut de Droit International* vol. 24, p. 355 and annex no. 4.

[11] Nor are statutory definitions of much assistance. Section 2 (a) of the International River Improvements Act, 3-4 Eliz. II, Stats. of Can., 1955, c. 47, states: "international river means water flowing from any place in Canada to any place outside Canada". Does this include rivers or lakes wholly in Canada which are tributary to water flowing outside Canada? The same criticism may be levelled at the Resolution adopted by the International Law Association at its Dubrovnik Conference, 1956. Principle I states: "An international river is one which flows through or between the territories of two or more states." The original documents may be found in the Report of the Forty-Seventh Conference — Dubrovnik, 1956, of the International Law Association. At the Association's Forty-Eighth Conference held in New York in 1958 the following principle was adopted: "A system of rivers and lakes in a drainage basin should be treated as an integrated whole (and not piece-meal)".

[12] As for example with the Scheldt and Meuse rivers in Belgium and the Netherlands.

ference with the international river itself. In practice it is hard to justify the exclusion from the area of international reference of purely national tributaries and those of international character which make a reasonable contribution to the volume of water. There seems however to be no general practice of states from which international rules can be drawn.[13]

The problems of today's uses of international rivers are based mainly in the technological advances of the past half-century. In earlier times the main uses of an international river were for transportation, fishing, domestic and sanitary use, small scale irrigation, and perhaps to drive water mills. These uses remain but modern engineering makes possible irrigation on a scale which can substantially reduce, or completely destroy the flow. The construction of industry has raised problems of pollution. And the necessity for large scale dams for hydro-electric power constitutes in many cases a radical change in the total uses of a river system.

The earlier uses did not generally affect the quantity of water available and on the whole were not conflicting in their nature. Today the situation is in many cases reversed and often the river system cannot satisfy even a part of the demands made on it. A balancing of the conflicting interests thus becomes necessary. One of the techniques of balancing is to assign a scale of priorities to the claims. By way of example, article 8 of the Boundary Waters Treaty of 1909 enumerates the following order: (1) Uses for domestic and sanitary purposes; (2) Uses for navigation, including the service of canals. . . ;(3) Uses for power and for irrigation purposes. Under article 3 of the treaty of February 3rd, 1944, between the United States and Mexico the following priorities are determined: (1) Domestic and municipal uses; (2) Agriculture and stock-raising; (3) Electric power; (4) Other industrial uses; (5) Naviga-

[13] Article 4 of the Treaty of Karlsted of October 26th, 1905, between Norway and Sweden states, "common lakes and waterways shall be deemed to be those serving as boundaries between two States, or situated in the territories of both, or flowing into the said lakes and waterways". This treaty may be found in Martens, *Recueil Général des Traités*, second series, vol. 34, p. 710. The Boundary Waters Treaty of 1909 between Great Britain (Canada) and the United States, (36 Stats. 2141) in its preliminary article defined "boundary waters" as, "the waters from main shore to main shore of the lakes and rivers and connecting waterways . . . along which the international boundary . . . passes . . . but not including tributary waters. . . ." Under the Convention between Canada and the United States to regulate the Level of the Lake of the Woods, 1925, (43 L.N.T.S., p. 252) article 1 includes the "entire region in which waters discharged at the outlets of Lake of the Woods have their natural source". The treaty of February 3rd, 1944 between Mexico and the United States (59 Stats. 1219), under articles 4 and 10, pools the waters of both the United States and Mexico including tributaries. *cf* an article by R. A. Mackay in (1928), 22 Am. J. Int'l L., 292, at p. 307.

tion; (6) Fishing and hunting. It need hardly be pointed out that the importance of competing claims will vary with the river system.[14]

Taking this into account however, it is interesting to notice the decline in importance of navigation[15] which was ranked second in 1909 but was placed fifth in 1944. Navigation was the first of the important international uses to develop, with the result that until the present century it was enshrined in a place of paramount importance in all treaties concerning international rivers.[16] This helps to explain, on a time basis, a fairly common conception in international law that navigation rights have priority over other uses, and it leads to two claims, which are also considered at other places in this article. The first is that economic uses must not be allowed to interfere with navigation. Secondly, that states may do as they please with the waters in their own territory provided that there is no interference with established navigation rights.[17] It is worthy of note that the constitution of the United States and the British North America Act in Canada both give support to the importance of navigation by vesting its control in the federal authority, while ignoring the other uses of rivers. As is suggested above, one of the reasons for this is the late date of new forms of exploita-

[14] For a discussion of reconciling the competing uses see Sevette, *op. cit., supra*, footnote 7, pp. 36-37, *cf* Smith, *op. cit., supra*, footnote 7, p. 136.

[15] The scope of this article does not permit an investigation of the laws of navigation on rivers or such questions as the right of riparian, and/or, non-riparian states to navigate boundary or pluri-national waters. There is a great deal of interesting history contained in the Advisory Opinion of the Permanent Court of International Justice on the European Danube Commission, Series B, No. 14, pp. 38-41. The subject is of possible importance regarding the use of the St. Lawrence Deep Waterway and the navigation of the Great Lakes. See generally, Convention and Statute on the Regime of Navigable Waterways of International Concern, 7 L.N.T.S., pp. 36-63.

[16] Article 2 of the Boundary Waters Treaty of 1909 raises this attitude very clearly. Under it, ". . . neither of the High Contracting Parties intends . . . to surrender any right which it may have to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary." Under article 8 of the Treaty of Peace of September 3rd, 1783, (8 Stats. at L. 80; Malloy, Treaties, I, 586) the United States and Great Britain provided: "the navigation of the River Mississippi from its source to the ocean shall forever remain free and open to the subjects of Great Britain. . . ."

[17] The Hon. William Pugsley, Minister of Public Works at the time of the adoption of the Boundary Waters Treaty of 1909, in describing article 2 to the Canadian House of Commons, stated: "The United States have contended that it is a principle of international law that any country has the right to divert waters in its own country, subject always to the question of navigation. . . . They have [not] contended that they would have a right to so divert the waters as to seriously or materially interfere with navigation." See House of Commons Debates (Canada, Sess. 1910-11, p. 870, December 6th, 1910.)

tion, such as hydro-electric development. Even at this date however, there is no justification for the assertion that the paramountcy of navigation is established in all cases.[18] To do so would be to ignore the needs of the community and the best uses for the particular river system. Thus the trend is to the view expressed by Professor Hyde who states:[19]

> . . . the conclusion is reached that international arrangements, multipartite or otherwise, attain their greatest usefulness when confined to the solution of the problems of navigation and commercial intercourse that are peculiar to particular river systems. . . . From arrangements of such a character there is not necessarily to be deduced the best regime that is applicable to others where differing conditions prevail. In general, to the riparian proprietors must be left the final decision touching the character of the regime that should prevail within waters traversing their territories.

The numerous treaties and agreements establishing navigation rights served only to crystallize that use at a certain point in the development of a river system.[20] New demands for the use of water for irrigation and for hydro-electric development must be given recognition as they reflect the general needs of the community.

Are there any general principles concerning the uses of international rivers which may be said to be established as rules of existing international law? So far as writers have tried to draft general principles, the disagreement as to their content has ranged all the way from the doctrine of absolute sovereignty to that of denying that a state has power to divert without obtaining prior agreement of all states concerned.

Professor Lauterpacht, writing in 1955, maintains that:[21]

> . . . the flow of not-national, boundary, and international rivers is not within the arbitrary power of one of the riparian States, for it is a rule

[18] See an excellent discussion of this problem by E. C. Carman, Sovereign Rights and Relations in the Control and Use of American Waters, (1929-30), 3 So. Cal. L. Rev. at p. 316.

[19] Hyde, *op. cit., supra,* footnote 7, p. 565.

[20] By article 2 of the Oregon Treaty of June 15th, 1846, (9 Stats. at L. 869; Malloy, Treaties, I, 656) British subjects were guaranteed free and open navigation of the Columbia River. In fact this right was never exercised and navigation is now impossible except on the lower reaches of the river owing to the construction of the Grande Coulee dam in 1940. No agreement abrogating this right has ever been made. The full rights of navigation on the Colorado (guaranteed by article 6 of the Treaty of Guadalupe-Hidalgo, Malloy, Treaties, I, 1111) were likewise not exercised by Mexico but were put forward as preventing the United States from altering the flow of the Colorado without Mexico's consent. Mexico surrendered her position for an increased allotment of water under article 10 of the treaty of 1944. These examples are set out to illustrate how a categorical determination of priorities can act as a bar to adjustments for the needs of the total river community.

[21] Oppenheim, *op. cit., supra,* footnote 7, p, 474.

> of International Law that no State is allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State. For this reason a State is not only forbidden to stop or divert the flow of a river which runs from its own to a neighbouring State, but likewise to make such use of the water of the river as either causes danger to the neighbouring State or prevents it from making proper use of the flow of the river on its part.

As authority for this rule of international law we find Professor Lauterpacht stating:

> The duty of the State not to interfere with the flow of a river to the detriment of other riparian States has its source in . . . the maxim *sic utere tuo ut alienum non laedas*[22] . . .; it is one of those general principles of law recognized by civilized States which the Permanent Court is bound to apply by virtue of Article 38 of its Statute.[23]

It seems difficult to see how this maxim can help us. It merely assumes the point in question, which is, what use may states make of their international rivers. Further, to say that states must act in good faith hardly carries us beyond our starting point. What is good faith?

Professor Hyde comes at the matter in a different fashion. Writing in 1947 he states:[24]

> Generally speaking, a State may divert for its own purposes waters of a river within or passing through its territory. Thus, it may do so, when from a source therein they flow through its domain and across a frontier into the territory of a neighbouring State; or when having a like source, they are tributary to and flow into waters that constitute an international boundary.

One observation to be made is that Professor Hyde indicates that a state's absolute right to divert is limited to rivers having their source in the state. He does not suggest any authority or reason for the distinction and it is hard to see a logical basis for distinguishing that type of river from one which passes through a state's territory. No such distinction has been found in domestic United States water law. On the whole, Professor Hyde agrees with and supports the view known as the Harmon doctrine, which broadly stated is that the upstream state may divert at will and without restraint regardless of the effect produced upon the downstream state.

Dr. Simsarian, writing in 1938, states that there are two rules of customary international law governing the rights of states to divert international waters:[25]

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[22] Defined in Black, Law Dictionary (4 ed., 1951), 1551 as "use your own property in such a manner as not to injure that of another."

[23] Oppenheim, *op. cit., supra*, footnote 7, p. 346.

[24] Hyde, *op. cit., supra*, footnote 7, p. 567.

[25] Simsarian, *op. cit., supra*, footnote 7, pp. 105-111.

> The first rule may be stated thus: Riparian States are entitled to share equally in boundary waters, that is, waters flowing along the international boundary betweeen riparian states. When boundary waters are not navigable, the sharing of the waters is easily achieved by an equal withdrawal. . . . Under such circumstances, a riparian State need not secure . . . consent . . . for the withdrawal. However, when the boundary waters are in fact navigable . . . an agreement between the riparian States is essential. The second rule . . . may be stated thus: There is no limitation on the right of a State to divert (a) the waters of a tributary (wholly within its territory) of boundary waters and (b) the waters of a river which crosses an international boundary line.

His opinion is to be respected for the long and careful study he has made of the matter but it is submitted that his view is influenced by the consistent position adopted by the United States. Further, it is not true that there is no limitation under (b) of his second rule. It has already been noted that the rights of navigation could not be interfered with, and it seems doubful that any writer would argue that actual prior appropriations downstream could be ignored.[26]

Professor Smith, in his monumental work on the subject, refused to go beyond the following findings:[27]

> . . . we can at least deduce with confidence certain negative results. In the law of rivers there is clearly no place for any purely legal doctrine derived from any single abstract principle, whether that principle be the absolute supremacy of the territorial sovereign or the old private law doctrine of riparian rights. The former is as essentially anarchic as the latter is obstructive. The former would permit every state to inflict irreparable injury upon its neighbours without being amenable to any control save the threat of war. The latter is essentially a right of veto.

There are perhaps few writers to disagree with this position, but this is only to say that there is agreement as to what cannot be principles of international law. By such slender threads must international law begin to weave a pattern for the future! Professor Smith adds an important caution to those interested in this subject:[28]

> . . . there is no fault more common, no fault which has brought more discredit upon our science, than the inveterate tendency of too many publicists to confuse the law as it actually is with the law as they think

[26] This is a matter of extreme difficulty which has been raised squarely by the Columbia River dispute. It has been contended that as a result of the embodiment of the Harmon Doctrine in article 2 of the Boundary Waters Treaty of 1909, Canada and the United States have agreed to exclude such a view of their international law obligations. The question is developed more fully elsewhere in this article.

[27] Smith, *op. cit., supra,* footnote 7, pp. 144-145.

[28] *Ibid.,* p. 150.

> it ought to be. As the problem of the economic use of rivers grows in practical importance it becomes more and more desirable that it should be governed by legal principles sufficiently definite to afford some practical guidance in the decision of particular cases, but the need for rules does not justify any writer in asserting that they actually exist, until they have been enacted by the only legislative process which the law of nations in its present form will recognize.

Professor Eagleton, writing in 1955, was willing to be more positive than Professor Smith was twenty years before. After an examination of a number of precedents, he says:[29]

> 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 alienum non laedas.*[30] This, it seems to me, is a very good foundation upon which to build. . . .

It was Professor Eagleton's proposals as to more specific principles which were adopted as a sound basis for further study by the forty-seventh Conference of the International Law Association held at Dubrovnik in 1956.[31] These principles do not attempt to set out rigid standards for adherence but rather provide a very flexible foundation for adjustment by the parties on a basis of "equitable apportionment". Principle V sets out a number of factors to be taken into account in settling disputes. These include:

(a) The right of each to a reasonable use of the water.
(b) The extent of the dependence of each state upon the waters of that river.
(c) The comparative social and economic gains accruing to each and to the entire river community.
(d) Pre-existent agreements among the states concerned.
(e) Pre-existing appropriation of water by one state.

Principle VIII is also a keystone proposal:

> So far as possible, riparian states should join with each other to make full utilization of the waters of a river, both from the veiwpoint of the river basin as an integrated whole, and from the veiwpoint of the widest variety of uses of the water, so as to assure the greatest benefit to all.

It is submitted that these principles serve many good purposes — not the least of which is that they set out the thinking of a

[29] Eagleton, *op. cit., supra,* footnote 7, p. 1021.
[30] See *supra,* footnote 22.
[31] See Report of the Forty-Seventh Conference of the International Law Association — Dubrovnik, 1956. The documents pertaining to international rivers, submitted to that conference are also contained in a pamphlet entitled "Principles of Law Governing the Uses of International Rivers".

number of experts in international law who have given close consideration to the matter. They also set out an ascertainable guide or signpost for the settlement of disputes which is in accordance with most modern views of the subject.[32] It is submitted however that great caution must be taken in asserting general principles for the reason that if they are to gain recognition they must be capable of application to a wide number of circumstances which vary both in place and time and affect the "vital interests" of states.[32A] Professor Brierly expresses himself against the adoption of general principles:[33]

> There are many rivers, especially so-called "international" rivers, which flow through or between the territories of more than one state, which it is desirable in the general interest that the law should regulate so that the maximum of advantage may be extracted from them. But this cannot be done by rules applying generally to all rivers. The political factors which have to be taken into account differ, and so do the uses to which rivers may be put; navigation; electric power generation; irrigation; water supply to cities; are some instances. Some rivers are more important for one purpose and some for another, so that they cannot all be dealt with in the same way; each requires a regime adapted to its own special circumstances.

Perhaps we need not be so pessimistic as Professor Brierly about our ability to evolve principles for the guidance of present and future international river difficulties.[34] What we must do how-

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[32] See Professor Smith's proposals, *op. cit., supra*, footnote 7, pp. 150-153, which he calls "reasonable inferences to be drawn from [the] evidence." Both Professor Smith and Professor Eagleton agree that the first principle is to treat the river system as an indivisible physical unit to be developed without regard to political jurisdictions. The other principles are subsidiary to this one and are directed to ascertaining the basis for dividing the benefits derived.

[32A] The Resolution adopted at the Forty-Eighth Conference of the International Law Association—New York, 1958, was a co-nsiderable retreat from the Dubrovnik Resolution. One of the Heads of Unanimous Agreement reads: "It is agreed that there may be issues not adequately covered by recognized rules of international law and also that there are rules as to which there exists differences as to their meaning." Paragraph 2 of the Resolution states: "Except as otherwise provided by treaty or other instruments or customs binding upon the parties, each co-riparian state is entitled to a reasonable and equitable share in the beneficial uses of the waters of the drainage basin. What amounts to a reasonable and equitable share is a question to be determined in the light of all the relevant factors in each particular case." See the Report of the Forty-Eighth Conference of the International Law Association—New York, 1958.

[33] J. L. Brierly, The Outlook for International Law (1944), pp. 42-43.

[34] The failure of the Barcelona Convention (7 L. N. Treaty Series, 35; Martens, *Nouveau Recueil des Traités*, series 3, vol. 18, 709) may be part of the reason for inertia and lack of sympathy for a new convention containing positive rules. Sevette, *op. cit., supra*, footnote 7, p. 44, although a bit more hopeful than Professor Brierly, agrees that: "However attractive the idea may be . . . we are of the opinion that the aim of this document, if it is to serve a useful purpose, should not be the ultimate formation of

ever is acquire a wider perspective of the problems we face, and a better understanding of our failures in the past. Professor Smith offers us an objective viewpoint of our difficulties in his concluding chapter. He points out:[35]

> . . . the resolutions[36] illustrate the dangers of premature attempts at codification, even when undertaken by jurists of the highest distinction. The report of the discussion at Madrid makes it clear that the diplomatic material available for study at the meeting was quite insufficient to illustrate the practical complexities of the problem. For the same reasons the subject is clearly one which is not ripe for codification at the present day. Experience is rapidly accumulating, but it has not as yet been adequately studied and surveyed as a whole. We may also be reasonably certain that new problems will arise for which no exact precedent can be found, and it is clearly impossible to predict the new developments which may be opened up by scientific progress. Any attempt to codify the law today would almost certainly put weapons in the hands of the obstructionists.

From this survey of the general principles relating to the international law of international rivers it is submitted that three conclusions can be drawn. In the first place we must reach the rather obvious conclusion that there is no general agreement on what are the relevant international-law principles; secondly, that as practised by states they were probably, and still may be, the "territorial sovereignty" theory, otherwise known as the Harmon doctrine; and thirdly, that there is increasing recognition for the need of rules for "equitable apportionment", the tests of the lawfulness of any diversion, in the absence of treaty rules, being the reasonableness of the diversion under the particular circumstances. It seems not open to doubt that international life rather than international law plays the determining role in the settlement of international-river disputes which are not regulated by treaty arrangements.

II. *The Position to 1909*

We have seen that there is a considerable area of agreement among writers that rules modifying the freedom of state activity with respect to the use of international rivers are necessary in the interests of international justice and harmony. We have also seen suggestions of what these rules ought to be. Now we shall turn to the actual practice of Canada and the United States to see what those

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a draft general convention . . . . Any attempt at codification would be premature."

[35] Smith, *op. cit.*, *supra*, footnote 7, pp. 157-158.

[36] Of the Madrid Conference of the Institut de Droit International, 1911 See 24 Yearbook of the Institute of International Law, p. 365.

who were given the responsibility for negotiating settlements affecting the future of vast areas and peoples said and did. The ore of international law may be furnished by the scholars, but the finished product is molded in the blast furnaces of international controversy.

Two separate and inconsistent trends were obvious before the turn of the century. On the one hand, the United States in its international-river disputes maintained a position of unqualified territorial sovereignty and justified this position as in accordance with recognized international law. It could divert and utilize the full volume of any waters flowing through its territory, regardless of injury caused downstream. On the other hand the United States and Canada, and the United States and Mexico came to agree on the principle of joint international commissions to investigate and to report, and later extended the powers of these commissions to include judicial and administrative functions. As the earlier developments took place in United States-Mexico relations, and because that practice greatly influenced later United States-Canadian relations in similar circumstances, we will first have a look at the significant pre-1909 United States-Mexico developments.[37]

A. *Mexico-United States*

As early as 1880 protests were being made by both the United States and Mexico over diversions of the Rio Grande,[38] a boundary water which forms about sixty percent of the border between the two countries, but a review of the diplomatic correspondence of the period to 1894 shows no demands being made of international law.[39] However, issue was joined in 1895 over the right of the United

[37] An excellent account of the developments of the period 1880-1935 is contained in Simsarian, *op. cit., supra*, footnote 7, pp. 39-61, also republished by that author in 17 Texas L. Rev. 27. The present writer is also heavily indebted for information to C. A. Timm, The International Boundary Commission — United States and Mexico (1941), and to an earlier work by the same author, Some Legal Problems Involved in the Nature and Work of the International Boundary Commission, United States and Mexico (unpublished thesis in Harvard Law School Library, 1934). See also W. Hawkins, Water Rights in United States — Mexico Streams (1930), 5 Temple L. Q., 193. For an official account of the operations of the International Boundary Commission see, International Boundary Commission: United States and Mexico, Department of State Publications (1925). For a non-legal account of the events to be considered see J. M. Callahan, American Foreign Policy in Mexican Relations (1932).

[38] The Rio Grande has its source in the State of Colorado, flows south through New Mexico for about one-third of its length and becomes a boundary water just north of El Paso, Texas. A majority of its total volume has its source in Mexico.

[39] See 1 Moore, Digest International Law (1906), p. 653; Foreign Relations of the United States (1880), p. 783; (1888), p. 1254; (1888), p. 1264; (1888), p. 1282; (1894), p. 395.

States to make diversions of water from the upper Rio Grande at a point where the river was totally within the territory of the United States. In October of that year the Mexican Minister in Washington, Romero, protested to Richard Olney, Secretary of State, attributing the failure of the Rio Grande to United States irrigation, and arguing that as the river was both a boundary water and navigable[40] the United States was restricted in its use to works which would not reduce the volume of water in an appreciable manner, unless prior agreement was obtained. Further that,

> . . . international law would form a sufficient basis for the rights of the Mexican inhabitants. . . . Their claim to the use of the water of that river is incontestable, *being prior to that of the inhabitants (of the United States) by hundreds of years, and, according to the principles of civil law, a prior claim takes precedence in case of dispute.*[41]

These arguments were bound to be unpopular in the United States.

The Secretary of State referred the Mexican claims to the Attorney General, Judson Harmon, for his opinion, and the basis on which his views were founded has since become known as the Harmon doctrine.[42] Two questions were posed for reply: (1) whether article 7 of the Treaty of Guadalupe Hidalgo could be applied against the United States?; (2) whether the diversions were contrary to the principles of international law and entitled Mexico to indemnity for harm suffered? To the first point Attorney General Harmon admitted that the diversions would hinder navigation but declared that article 7 was limited in its application to the international section of the river.

> It is that part alone which is made free and common to the navigation of both countries, and to which the various prohibitions apply. The fact, if such it were, that the parties did not think of the possibility of such acts as those now complained of (*i.e.* the diversions in the United States) would not operate to restrain language sufficiently broad to include them, but the terms used in the treaty are not fairly capable of such a construction.[43]

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[40] Article 7 of the treaty of Guadalupe-Hidalgo, 1848 (9 Stats. 922; Malloy, Treaties, I, 1107), stated that the part of the Rio Grande which was boundary waters, "shall be free and common to the vessels and citizens of both countries". This was affirmed by article 5 of the treaty of Nov. 12th, 1884 (24 Stats. 1011; Malloy, *ibid.*, I, 1159), which sets out, ". . . such common right (of navigation) shall continue without prejudice . . . from the mouth of the Rio Grande to the point where the Rio Grande ceases to be the international boundary."

[41] See Romero to Olney, Oct. 21st, 1895, S. Doc., 57 Cong., 2d sess., XIII (4428), no. 154, pp. 7-8. Italics mine. Although the United States flatly rejected this "prior appropriation" argument at the time, it is now being seriously pressed by them as protecting vested interests on international rivers coming under article 2 of the Boundary Waters Treaty of 1909. See *infra.*

[42] *Op. cit., supra,* footnote 6. [43] *Ibid.,* p. 277.

Attorney General Harmon's view was that that treaty applied only so long as the Rio Grande remained as boundary waters, for the reason that the words could not properly be constructed in any other fashion. It is submitted that whatever merit his argument may have as an exercise in logic it has no relation to common sense. Article 7 of the Treaty of Guadalupe Hidalgo of 1848 states:

> . . . the navigation of the [Rio Grande] below said boundary shall be free and common to the vessels and citizens of both countries; and *neither* [the United States or Mexico] *shall*, without the consent of the other, *construct any work*[44] that may impede or interrupt, in whole or in part, the exercise of this right. . . .

What this article in fact says is that Mexicans have the right to navigate up to the boundary and nothing shall interfere with this right. Any other construction would reduce the clause to nonsense by saying that these navigation rights are subject to the United States permitting some flow of the Rio Grande. Thus what is guaranteed by words is removed by deeds. For a state to say that it grants the right to navigate is incompatible with any implied condition, as Attorney General Harmon contends for, that it reserves the right to divert the flow, and thus the right to navigate. Attorney General Harmon in this case is guilty of serious error.[45]

In concluding his argument on question (1) Attorney General Harmon makes an important point. He states:[46]

> . . . the claim now made by Mexico finds no support in the treaty. On the contrary, the treaty affords an effective answer to the claim by the well-known rule that the expression of certain rights and obligations in an agreement implies the exclusion of all others with relation to the same subject.[47]

In other words, he is employing as an argument what is really only an assertion, that it would take clear, nay, absolutely explicit language, for the United States to surrender any of its sovereignty.

Turning to the second point Attorney General Harmon summarizes the Mexican claim:[48]

> . . . it is evident that what is really contended for is a servitude which

[44] Italics mine.

[45] Smith says of another controversy, the Chicago diversion, *op. cit., supra*, footnote 7, pp. 47-48, "Perhaps we cannot always demand consistency in international argument, but it may be pointed out that a state which claims equal rights of navigation in the lower waterway can scarcely claim at the same time the right to injure or to destroy it by unilateral action."

[46] *Op. cit., supra*, footnote 6, p. 278.

[47] This is another argument capable of being turned back on the United States respecting the interpretation of article 2 of the Boundary Waters Treaty of 1909 with Canada. See *infra*.

[48] *Op. cit., supra*, footnote 6, p. 281.

> makes the lower country dominant and subjects the upper country to the burden of arresting its development and denying to its inhabitants the use of a provision which nature has supplied entirely within its own territory.

But he does not find this a requirement of international law at all because:[49]

> The fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its own territory. Of the nature and scope of sovereignty with respect to judicial jurisdiction, which is one of its elements, Chief Justice Marshall said (*Schooner Exchange* v. *McFaddon*, 7 Cranch, p. 136):
> "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.
> All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

This then is the Harmon doctrine: that there is no duty or obligation in international law on any state to restrain its use of the waters within its territory to accommodate the needs of another state. Jurisdiction and control of a state over the waters of an international river wholly in its territory is exclusive. The recognition of any other principle would be entirely inconsistent with the sovereignty of a state over its national domain.[50]

Attorney General Harmon's opinion was not of course binding on anyone and could have been ignored. But that was not the case. From that point on the United States firmly adhered to the principles of the Harmon doctrine as firmly established international law and the doctrine played a very full role in protecting the interests of the United States, as we shall see. It may be that this doctrine still expresses the views of the United States. This also will be considered.

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[49] *Ibid.*, pp. 281-282.

[50] Professor Oppenheim, in his first edition of his text on International Law which appeared a few years after the opinion of Attorney-General Harmon, stated at p. 175; ". . . 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 a territory of a neighbouring state—for instance, to stop or to divert the flow of a river which runs from its own into a neighbouring territory." Under Part 2, principle 3, of the Madrid Declaration of the Institute of International Law, April 20th, 1911, "No establishment . . . may take so much water that the constitution, otherwise called the utilisable or essential character of the stream, shall, when it reaches the territory downstream, be seriously modified."

Although the United States stood firmly behind their position that international law imposed no obligations upon them, in practice they were not so inflexible in their attitude.[51] In 1897 the Mexican Minister submitted a draft treaty to the United States which called for recognition of Mexico's rights to a certain volume of the waters of the Rio Grande.[52] Diplomatic exchanges took place at intermittent periods[53] for the next nine years and were rewarded by the conclusion of a treaty on May 21st, 1906.[54] This treaty, negotiated and signed by Elihu Root, then Secretary of State,[55] reflected the prevailing attitude of the United States that though in international law they could withdraw the complete flow, in terms of international comity they were willing to provide Mexico with water equivalent to that which she had used before the diversions took place. The preamble sets out that:

The United States of America and the Unites States of Mexico being

[51] On August 4th, 1896, the Mexican Minister submitted a complaint to the Secretary of State (see Simsarian, *op. cit., supra*, footnote 7, p. 47, and *supra*, footnote 23) against the construction of a dam at Elephant Butte, New Mexico. The United States undertook an investigation and recognized the validity of the Mexican arguments that the construction of the dam would deprive them of all water. Thus began a *cause célèbre* in the United States, under which the Departments of State, Justice, War and the Interior succeeded by legal technicalities in blocking the construction of the dam. The ramifications of this case are beyond the scope of this study but see, *United States* v. *Rio Grande Dam and Irrigation Company* (1899), 174 U.S. 690; (1902), 184 U.S. 416; (1909), 215 U.S. 266. For an account of the controvery see Simsarian, *ibid.*, pp. 47-53. For a full probe of the background dynamics see, El Paso Dam and Elephant Butte Dam, Testimony Submitted to the Committee on Foreign Affairs (1901).

[52] One authority quoted by Mexico was 1 Farnham, Law of Waters and Water Rights (1904), p. 29 who wrote, "A river which flows through the territory of several states . . . is their common property. . . . Neither nation can do any act which will deprive the other of the benefits. . . ."

[53] One of the less flexible exchanges took place in April of 1905 when the Mexican Minister protested the enactment of a statute for the construction of a dam on the Rio Grande near Engle, New Mexico ((1905), 33 Stats. 814). No provision was made concerning Mexican rights to the same water. The Acting Secretary of State, Alvey A. Adee, replied: "A careful examination of the law of nations on the subject has failed to disclose any settled and recognized right created by the law of nations by which it could be held that the diversion of the waters of an international boundary stream for the purpose of irrigating lands on one side of the boundary and which would have the effect to deprive lands on the other side of the boundary of water for irrigation purposes would be a violation of any established principle of international law. Nevertheless, the government of the United States is disposed to govern its action in the premises in accordance with the *high principles of equity and with the friendly sentiments which should exist between good neighbours.*" (Italics mine.) Hyde *op. cit., supra*, footnote 7, comments on this statement at pp. 567-568.

[54] 34 Stats. 2953; U.S. Treaty Series, 455.

[55] Mr. Root also took a leading role in the negotiations for the Boundary Waters Treaty of 1909 with Great Britain. For a biographical account of Mr. Root's activities at this period see, P. C. Jessup, Elihu Root (1938), vol. II, pp. 98-9.

> desirous to provide for the equitable distribution of the waters of the Rio Grande . . . and being moved by considerations of international comity, have resolved. . . .

Articles 1 and 2 provide for the completion of a dam and set out Mexico's share of the water. Article 3 provides for various costs. Articles 4 and 5 show clearly the legal position of the parties and the attitude of the United States in concluding the treaty. Article 4 relates:

> The delivery of water as herein provided is not to be construed as recognition by the United States of any claim on the part of Mexico to the said waters.

To make abundantly clear what was intended, article 5 proclaims in part:

> The United States, in entering into this treaty, does not thereby concede, expressly or by implication, any legal basis for any claims heretofore asserted or which may be hereafter asserted by reason of any losses incurred by the owners of land in Mexico due or alleged to be due to the diversion of the waters of the Rio Grande within the United States; nor does the United States in any way concede the establishment of any general principle or precedent by the concluding of this treaty.

Thus the Harmon doctrine came to be officially proclaimed by the United States as international law, the treaty being clearly founded on the basis that the United States was permitting some allocation of waters to Mexico out of international comity, or "good neighborliness" alone.

During the period under discussion the development of the Colorado River[56] was also a bone of contention between the two states. As early as 1898 large projects for irrigation were being planned or undertaken on the United States side which Mexico feared would result in exhausting the flow and interrupt the free navigation of the Colorado.[57] While developments went ahead on the United States side to irrigate great areas in Arizona and Lower California,[58] the negotiations for a treaty apportioning the flow

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[56] The Colorado River rises in Wyoming and flows southward through Colorado, Utah, Arizona, and California, crosses the border into Mexico near Yuma, and empties into the Gulf of California. Of a total length of 1,400 miles less than 100 miles are in Mexico. All of the volume of the flow is derived from sources in the United States.

[57] Article 6 of the 1848 treaty set out that: "The vessels and citizens of the United States shall, in all time, have a free and uninterrupted passage by the Gulf of California, and by the river Colorado below its confluence with the Gila, to and from their possessions situated north of the boundary line. . . ." Article 4 of the Treaty of 1853 (10 Stats. 1031) confirmed this provision.

[58] For an account of the engineering difficulties see J. M. Callahan,

stalled over the amount Mexico should receive, and later had to be postponed because of problems of diplomatic recognition.[59] A good deal of controversy took place during the 1920's and 1930's which was a period of great development of the resources in the Southwestern United States and it was not until 1944 that an agreement was finally reached with Mexico over the disposition of the waters of the Colorado. We will consider these matters shortly but first it is necessary to examine the parallel developments of this period in Canadian-United States relations.

B. *Canada-United States*

From Passamaquoddy Bay, bordered by New Brunswick and Maine, to the Straits of Juan de Fuca, bordered by British Columbia and Washington, the Canadian-United States boundary runs for 3,987 miles, over half of which, 2,198 miles, is water boundary.[60] Not to be forgotten is the Alaska-Canada boundary of 1,540 miles which runs from Portland Canal on the Pacific ocean to the Arctic ocean near the mouth of the Mackenzie River. The preservation of friendly relations between Canada and the United States along this immense frontier has been a paramount policy of both nations and though difficulties have naturally arisen over boundaries and over the use of boundary waters and international rivers the spirit of the Treaty of Ghent, December 24th, 1814, that "there shall be a firm and universal peace between His Britannic Majesty and the United States" has prevailed. The modern era of water regulation begins roughly at about the turn of the century and we will commence our study at that point.[61]

American Foreign Policy in Mexican Relations (1932), pp. 461-470. See also the account in Simsarian, *op. cit., supra,* footnote 7, pp. 58-62.

[59] A revolutionary government under General Huerta refused to consider the Colorado question until his administration was recognized by the United States. See May 8th, 1913, Foreign Relations of the United States (1913), pp. 799 and 927.

[60] For a description of the boundary and an account of its history, see S. W. Boggs, International Boundaries (1940), especially pp. 33-54.

[61] There are a number of treaties during the nineteenth century which regulated the uses of Canadian-United States waters. Article 8 of the Treaty of Peace of September 3rd, 1783, provided: ". . . the navigation of the River Mississippi from its source to the ocean shall forever remain free and open to the subjects of Great Britain and the citizens of the United States" (8 Stats. 80; Malloy, Treaties, I, 586). Article 3 of the Jay Treaty of November 19th, 1794, confirms this grant (Malloy, *ibid.*, I, 592). Jefferson, in his negotiations with Spain for the Treaty of San Lorenzo el Real, October 27th, 1795 (*ibid.*, II, 1642), argued that "when . . . rivers enter the limits of another society, if the right of the upper inhabitants to descend the stream is in any case disturbed, it is an act of force by a stronger society against a weaker, condemned by the judgment of all mankind" (See Am. State Papers, For. Rel., I, 252-257; Hyde, *op. cit., supra,* footnote 7, p. 526, Phillimore, Commentaries Upon International Law

Three major issues of water regulation were clearly in view as the 1900's commenced. The most immediate problem was the allocation of the waters of the Milk and St. Mary Rivers between Alberta and Montana. This was brought to rest by article 6 of the Boundary Waters Treaty of 1909. A second problem was raised over a suggested diversion of the waters of Birch Lake in Minnesota, which in its natural course flowed into the Lake of the Woods, and thus into Lake Superior, in order to generate electrical power. This was settled by the terms of article 2 of the same treaty. The most important and disturbing problem was the diversion of the waters of Lake Michigan by way of a drainage canal at Chicago which directed those waters into the Mississippi River above St. Louis. This problem was not put to rest until 1930 and may again prove a matter of contention[62]. We will consider each of these issues in turn to see what legal arguments were raised concerning them and how they were settled.

Four small rivers cross the Montana-Alberta border. Two of them, the Waterton and Belly Rivers, we are not concerned with here.[63] Of the remaining two the Milk River rises in Montana, flows into Canada, for some 100 miles, and then turns south again to join the Missouri system. West of the Milk River, the St. Mary River also rises in Montana and crosses the boundary but continues north

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(3rd ed. 1879), p. 226). This sentiment had no effect on Great Britain which refused the United States the right to navigate the St. Lawrence River to its mouth (See Am. State Papers, Foreign Relations, VI, pp. 757-777; an excellent account of negotiations carried on from 1824-1871 concerning the St. Lawrence River is contained in H. A. Smith, Great Britain and the Law of Nations (1935), vol II, pp. 318-352). In 1871, the Treaty of Washington of May 8th, 1871, (Malloy, *ibid.*, I, 761) by article 26, set out that navigation on the St. Lawrence to the point where the river ceases to be an international boundary, "shall forever remain free and open for the purposes of commerce to the citizens of the United States." The same article sets out as a quid pro quo, "The navigation of the Rivers Yukon, Porcupine, and Stikine, . . . shall forever remain free and open for the purposes of commerce to the subjects of Her Britannic Majesty and to the citizens of the United States. . . ." The Oregon Treaty of August 9th, 1842, (9 Stats. 869; Malloy, Treaties, I, 656) by article 2 set out that navigation of the Columbia "shall be free and open . . . to all British subjects. . . ."

Many of these treaties are still in force and will be touched on again as they relate to this study. They are not however primarily within its scope. For an account of early United States water treaties see, E. C. Carman, *op. cit.*, *supra*, footnote 18, at pp. 152-172. See also Chacko, *op. cit.*, *supra*, footnote 7, pp. 52-64.

[62] See Time Magazine, vol. LXVIII, no. 27, pp. 10-11, December 31st, 1956. Also see Time Magazine, Canadian Edition, March 23rd, 1959, p. 18.

[63] To the present time these rivers have not raised serious difficulties, but see a statement made by General A. G. L. McNaughton, Canadian Chairman of the International Joint Commission, on May 13th, 1954, in Minutes of Proceedings and Evidence, no. 7, p. 187, Standing Committee on External Affairs: House of Commons (Canada), 1st Sess., 1953-54.

into the Old Man River and thence into the South Saskatchewan system. Before the beginning of this century both sides of the boundary had been substantially settled and irrigation projects had been commenced or were being planned. As more extensive use of the waters of these rivers became possible the clash of interests heightened.[64] In 1902 the United States Congress passed the Reclamation Act[65] providing for a diversion of the St. Mary River into the Milk River in order to provide extra water for the arid areas of eastern Montana. This was protested by Canada which had already appropriated much of the waters of the St. Mary. In the meantime plans underway in Canada for a diversion of the Milk River raised protests in the United States, and on December 30th, 1904, Secretary of State Hay pointed out[66] that the waters of the Milk River were put to,

> beneficial use by the inhabitants of the Milk River Valley long prior to any diversion of that river in Canada. *Under the laws and customs which have grown up in the arid regions, and which are in force in Canada, priority of appropriation and use has been recognized.*[67]

In 1907 Elihu Root, Secretary of State, on the invitation of the Canadian government submitted a draft treaty "with a view to bringing to a determination the questions so long discussed relating to the use of the waters of the St. Mary River and the Milk River."[68] As a result of further negotiations an agreement was finally made and incorporated as article 6 of the Boundary Waters Treaty of January 11th, 1909. The high contracting parties said in part:

> . . . the St. Mary and Milk Rivers and their tributaries . . . are to be treated as one stream for the purposes of irrigation and power, and the waters thereof shall be apportioned equally between the two countries

[64] A historical account is contained in Hearings of the International Joint Commission, St. Mary and Milk Rivers, pp. 11-75. Much of the background information concerning the St. Mary and Milk river disputes is digested in Chacko, *op. cit., supra,* footnote 7, pp. 210-235, and Simsarian, *op. cit., supra,* footnote 7, pp. 9-12.

[65] 32 Stats. 388.

[66] See Hearings *supra,* footnote 64, pp. 62-63.

[67] Italics mine. This was the same argument put forward by Mexico in relation to the Rio Grande dispute. See pages of this article and footnote 41. Attorney General Harmon said against the Mexican contention (*op. cit., supra,* footnote 6, p. 281): ". . . I need not enter upon a discussion of the rules and principles of [the common and civil law] . . . because both are municipal and, especially as they relate to real property, can have no operation beyond national boundaries. (Creasy, Int. Law, p. 164). So they can only settle rights of citizens of the same country *inter sese.* The question must, therefore, be determined by considerations different from those which would apply between individual citizens of either country."

[68] See Hearings, *supra,* footnote 64, p. 67. This draft treaty is also mentioned by Simsarian, *op. cit., supra,* footnote 7, p. 12, quoting from the private documents of Chandler P. Anderson, counsellor for the State Department at the same time.

> . . . The measurement and apportionment of the water to be used by each country shall from time to time be made . . . under the direction of the International Joint Commission.

This article was limited in its application to the two rivers mentioned and in fact created a special regime for them. No mention was made in this article of any rules of international law and at face it would seem an acceptance of the idea of equitable apportionment. Article 2 of the same treaty however, imposed on the parties an acceptance of the Harmon doctrine in every other case and recognized in article 6 a situation which was not to be construed as a precedent. A final note of interest relates to the last sentence of article 6 as above. The International Joint Commission[69] is constituted as an administrative authority with powers to regulate under its own initiative. This was certainly a noteworthy step in Canadian-United States relations.[70] Further, it may well serve as a precedent for the resolution of the Columbia dispute, in spite of prior intentions.

A less contentious and more easily settled problem was the Lake of the Woods dispute. In this case the Minnesota Canal and Power Company in 1904 applied to the United States for permission to divert the waters of Birch Lake, a tributary of the Lake of the Woods which was a boundary water.[71] Canada protested and in 1906 the matter, by agreement between Canada and the United States, was submitted to the International Waterways Commission[72] for its views.

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[69] Established by article 7 of the same treaty. The Commission is dealt with more fully at another place in this article.

[70] It is not within the scope of this article to study the administration of these rivers by the Commission. See however, International Joint Commission Hearings, St. Mary and Milk Rivers. Also an analysis of the Commission's powers under article 6 by Chacko, *op. cit., supra*, footnote 7, pp. 209-239.

[71] See International Waterways Commission, Second Progress Report, Dec. 1st, 1906.

[72] This Commission was the forerunner of the International Joint Commission, but its duties were limited to investigation and report. The idea of the Commission arose from a proposal made at a meeting of the Irrigation Congress of the United States held in New Mexico in 1895, where a resolution was passed asking for steps to be taken "for the appointment of an International Commission to act in conjunction with the authorities of Mexico and Canada in adjudicating the conflicting rights which have arisen, or may hereafter arise, on streams of an international character". In 1896 the Canadian government informed the United States it favoured such a proposal. In 1902 Congress authorized the President to invite Great Britain to join in the foundation of an international commission, "to investigate and report upon the conditions and uses of the waters adjacent to the boundary lines between the United States and Canada, including all of the waters of the lakes and rivers whose natural outlet is by the River Saint Lawrence to the Atlantic Ocean. . . ." (See River and Harbor Act, 32 Stats. 331). As an aside it is worth pointing out

The views of the Commission, coming as they did in the same year as the Treaty of 1906 between the United States and Mexico, are worth close attention. Although it was not a representative body with powers to express on behalf of either government their legal or other views it does reflect some of the prevailing attitudes of the time, especially so since two of its members, Mr. Gibbons of Canada and Mr. Clinton of the United States, played a leading role in negotiating the Boundary Waters Treaty. In its report of November 15th, 1906, the Commission said:[73]

> It can hardly be disputed that, in the absence of a treaty stipulation, a country through which streams have their course or in which lakes exist can in the exercise of its sovereign powers, rightfully divert or otherwise appropriate the waters within its territory for purposes of irrigation; the improvement of navigation; or for any other purpose which the government may deem proper. This principle was lucidly stated by Mr. Harmon, Attorney-General of the United States. . . . It would seem therefore, to be settled international law, recognized by both countries, that the exercise of sovereign power over matters within the jurisdiction of a country cannot be questioned, and that, notwithstanding such exercise may take a form that will be injurious to another country through which the waters of the same streams of lakes pass, it cannot be rightfully regarded as furnishing a cause of war. But where the citizens of a country are injured by such exercise of sovereignity, international law recognizes . . . that there is a breach of comity. . . . It would seem that comity would require that, in the absence of necessity, the sovereign power should not be exercised to the injury of a friendly nation or of its citizens or subjects, without the consent of that nation.

The similarity in view between the position as expressed by the Commission and the ultimate draft of article 2 of the Boundary Waters Treaty of 1909 is striking.

The Commission also recommended that the United States should not give the necessary permission to the Minnesota company unless Canada also consented. This proved to be a position not acceptable to the United States[74] which however agreed to

here that the jurisdiction of the Commission included Lake Michigan, which was left out of the definition of boundary waters under the treaty of 1909. In 1906, with the appointment of the Canadian members the Commission began its shortlived (1906-1915) but useful existence. For references see; G. P. Glazebrook, A History of Canadian External Relations (1950), pp. 239-240; The International Joint Commission, Round Table, Sept. 1915: Chacko, *op. cit., supra,* footnote 7, pp. 71-78; Callahan, American Foreign Policy in Canadian Relations (1937), pp. 500-510.

[73] Compiled Reports of the International Waterways Commission, 1905-1913, Sessional Papers no. 19 (a), Canada, Sessional Papers, vol. XLVII (1913), 363-365.

[74] See Simsarian, *op. cit., supra,* footnote 7, p. 495, quoting a memorandum from Mr. Anderson to Mr. Root, to be found in the private (and unpublished) papers of Mr. Anderson.

withhold consent until article 2 of the Boundary Waters Treaty was brought into force, thus providing a means for indemnifying private Canadian interests injured by the diversion.

The Chicago diversion for domestic and sewage purposes of the waters of Lake Michigan raised for Canada and the United States one of their most important controversies to that time.[75] During the nineteenth century, the city of Chicago discharged its sewage into Lake Michigan—at the same time supplying water to the city for domestic use from that lake. In 1889 an administrative board called the Sanitary District of Chicago was created,[76] for the purpose of providing for sewage. It constructed at Chicago a drainage canal to withdraw from Lake Michigan, by way of the Chicago River to the Mississippi River, enough water to dilute the sewage and carry it away from Chicago. The canal was opened in January, 1900. In 1899 Congress passed an act prohibiting diversions affecting navigation without the consent of the Secretary of War.[77] In 1903 the authorized diversion amounted to 4,167 cubic feet per second but in succeeding years the Sanitary District diverted up to 8,500 cubic feet per second without authorization, contending that it was required to do so by Illinois legislation and because that legislation asserted the sovereignty of the state of Illinois.[78] The effect of this diversion was to lower the level of the Great Lakes about six inches to the hazard of navigation all the way to the Atlantic Ocean.[79]

In 1908 the United States filed suit in the federal district court at Chicago to restrain the Sanitary District from diverting more than the authorized quantity of water. It was not until 1925 that the Supreme Court of the United States issued the injunction.[80]

[75] This matter has been given a great deal of attention by writers in international law. For the various views see the following: H. A. Smith, *op. cit., supra*, footnote 7, pp. 43-54 (for the Canadian position): H. A. Smith (1930), 9 Br. Y. B. Int'l L. 144 and (1930), 8 Can. Bar Rev. 330: H. Willmann, (1932), 10 Can. Bar Rev. 575 (for Canada): J. Q. Dealey, Jr. (1928), 23 Am. J. Int'l L. 837 (for U.S.): Williams, (1929-30), 28 Mich. Law Rev. 1 (for U.S.): E. C. Carman, *op. cit., supra*, footnote 18, at pp. 304-309 (critical of the Supreme Court of the United States): Simsarian, *op. cit., supra*, footnote 7, pp. 17-23 (for U.S.): P. E. Corbett, The Settlement of Canadian-American Disputes (1937), pp. 121-125, (for Canada).

[76] Laws of Illinois (1889), 125.

[77] 30 Stats. 1121. Section 10 sets out: ". . . the creation of any obstruction not affirmatively authorized (by the Secretary of War), to the navigable capacity of any of the waters of the United States is hereby prohibited."

[78] See Carman, *op. cit., supra*, footnote 18, at p. 305.

[79] See House of Commons Debates (Canada), Session 1936, pp. 1318-23, especially a speech by Mr. J. R. MacNicol (Davenport).

[80] See *Sanitary District of Chicago* v. *United States* (1925), 266 U.S. 405. Shortly thereafter the Secretary of War authorized a diversion of 8,500 cubic feet per second to continue until December 31st, 1929. Con-

By the end of 1908 however, it is clear that the unauthorized diversions seriously threatened navigation interests on the Great Lakes and St. Lawrence River and possibly the scenic grandeur of the Niagara Falls, to the consternation not only of Canada, but of all of the states of the Union bordering on the lakes.[81]

III. *The Boundary Waters Treaty of 1909*

Having now examined both the practice and the theory of the United States and Canada, as well as a view of the international position generally, to 1909, we can turn to an examination of the history of the treaty of 1909 to see what was put into it and what reasons those responsible for it offered for their actions. By this light we will be better able to understand what the two nations conceived their positions to be under international law, in what manner the treaty itself modified these views, and what, consequently, the legal obligations are between them concerning (a) boundary waters, and (b) international rivers, that is rivers flowing from one country into the other.

As early as May 3rd, 1906, the International Waterways Commission, still in its first year of activity, recommended the establishment of a permanent commission with well-defined powers.[82] The idea proved popular and two members of the Commission, George Clinton of the United States and George C. Gibbons of Canada prepared a draft treaty which was submitted in September, 1907. This draft included as "boundary waters" Lake Michigan, the whole of the St. Lawrence River, and the Columbia River.[83] The Secretary of State, Elihu Root, referred the draft to Chandler P. Anderson for his comment and heard in reply that:[84]

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cerning the authority of the Secretary of War see (1923-1925), 34 Ops. Atts.-Gen. 410. For a discussion of the general aspects of the problem see Hackworth, *op. cit., supra,* footnote 7, pp. 618-621.

[81] See the report of the International Waterways Commission, May 3rd, 1908, Canada, Sessional Papers, XLII, 1907-1908, no. 9, and another report of the same Commission on January 4th, 1907, Canada, Sessional Papers, XLI, 1906-1907, no. 8, Sess. Paper no. 19. For United States reaction see 1906, 59 Cong., 1st Sess., Sen. Doc. 242, and also an Act of June 29th, 1906, at 34 Stats. 626.

[82] See the Report upon Conditions Existing at Sault Ste. Marie, International Waterways Commission, Progress Reports, Ottawa, 1905, at Second Report, 1906, vol. 1, pp. 14-15. Further recommendations on January 7th, 1907, Third Report, 1906, vol. 2, p. 234. See also Second Report, vol. 2, pp. 104, 112, 131. For an account of the creation of the International Joint Commission see Chacko, *op. cit., supra,* footnote 7, pp. 71-85.

[83] I am indebted for the details of the treaty negotiation to Simsarian, who in the preparation of his book had access given him by Mrs. Chandler P. Anderson to the private records and letters of her husband.

[84] Simsarian, *op. cit., supra,* footnote 7, pp. 20-23.

> "boundary waters" should be limited and should not include matters relating to the use of tributary waters or waters flowing across the boundary. The right on the part of the United States to divert without the consent of Canada the waters of Lake Michigan through the Chicago drainage canal, and the waters of the Milk and St. Mary rivers for irrigation purposes was recognized and sustained by international law. These waters could be distinguished from boundary waters in which both countries have certain interests. . . . If, however, such tributary waters and waters flowing across the boundary should lose their distinction from boundary waters and be classified with them, as proposed in the draft treaty, the right of exclusive control over them would be lost and Canadian consent to their diversion would be necessary in each instance.

In 1908 Mr. Anderson[85] succeeded Mr. Clinton as negotiator and he and Mr. Gibbons hammered out the present treaty. The original article 4 provided that only a certain amount of water could be taken from Lake Michigan for the Chicago drainage canal. Mr. Root refused to have any mention made of the Chicago diversion in the treaty and at his insistence it was withdrawn.[86] The definition of "boundary waters" was tailored to suit the distinction between waters which flowed along a boundary and those which flowed from one country to another, and Lake Michigan was excepted from the definition as was the Columbia River and the purely Canadian section of the St. Lawrence River.[87] Article 1 in final form guaranteed freedom of navigation on all "boundary waters: and extended this freedom to include Lake Michigan." Articles 3, 4, 7, 8, 9, and 10 set up the International Joint Commission and defined its powers.[88] These are broad and deserve mention in this

[85] Professor Jessup, writing in his biography of Elihu Root, said of Mr. Anderson's role (vol. 2, pp. 97-98): "On the American side, the real negotiator, the man who worked out every point of detail, was Chandler P. Anderson. His service was not as a mere assistant, but a strong co-adjutor of independent contacts with the representatives of other powers."

[86] Speaking to the Senate Committee on Foreign Relations in January, 1909, Mr. Root said that he had carefully guarded to see that nothing would prohibit the Chicago diversions, See S. Res. 278, 72 Cong., 1st Sess., p. 1005.

[87] The preliminary article of the treaty of 1909 reads in part: ". . . 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 international boundary . . . 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*." Italics mine.

[88] The subject of the International Joint Commission only incidentally touches the present topic. For a thorough study of its powers and activities see C. J. Chacko, *op. cit., supra*, footnote 7. A shorter, but excellent account is given by R. A. MacKay, The International Joint Commission between the United States and Canada (1928), 22 Am. J. Int'l L., p. 292. Short and less detailed accounts may be had in The International Joint

study. By article 3 the approval of the Commission must be had for any uses or obstructions or diversions of boundary waters on either side of the line which would affect the level or flow of boundary waters on the other side of the line. The Chicago diversion was however excluded by the sentence, "The foregoing provisions are not intended to limit or interfere with the existing rights. . . ." Article 4 requires the agreement of the Commission for any construction whether it is on boundary rivers or not, which would raise the levels on the other side of the boundary. In matters under articles 3 and 4 then, the Commission is really a final court. Only the agreement of the two governments can upset its decision. Article 7 serves only to juridically create the Commission, composed of six commissioners, three from each side. Article 8 sets out certain fixed principles to assist the Commission in the exercise of its judicial functions under articles 3 and 4. Included here is the power to impose conditions for its approval, including compensation for the particular use of diversion proposed and "suitable and adequate provision . . . for the protection and indemnity of all interests. . . ." Article 9 makes the Commission an investigative body in matters not related to articles 3 and 4. Article 9 sets out in part:

> . . . any other questions or matters of difference arising between [Canada and the United States] involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier . . . shall be referred from time to time to the International Joint Commission for examination and report, whenever *either*[89] [government] shall request . . . Such reports . . . . shall in no way have the character of an arbitral award.

This is a wide provision which, permitting investigation even against the desires of one of the states, is a deep inroad into its sovereign domain. It is far and wide beyond any surrender of sovereignty which has been made under the United Nations Charter.[90] Article 10 is another grant of very wide scope to the

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Commission (1924); Papers Relating to the Work of the International Joint Commission (1929): H. L. Keenleyside, Canada and the United States (1929): L. J. Burpee, Good Neighbours (1940); The International Joint Commission, Round Table, September, 1915. As early as 1912 the work of the Commission was being praised. See (1912), 4 Am. J. Int'l L. 194-196. And the Canada Year Book, 1926, at p. 972 referred to the Commission as a "League of Nations for the particular benefit of Canada and the United States." See especially Bloomfield and Fitzgerald, *op. cit., supra*, biographical footnote.

[89] Italics mine.

[90] The Charter contains no provision allowing investigation into a country in cases where *one member* claims a matter of difference has arisen with another or other states. It is true that article 14 of the Charter permits

Commission. Under it the Commission is rendered, in certain conditions, a board of arbitration between the two nations. It provides that:

> Any questions or matters of difference . . . involving the rights, obligations, or interests of the United States or of the Dominion of Canada . . . may be referred for decision to the International Joint Commission by the *consent of the two parties. . . .*[91]

Truly, viewing the Boundary Waters Treaty under the articles we have examined thus far it is a wonderful document for international co-operation and harmony. To quite an extent, considering the period in question, both countries had given up a significant area of their national sovereignty, not only in theory, but with regard to substantial assets in the economy of each nation. The matter of the Chicago diversion remained a cloud on the horizon, but then the treaty did not set out that Lake Michigan was not a boundary water but merely, "for the purposes of this treaty" it was not a boundary water. Therefore, in international law Lake Michigan remained a boundary water and Canada retained her international law rights to protest the diversion of this navigable water. This was the basis on which Canada rested her claims in the following years. Thus an observer of these sections of the treaty would consider any claims to territorial sovereignty dead, or nearly so. But they were not only very much alive, but extremely strong and healthy.

Article 2 of the treaty was the provision which gave the most difficulty in drafting and which nearly caused the wreck of the treaty as a whole. It declares in words so clear that they would

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the General Assembly to discuss and recommend measures for the peaceful adjustment of any situation regardless of origin which it deems likely to impair the general welfare. But matters under article 9 of the Boundary Waters Treaty are *any* matters, not only those of broad international significance. Further, the General Assembly has no comparable power as the Commission to undertake investigations in the state. Under article 25 of the Charter members agree only to carry out the decisions of the Security Council. That organ's powers under article 34 of the Charter permit it to "investigate any dispute, or any situation which might lead to international friction" but its powers under chapter 6 are limited to recommendations and it has no authority to investigate within a state without the express consent thereof. In order to make a decision binding on the members, the Security Council would have to find the existence of a threat to the peace under article 39. But article 9 of the Boundary Waters Treaty requires only "any matters of difference".

[91] Italics mine. The Honourable Wm. Pugsley, Minister of Public Works, in a debate in the Canadian House of Commons on the Boundary Waters Treaty, said of article 10: "It is in a small way, perhaps not so small a way after all, a sort of a Hague tribunal to which may be referred, by the consent of both parties, all such questions of whatever nature or kind, which may arise between the United States and the Dominion of Canada." See Debates, Sess. 1910-11, p. 900.

even satisfy Mr. Harmon himself of the exactness of their meaning:

> Each of the High Contracting Parties *reserves to itself . . . the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters;*[92] but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs;

Thus whatever might be the case for boundary waters, the situation as to rivers flowing across boundary lines was based on the Harmon doctrine of exclusive jurisdiction. The second part of the paragraph is however a modification of Attorney General Harmon's view that individuals had no right of action and that there could be no claim to rights under national law. It is clear that individuals are granted the same status to sue in the courts of the diverting country as they would have if they were citizens of that country. We shall return to consider the operation of this article at a later point in this paper.[93]

It is clear from the discussion above that the United States argued for and insisted upon the Harmon doctrine as a general principle of international law and that it sought and achieved its embodiment in the Boundary Waters Treaty under article 2. But what was Canada's position respecting the Harmon doctrine? Why did it agree to accept it when it seemed a principle obviously injurious to its interests, permitting as it did the United States to justify its diversions at Chicago and to interfere with the flow at other places? To this matter we now turn.

Debate was raised in the Canadian House of Commons on December 6th, 1910, concerning the Boundary Waters Treaty. Mr. R. Borden (Halifax), Leader of the Opposition, and later Prime Minister of Canada, in replying to an argument by the government for article 2, stated:[94]

> I do not know what argument might have been made by the Attorney-General of the United States. I would pay as much respect to that as the reasoning contained in it would demand, but I would not regard the argument of the Attorney-General of the United States, made with respect to a matter in controversy between his own govern-

[92] Italics mine.

[93] See the discussion relating to the Columbia River and the proposed diversion by Canada.

[94] House of Commons Debates (Canada) Sess. 1910-11, pp. 895-896 and p. 900.

ment and the government of Mexico. as absolutely conclusive of the international law upon this subject. I do not feel myself bound at all by the opinion of the Attorney-General of the United States making an argument for the interest of his own country in the matter that has been alluded to.

I would be inclined to think that the government in entering into this treaty have had a wrong impression as to the international law on this subject. It would appear that international law is not embodied in the terms of this treaty, that a very different principle is laid down and recognized by this treaty, one for which my hon. friend says the United States has made contention in the past, notably in the case of a dispute with Mexico. . . . I do not know that there is any particular reason why we should have been led in this particular case to accept as a true statement of international law that which was simply an argument, a brief for the United States. . . .

In his reply, Sir Wilfred Laurier, Prime Minister of Canada set out in crystal-clear terms, the reasons which motivated Canadian action:[95]

I may say that it was only after careful and exhaustive consideration on my part that I agreed to accept the treaty as it has been written. I would have regarded the international law as my hon. friend opposite [Mr. Borden] does, that is to say, that the same principle should prevail in international law as prevails in the common law and the civil law, namely, that a man may make such use as he pleases of the water which flows over his property so long as he does not do so to the detriment of anybody else.

But in this case, *whether we liked it or did not like it, the United States had taken the position that international law provides that, except in matters of navigation, the upper power has the right to use the water within its own territory as it thinks best. What were we to do?* They might do so, and if they did so, they might do it to our injury and we had no recourse whatever. *Was it not wiser, then, under such circumstances, to say:* Very well, if you insist upon that interpretation you will agree to the proposition that if you do use your powers in that way you shall be liable to damages to the party who suffers. At the same time *we shall have the same power on our side, and if we choose to divert a stream that flows into your territory you shall have no right to complain, you shall not call upon us not to do what you do yourselves. . . . What wiser course could have been adopted?*[96]

I for my part, have always believed that the Americans are very good and very fair neighbours, but they always stand for their own view of things. . . . They said: This is international law and we do not admit any other interpretation than this one. It was no use to argue with them. We might have quoted Vattel and a number of the other writers that we know of, but it would have had no effect. Therefore, we took this course under the cirmcumstances and said: Very well, *if you insist upon your view of it we want our law the same as your law and the consequences will be the same on either side.*[97]

[95] *Ibid*, pp. 911-912. [96] Italics mine. [97] Italics mine.

Perhaps once a prophecy of the future, today these words portray a real and difficult problem for Canadian-United States relations.

IV. *The Position 1910-1945*

In the preceding sections we considered the origin and development of the Harmon doctrine from its adoption under the pen of Attorney General Harmon to its adulthood as article 2 of the Boundary Waters Treaty of 1909. Under the present section we shall enquire into its role in Canadian-United States relations in the period under discussion, view its influences briefly in Mexican-United States affairs, and see what attention has been paid it in domestic United States water law.

A. *Canada-United States*

So far as future matters would be raised the Boundary Waters Treaty applied to them as they fell within its orbit. But the treaty did not apply to existing cases[98] and the real fun with the Chicago diversion had only begun. Whereas the Secretary of War had authorized a diversion of 4,167 cubic feet per second, by 1917 the unauthorized diversion exceeded 8,000 cubic feet per second.[99] The United States government succeeded in 1925 in obtaining an injunction against the Sanitary District[100] but the Secretary of War issued a temporary permit to prevent the city from becoming menaced by sewage and to give Chicago time to construct new means of sewage disposal.

With the level of the Great Lakes reduced from between four and eight inches and with no reasonable prospects for its restoration in the near future, Wisconsin, joined by New York, Pennsylvania, Ohio, Michigan, Indiana, and Minnesota filed suit in

[98] We have mentioned the exclusion of the Chicago diversion from the terms of the treaty by the failure to include Lake Michigan as a boundary water. Thus it has been argued that by article 2 the United States has reserved exclusive jurisdiction to itself in this matter. Under article 3 the United States also provided itself with a shield. None of its provisions requiring approval of the Commission for diversion were intended to "limit or interfere with . . . existing rights . . . nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes." However, article 2 relates to international rivers, not boundary waters.

[99] Diversion of Water from the Great Lakes and Niagara River (1921), p. 108.

[100] *Sanitary District of Chicago* v. *United States*, *supra*, footnote 80. The court rested its opinion entirely on municipal law: "the diversion lowered the levels of the Great Lakes and thus injured navigation, such act could not be lawfully done without the consent of the Secretary of War and consent had not been given. The international question was brought in only incidentally as an indication of the Federal government's interest in the diversion."

1922 to test the power of Congress to authorize the diversion in question,[101] and to obtain an injunction to prevent diversions materially affecting the level of the Great Lakes. The states of Missouri, Kentucky, Tennessee, Louisiana, Mississippi and Arkansas promptly allied themselves with Illinois in defence of the legislation (which Illinois only a few years before in *Sanitary District* v. *United States* had attacked) on the ground that it was a federal enterprise for the improvement of navigation. Chief Justice Taft, for the United States Supreme Court upheld the action of the plaintiff states for a decree enjoining the diversion and the court undertook, in view of its equity jurisdiction to set out a time table of reductions and a sliding scale of injunctions that would reduce the diversion to no more than 1,500 cubic feet per second after December 30th, 1938.[102]

Canadian views of the Chicago diversion seemed rather uncertain to begin with. The International Waterways Commission in 1906 recommended an allocation to Chicago of 10,000 cubic feet per second for sanitary purposes,[103] but this was apparently based on the view that no serious harm would result. However Canadian counsel appeared before the Secretary of War in 1912[104] to argue against the application for an increased flow by the Sanitary District. Canada based her argument on international law to the effect that navigable boundary waters could not be reduced without consent and further that the diversion was an illegal interference with navigation rights granted under the Treaty of 1871 and the Treaty of 1909. The Sanitary District argued in reply that the United States had retained full rights to divert under the treaty of 1909, and in any event sanitary purposes took precedence over navigation.[105] In 1913 the Canadian government protested the

[101] See 30 Stats. 1121. In the meantime Canada had been protesting regularly of the illegality of the diversion and insisting on the damage caused to her navigation interests. See, Protest Against Further Diversion of Water from Lake Michigan for the Chicago Drainage Canal (1912). See also, Canada, Sessional Papers, 1928, Sess. Paper no. 227, pp. 21, 23, 31, 35, 42, 43, 45.

[102] *Wisconsin et al.* v. *Illinois et al.* (1929), 278 U.S. 367. The United States Supreme Court referred the matter to Charles Evans Hughes as Special Master, who found that the diversions were causing serious injury to navigation; see the Hughes Report at 70 Cong., 1st Sess., H. Doc. 178. See also subsequent actions by the court in that case (1930), 281 U.S. 696; and (1930), 281 U.S. 179.

[103] Compiled Reports of the International Waterways Commission, 1905-1913, Canada, Sessional Papers, no. 19 (a), vol. 1, pp. 339-340.

[104] Protest Against Further Diversion of Water from Lake Michigan for the Chicago Drainage Canal (1912).

[105] See Papers Relating to the Application of the Sanitary District of Chicago, 1911, pp. 170-172. The decision of the Secretary of War is contained in Canada, Sessional Paper no. 180, vol. LX (1924), part 7.

diversion[106] on two further grounds: firstly, that it was unlawful by reason of the Ashburton-Webster Treaty of 1842 to interfere with Canada's right of navigation; secondly that "apart from these treaties the authorities of the United States . . . have not under the recognized principles of international law any right to divert from Lake Michigan by any means, or for any purpose, such an amount of water as will prejudicially affect the navigation of boundary waters in which both Canada and the United States are deeply and vitally interested." In 1921 Canada advanced an even more interesting argument, that it was a recognized principle that, "no permanent diversion should be permitted to another watershed from any watershed naturally tributary to waters forming the boundary between two countries."[107] A number of other protests were registered and much debate took place in the Canadian House of Commons[108] but compliance with the court order mentioned above set most fears to rest and the matter stands at that point at the present time.[109]

As we have noted, the question of the Harmon doctrine and its application to the Chicago diversion was put forward by some United States interests and hotly denied by Canada. We might say therefore by analogy to the municipal law, that the case in question went off on another point. One case which did not go off on another point was the Lake of the Woods watershed problem.[110] Article 2 of the Treaty of 1909 made clear that diversions from purely national portions of international rivers are strictly matters of domestic concern. But in the Lake of the Woods problem practical reasons required the level of the lake to be maintained and diversions on tributaries regulated.[111] Accordingly the Har-

[106] Canada, Sessional Paper no. 180, vol. LX (1924), part 7, pp. 120-126.

[107] *Ibid*, pp. 128-129.

[108] See House of Commons Debates (Canada), Sess. 1928, pp. 2207-2209; Sess. 1936, p. 1321; Sess. 1940, p. 414; Sess. 1928, pp. 545-561.

[109] In view of Canada's earlier concern over the Chicago diversion a statement in the House of Commons on February 3rd, 1955, by J. W. Murphy (Lambton-West) had a novel ring. He complained of the *high level* of the Great Lakes and resulting property damage and made the following proposal: "Some years ago Canada was greatly alarmed about the amount of water the Chicago drainage scheme was taking from Lake Michigan. Action was taken in the United States courts, and as a result of this flow was reduced to about 3,200 cubic feet per second. I would suggest that this government should consult with that of the United States in an endeavour to see if we cannot put *more water* through that scheme now. . . ."

[110] For a discussion of the work of the International Joint Commission under its reference of June 27th, 1912, in accordance with article 9 see Chacko, *op. cit., supra,* footnote 7, pp. 247-264.

[111] International Joint Commission, Final Report on the Lake of the Woods Reference, Washington (1917).

mon doctrine was discarded by the United States and Canada who agreed under article 11 of the Lake of the Woods treaty of 1925:

> No diversion shall henceforth be made of any waters from the Lake of the Woods watershed to any other watershed except by authority of the United States or the Dominion of Canada within their respective territories and with the approval of the International Joint Commission.

Permanent diversions from tributaries of this watershed are thus brought under the treaty of 1909.

B. *Mexico-United States*

As we noted in our previous discussion of Mexican-United States water problems no agreement was concluded concerning the distribution of the waters of the Colorado River. Although negotiations continued on an off and on again basis it was not until the very end of the period under consideration here that a definite treaty was concluded between Mexico and the United States for the apportionment of all of the waters, including the Colorado, touching their common frontier.[112] It is the purpose of this sub-section to have a brief look at some of the more important events leading up to the conclusion of this treaty, and of course to consider the provisions of the treaty itself.

By 1921 utilization of the waters of the Colorado River on the United States side had progressed so far that the States of the Union involved decided to conclude a compact[113] between them for dividing the flow.[114] Arizona became dissatisfied with its allotment and dropped out of this "Colorado River Compact" but the compact received federal approval in 1928[115] under the title of Boulder Canyon Project Act. Section 20 of this Act set out the United States position vis à vis Mexico:

> Nothing in this Act shall be construed as a denial of recognition of any rights, if any, in Mexico to the use of the waters of the Colorado River System.

Meanwhile, in 1922, Secretary of Commerce Herbert Hoover, under whose direction the compact was to take shape, requested

[112] (1947), 3 U.N.T.S., p. 313, 59 Stats. 1219.

[113] For a discussion of state sovereignty in domestic United States law see E. C. Carman, *op. cit.*, footnote 18, at pp. 84-100, 152-172, 266-319.

[114] Permission of Congress was obtained with the enactment of an Act of August 19th, 1921, 42 Stats. 171.

[115] (1928), 45 Stats. 1057. For a thorough going review of these developments over the period 1922-1930 see E. C. Carman, *op. cit., supra*, footnote 18, at pp. 309-314. The Compact itself may be found in H. R. Doc. No. 605, 67th Cong., 4 Sess. (1923).

an opinion from the State Department as to Mexico's rights to the waters of the Colorado.[116] Secretary of State Charles Evans Hughes in reply[117] noted Mexico's right to navigate the Colorado under the Treaty of 1848 and the Treaty of 1853 but stated that the United States could build projects within its own territory and though this might interfere with the flow it was not prohibited by either of those treaties. As authority he cited the opinion of Attorney General Harmon to the same effect.[118] But Secretary Hughes also noted that the United States had never stood rigidly on its legal rights but had always taken into consideration matters of comity and equity. In summarizing his view he stated:

> . . . if it shall be proposed so to apportion the waters . . . as to cut off the present supply of water in the river as it enters the Republic of Mexico, I may say that it would seem to me that considerations of equity and comity would require that the interests of Mexico in the matter should be taken fully into consideration.

In 1927 Congress authorized the President to co-operate with Mexico in the study of the Colorado, Tia Juana and Lower Rio Grande rivers,[119] and a commission was formed known as the International Water Commission, United States and Mexico. The report of the United States section[120] requires some attention. The Mexican section is reported as arguing the right of Mexico under existing agreements (treaties of 1848 and 1853) to navigate both the Rio Grande and the Colorado with the result that any modifications of these rights would have to be consented to by Mexico. The American section however recommended that the "theory of navigability"[121] be abandoned as the main uses of both rivers were for irrigation. The American section further suggested that in an "equitable division" of the waters of the Colorado the United States might deliver every year 750,000 acre feet (total flow about 20,000,000 acre feet) which was the maximum which Mexico had

[116] Report of the American Section of the International Water Commission, United States and Mexico, p. 261. See also H. D. No. 359, 71st Cong., 2 Sess., 263 *et seqq.*

[117] *Ibid*, Simsarian, *op. cit., supra*, footnote 7, discusses this matter at pp. 63-65.

[118] *Op. cit., supra*, footnote 6. [119] 44 Stats. p. 1403.

[120] H. Doc. 359, 71st Cong., 2nd Sess., p. 2.

[121] When is a river navigable? The treaties of 1848 and 1853 say the Colorado is a navigable river. On this point *Arizona* v. *California et al.* (1931), 283 U.S. 423 is worth noting. Arizona brought an action to enjoin construction of a dam at Black Canyon on the Colorado on the ground that the Federal government lacked power to erect obstructions on non-navigable rivers. The United States Supreme Court stated that the purpose of the construction was to improve the navigability of the Colorado and that other purposes incidental thereto might also be served. On this matter see W. Hawkins, *supra*, footnote 37, at p. 203.

used in any one year. These proposals were presented as possible acts of comity and not of any right accruing to Mexico. In transmitting this report to the President, the State Department stated:[122]

> The American section of the commission in its report expresses views on certain legal and political matters which have not been passed on or approved by this department.

Negotiations between the United States and Mexico continued on through the 1930's with some progress towards settlement. One writer, Hawkins, summarizes the positions taken by the two nations in this manner:[123]

> To the American section's claim of sovereign right to all the waters of the Colorado the Mexican section interposed a sovereign legal right to a share thereof, and then to the Mexican section's assertion of a sovereign right to all the waters of the Mexican tributaries of the Rio Grande the American section interposed a sovereign legal right to all such tributary waters now used in American territory. This is enough on which to say that neither section seriously doubts the rule . . . that a nation may not divert and use the waters of an international stream without accountability.

Hawkins is undoubtedly correct in detecting some necessity for varying the formerly rigid adherence to the Harmon doctrine. We will now continue on to see what position the United States assumed in its negotiations with Mexico for the treaty of 1944.

The Treaty of Washington of February 3rd, 1944, brought to rest over sixty years of tribulation between Mexico and the United States over their joint water resources. It is not a treaty proclaiming general principles as did the Boundary Waters Treaty of 1909 between Canada and the United States. It is a close-knit and very technical document. The preamble states only that the two countries desire "to obtain the most complete and satisfactory utilization (of their joint water resources)." No principles set out the allotment of the waters of the Rio Grande. Article 4 lists in terms of percentages the amount allocated to each state from the various Mexican and United States rivers. Article 10 allots the waters of the Colorado River, granting 1,500,000 acre feet annually to Mexico. Article 10(b) says that:

> Mexico shall acquire no right beyond that provided by this sub-paragraph (1,500,000 a.f.a.)[124] by the use of the waters of the Colorado system. . . .

This distribution of waters is clearly not prompted by the Harmon

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[122] *Op. cit.*, p. vii.
[123] Hawkins, *supra*, footnote 37, at pp. 203-204.
[124] Acre feet annually.

doctrine and thus we are led to enquire into the motivation for the recognition of these rights in Mexico. Is this a grant similar to that under the treaty of 1906 based on "international comity" or is it a recognition of rights supported by international law and confirmed by a treaty provision? For the answer we must turn to the *travaux préparatoires.*

From the statements of those United States officials responsible for the drafting of the treaty[125] it is clear that the Harmon doctrine as a general principle of internationl law has received a substantial amendment. The United States, for the first time in a formal document, was ready to concede that though the upstream user might divert waters as was thought fit, no diversion could be made which would interfere with existing, or vested interests downstream. This is not recognition of any doctrine of "equitable apportionment", which would require a consideration of the future needs of the states involved, but it is certainly a long step away from the position that there is no duty in international law on any state to restrain its use of the waters within its territory. Edward R. Stettinius, Secretary of State, in his statement to the Senate Committee on Foreign Relations, made it clear that the Harmon doctrine as a starting point for the United States view had not been abandoned.[126] He described the treaty as:[127]

> . . . the application of those principles of comity and equity which should govern the determination of the equitable interests of two neighboring countries in the waters of international streams.

But this is not to say that there were no doubts raised as to the validity of the Harmon doctrine in international law today. Mr. Benedict English, Legal Advisor at the State Department, in his testimony to the Committee on the question of United States obligations in the absence of a treaty with Mexico cited from a number of foreign writers and then told the Committee:[128]

> . . . those to which we have referred are sufficient to indicate to the Committee that there is, to say the least, considerable doubt regarding the soundness of the Harmon opinion that as a matter of international law the United States can do as it pleases with the waters of an international river and that the lower riparian State has no right.

He stated however that this was only his personal view and did not have the approval of the Department of State.[129]

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[125] See Hearings before the Senate Committee on Foreign Relations on the Treaty with Mexico Relating to the Utilization of the Waters of Certain Rivers, 79th Cong., 1st Sess. (1945), esp. at pp. 1738-1782.

[126] *Ibid*, pp. 19-21. [127] *Ibid*, p. 21. [128] *Ibid*, p. 1745.

[129] *Ibid*, p. 1753. Mr. John G. Laylin in a document submitted to the International Law Association at its Dubrovnik Conference, 1956, relies

The Assistant Secretary of State, Dean Acheson, in his testimony made it very clear to the Committee why the treaty ought to be accepted:[130]

> . . . our Government simply could not afford to let this question of the waters of the Colorado River continue unsettled to plague our relations with Mexico for years to come. If this treaty should be defeated and if subsequently Mexico should request that the matter be arbitrated, I do not see how as a matter of policy—entirely aside from treaties and legal precedents—we in the Department of State or you in the Senate could refuse such a request. There would be too much at stake in relation both to Mexico and to our total aims in the field of foreign affairs to justify our refusing to do so for any reason. As to what the outcome of such arbitration might be I am not prepared to say. But it is our strong feeling in the Department of State that our own interests in this country, in California as well as in other basin States, would be seriously endangered by a continuation of the present situation. That is one of the main reasons we have pressed for the treaty. . . . Today some 8,000,000 acre feet a year of this water are wasting through Mexican territory. There is nothing to stop Mexico's using more and more of this water as time goes on. And regardless of what the legal niceties may be, let no one be deceived that the longer this building up of use continues, the more difficult it will be to negotiate a settlement on anything like as favorable a basis as we have here.

What conclusions can be drawn concerning the Harmon doctrine from this latest treaty by the United States concerning the regulation of international rivers? Mr. Acheson admits, at least with respect to existing uses of the downstream state, that the United States is not going to be able to rely on the Harmon doctrine without serious international repercussions. It is not so obvious however from a study of the documents what the United States considered the international rules to be. There is certainly nowhere a repudiation of the Harmon doctrine. Mr. Stettinius

heavily on the testimony of Mr. English for the view that the United States by this treaty had abrogated the Harmon doctrine (see pp. 7-8 of his article, The Uses of the Waters of International Rivers, in a pamphlet issued by the United States branch of the Association entitled, Principles of Law Governing the Uses of International Rivers). So far as the testimony of Mr. English being personal only, Mr. Laylin states (footnote 25, p. 42): "In order to avoid embarrassment to the United States in case the treaty should not be ratified by the Senate (*sic*), his statement was presented as representing only his personal view. . . ." It is not apparent to me why a denunciation of the Harmon doctrine might be embarrassing in the case of non-ratification but not otherwise, unless Mr. Laylin means by this that if the treaty had not gone through the United States would thereafter have insisted on the Harmon doctrine. Indeed this was suggested by Senator Milliken (*Ibid.* p. 1754) when he stated: "I most respectfully suggest that no one from the State Department be pushed to give an opinion, either off or on the record, that might be thrown in our teeth if we do not have a treaty." In any event there is nothing in the record to show that the view of Mr. English was anything but personal.

[130] *Ibid*, p. 1761.

says the treaty is based on international comity. At best there is merely the suggestion that as a result of the practice of states and the opinions of writers its usefulness is rapidly diminishing. The treaty itself is similarly vague. Article 10(b) suggests, when it says, "Mexico shall acquire *no right beyond that provided by this subparagraph.* . . ." [131] that the United States was by this treaty *providing rights* and *not recognizing them.* The clear inference from the words of Mr. Acheson strengthens this view. He says plainly that United States willingness to provide Mexico with 1,500,000 a.f.a. is a quid pro quo for Mexico's promise not to contend, by any use of waters in excess of that amount, for vested rights, which rights might prove difficult to deny from the point of view of international law. The United States is not willing to recognize that Mexico has any rights to the water but at the same time is unable to contend that Mexico has none.

C. *Domestic United States Water Law*

At this juncture a brief incursion into domestic United States water law is called for. One of the constitutional theories of the United States is that each state of the Union is a sovereign entity which has conceded certain powers to a federal union but retains residuary powers.[132] Thus in the disputes between the states we have a problem not unlike international disputes, and indeed the Supreme Court of the United States has often taken the position that it could apply international law to these domestic disputes.[133] Some question can of course be raised regarding the value of decisions of the Supreme Court of the United States as evidence of inter-

[131] Italics mine.

[132] Chief Justice Shaw of Massachusetts in *Commonwealth* v. *Alger* (1851), 7 Cush. (61 Mass.) 53, at p. 81 stated: "This right of dominion . . . when relinquished by the parent country (Great Britain) . . . vested in the several states, in their sovereign capacities, respectively, and was not transferred to the United States. . . . Special jurisdiction has been from time to time vested in the general government, but the general jurisdiction remains with the several states. . . ."

[133] In the leading case of *Kansas* v. *Colorado* (1902), 185 U.S. 125 the court said at pp. 146-147: "Sitting, as it were, as an international, as well as domestic, tribunal we apply Federal law, State law and international law, as the exigencies of the particular case may demand. . . ." In the same case when it came before the court again in 1907 (206 U.S. 46 at p. 97) Mr. Justice Brewer said: "Nor is our jurisdiction ousted, even if, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal." Mr. Justice Gray in 1900, in the case of *The Paquete Habana* 175 U.S. 677, at p. 700 declared: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination."

national law.[134] There is this difficulty with accepting the decisions of any national court as of real and direct value to international law, that they owe their existence to legislative acts of a national community, and as such are governed by the nature of the legislation. This may apply particularly to the United States Supreme Court where by statute and precedent the decisions are likely to have a political rather than a legal basis, thus leading to a tendency to regulate disputes by compromise rather than by the application of any written law. Indeed, Professor Hyde has pointed out:[135]

> As a tribunal possessed of sufficient jurisdiction to prevent or grant relief on account of diversions of the waters of American interstate streams, the Supreme Court of the United States has not been obliged to seek light from the law of nations in enunciating rules that should be applied. . . . Thus it has not sought to explore the problem touching the freedom of a State under that law to divert the waters of a river flowing out of or constituting the boundary of, its territory.

Taking into account then the above mentioned limitations on the value of this reference we can turn to an enquiry of a few of the leading United States cases. Our discourse will be useful, at the very least, for the reason that they are examples of sensible solutions to the conflicting claims of states. In addition it must be remembered that our purpose here is not to display the judgments of the court as evidence of international law but to consider how matters analogous to the problems in question were handled by it.

In 1895 Attorney General Harmon gave his famous opinion. In 1906 it was embodied in the Treaty of Washington of May 21st. A year later the Supreme Court of the United States handed down their epoch making decision in *Kansas* v. *Colorado*.[136] This action by Kansas, by way of an original suit in the United States Supreme Court, was to restrain Colorado, the upstream state, from diverting the waters of the Arkansas River for irrigation purposes. In the same case in an earlier decision[137] Chief Justice Fuller summarized the contentions of Colorado as follows:

> The State of Colorado contends, that, as a sovereign and independent State, she is justified if her geographical situation and material welfare demand it in her judgment, in consuming for beneficial purposes all

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[134] For some views on this topic see Hyde, *op. cit.*, *supra*, footnote 7, pp. 570-571; C. C. Hyde, The Supreme Court of the United States as an Expositor of International Law (1937), 18 Br. Y.B. Int'l L. 1; Sprout, Theories as to the Applicability of International Law in the Federal Courts of the United States (1932), 26 Am. J. Int'l L. 281; H. C. Smith, The American Supreme Court as an International Tribunal; *cf* a comparison with the Swiss Federal Cantons by Schindler (1921), 15 Am. J. Int'l L. 149.

[135] Hyde, *op. cit.*, *supra*, footnote 7, pp. 570-571.

[136] (1907), 206 U.S. 46.

[137] (1902), 185 U.S. 143.

> the waters within her boundaries; and that as the sources of the Arkansas River are in Colorado, she may absolutely and wholly deprive Kansas and her citizens of any use of or share in the waters of that river. She says that she occupies toward the State of Kansas the same position that foreign states occupy toward each other. . . .

But the court rejected this Harmon doctrine outright in both decisions and held in the latter case (1907) that though the diminution of the flow of water by Colorado for irrigation had worked a detriment in Kansas, yet it was to be compared with the great benefit resulting to Colorado. The suit was dismissed without prejudice to Kansas to institute new proceedings if so much water was taken that it would go,

> to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river.

Thus the rule established in domestic situations was not the Harmon doctrine but "equitable apportionment".

In 1931 the Supreme Court in *Connecticut* v. *Massachusetts*,[138] had a further opportunity to define equitable apportionment:

> . . . disputes are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters of an interstate stream among the States through which it flows. It means that the principles of right and equity shall be applied having regard to the equal level or plane on which the States stand in point of power and right under our constitutional system and that, upon a consideration of the pertinent laws of the contending States and all other relevant facts, this Court will determine what is an equitable apportionment of the use of such waters.

One of the relevant facts which the court will consider in determining equitable apportionment was set out in *Wyoming* v. *Colorado et al.*,[139] where the defendants were diverting in Colorado a considerable portion of the Laramie River, which flows from Colorado into Wyoming. This water was diverted to another watershed for use in irrigating lands. The Supreme Court denied Colorado's right to divert these waters for the reason that:

> As between different appropriations from the same stream, the one first in time was deemed superior in right, and a completed appropriation was regarded as effective from the time the purpose to make it was definitely formed and actual work thereon was begun, provided the work was carried to completion with reasonable diligence.

From the point of view of diversion from one watershed to another the case of *New Jersey* v. *New York et al.*[140] is an interesting

[138] (1931), 282 U.S. 660, at pp. 669-670.
[139] (1922), 259 U.S. 419, at p. 459.
[140] (1931), 283 U.S. 336.

one. New Jersey brought suit to enjoin a proposed diversion of waters in New York from tributaries of the Delaware River to the watershed of the Hudson River, which diversion was intended to increase the water supply for New York City. Mr. Justice Holmes stated that the court must adopt the principle of "equitable division" and pointed out that,

> removal of water to a different watershed obviously must be allowed at times unless States are to be deprived of the most beneficial use on formal grounds.

Finally, we would not depart this short view of domestic United States water law without setting out another and equally famous portion of Mr. Justice Holmes' judgment in which he tells us:[141]

> A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it.

Was the Harmon doctrine ever accepted as a rule of domestic United States law? Clearly it was not. At the same time that the United States was insisting externally on the strict principles of territorial sovereignty, the Supreme Court of the United States was rejecting it in favour of a doctrine of equitable apportionment. If the court was, in so doing, applying principles of international law, it was not applying those principles recognized by the United States. Of course the two situations were not analogous. The Supreme Court was never called upon to adjudicate questions of an international character where the alternative to accepting the decision of the court might be war. What it was called upon to do was to balance interests within a federal system, and one based on principles of law and politics not necessarily similar to those rules of international law and international life which guide the family of nations. At the same time, the court was working out rules of law for problems in economics and politics not unsimilar to those found in international law. For this reason its solutions can be a valuable guide, not as authorities for similar cases in international law, but as reasons to be accepted as their merit demands.

V. *A Contemporary Problem: The Columbia*

A. *The Economic Problem*

We now come to a matter which is destined to loom very large in United States-Canadian relations. A few facts will show why.[142]

At present the United States is close to realizing the maximum

[141] *Ibid*, at p. 342.

[142] The information presented here is taken from, R. L. Neuberger, Study of the Development of Upper Columbia River Basin, Canada and

potential of the Columbia River system as it exists today.[143] Canada on the other hand has not constructed one dam to develop its resources from the Columbia. Much of the reason for this is of course the disparity in economic growth on either side of the border. But the impending power shortage in the Pacific Northwest comes at a time when Canada, and more particularly British Columbia, stands at the threshold of gigantic industrial and economic development. The Right Hon. C. D. Howe, then Minister of Trade and Commerce, speaking in the House of Commons on February 4th, 1955, gave warning of the developments and difficulties to come when he stated:[144]

> At the present time the development and utilization in Canada of waters . . . is a matter of ever increasing importance in the development of the Canadian economy. This is true of the Columbia River system and its watersheds. The use of such waters has to be viewed not only in its present implications, and in the light of our relations with the United States, but also in the light of future water and power requirements of Canada and Canadians. The demand for hydro-electric power in Canada is insatiable: in fact our industrial economy is largely built on low cost electricity.

The United States is presently drawing approximately 9,300,000 horsepower of hydro-electric power from the Columbia basin. At the rate at which the area now serviced by this power is developing, that amount must be doubled by the end of the present decade. The plants now producing power are estimated at $1,500,000,000 and funds have been authorized for new construction totalling in excess of $3,000,000,000. To produce the extra power which the Pacific Northwest needs requires the utilization of heavy run-offs which now are wasted. Herein is the problem. In order to further develop the Columbia, storage dams are needed to hold back the excess waters until the autumn and winter seasons. But these dams must be constructed in Canada. The one feasible place for the United States to store water domestically is at Libby Dam on the

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United States (1955); The Diversion of Columbia River Waters, Bulletin No. 12, Part 4, Institute of International Affairs, University of Washington, June, 1956: The Vancouver Province (B.C.) of April 23rd, 24th, 25th, 1956: House of Commons (Canada), First Session, 1953-1954, Standing Committee on External Affairs, Minutes of Proceedings and Evidence, no. 7.

[143] The Columbia River is some 1,200 miles in length, over one-third of which is in Canada. Its source is at Columbia Lake in the Canadian Rockies from where it flows northward for about 150 miles before being turned to the south by the Rocky Mountain Range. Of a total volume of 180,000,000 acre feet annually (or five-sixths that of the Mississippi) somewhat over a third is contributed by sources in Canada.

[144] House of Commons Debates (Canada), Sess. 1955, p. 871.

Kootenai River[145] but under the Boundary Waters Treaty of 1909 the consent of the International Joint Commission is necessary for the reason that this dam would back water 42 miles into Canada, 150 feet deep at the boundary.[146] Meanwhile British Columbia also faces an impending, although not so immediate, power shortage which can only be alleviated economically by one of two means; either by selling its storage in return for power developed in the United States, or by developing its own power in Canada. To this latter end General A. G. L. McNaughton, Canadian Chairman of the International Joint Commission has proposed two diversions which would result in a channelling of all of the surplus waters of the Columbia down an all-Canadian river for power production in Canada.[147] This of course would make the Libby project impossible and seriously restrict further development of the Columbia on the United States side.

At the time of writing, the matters mentioned above remain in the planning and discussion stage. Canada is in the position of contending that if storage of waters is permitted in Canada she is entitled to "downstream benefits" in the form of a power return. The United States until recently has denied that Canada is entitled to anything but damages caused by the flooding. General McNaughton, speaking before the Standing Committee on External Affairs, outlined present thinking in this area and gave evidence that there

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[145] The Kootenay River rises in the Rocky Mountains of B.C. and flows south into Montana and Idaho and then turns northward back into Canada where it joins the Columbia only a few miles north of the boundary.

[146] In 1950 Congress authorized the Libby Dam as a Federal Project and application was made for the approval of the International Joint Commission. Canada favoured the construction of the Libby Dam on the basis of adequate compensation in the form of a power return measured by the value of the storage provided. The United States refused to recognize any downstream benefits and offered Canada $7,000,000 in return for damage caused by flooding. With the Commission violently in disagreement, the United States withdrew its application. See External Affairs 1953, Minutes of Proceedings No. 3, where General McNaughton stated to the Standing Committee on Exteranal Affairs; "This project is one in which we are invited to present, that is, to make a gift to, our friends to the south of the line of the rights in perpetuity to a large flow of Canadian origin capable of being used in Canada. By this action, if we should take it, we would divert a resource of very great value from ourselves to the service of industry in another nation. . . ."

[147] The first diversion would be at Canal Flats where the Columbia and Kootenay Rivers are only a few miles apart. All of the flow of the Kootenay could be diverted into Columbia Lake. The second diversion could take place at Little Dalles Reservoir where a tunnel of some 15 miles length would bring the water to Shuswap Lake. An alternative diversion could take place at Downie Creek to Shuswap Lake. Approximately 15 million acre feet of water (about two-thirds of the total flow of the Colorado) would be stored at Mica Creek to be diverted into Shuswap Lake to augment the flow of the Fraser River in low season.

was some hope of the Commission reaching agreement when he said:[148]

> Under the previous United States administration . . . we were dealing . . . with the United States as such. That situation has changed very substantially because the policy of the present administration in the United States is to encourage private interests to do these developments and to encourage the States to undertake their share. . . . The consequence of that is, since there are at least five States in the United States that are concerned with the Columbia basin, the problem of downstream benefits as between States has become a very live issue in the United States. As long as they were dealing with us, dealing solely with Canada in the matter, they could afford to say, "We will not recognize downstream benefits; once the water comes into our country it is our water and anything we get out of it will be our power and we will not even consider your representations". But when you have four or five States of the Union, some of which are upper states and others lower states, the upper states have been telling the lower ones, "Well, if you will not give us the downstream benefits, we are sorry, but you won't have any storage". With the present United States administration and policies we are in a very favorable position to have our representations dealt with.

But if the United States and Canada cannot reach an agreement as to the value of upstream storage, then, apparently, Canada will go ahead with her own plans for an all-Canadian development. The issues at stake are no less than the economic development of these areas. As Leon J. Ladner, Q.C., a prominent Vancouver lawyer and former Member of Parliament, has pointed out:[149]

> With power costs at 2 mills per k.w.h. or perhaps 1½ mills in the future, industries from all parts of the world are in fact attracted — we know that. Similarly, the markets of the world in certain products may in the future be controlled by those 2 mills.

It seems almost trite to suggest that both nations must do their utmost to arrive at a satisfactory solution without thought to anything but the necessity of finding a formula which will permit an optimum of development on both sides of the border. Senator Richard L. Neuberger of Oregon, in a report to the Senate Committee on Interior and Insular Affairs, set out an imperative guide for both nations in this matter when he declared:[150]

> I want to stress to this committee my personal conviction that, with an earnest and open minded effort on both sides, we can agree with

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[148] External Affairs, Minutes of Proceedings and Evidence, no. 7, pp. 167-168.

[149] Leon J. Ladner, Q.C., Diversion of Columbia River Waters, Publications of the University of British Columbia, Lecture Series no. 27, at p. 10.

[150] 84th Congress, 1955. See *supra*, footnote 142.

Canada on a program to make the best use of our great jointly held water resources in their present channels. I stated in the introduction that failure to reach agreement on a mutually beneficial program for developing the Columbia River would threaten the gravest crisis in modern United States—Canadian relations, as well as incalculable economic loss to both countries.

B. *The Legal Issues*

Having considered a few of the basic difficulties facing a settlement of the economic problems of the Columbia we can now turn to a study of the legal relationship of Canada and the United States concerning these matters at issue. What is not intended by the following discussion is to assert that any particular doctrine of international law, or even any set of specific rules, ought to be applied for a solution. The Columbia crisis is not one to be solved by the application of dogma in the manner of a medieval scholar. It is an economic crisis, a legal crisis, and perhaps, although we hope it will not result, a political crisis. It must be solved across the bargaining table, and not before the bar. But the legal relationship created by the parties must be a starting point in their deliberations, and a guide to their conduct. With that frame of reference we turn once more to the Harmon doctrine, to consider what role it may play here.

What are the binding rights and obligations of Canada and the United States concerning the use of the waters of the Columbia River? Here we must make an important distinction between the rights and obligations these two nations would have under general principles of international law, and those in existence under the Boundary Waters Treaty of 1909. As for the first case it is clear, from what we have said so far, and from consistent United States practice in this matter, that Canada could utilize these waters in a reasonable manner, having regard to the requirements of comity and equity and the necessity of protecting vested interests or prior appropriations downstream. But in actual fact, the rights and obligations of the two nations do not rest on the general principles of international law, which are irrelevant to the matter, but on the definitive Boundary Waters Treaty of 1909 which was agreed to by both states in order to set out the principles which would bind them in the regulation of disputes concerning their international water resources. It is to this treaty then that we must turn.

The application of those provisions of the treaty relating to boundary waters is clearly excluded by the definition of boundary waters in the preliminary article which sets out, ". . . boundary

waters are defined . . . but not including . . . the waters of rivers flowing across the boundary." Article 2, which we have mentioned elsewhere, sets out the general principles which are to guide Canada and the United States concerning these rivers which do not form boundary waters:

> Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other, as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters . . . .

In the light of the history of this provision it is abundantly clear that no legal limits can be set to Canada's right to divert the waters of the Columbia as she sees fit and that no regard need be had to downstream uses or prior appropriations of any sort. The phrase, "subject to any treaty provisions now existing with respect thereto," was included in the treaty to prevent a conflict in interpretation between this article and article 6 which set up a special regime for the waters of the Milk and St. Mary Rivers. The only limit which article 2 sets on the right to divert rivers flowing across boundaries is that contained in the last sentence of the article:

> . . . neither of the High Contracting Parties intends by the foregoing provisions to surrender any right which it may have to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.

There is no question of any interference with navigation in the dispute about the Columbia River diversions. And it was apparently conceded, by Len Jordan, former Governor of Idaho and formerly Chairman of the United States section of the International Joint Commission, and other Americans,[151] that Canada does have the legal right to divert, although it is not conceded that she can do so without regard to downstream interests.

Assuming then that Canada does have the right to divert under article 2 of the Boundary Waters Treaty, which as we have shown incorporates the Harmon doctrine, does she have any legal obligation to compensate for injury suffered to vested interests downstream? We must keep in mind here that where a treaty grants a right and mentions nothing of compensation, no compensation is intended. However, article 2 has a proviso as to compensation, which was put in at the insistence of Canada.[152] It reads:

[151] See the Financial Post (Canada), January 21st, 1956, p. 11.

[152] Before we go any further I must make it clear that Canada has not

> . . . but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs. . . .

Admittedly, this provision is pretty hard to understand. Professor Eagleton, writing in 1955, raised two of the difficult problems:[153]

> Another thing that interests me—perhaps because I once wrote a book on it—is the responsibility of the two states. I remarked earlier that I was puzzled how a claim for damages should be presented; I cannot make out whether article 2 of the treaty of 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.

Keeping in mind these difficulties let us enquire what those who enacted the treaty thought this provision said. The Minister responsible, Hon. Wm. Pugsley, in a debate on December 6th, 1910, in the Canadian House of Commons, told the members:[154]

> . . . as to all future cases the *citizens*[155] of either country are placed in exactly the same position as a riparian proprietor lower down the stream would be placed in regard to any diversion of water by a *private*[155] riparial owner further up the stream by which his rights would be interfered with. In other words, both nations, by the latter clause of this article, making provision for the recognition and payment by the country whose subject caused the injury, recognize that there would be the same obligation to make payment for that injury as if it was a question between citizens of the same country.

The treaty in at least one regard is thus made perfectly understandable. The first part of article 2 makes clear there is no obligation by one state to another not to divert. The second part, as a matter of grace or comity, confers upon those citizens who are injured downstream the right to come into the courts of those doing the injury to obtain the same rights and remedies available to citizens of that state.[156] One reason why Canada may have insisted on such

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said that she would interfere with vested rights downstream, and if in fact she does not, then no question of compensation will arise. Canada's position is that she will divert only those waters which are not presently being used downstream.

[153] (1955), 33 Can. Bar Rev., at pp. 1033-1034.

[154] House of Commons Debates (Canada), Sess. 1910-11, pp. 870-871.

[155] Emphasis supplied.

[156] Under the Water Act of British Columbia, R.S.B.C., 1948, c. 361, originally enacted in 1891, no person can acquire rights to the use of waters in the province without a licence from the provincial government. It is hardly likely that any user of the Columbia river in the United States would be considered to be in the same position as if granted a licence in British Columbia. Thus they would be entitled to no compensation. They

a provision was because of the United States refusal, just a few years before, to recognize any claims by Mexican citizens who had been injured by diversions of the Rio Grande.

In another regard however the treaty is not so clear. Suppose for example that instead of a diversion by an individual, the diversion is made by an agency of the government of the United States or Canada pursuant to duly enacted and constitutionally valid statute. Unless the statute itself provided compensation the individual injured would have no remedy. He can stand in no better place than the citizens of the state in question. Here there may well be a valid diplomatic claim not excluded by the treaty. It would of course depend on one's view of whether the treaty meant literally that an injured alien individual could have no better claim than a citizen, or whether the treaty was considering the sole case of injury caused by an individual, and not referring to other matters.

We have considered the case of one individual injured by another individual and also the case of an individual injured by a government. What about the case where it is the state itself that is injured by the diversion? Mr. Len Jordan, then Chairman of the United States section of the International Joint Commission, argued at its semi-annual meeting in Ottawa on October 4th, 1955:[157]

> I think it proper to point out at this time that the injuries downstream occasioned by the annual diversion of 15,000,000 acre feet of Columbia water to another basin will be suffered by a Sovereign . . . one of the High Contracting Parties—namely, the United States of America. Obviously, therefore, the United States, as injured Sovereign, will not be limited to the redress provided for an injured party by article 2.

What Mr. Jordan contends for is that as the states themselves are designated by article 2 as "the High Contracting Parties," the proviso concerning compensation is not applicable to limit them, the proviso referring only to "injured parties", meaning individuals only. This argument is anything but obvious! Professor Charles B. Bourne, of the University of British Columbia, speaking at the Pacific Northwest Regional Meeting of the American Society of International Law in April, 1956, made this reply:[158]

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would however be in the same position as any user of water in the province without a licence. An action might be brought in British Columbia in order to open the avenue for a diplomatic claim. However, it is difficult to see, keeping in mind that both parties accepted the Harmon doctrine, any other result than that such representation is excluded by the treaty.

[157] Proceedings of the International Joint Commission.

[158] Professor Bourne's discourse is printed as Diversion of the Columbia

> Now, even if one were to accept this interpretation of "injured parties" in Article 2, that these words do not limit the remedies of the United States, how could the United States have any legal claim under the general principles of international law in view of the first part of Article 2? Does Article 2 not define the law for the parties to the treaty? Certainly, the history of the Harmon doctrine and of Article 2, which embodies that doctrine subject only to the qualification expressed in that Article, makes it difficult to believe that any tribunal could be persuaded that the United States has a legal right, found *outside* of Article 2, to compensation for downstream losses and injury occasioned by a diversion of Columbia River waters in Canada.

The force of this argument is difficult to blunt.

One further matter remains to be considered, and that is the question of vested interests. Can a future appropriation be a vested interest? Mr. Len Jordan seems to think so. At the proceedings of the International Joint Commission in Ottawa on October 4th, 1955, he stated:

> The United States Government already has substantial investments in existing power plants in the Columbia Basin amounting to about one and one-half billion dollars; in power plants under construction, another billion dollars; plus another estimated two billion dollars for power plants expected to be built in the next ten years. Wide publicity has been given all of these projects. Canadian and provincial officials have been given all our engineering reports. Never at any time has secrecy shrouded our building or our planning. All of these projects were planned and all of the funds are committed in anticipation that the waters of these international rivers would not be utilized by Canada in such a way as to jeopardize downstream interests . . . Diversion would result in very serious injury to downstream interests in the United States.

But what does article 2 provide? Even assuming that prior appropriation will give a right to compensation does this also include injury to a prospective or potential prior appropration? To have a right to be compensated under article 2 there must be an actual appropriation of the water which is interfered with by the diversion in question. The United States cannot protect itself against competition from Canada for the unappropriated waters of the Columbia by contending that they thought about it first.

Conclusion

Conflicts of interest, on whatever level, are a part of our daily life. Perhaps man's history may be described as a struggle to minimize struggle. In the regulation of international rivers, as in many other fields of human activity, man's harmony with man depends on the

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River in Canada, Publications of the University of British Columbia, Lecture Series No. 27, p. 17. See p. 24.

mutual recognition of needs and a co-operative endeavour to find a solution which most closely meets them. It is to the credit of both Canada and the United States that the International Joint Commission has succeeded in such great degree in minimizing the difficulties which have arisen between them. The idea of such a commission, and the Harmon doctrine were born in the same year. The growth of the former has been slow and unspectacular. The growth of the latter has been lusty and troublesome. The former will stand as a monument to the wisdom of two nations. The latter will wither away. If these two nations, Canada and the United States, cannot settle their differences, large or small, with a minimum of ill will, there can be little hope for the future that nations whose differences in culture and economics are much greater, will set a better example in appreciating the possibilities of settling international disputes by peaceful means.