

TREATIES AND RIGHTS OF TRANSIT ON THE ST. LAWRENCE

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I

The announcement by the Canadian government that it intends to restrict the Great Lakes and St. Lawrence coasting trade to vessels of Canadian registry¹ and the recent changes in shipping legislation concerning compulsory pilotage on these waters² indicate the importance of an answer to the questions: To what extent do treaties limit Canada's power to act? What are the scope and import of Canadian treaty obligations concerning freedom of transit on the St. Lawrence? Are changes recently made or proposed for Canadian shipping legislation consistent with Canada's international obligations?³

Testifying in 1959 before the Canadian Senate's Standing Committee on Transport and Communications, an official of the

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¹"Ship operating and shipbuilding — statement of government policy", Hon. Leon Balcer (Minister of Transport), Friday, May 12th, 1961. House of Commons Debates (Canada), Vol. 105, p. 4711 *et seq.*

²An Act to amend the Canada Shipping Act, S.C., 1960, c. 40. In general, these amendments permit registered United States pilots to work in the Canadian waters of the Great Lakes and St. Lawrence, and exempt from some of the compulsory pilotage requirements vessels of Canadian or United States registry operating between ports on the Great Lakes and St. Lawrence. Prior to these changes, American shipping companies had complained of compulsory pilotage requirements for American Great Lakes vessels in the Cornwall-Montreal section of the Seaway: *Le Devoir*, January 25th, 1961.

³Also emphasizing the importance of deciding this question are the research projects of the United Nations Secretariat, the International Law Association, the Institut de Droit International, New York University and other bodies concerning uses of international rivers. Although the bulk of this work concerns non-navigational uses, the non-navigational and navigational uses are closely related.

Other recent developments are the construction of the Calumet-Sag Channel linking the Mississippi-Illinois River system with the Great Lakes, and the recurrence of proposals to render the Ottawa and Richelieu — Lake Champlain — Hudson River systems navigable for ocean vessels. See *Toronto Globe and Mail*, May 5th, 1961; *Le Devoir*, December 14th, 1960, Feb. 15th, April 13th, May 11th and May 25th, 1961.

Legal Division of the External Affairs Department reported that there were in force between Canada and other states approximately twenty-two treaties granting to sixteen countries (excluding Commonwealth countries) "national treatment" with respect to freedom of navigation.⁴

This article will attempt to show that Canadian treaties are both more extensive and more complex than was suggested by the External Affairs Department representative. An examination will be undertaken of treaties affecting transit on the St. Lawrence and creating international obligations to at least thirteen Commonwealth countries and forty-four other countries.⁵ Consideration will be restricted to questions of commercial transit and will disregard navigation of the St. Lawrence by military vessels.

Canadian treaties affecting freedom of transit on the St. Lawrence can be divided into four types of obligation: first, the treaties granting to the United States the freedom of the St. Lawrence; second, bilateral treaties granting to non-Commonwealth states privileges concerning transit (either directly, or indirectly by way of most-favoured nation or national treatment); third, transit provisions of the General Agreement on Tariffs and Trade;⁶ and finally, the British Commonwealth Merchant Shipping Agreement.⁷

II

The treaties with the United States are of particular importance, not only as they define the rights of that country itself, but because in some matters the United States appears to be "the most-favoured-nation" within other bilateral agreements. This favour-

⁴ Testimony by Mr. H. C. Kingstone, Legal Division, Department of External Affairs, on February 12th, 1959. Canada. Senate. Proceedings of the Standing Committee on Transport and Communications to whom was referred the Bill S-3, an Act to amend the Canada Shipping Act, pp. 112, 116, 121.

⁵ *Commonwealth*: Australia, British West Indies (except Jamaica), Bermuda, British Guiana, British Honduras, Ceylon, Ghana, India, Malaya, New Zealand, Federation of Rhodesia and Nyasaland, Union of South Africa, United Kingdom (and possibly Nigeria, Sierra Leone and other former colonies). *Non-Commonwealth*: Argentina, Austria, Belgium-Luxembourg, Bolivia, Brazil, Burma, Cambodia, Chile, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Finland, France (and possibly a number of former French colonies), Germany (Federal Republic), Greece, Guinea, Haiti, Indonesia, Iran, Italy, Israel, Japan, Laos, Liberia, Morocco, Muscat, Netherlands, Nicaragua, Norway, Peru, Poland, Spain, Sweden, Switzerland (including Liechtenstein), Tunisia, Turkey, Union of Soviet Socialist Republics, United States, Venezuela, Vietnam, Yugoslavia.

⁶ 55 U.N.T.S. 187, 1947 Can. T.S. No. 27.

⁷ Signed at London, December 10th, 1931, 129 L.N.T.S. 177, 1931 Can. T.S. No. 7.

able position was achieved following a long—and so far as Canadian interests of the day were concerned, a self-defeating—series of controversies with the United States concerning the navigation rights. Perhaps the most striking feature of the history of this treaty concession to the United States is the slowness of the triumph of economic interest over legalistic scruple.

As an American statesman wrote in 1827: "It is certainly an extraordinary circumstance, that the great importance of the American inland commerce to her own navigation, and to the prosperity of Canada, should not have been sooner strongly felt, and particularly attended to; that the obstacles to an intercourse, by which American produce is exported through Quebec, in preference to the Ports of the United States, should have arisen on the part of Great Britain, and not of the United States."⁸

Yet, as early as 1791, Thomas Jefferson, then Secretary of State, complained to the British Minister to the United States that the British "have excluded the citizens of the United States from navigating even on our side of the middle line of the Rivers and Lakes established as the boundary between the two Nations".⁹

In 1794, article III of the Jay Treaty provided:

. . . it shall at all times be free . . . to citizens of the United States . . . freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties . . . and to navigate all the lakes, rivers and waters thereof. . . .

But the liberty granted was subject to the proviso:

This article does not extend to the admission of vessels of the United States . . . into such parts of the rivers in His Majesty's territories as are between the mouth thereof, and the highest port of entry from the sea, except in small vessels trading *bona fide* between Montreal and Quebec, under such regulations as shall be established to prevent the possibility of any frauds in this respect.¹⁰

Even this limited right was regarded by the British as terminated by the War of 1812.¹¹

⁸ Albert Gallatin, Minister in London, to Henry Clay, Secretary of State, October 1st, 1827, 19 B.F.S.P. 1103.

⁹ Thomas Jefferson, Secretary of State of the United States, to George Hammond, British Minister to the United States. December 15th, 1791. Manning, Diplomatic Correspondence of the United States: Canadian Relations, 1784-1860, vol. 1, p. 47.

¹⁰ Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers 1776-1909, compiled under the direction of the Committee on Foreign Relations of the United States Senate by William M. Malloy, Vol. 1, pp. 590, cited hereafter as Malloy, Treaties, I.

¹¹ Lord Bathurst, British Secretary of State for Foreign Affairs, in a note addressed to John Quincy Adams, United States Minister in London on October 30th, 1815, asserted, "To a position of this novel nature

During negotiations in 1815 in London for a commercial convention, the American plenipotentiaries sought to insert an article granting freedom of navigation on the St. Lawrence to United States citizens. But the British negotiators were adamant in refusing to concede such a right. As a result, the parties agreed to omit all reference to the matter.¹² Less than ten years later, the issue was before another international conference. In 1823, the inhabitants of Franklin County, New York, presented a petition to Congress, complaining of British fiscal legislation. A British statute of 1821 had provided that United States timber "brought by land or inland navigation into the said Provinces and imported from the said Provinces into Great Britain" should pay the same duties as if imported directly from the United States.¹³ A further statute of 1822 had imposed various duties on American products imported into Canadian ports.¹⁴ By the 1822 Act, the American government complained, many of the most important articles of the United States were absolutely prohibited; even as to some of the articles admitted, the duties were so high as to be equivalent to a prohibition.¹⁵ The petition was favourably received, and Richard Rush, the American minister in London, was instructed to press upon the British government a claim for freedom of navigation. In the summer of 1824, a conference was held in London.¹⁶

Great Britain cannot accede. She knows of no exception to the rule that all Treaties are put an end to by a subsequent war between the same Parties." 7 B.F.S.P. 94. Against this view, the United States protested: Malloy, *Treaties*, I, p. 580.

¹² 3 B.F.S.P. 83-109. The proposed American article read: "The navigation of all the lakes, rivers and water communications, the middle of which is the boundary between the United States and His Britannic Majesty's Dominions on the Continent of North America shall, at all times, be free to the Citizens of the United States, and to His Majesty's Subjects. The said Citizens and Subjects may freely carry on trade and commerce with each other, and for that purpose pass and repass by land or inland navigation, into the respective Territories of the two Parties, on the said Continent; and no higher or other tolls or rates of ferriage, than what are, or shall be payable by Natives, shall be demanded on either side...".

¹³ (1921), 1 & 2 Geo. IV, c. 37, s. 8.

¹⁴ (1922), 2 & 3 Geo. IV, c. 119.

¹⁵ Argument of the American Plenipotentiary, annexed to the 18th Protocol of the Conference held in London, between the British and American Plenipotentiaries, on the 19th of June, 1824. 19 B.F.S.P. 1067.

¹⁶ H. A. Smith, *Great Britain and the Law of Nations*, (1935), vol. II, p. 318 *et seq.* Smith, however, seems to be mistaken in his estimate of the significance of this dispute. He argues that in 1824 commercial navigation from the Great Lakes to the ocean was a physical impossibility, and that the elaborate arguments were irrelevant to the practical question at issue. But see G.P. de T. Glazebrook, *A History of Transportation in Canada*, (1938), pp. 93-94: in 1822 Durham boats carried to Montreal 19,633 barrels of flour and 1,836 bushels of wheat from the United States and 42,938 barrels of flour and 5,344 bushels of wheat from Upper Canada.

The arguments exchanged by the plenipotentiaries in carefully reasoned state papers, spiced with references to the authority of Vattel and Grotius, are a classic example of the triumph of narrow legalism over common sense. Basically, the positions of the two parties were these.¹⁷ The United States asserted a *natural* right to navigate the river:

The right of navigating the river is a right of nature, pre-existent on point of time, not necessary to have been surrendered up for any purpose of the common good, and unsusceptible of annihilation.¹⁸

The British, though willing to grant the right of navigation, stubbornly refused to concede that the right was a natural or prescriptive one, existing independently of such a grant:¹⁹

The American Plenipotentiary must be aware that a demand, rested upon this principle, necessarily precludes those considerations of good neighbourhood and mutual accommodation, with which the Government of Great Britain would otherwise have been anxious to enter upon the adjustment of this part of the negotiation.

A right claimed without qualification on the one side, affords no room for friendly concession on the other; total admission, or total rejection, is the only alternative which it presents.²⁰

No agreement was reached.

Further pressure toward free navigation came from the opening of the Erie Canal. Lord Durham observed in 1838, "Buffalo, the headquarters of the robbers and pirates who have so long infested this country", was a surprisingly prosperous town, "owing to the Erie Canal which commences at Buffalo and thus makes it the Depot of all the trade of the West flowing to New York".²¹ To meet this competition, the British and Canadians moved in two ways. At a staggering cost in terms of Canadian financial resources, canals were constructed to provide a nine-foot ship channel for the St. Lawrence.²² Secondly, alterations were made to the British tariff policy of the Corn Laws to grant a preference to colonial produce, and to encourage American timber and provisions to cross the border and be exported from Canada.²³ The Canada

¹⁷ The exchange of state papers is reprinted in 19 B.F.S.P. 1067.

¹⁸ *Ibid.*, p. 1070.

¹⁹ See the extract from the instructions to the British plenipotentiaries cited by Smith, *op. cit.*, *supra*, footnote 16, p. 345, n. 2.

²⁰ Reply of the British plenipotentiaries to the American Argument annexed to the 24th Protocol of the 19th of July, 1824, 19 B.F.S.P. 1075.

²¹ Canadian Archives, Durham Papers, Durham to Glenelg, July 16th, 1838, quoted by Glazebrook, *op. cit.*, *supra*, footnote 16, p. 92.

²² S. McKee, Jr., *Canada's Bid for the Traffic of the Middle West: a Quarter-Century of the History of the St. Lawrence Waterway: 1849-1874*, Report of the Annual Meeting of the Canadian Historical Association (1940), p. 26 *et seq.*

²³ G. W. Brown, *The St. Lawrence Waterway as a Factor in Interna-*

Corn Act of 1843,²⁴ by granting a substantial preference to Canadian flour, caused the doubling within a single year of shipments of United States grain to be milled in Canada for export.²⁵

Yet, as the St. Lawrence canals were reaching completion, this preferential system was destroyed. The abolition of the Corn Laws in 1846—the embarkation by Britain upon a policy of free trade—destroyed the usefulness of the newly built Canadian flour mills.²⁶ The Governor of Canada, Lord Elgin, wrote to the Colonial Secretary, Lord Grey:

I do not think that you are blind to the hardships which Canada is now enduring, but I must own I doubt whether you fully appreciate their magnitude, or are aware of how directly they are chargeable on Imperial legislation. Stanley's bill of 1843 attracted all the Produce of the West to the St. Lawrence, and fixed all of the disposable capital of the Province in Grinding mills, warehouses, and forwarding establishments—Peel's Bill of 1846 drives the whole of this Produce down the New York channels of communication, destroying the Revenue which Canada expected to derive from Canal dues, and ruining at once Mill owners, Forwarders and Merchants. The consequence is that Private Property is unsaleable in Canada, and not a shilling can be raised on the credit of the Province. We are actually reduced to the disagreeable necessity of paying all Public Officers, from the Governor General downwards in debentures, which are not exchangeable at par. . . .²⁷

He warned that the inconsistency of British policy was creating a desire for annexation. The ingenious solution proposed for this crisis was a treaty obtaining access to United States markets for Canadian produce in exchange for the grant to the United States of a right of St. Lawrence navigation:²⁸

. . . a special treaty should be entered into with the States, giving them the navigation of the St. Lawrence jointly with ourselves on condition that they admit Canadian produce duty free.²⁹

A movement for a reciprocity treaty with the United States was
tional Trade and Politics, 1783-1854, University of Chicago, Abstracts of Theses, Humanistic Series, Vol. III, p. 182.

²⁴ (1843), 6 & 7 Vict., c. 29.

²⁵ Glazebrook, *op. cit.*, *supra*, footnote 16, p. 95.

²⁶ T. Walrond, Letters and Journals of James, Eighth Earl of Elgin (1872), pp. 59-60.

²⁷ Private letters from Elgin to Grey, dated at Montreal, Nov. 16th, 1848. Sir A. G. Doughty, editor, The Elgin-Grey Papers, 1846-1852 (1937), Vol. 1, p. 256.

²⁸ An important first step toward the opening of the St. Lawrence was the repeal in 1849 of the Navigation Laws, which had preserved a British monopoly of the shipping between the colonies and Great Britain. See G. W. Brown, The St. Lawrence Navigation System (1928), 35 Queen's Quarterly 628, at p. 638 *et seq.*

²⁹ Private letter from Elgin to Grey, dated at Montreal, May 24th, 1848. Doughty, *op. cit.*, *supra*, footnote 27, Vol. 1, p. 150.

organized, largely through the work of William Hamilton Merritt, a St. Catharines miller and member of the legislature, who became convinced in 1846 that reciprocity would satisfy the Canadian farmer and divert the export of bread-stuffs from the western states to the St. Lawrence route.³⁰ But neither the potential economic benefits to the Canadian colonies nor the risks of annexation were sufficient in themselves to produce the reciprocity treaty. It was the fear of war between Great Britain and the United States over coastal fisheries which impelled both the British and American authorities to continue negotiations until a settlement was reached.³¹

In 1849 the fisheries had been regarded as an incidental concession (to the United States) which would make possible the negotiation of a reciprocity treaty. By 1854 the emphasis had shifted: reciprocity had now become the incidental concession (this time to the colonists) which must accompany the main object—a settlement of the fishery question.³²

Even at the earlier stage of negotiation, the question of St. Lawrence navigation had been regarded as a subsidiary question. The British negotiator was instructed to offer freedom of navigation only as a last resort:

To the concessions above mentioned, Her Majesty's Government would be prepared, if necessary, to add the admission of United States Vessels and Citizens to a full and free participation in the navigation of the River St. Lawrence and of certain Canals to be specified, which are connected with that Navigation; with the reservation however, that the British Government must retain the right of suspending this privilege on giving due notice thereof to the Government of the United States, whenever political considerations, of which the British Government must be the sole judge, should in its opinion render such a measure necessary. . . . It is probable that in reply to your application for the free admission of the Produce of the British Provinces into the United States, the United States Government will ask for the admission of the United States Fishermen to a participation in the British North American Fisheries; and it is possible that you may be able to conclude an Agreement on those terms. This of course you should, in the first place, endeavour to do, but if you should find this impossible, you will then proceed to add the offer of the free navigation of the St. Lawrence.³³

³⁰ D. D. Masters, *The Reciprocity Treaty of 1854: Its History, Its Relation to British Colonial and Foreign Policy and to the Development of Canadian Fiscal Autonomy* (1936), p. 6. Masters describes Merritt's career as "a lifelong crusade to make Canada the avenue of trade with Great Britain and the western United States".

³¹ *Ibid.*, pp. 37 *et seq.*, and 62 *et seq.*

³² *Ibid.*, p. 51.

³³ Copy of the Instruction addressed by Palmerston to Sir Henry L. Bulwer on Nov. 1st, 1849, on proceeding to his post as British Minister

Ultimately, the concession of free navigation was added to the treaty as an inducement to the grain interests of the western states.³⁴

Article IV of the Reciprocity Treaty of 1854 granted to Americans "the right to navigate the River St. Lawrence, and the canals in Canada used as a means of communicating between the Great Lakes and the Atlantic Ocean . . . as fully and freely as the subjects of Her Britannic Majesty . . .". The British government reserved the right to suspend the privilege, but the United States was then to be free to exclude Canada from the tariff concessions.³⁵

Scarcely, however, had the treaty come into effect before the effects of the economic depression of 1857, the rise of Canadian and American protectionism, American hostility to Canadian fiscal legislation, and antagonisms arising out of the American civil war combined to strike down the Reciprocity Treaty.³⁶ The treaty was terminated on March 17th, 1866 as the result of notice given a year earlier. In ensuing correspondence, the British government pointed out that abrogation of the treaty automatically ended any American right to navigate the St. Lawrence, but expressed its intention of continuing as a "privilege" what could not be claimed as a right.³⁷

Final settlement of the navigation question came in the Treaty of Washington of 1871 which settled the Alabama claims arising out of the American civil war.³⁸ Article 26 provided:

in Washington on the subject of the Commercial intercourse between the United States and the British provinces in North America, transmitted from Grey to Elgin on Nov. 17th, 1849. Doughty, *op. cit.*, *supra*, footnote 27, Vol. 4, Appendix XVI, p. 1483.

³⁴ Masters, *op. cit.*, *supra*, footnote 30, p. 73. See also: G. W. Brown, *The Opening of the St. Lawrence to American Shipping* (1926), 7 *Can. Hist. Rev.* 4, at pp. 11-12.

³⁵ Reciprocity Treaty as to Fisheries, Duties and Navigation British North America, concluded June 5th, 1854. Malloy, *Treaties*, I, 668. Previously, in 1842, the Ashburton-Webster Treaty, article 7 had decreed that the channels in the St. Lawrence on both sides of the Long Sault Islands and of Barnhart Island should be equally free and open to vessels of both parties: Treaty between Her Majesty and the United States of America, to Settle and Define the Boundaries between the Possessions of Her Britannic Majesty in North America, and the Territories of the United States; for the Final Suppression of the African Slave Trade; and for the Giving Up of Criminals, Fugitives from Justice, in Certain Cases. Signed at Washington, August 9th, 1842, 30 *B.F.S.P.* 360, Malloy, *Treaties*, I, 650.

³⁶ H. L. Keenleyside, *Canada and the United States: Some Aspects of the History of the Republic and the Dominion* (1929), pp. 138-139. See also O.D. Skelton, *General Economic History, 1867-1912* (1913), p. 127; Masters, *op. cit.*, *supra*, footnote 30, p. 113 *et seq.*

³⁷ 58 *B.F.S.P.* 1190. Smith, *op. cit.*, *supra*, footnote 16, pp. 349-350.

³⁸ Treaty between Her Majesty and the United States of America for the Amicable Settlement of all Causes of Difference between the Two Countries ("Alabama" Claims; Fisheries; Claims of Corporations,

The navigation of the River St. Lawrence, ascending and descending from the 45th parallel of north latitude, where it ceases to form the boundary between the two countries, from, to, and into the sea, shall forever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain or of the Dominion of Canada, not inconsistent with such privileges of free navigation. . . .

Any possible argument that this freedom of navigation precludes a Canadian reservation of the coasting trade would seem to be ousted by the specific provision in article 30 (since terminated by notice given by the United States)³⁹ for a restricted right of cabotage or coasting trade.

The grant of the perpetual right of navigation did not extend to the St. Lawrence canals. Article 27 merely obliged the British government "to urge upon the Government of the Dominion of Canada to secure to the citizens of the United States the use of the Welland, St. Lawrence, and other canals in the Dominion on terms of equality with the inhabitants of the Dominion . . .". This distinction between the river and the canals was drawn at the instance of Sir John A. Macdonald, the Canadian Prime Minister and one of the British negotiators. The other British negotiators would have been willing to extend the perpetual right not only to the St. Lawrence but to the canals. But Sir John seized upon the American principle of divided sovereignty, precluding the federal government from use of the treaty-making power to interfere with the property of individual states without their consent; the British government could not be expected to grant perpetual rights in canals owned by the Dominion of Canada:

The instructions from England, however, were positive to consent to the free navigation of the St. Lawrence, the Government holding apparently that, by international law, as now understood, the Americans had really a right to its navigation to the mouth, and the two secretaries of the Commission had settled a clause for that purpose. . . .

I protested most loudly against the concession. . . .

The reply was that England had finally made up her mind on the point, and would yield to the request as a reasonable and proper one.

I then objected to the words of the clause, which gives the right of navigation ascending and descending, and argued that, as it was known no vessels could ascend the river by its natural channel, the grant of such navigation would give the Americans the opportunity

Companies or Private Individuals; Navigation of Rivers and Lakes; San Juan Water Boundary; and Rules Defining Duties of a Neutral Government during War). Signed at Washington, May 8th, 1871, 61 B.F.S.P. 40; Malloy, *Treaties*, I, 700.

³⁹ Terminated as from July 2nd, 1885, by notice given by the United States July 2nd, 1883.

of arguing that the treaty conferred the right to use our canals, as being the only mode by which the river could be ascended at the time the treaty was made. Professor Bernard had to admit that it was a point capable of argument. The trouble was, however, how to prevent the argument being raised, and, as Mr. Fish was specially anxious that some hope should be held out in the treaty of getting the use of the canals, in order to please the Western Senators, I suggested that both objects might be accomplished by putting in an article similar to that in the Reciprocity Treaty regarding the State canals. By looking back to item No. 10 you will see that the Queen engages to urge the Government of Canada to secure to the U.S. citizens the use of the Welland, St. Lawrence, and other canals, and the United States agrees to do the same thing with respect to its State canals. This article shows expressly that the canals are not a portion of the St. Lawrence, but are within the sole control of Canada.⁴⁰

During a controversy in 1892 between the United States and Canada concerning discriminatory tolls in the Welland Canal, a State Department memorandum declared that the undertaking regarding the canals is not obligatory and that Canada may withdraw the privilege of free and equal navigation in them at any time—presumably subject to the loss of the reciprocal rights granted in the American canals. The memorandum described the undertaking as “the reciprocal qualified privilege granted by Canada in respect of the Dominion canals, which in terms was dependent upon the pleasure of Canada, and liable to be terminated at any time by adverse legislation or regulation”.⁴¹

No substantial change in this position was made by the Boundary Waters Treaty of 1909.⁴² Article 1 provided that:

. . . the navigation of all navigable boundary waters shall for ever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation, and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.

⁴⁰ Macdonald to Tupper, April 21st, 1871. Quoted by Joseph Pope, *Memoirs of the Right Honourable Sir John Alexander Macdonald* (1894), Vol. II, pp. 128-9. See also, B. K. Sandwell, *American Rights and the Proposed St. Lawrence Canal* (1928), 103 *The Nineteenth Century and After* 468, at p. 479.

⁴¹ Memorandum by Alvery A. Adee, June 28th, 1892. [1892] *Papers relating to the Foreign Relations of the United States* 282, at pp. 285-6. The discriminatory Canadian tolls were lifted after the United States had retaliated with discriminatory tolls on the Sault Ste. Marie Canal. See [1893] *Foreign Relations of the United States* 329-331.

⁴² Treaty between His Majesty and the United States of America relating to Boundary Waters and Questions Arising Along the Boundary between Canada and the United States. Signed at Washington, Jan. 11th, 1909, 102 *B.F.S.P.* 140.

Although there is in the 1909 treaty no provision concerning coasting rights which can be used, like article 30 of the Treaty of Washington, to oust the construction that freedom of navigation extends to cabotage, nevertheless the scope of the 1909 treaty is not sufficiently broad to deal with regulation of coasting trade throughout the St. Lawrence.⁴³ The treaty applies only to "boundary waters" 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 . . . but not including . . . waters flowing from such lakes, rivers and waterways . . .".

Article 1 of the Boundary Waters Treaty also provided that, for the lifetime of the treaty, "this same right of navigation shall extend to all canals connecting boundary waters, and now existing or which may hereafter be constructed on either side of the line". Tolls and regulations for use must apply equally to both Americans and Canadians. Yet not all of the St. Lawrence canals can be described as "connecting boundary waters".

Although the investigations undertaken by the International Joint Commission created by the 1909 treaty provided an authoritative foundation for the ultimate construction of the St. Lawrence Seaway,⁴⁴ the Commission has been given no jurisdiction over the operation of navigation within the seaway. Fixing of tolls, for example, continues to be a subject for negotiation between the two governments.⁴⁵

⁴³ Nor is access to the American coasting trade allowed to Canadians. An attempt to have this right conceded by the Reciprocity Treaty of 1854 was rejected firmly by the American negotiators: see Masters, *op. cit.*, *supra*, footnote 30, p. 89. The abortive Brown-Fish Agreement of 1874 contained the provision that the coasting trade should be free to ships of either nation: see Keenleyside, *op. cit.*, *supra*, footnote 36, pp. 302-303. See however, the complaint by Senator McKeen during the Canadian Senate's hearing, *supra*, footnote 4, at pp. 112 *et seq.*, that Americans can form Canadian shipping companies with greater ease than Canadians can form American corporations.

⁴⁴ See: International Joint Commission, Report on the St. Lawrence Navigation and Power Investigation (1921), quoted in, "St. Lawrence Seaway: Message from the President of the United States, transmitting a letter from the Secretary of State submitting the Report of the International Joint Commission concerning the Improvement of the St. Lawrence River between Montreal and Lake Ontario for Navigation and Power" (1922), Senate Doc. No. 114, 67th Cong., 2d Sess. For the history of subsequent negotiations leading to the construction of the Seaway, see, *inter alia*, James L. Kunen, The International Negotiations Concerning the St. Lawrence Project (1955), 33 U. Det. L.J. 14; M. Cohen, and G. Nadeau, The Legal Framework of the St. Lawrence Seaway, in P. O. Proehl, editor, Legal Problems of International Trade (1959), p. 29; Baxter Richard R., editor, Documents on the St. Lawrence Seaway (1960), pp. 1-5; F. Lincoln, Battle of the St. Lawrence, Fortune, December, 1950, pp. 84 *et seq.*

⁴⁵ Baxter, *ibid.*, p. 4 states that as compared with international commis-

Nor did the agreements between the United States and Canada respecting the construction of the Seaway substantially extend the right of navigation granted by the Treaty of Washington and the Boundary Waters Treaty. Article 6 of the Exchange of Notes of August 17th, 1954⁴⁶ provided as follows:

(a) It is recognized that it is of great importance to Canada and the United States that the St. Lawrence Seaway be used to the maximum extent required by the needs of commerce. It is understood therefore that both Governments will use their best endeavours to avoid placing unreasonable restrictions on the transit of passengers, shipping or trade in the international section of the St. Lawrence Seaway.

(b) It is further agreed that each Government will consult the other before it enacts any new law or promulgates any new regulation, applicable in the respective national parts of the international section of the St. Lawrence River, which might affect Canadian or United States shipping, or shipping of third-country registry proceeding to or from Canada or the United States respectively.

(c) Similarly, with respect to any laws or regulations now in force in either country which affect the shipping interests of the other country in the international section of the St. Lawrence River, the Government affected may request consultation concerning such laws or regulations and the other Government shall accede to requests for consultation.

(d) The foregoing undertakings are in addition to the treaty obligations now in force between Canada and the United States affecting shipping in the St. Lawrence River and canals, particularly Article 1 of the Boundary Waters Treaty of 1909.

The agreements authorizing construction works within Canadian territory specifically stated that "the works carried out in Canadian territory shall be without prejudice to the sovereign rights of Canada".⁴⁷

In summary, what then is the position of the United States concerning freedom of transit in the St. Lawrence, based upon bilateral agreements? By the Treaty of Washington of 1871, coupled with the Boundary Waters Treaty of 1909, the United States is entitled to a perpetual right to freedom of navigation for the purposes of commerce. But this right does not extend to

sions for various rivers of Europe, the regime of the St. Lawrence Seaway "superficially conveys the impression of improvisation and lack of organization".

⁴⁶ Exchange of Notes (August 17th, 1954) between Canada and the United States of America, modifying the Exchange of Notes of June 30th, 1952, concerning the Construction of the St. Lawrence Seaway, 1954 Can. T.S. No. 14; T.I.A.S. 3053; 5 U.S.T. 1793.

⁴⁷ Exchange of Notes (February 27th, 1959) between Canada and the United States of America concerning the St. Lawrence Seaway: Navigation Improvements of the Great Lakes Connecting Channels, 1959 Can. T.S. No. 6; T.I.A.S. 4199; 10 U.S.T. 383.

cabotage—at any rate, other than within the international section of the St. Lawrence. Nor does the United States have the right by these treaties to navigate through the St. Lawrence Canals within Canadian territory; Canada would seem to be entitled to withdraw the right to navigate, at the expense of the loss of a reciprocal right in American canals.⁴⁸ All of this, of course, is exclusive of the American rights under the General Agreement on Tariffs and Trade.

III

As Canada achieved nationhood, she inherited a substantial number of the treaty rights and obligations of Great Britain. Since then, Canada has entered into an additional series of commercial treaties, many of them containing provisions relating to navigation. If it is possible to see a trend, the later bilateral treaties would appear to grant less concerning navigation than the earlier treaties. No bilateral treaty after 1935 specifically grants freedom of navigation or transit.

The broadest extensions of Canada's grants of freedom of transit are through various forms of "most-favoured nation" clauses and "national treatment" clauses. The distinction between most-favoured nation and national treatment was concisely summarized by a report adopted in 1927 by a League of Nations Committee:

By national treatment is meant a promise that the inhabitants of one of the contracting parties shall be treated in the respects agreed to, in the territory of the other contracting party, just as if they were natives of the second contracting party. . . .

The effect of national treatment is to prevent discrimination against the nationals of the contracting parties, in any way, in regard to the points stipulated in the treaty.

Most-favoured-nation treatment, on the other hand, is a promise that the inhabitants of the contracting parties shall be treated in the respects agreed to, in the territory of the other contracting party, no more unfavourably than any other foreigner. . . .

Under this clause, the nationals of one of the contracting parties may be discriminated against as compared with the nationals of the nation giving the promise, but must be given treatment at least as good as those of other countries.

It will be seen, then, that national and most-favoured-nation treatment are the same in principle; but that national treatment, guaranteeing perfect equality, is much broader than most-favoured-nation

⁴⁸ This would still seem to be the case, in spite of the incongruous picture of the Dominion government urging itself to allow the Americans to navigate the canals.

treatment, which excepts from its promise of equality favours to its own nationals.⁴⁹

National treatment

Generally, in Canada's treaties, broad grants of national treatment concerning freedom of navigation are rare, although grants of national treatment concerning pilotage and similar duties and regulations are fairly common. An example of this limited national treatment in a treaty inherited by Canada from Great Britain is article 5 of the Argentine treaty of 1825.⁵⁰

No higher or other duties or charges on account of . . . pilotage . . . or any other local charges, shall be imposed . . . in the ports of any of His Britannic Majesty's territories, on the vessels of the United Provinces of above 120 tons, than shall be payable, in the same ports, on British vessels of the same burthen.

Another instance, using the term "national vessels" rather than "British vessels" is article 3 of the Liberian treaty of 1848:⁵¹

. . . and in like manner, no tonnage, import, or other duties or charges shall be levied in the British dominions on vessels of the republic, or on goods imported or exported in those vessels, beyond what are or may be levied on national vessels, or on the like goods imported or exported in national vessels.

Provisions granting one form or another of national treatment are to be found in treaties with Venezuela, Norway, Sweden, Morocco, Colombia, Iran, Bolivia, Spain, Yugoslavia, Panama, France, Cambodia, Laos, Tunisia, Vietnam and Poland.⁵²

⁴⁹ League of Nations. Committee of Experts for the Progressive Codification of International Law. The Most-Favoured-Nation Clause. Report Adopted by the Committee at Its Third Session, held in March-April 1927. Annex 1. Report of the Sub-Committee Rapporteur: Mr. Wickersham (League Doc. C. 205. M. 79. 1927.V.), p. 3. See also, R. C. Snyder, *The Most-Favoured-Nation Clause: an Analysis with Particular Reference to Recent Treaty Practice and Tariffs* (1948).

⁵⁰ Treaty of Amity, Commerce and Navigation between the United Kingdom and the United Provinces of Rio de la Plata. Signed at Buenos Aires, February 2nd, 1825. Great Britain, Foreign Office, *Handbook of Commercial Treaties, etc. with Foreign Powers*, (4th ed., 1931) (Cited hereafter as *Handbook*), p. 15. The Trade Agreement between Canada and the Argentine Republic, signed at Buenos Aires, October 2nd, 1941, 1941 Can. T.S. No. 17 contains no similar provisions.

⁵¹ Treaty of Friendship and Commerce between the United Kingdom and Liberia. Signed at London, November 21st, 1848, *Handbook*, p. 412. The Canadian Order in Council P.C. 1955-290 of March 1st, 1955, S.O.R. 55-56, granting most-favoured nation tariff treatment to Liberia, contains no provisions concerning freedom of transit.

⁵² *Venezuela*: Treaty of Amity, Commerce and Navigation between the United Kingdom and Colombia. Signed at Bogota, April 18th, 1925, *Handbook*, p. 722 art. 5. This treaty now applies to Venezuela only, which, at the time of its conclusion, formed an integral part of Colombia. *Norway and Sweden*: Convention of Commerce and Navigation between the United Kingdom and Sweden and Norway. Signed at London, March

Most-favoured nation treatment

Most grants of most-favoured nation treatment are broad concessions of any rights concerning commerce or navigation given to the most favoured state. An example of this broad most-favoured nation clause is article 2 of the treaty of 1922 with Spain:

The contracting parties agree that, in all matters relating to commerce, navigation and industry, any privilege, favour or immunity which either contracting party has actually granted or may hereafter grant, to the ships and subjects or citizens of any other foreign State, shall be extended simultaneously and unconditionally without request and without compensation to the ships and subjects of the other, it being their intention that the commerce, navigation and industry of each contracting party shall be placed in all respects on the footing of the most-favoured-nation.⁵³

Such a broad most-favoured nation clause is often used as a residual clause in commercial agreements. Examples of extensive most-favoured nation clauses affecting navigation are found in Canada's treaties or agreements with Denmark, Sweden, Costa Rica, Switzerland, Bolivia, Russia, Belgium, Luxembourg, The Netherlands, Yugoslavia, Czechoslovakia, France, Cambodia, Laos, Tunisia and Vietnam.⁵⁴ A single example of conditional most-

18th, 1826, Handbook, p. 479, arts. 3 and 6. *Morocco*: Convention of Commerce and Navigation between the United Kingdom and Morocco. Signed at Tangier, December 9th, 1856, Handbook, p. 433, art. 10. *Colombia*: Treaty of Friendship, Commerce and Navigation between the United Kingdom and Colombia. Signed at London, February 16th, 1866, Handbook, p. 118, arts. 2, 5, 7 and 8. *Iran*: Agreement between the United Kingdom and Persia, modifying the Commercial Convention of February 9th, 1903. Teharan, March 21st, 1920, Handbook, p. 512, art. 4. *Bolivia*: Treaty of Commerce between the United Kingdom and Bolivia. Signed at La Paz, August 1st, 1911, Handbook, p. 45, arts. 1 and 4. *Spain*: Treaty of Commerce and Navigation between the United Kingdom and Spain. Signed at Madrid, October 31st, 1922, 1928 Can. T.S. No. 7, arts. 1 and 14. *Yugoslavia*: Treaty of Commerce and Navigation between the United Kingdom and Yugoslavia. Signed at London, May 12th, 1927, Handbook, p. 732, arts. 1, 17 and 19. *Panama*: Treaty of Commerce and Navigation between the United Kingdom and Panama. Signed at Panama, September 25th, 1928, Handbook, p. 494, art. 6. *France, Cambodia, Laos, Tunisia and Vietnam*: Convention concerning the Rights of Nationals and Commercial and Shipping Matters between Canada and France. Signed at Ottawa, May 12th, 1933, 1936 Can. T.S. No. 18, art. 11. *Poland*: Convention of Commerce between Canada and Poland. Signed at Ottawa, July 3rd, 1935, 172 L.N.T.S. 69; 1936 Can. T.S. No. 15, art. 11.

⁵³ *Supra*, footnote 2, art. 2.

⁵⁴ *Denmark*: Treaty of Peace and Commerce between the United Kingdom and Denmark. Signed at Whitehall, February 13th, 1660-1, Handbook, p. 146, arts. 13 *ad fin.* and 24; Treaty of Peace and Commerce between the United Kingdom and Denmark, signed at Copenhagen, July 11th, 1670, Handbook, p. 151, arts. 8 *ad fin.* and 40. *Sweden*: Treaty of Commerce and Alliance between the United Kingdom and Sweden. Signed at Stockholm, February 5th, 1766, Handbook, p. 657, art. 2. *Costa Rica*: Treaty of Friendship, Commerce and Navigation, between the United Kingdom and Costa Rica. Signed at San Jose, November 27th,

favoured nation treatment is found in the treaty of 1848 with Liberia:

It being the intention of the two contracting parties to bind themselves by the present treaty to treat each other on the footing of the most favoured nation, it is hereby agreed between them, that any favour, privilege, or immunity whatever, in matters of commerce and navigation, which either contracting party has actually granted, or may hereafter grant, to the subjects or citizens of any other State, shall be extended to the subjects or citizens of the other contracting party, gratuitously, if the concession in favour of that other State shall have been gratuitous, or in return for a compensation as nearly as possible of proportionate value and effect, to be adjusted by mutual agreement, if the concession shall have been conditional.⁵⁵

A number of treaties binding Canada contain an older form of most-favoured nation clause promising freedom of access to places, ports and rivers to which other foreigners are allowed to go. For example, article 2 of the Venezuelan treaty of 1825 provides:

The subjects and citizens of the two countries respectively, shall have liberty freely and securely to come, with their ships and cargoes, to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are or may be permitted to come, to enter into the same, and to remain and reside in any port of the said territories, respectively. . . .⁵⁶

1849, Handbook, p. 126, art. 4. *Switzerland*: (including Liechtenstein) Treaty of Friendship, Commerce and Reciprocal Establishment between the United Kingdom and Switzerland. Signed at Berne, September 6th, 1855, Handbook, p. 667; 1947 Can. T.S. No. 26, art. 10. This treaty was made applicable to Liechtenstein so long as it remains an integral part of Swiss customs territory by Exchange of Notes of March 28th-April 26th, 1924 between the United Kingdom and Switzerland. Handbook, p. 667, note 1. By Exchange of Notes, 1947, Can. T.S. No. 26, Liechtenstein was included under this treaty insofar as it binds Canada. *Morocco*: *supra*, footnote 52, art. 1. *Bolivia*: *supra*, footnote 52, art. 5. *Russia*: Trade Agreement between His Britannic Majesty's Government and the Government of the Russian Socialist Federal Soviet Republic. Signed at London, March 16th, 1921, 4 L.N.T.S. 127, para. (2). *Spain*: *supra*, footnote 52, arts. 1 *ad fin.* and 2. *Italy*: Commercial Convention between Canada and Italy. Signed at London, January 4th, 1923, 25 L.N.T.S. 375, Handbook, p. 381, art. 4. [This treaty was probably terminated by the Second World War.]

Belgium-Luxembourg: Convention of Commerce between the Economic Union of Belgium and Luxembourg and Canada. Signed at Ottawa, July 3rd, 1924, 32 L.N.T.S. 35, Handbook, p. 43, art. 4. *The Netherlands*: Commercial Convention between Canada and The Netherlands. Signed at Ottawa, July 11th, 1924, 39 L.N.T.S. 45, Handbook, p. 469, art. 4. *Yugoslavia*: *supra*, footnote 52, art. 4. *Czechoslovakia*: Convention of Commerce between Canada and Czechoslovakia. Signed at Ottawa, March 15th, 1928, 82 L.N.T.S. 147, Handbook, p. 143, 1928 Can. T.S. No. 6, art. 4. *Panama*: *supra*, footnote 52, art. 3. *France, Cambodia, Laos, Tunisia and Vietnam*: *supra*, footnote 52, art. 1.

⁵⁵ *Supra*, footnote 51, art. 7.

⁵⁶ *Supra*, footnote 52. See also art. 3.

Further examples of this type of clause are found in treaties with Argentina, Costa Rica, Peru, Colombia and Japan.⁵⁷

Many agreements contain (some of them in addition to a broad residual most-favoured nation clause) specific guarantees of most-favoured nation treatment with respect to transit or pilotage and other dues and regulations. This type of more specific most-favoured nation clause occurs in treaties in force between Canada and Denmark, Sweden, Norway, Switzerland, Morocco, France, Cambodia, Laos, Tunisia and Vietnam.⁵⁸

In some instances, to provide against the possibility that a state entitled to national treatment might not be able to claim privileges granted by a country to subjects of a foreign state but withheld from the granting state's own nationals, an article couples a grant of "national or most-favoured nation" treatment. Such clauses are found in treaties with Switzerland, Colombia, Iran, Bolivia, Spain, Yugoslavia, Panama, France, Cambodia, Laos, Tunisia, Vietnam and Poland.⁵⁹

Direct grants

A grant of freedom of transit or of lesser privileges, such as freedom from pilotage or other dues, need not arise indirectly through national or most-favoured nation treatment, but may be given specifically and directly. An example of a limited, but direct grant is the clause used in five treaties—with Italy in 1923, with the Economic Union of Belgium and Luxembourg and with The Netherlands in 1924, with Czechoslovakia in 1928 and with Poland in 1935.⁶⁰

⁵⁷ *Argentina*: Treaty of 1825, *supra*, footnote 50, arts. 2 and 3. *Costa Rica*: Treaty of Friendship, Commerce and Navigation, between the United Kingdom and Costa Rica. Signed at San Jose, November 27th, 1849, Handbook, p. 126, arts. 2 and 3. *Peru*: Treaty of Friendship, Commerce and Navigation between the United Kingdom and Peru. Signed at London, April 10th, 1850, Handbook, p. 531, art. 2. *Colombia*: *supra*, footnote 52, art. 2. *Japan*: Treaty of Commerce and Navigation between the United Kingdom and Japan. Signed at London, April 3rd, 1911, Handbook, p. 384, art. 6. [This treaty was probably terminated by the Second World War.]

⁵⁸ *Denmark*: *supra*, footnote 54. Treaty of 1660-1, art. 13; Treaty of 1670, art. 8. *Sweden and Norway*: *supra*, footnote 52. Convention of 1826 with Sweden and Norway, art. 6. *Switzerland* (including *Liechtenstein*): *supra*, footnote 54, art. 9. *Morocco*: *supra*, footnote 52, art. 10. *France, Cambodia, Laos, Tunisia and Vietnam*: *supra*, footnote 52, art. 10.

⁵⁹ *Switzerland* (including *Liechtenstein*): *supra*, footnote 54, art. 8. *Colombia*: *supra*, footnote 52, art. 2. *Iran*: *supra*, footnote 52, art. 4. *Bolivia*: *supra*, footnote 52, art. 4. *Spain*: *supra*, footnote 52, arts. 14 and 17. *Yugoslavia*: *supra*, footnote 52, arts. 17 and 19. *Panama*: *supra*, footnote 52, art. 6. *France, Cambodia, Laos, Tunisia and Vietnam*: *supra*, footnote 52, arts. 11 and 17. *Poland*: *supra*, footnote 52, art. 11.

⁶⁰ *Italy*: *supra*, footnote 54, art. 3. *Belgium-Luxembourg*: *supra*,

Articles the produce or manufacture of Canada passing in transit through Czechoslovakia and articles the produce or manufacture of Czechoslovakia passing in transit through Canada shall be reciprocally free from all transit duties whether they pass through direct or whether during transit they are unloaded, warehoused or reloaded.

A more general provision is article 16 of the 1927 treaty with Yugoslavia:

The measures taken by the two contracting parties for regulating and forwarding traffic across their territories shall facilitate free transit by rail or waterway on routes in use convenient for international transit. No distinction shall be made which is based on the nationality of persons, the flag of vessels, the place of origin, departure, entry, exit of destination, or on any circumstances relating to the ownership of goods or of vessels . . . or other means of transport. . . .⁶¹

A general introductory clause used in many treaties is of this direct type:

There shall be between the territories of the two contracting parties reciprocal freedom of commerce and navigation. . . .

This type of clause occurs in treaties with Argentina, Venezuela, Peru, Colombia, Muscat, Japan, Bolivia and Spain.⁶² However, it is doubtful whether this general introductory clause alone creates specific obligations concerning freedom of transit or navigation. Normally, it is followed immediately by a clause granting more specific most-favoured nation or national treatment.

Other instances of direct grants of rights of navigation or transit are found in treaties with Sweden, Denmark and Muscat.⁶³

An examination of the treaties binding Canada reveals a footnote 54, art. 3. *The Netherlands: supra*, footnote 54, art. 3. *Czechoslovakia: supra*, footnote 54, art. 3. *Poland: supra*, footnote 52, art. 7.

⁶¹ *Supra*, footnote 52.

⁶² *Argentina: Treaty of 1825, supra*, footnote 50, arts. 2 and 3. *Venezuela: supra*, footnote 52, arts. 2 and 3. *Costa Rica: supra*, footnote 54, arts. 2 and 3. *Peru: supra*, footnote 56, art. 2. *Colombia: supra*, footnote 52, art. 2. *Muscat: Treaty of Friendship, Commerce and Navigation between the United Kingdom and Muscat. Signed at Muscat, March 19th, 1891, Handbook, p. 442, art. 4. Japan: Treaty of Commerce and Navigation between the United Kingdom and Japan. Signed at London, April 3rd, 1911, Handbook, p. 384, art. 6. [This treaty was probably terminated by the Second World War.] Bolivia: supra, footnote 52, art. 1. Spain: supra, footnote 52, art. 1.*

⁶³ *Sweden: Treaty of Peace and Commerce between the United Kingdom and Sweden. Signed at Uppsala, April 11th, 1654, Handbook, p. 644, arts. 3 and 10; modified as to trade with America by Treaty of Commerce between the United Kingdom and Sweden. Done at Westminster, July 17th, 1656, Handbook, p. 649, art. 9; Treaty of Peace and Commerce between the United Kingdom and Sweden. Concluded at Whitehall, October 21st, 1661, Handbook, p. 652, arts. 3, 4 and 10. Denmark: supra, footnote 54. Treaty of 1660-1, arts. 6 and 20; Treaty of 1670, arts. 5, 6 and 30. Muscat: supra, footnote 62, art. 4 ad fin.*

bewildering variety of combinations of these three forms of clause—the national treatment clause, the most-favoured nation clause, and the direct grant. And each of these forms or a combination of them may be applied to a narrow grant of rights concerning pilotage or other dues, or to a broad general grant of freedom of navigation or transit.

Moreover, the determination of the extent of Canada's obligations is further complicated by the addition to a number of treaties of clauses reserving coasting rights or cabotage. Such reservations are found in treaties with Costa Rica, Peru, Colombia, Japan, Spain, Yugoslavia, Panama, France, Cambodia, Laos, Tunisia and Vietnam.⁶⁴ Even more extensive reservations are made in Canada's treaty of 1935 with Poland:

. . . excepting always coasting trade and river or lake traffic which each of the High Contracting Parties shall have the right to reserve to national vessels.⁶⁵

and her trade agreement of 1956 with Russia:

The provisions of this Article [according most-favoured nation treatment "upon arrival at and departure from the seaports . . . and during the time spent in such seaports"] shall not apply to the performance of harbour services including pilotage or towing, nor to coastal shipping.⁶⁶

A number of other treaty provisions have incidental effects upon freedom of transit on the St. Lawrence. In addition to grants of freedom of transit or navigation, some states have additional protection against the indirect curbing of navigational freedom by import or export restrictions,⁶⁷ by discriminatory taxation,⁶⁸ or

⁶⁴ *Costa Rica: supra*, footnote 54, art. 2. *Peru: supra*, footnote 57, art. 2. *Colombia: supra*, footnote 52, art. 9. *Japan: supra*, footnote 57, art. 21. *Spain: supra*, footnote 52, art. 15. *Yugoslavia: supra*, footnote 52, art. 20. *Panama: supra*, footnote 52, art. 6 *ad fin.* *France, Cambodia, Laos, Tunisia and Vietnam: supra*, footnote 52, art. 13.

⁶⁵ *Supra*, footnote 52, art. 11.

⁶⁶ Trade Agreement between Canada and the Union of Soviet Socialist Republics. Signed at Ottawa, February 29th, 1956, 1956 Can. T.S. No. 1. A protocol to renew this agreement was signed at Moscow, April 18th, 1960: Canada, Department of External Affairs, 12 External Affairs 635.

⁶⁷ See, for example, the treaty of 1927 with Yugoslavia, *supra*, footnote 52, art. 9.

⁶⁸ Canada has a series of agreements providing for the reciprocal exemption from income tax of profits accruing from the business of shipping. See, for example, Exchange of Notes between the Government of the United States of America and the Canadian Government, Washington, August 2nd and September 17th, 1928, 95 L.N.T.S. 209. Similar agreements were signed with Norway (Exchange of Notes of May 2nd, 1929); Denmark (Exchange of Notes of June 18th, 1929); Japan (Exchange of Notes of September 21st, 1929); The Netherlands (Exchange of Notes of September 23rd, 1929); Greece (Exchange of Notes of September 30th, 1929); Sweden (Exchange of Notes of November 21st, 1929); Germany

by sanitary, security or morality regulations.⁶⁹

It is important to note that the operation of the most-favoured nation clauses in Canada's treaties may have a cumulative or "snowballing" effect. If Canada grants most-favoured nation treatment to country A and has granted or later grants national treatment to country B, then Canada must, by the most-favoured nation obligation, extend the national treatment to country A as well as country B.

Thus, it is obvious that Canada is obliged by most-favoured nation clauses to extend to a large number of countries the national treatment concerning St. Lawrence navigation accorded by the treaties with the United States. Moreover, Canada must extend to these countries the extensive grants of national or most-favoured nation treatment provided in her existing treaties.

IV

Basically, the General Agreement on Tariffs and Trade⁷⁰ is a multilateral trade treaty promising most-favoured nation treat-

(Exchange of Notes of April 17th, 1930); United Kingdom (Exchange of Notes of September 3rd, 1943 respecting persons resident in British Guiana). The Japanese and German agreements were probably terminated by the Second World War.

⁶⁹ Although the Trade Agreement between the United States of America and Canada, signed at Washington, November 15th, 1935, [168 L.N.T.S. 355, 1936 Canada T.S. No. 9 (suspended so long as both parties are members of G.A.T.T.)] contains no provisions concerning freedom of transit, it contains an interesting provision in art. 11 for the establishment of a committee of technical experts to submit recommendations concerning disputed sanitary laws.

Less extensive provisions concerning sanitary and similar laws are found in treaties with Yugoslavia (*supra*, footnote 52, art. 9); Brazil (Exchange of Notes constituting a Provisional Commercial Agreement. Rio de Janeiro, December 4th, 1931, 139 L.N.T.S. 241, 1941 Can. T.S. No. 18, art. 6); Haiti (Trade Agreement, signed at Port-au-Prince, April 23rd, 1937, 194 L.N.T.S. 59, 1938 Can. T.S. No. 16); Guatemala (Trade Agreement, signed at Guatemala City, September 28th, 1937, 194 L.N.T.S. 65, 1939 Can. T.S. No. 3); Dominican Republic (Trade Agreement, signed at Trujillo, March 8th, 1940, 1941 Can. T.S. No. 1); Chile (Trade Agreement, signed at Santiago-de-Chile, September 10th, 1941, 1941 Can. T.S. No. 16, art. 5); Argentina (Trade Agreement, signed at Buenos Aires, October 2nd, 1941, 1941 Can. T.S. No. 17, art. 6); Mexico (Trade Agreement, signed at Mexico, February 8th, 1946, 1946 Can. T.S. No. 4, art. 5); Colombia (Trade Agreement, signed at Bogota, February 20th, 1946, 1946 Can. T.S. No. 7, art. 5. Canada. Department of Trade and Commerce. Annual Report: 1959, (1959), p. 104 states that this agreement "has not been put into force"); Nicaragua (Trade Agreement, signed at Managua, December 19th, 1946, 1946 Can. T.S. No. 43, art. 5); Costa Rica (Exchange of Notes constituting a Commercial *Modus Vivendi*, November 17th and 18th, 1950, 1950 Can. T.S. No. 20, art. 7(b)); and Honduras (Exchange of Notes for the Establishment of a Commercial *Modus Vivendi*, July 11th, 1956, 1956 Can. T.S. No. 10, art. 7(b)).

⁷⁰ *Op. cit.*, *supra*, footnote 6. For the history of the negotiations of the

ment respecting tariff concessions. Some thirty-eight nations, including Canada, plus six other states that participate provisionally in the agreement, are bound.⁷¹ In addition, however, to the economic provisions of the agreement, the General Agreement on Tariffs and Trade contains a number of so-called technical articles, one of which is article 5 respecting freedom of transit. The extent of the obligation concerning navigation thereby undertaken by Canada does not seem to be generally appreciated. Following a definition of "traffic in transit" in paragraph 1, paragraph 2 contains this broad undertaking:

2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels, or of other means of transport.

Paragraph 3 forbids unnecessary delays or restrictions and provides exemption from customs duties or transit charges (save for services rendered). Paragraph 4 requires that charges and regulations imposed on traffic in transit be "reasonable, having regard to the conditions of the traffic". And paragraph 5 provides:

5. With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.

Thus, Canada has undertaken to allow "freedom of transit" through the St. Lawrence for traffic in transit to American Great Lakes ports, and to impose charges and regulations on this traffic no more stringent than on traffic from Canadian Great Lakes ports to third countries.

Moreover, these undertakings would seem to extend to traffic in transit between American Great Lakes ports and American

G.A.T.T., see R. E. Asher, *et al.* The United Nations and Promotion of the General Welfare (1957), pp. 249 *et seq.*

⁷¹ Canada, Department of Trade and Commerce, Annual Report: 1959, Appendix "F", (1959), p. 101. The parties are, besides Canada: Australia, British West Indies, Bahamas, Bermuda, British Guiana, British Honduras, The West Indies Federation, Ceylon, Ghana, India, New Zealand, Malaya, Pakistan, Federation of Rhodesia and Nyasaland, Union of South Africa, United Kingdom, Austria, Belgium-Luxembourg, Brazil, Burma, Chile, Cuba, Czechoslovakia, Denmark, Dominican Republic, Finland, France, Germany (Federal Republic), Greece, Guinea, Haiti, Indonesia, Italy, Japan, Netherlands, Nicaragua, Norway, Peru, Sweden, Turkey, United States. The six countries participating provisionally are: Cambodia, Israel, Poland, Switzerland, Tunisia and Yugoslavia.

East Coast ports. A report of a Sub-committee of the United Nations Conference on Trade and Employment interpreted traffic "in transit" as including a movement between two points in the same country.⁷²

It is perhaps surprising that Canada entered these commitments with so few qualms—particularly since they are based, at least in part, upon the recommendations of a 1921 international conference which she declined to attend and the resulting treaties which she declined to sign. The original source of the General Agreement on Tariffs and Trade transit provisions would appear to be the recommendations of the Barcelona Conference on Communications and Transit.⁷³ By article 23(e) of the League of Nations Covenant, member nations undertook to "make provision to secure and maintain freedom of communications and of transit". In accordance with the agreement of all the delegates at the meeting of the first Assembly of the League of Nations, the First Transit and Communications Conference met in Barcelona from March 10th until April 20th, 1921.⁷⁴ Canada did not attend (although New Zealand and India did). Two conventions were drawn up and signed by many of the delegates; one dealt with freedom of transit,⁷⁵ the other with the regime of navigable waterways of international concern.⁷⁶ Although both provided generally for freedom of transit and navigation for other signatories, the convention concerning the regime of navigable waterways contained very detailed provisions defining the waterways to be affected, providing a choice of adherence with respect to "all navigable waterways" or "all naturally navigable waterways", and reserving cabotage or coasting trade. Canada adhered to neither convention.

⁷² United Nations. Conference on Trade and Employment. Reports of Committees and Principal Sub-Committees (1948), U.N. Doc. No. ICITO 1/8, p. 71. Report of Sub-Committee C of the Third Committee on Articles 32-39 [Original Doc. No. E/CONF 2/C3/38]. Canada is said to have invoked the G.A.T.T. transit provisions in a recent case where a consignment of shrimp, imported into Canada from Communist China and en route through the United States to Eastern Canada, was seized by the United States.

⁷³ Contracting Parties to the G.A.T.T., Analytical Index of the General Agreement (1953), p. 17 states, "Paragraph 1 and the last sentence of paragraph 2 were based on the text of the Barcelona Convention of 20 April 1921". See also: United Nations. Economic and Social Council. Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment (20th January to 25th February, 1947) (1947), U.N. Doc. No. E/PC/T/34/Rev. 1, p. 12.

⁷⁴ C. J. B. Hurst, Transit and Communications Conference at Barcelona (1921-22), 2 B.Y.I.L. 174.

⁷⁵ 7 L.N.T.S. 11; 116 B.F.S.P. 517; Hudson, International Legislation (1931), Vol. 1, p. 625.

⁷⁶ 7 L.N.T.S. 35; 116 B.F.S.P. 546; Hudson, *ibid.*, p. 638.

Yet, though unwilling in 1921 to accept the obligations carefully defined and delimited in the Barcelona Conventions, Canada accepted without apparent hesitation in 1948 the vague and general provisions of the General Agreement on Tariffs and Trade.

A partial explanation for this *volte-face* may be that the Canadian government seems to have regarded the treaty from the purely economic point of view. The Canadian delegation to the meetings where the General Agreement on Tariffs and Trade was drafted did not include any legal representatives.⁷⁷

V

The provisions of the British Commonwealth Merchant Shipping Agreement of 1931⁷⁸ concerning the coasting trade are quite clear; Canada promises national treatment to other Commonwealth nations. Article 10 states:

Each Part of the British Commonwealth agrees to grant access to its ports to all ships registered in the British Commonwealth on equal terms and undertakes that no laws or regulations relating to seagoing ships at any time in force in that Part shall apply more favourably to ships registered in that Part, or to the ships of any foreign country, than they apply to any ship registered in any other Part of the Commonwealth.

Article 11 reads:

While each Part of the British Commonwealth may regulate its own coasting trade, it is agreed that any laws or regulations from time to time in force for that purpose shall treat all ships registered in the British Commonwealth in exactly the same manner as ships registered in that Part, and not less favourably in any respect than ships of any foreign country.

This Agreement would now seem to extend to Australia,⁷⁹ the

⁷⁷ The Canadian delegates to the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment were: H. B. McKinnon, Head of Delegation, Chairman of Tariff Board; D. Sim, Deputy Minister of Customs and Excise; L. E. Couillard, Department of Trade and Commerce; J. J. Deutsch, Director of Economic Relations, Department of Finance; H. R. Kemp, Director, Commercial Relations and Foreign Tariffs Division, Department of Trade and Commerce; F. A. McGregor, Commissioner of Combines, Department of Justice; S. D. Pierce, Head of Economic Division of Department of External Affairs. The Canadian delegates to the Drafting Committee were: Arnold C. Smith, Department of External Affairs; Gordon B. Urquhart, Chief Dominion Customs Appraiser, Department of National Revenue; F. A. McGregor; Ian M. MacKeigan, Deputy Commissioner, Combines Investigation. Although the delegates from the Combines Branch were legally trained, they were not present as legal advisors.

⁷⁸ Signed at London, December 10th, 1931, 129 L.N.T.S. 177; 1931 Can. T.S. No. 7.

⁷⁹ In addition to the rights under the British Commonwealth Merchant Shipping Agreement, article 8 of the Trade Agreement between Canada

British West Indies, Bahamas, Bermuda, British Guiana, British Honduras, Ceylon, Ghana, India, New Zealand, Malaya, Pakistan, Federation of Rhodesia and Nyasaland, The United Kingdom and possibly Nigeria, Sierra Leone and other states. Its application to the Union of South Africa is uncertain.

The possibility of states possessing most-favoured nation agreements claiming the rights accorded by this treaty is excluded by the invariable clause in Canada's most-favoured nation treaties excepting treatment given to other Commonwealth countries.

On December 9th, 1957, the Royal Commission on Coasting Trade recommended against proposals to restrict that trade to vessels of Canadian registry.⁸⁰ On May 12th, 1961, the Canadian government announced its intention of restricting the coasting trade of the St. Lawrence and Great Lakes to Canadian vessels.⁸¹ Transport Minister Balcer, replying to Opposition Leader Pearson's inquiry whether there had been prior consultation with the government of the United Kingdom, stated:

Mr. Speaker, we are going to follow precisely the procedure that exists at the present time in regard to these agreements. We are going to notify the various Commonwealth countries along the lines of Article 25 of this Agreement, and I think, after a period of three months, we will be in a position to enforce our proposals.⁸²

Article 25 of the Agreement provides for variations "by common accord". Thus, a single Commonwealth government will be able to block the proposed Canadian change. Article 26 provides for the holding of a conference on any matter the subject of the Agreement at the request of three Commonwealth governments. Another possible recourse would be withdrawal from the Agreement upon twelve months' notice as required by article 24.

VI

A difficult and unresolved problem is the extent of the obligation and Australia provides for the establishment of consultative procedures concerning "shipping problems and non-tariff obstacles to trade". Australian Trade Agreement Act, 1960, S.C., 1960, c. 17, Schedule, art. 8.

⁸⁰ Canada. Royal Commission on Coasting Trade. Report. Ottawa: December 9th, 1957, p. 178. The Royal Commission estimated that: "Applied to the Great Lakes and St. Lawrence River, the restriction would mean moderately greater water transportation charges than would obtain otherwise in coasting trades. It would probably cause most Canadian export grain to be shipped directly overseas from the Lakehead, causing a substantial loss of coasting trade. This loss would impair the competitive position of Canadian operators in the transborder trade. It would not afford any substantial advantage in shipping service." (p. 139). The Commission also rejected proposals to restrict the transborder trade to Canadian registered and United States registered vessels. (pp. 139-40).

⁸¹ *Op. cit.*, *supra*, footnote 1.

⁸² *Ibid.*, p. 4714.

incurred by granting freedom of transit or freedom of navigation. If Canada intends to respect her international commitments, it is possible that her ability to legislate is seriously impaired by such a treaty provision. The Federal Tribunal of Switzerland has suggested that an obligation to allow freedom of transit may limit a riparian state's jurisdiction over river shipping:

It may be argued that a riparian state cannot extend its legislation relating to accident insurance to the crews of foreign vessels passing through its territory or anchoring in its ports, for the obligations and formalities resulting from such legislation would interfere with freedom of navigation. . . .⁸³

Certainly, the treaty provision should preclude discriminatory pilotage tolls or regulations. There is even authority that the imposition of any tolls at all is inconsistent with freedom of navigation. Mr. Justice Lamont stated in *Re Arrow River and Tributaries Slide & Boom Co. Ltd.*:

I cannot agree with the appellants' contention that the words "free and open" [in the Ashburton-Webster Treaty] are consistent with the imposition of tolls for the use of improvements erected in the river. In my opinion the meaning of these words in the clause is that the citizens of both countries are to be at liberty, as a matter of right, to travel these waters on both sides of the fixed boundary line without let or hindrance from anyone, or having to pay anything for so doing. . . .

Cannon J. concurred with Lamont J. Chief Justice Anglin took the opposite view, holding that the imposition of tolls was proper, if applied equally to citizens of both countries. Two other judges, Smith and Rinfret JJ. held the treaty did not regulate the section of the particular river, which was non-navigable because of 120-foot falls.⁸⁴ On the other hand, the Supreme Court of the United States has held that a "reasonable and nondiscriminatory charge for the use of such an improvement" is not clearly inconsistent with freedom of navigation.⁸⁵

Nor is it obvious that Canada retains the right to restrict entry

⁸³ *Basler Rheinschiffahrt — Aktiengesellschaft v. Bundesamt für Sozialversicherung*, [1948] A.D. 69 (No. 25); M. Katz, and K. Brewster, Jr., *The Law of International Transactions and Relations: Cases and Materials* (1960), p. 630 (Federal Tribunal, Switzerland, June 25th, 1948).

⁸⁴ [1932] S.C.R. 495, [1932] 2 D.L.R. 250. All of the judges agreed that even if the tolls violated the treaty, an affected individual could not invoke the treaty in the absence of legislation.

The case does not seem to be authority for the view for which it is cited by the Department of External Affairs: "The words 'free and open' have been held not to be inconsistent with the levying of tolls where the charges levied were uniform for citizens of the two countries." *Op. cit.*, *supra*, footnote 4, p. 235.

⁸⁵ *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox* (1934), 291 U.S. 138, at p. 158, 54 S. Ct. 361, at p. 366.

to the coasting trade on the St. Lawrence. Dr. H. Fortuin, rapporteur of the International Law Association's committee on the navigation aspects of the law of international rivers, has argued recently that freedom of navigation implies the right to engage in cabotage.⁸⁶ The significance of this issue is shown by the controversy between Germany and other Rhine riparians concerning Germany's attempts to reserve cabotage.⁸⁷

The complexity of Canada's treaties may offer methods of avoiding any Canadian legislation incidentally affecting a foreign shipper's freedom to navigate the St. Lawrence. For example, the proposed Canadian legislation to restrict the coasting trade to Canadian vessels may be circumvented by registration in Bolivia. The Treaty of Commerce of 1911 between the United Kingdom and Bolivia was made applicable to Canada by an Order in Council of July 20th, 1935.⁸⁸ Article 1 of this treaty undertakes to give national treatment to Bolivian subjects in matters of commerce. Article 4 promises national or most-favoured nation treatment concerning transit dues (which may cover pilotage dues). And article 5 contains a general most-favoured nation residuary provision. No provision reserves the coasting trade. Presumably the reason for the broadness of this treaty is that Bolivia is a landlocked country. Ironically, however, the one convention resulting from the Barcelona Conference which was accepted by Canada was the "Declaration Recognizing the Right to a Flag of States having no Seacoast".⁸⁹ Presumably then, the Bolivian government could claim for a ship of Bolivian registry equality of treatment with Canadian vessels in the coasting trade.

It is difficult to think of any change in Canadian legislation concerning St. Lawrence navigation which does not involve the commitments arising from treaties binding Canada. Is not Canada obligated to extend the recent pilotage concessions granted to the United States to a number of other countries? Proposals to restrict the St. Lawrence coasting trade to Canadian vessels or to exempt American vessels from pilotage or other requirements should not be undertaken lightly.

⁸⁶ H. Fortuin, *The Regime of Navigable Waterways of International Concern and the Statute of Barcelona* (1960), 7 *Nederlands Tijdschrift voor Internationaal Recht* 125, at pp. 132-135.

⁸⁷ *Ibid.*

⁸⁸ Canada, Department of Trade and Commerce, *Annual Report: 1959* (1959), p. 104.

⁸⁹ Opened for signature at Barcelona, April 20th, 1921, 7 *L.N.T.S.* 73; 116 *B.F.S.P.* 547; Hudson, *op. cit.*, *supra*, footnote 75, pp. 662-663. Hudson states that the declaration was definitively accepted by Canada, citing League of Nations Doc. A.6.(a). 1931.V. Annex.