

No. 3.

*Memorandum by the Legal Adviser of the Department of External Affairs,
March 12, 1941.*

GREAT LAKES-ST. LAWRENCE BASIN DEVELOPMENT
PROCEDURE BY AGREEMENT BASED UPON THE
LEGISLATIVE AUTHORITY OF CONGRESS

1. In the course of negotiation of the arrangements with the United States for the development of navigation and power in the Great Lakes-St. Lawrence Basin, the question has arisen whether such arrangements should be embodied in a Treaty, or in an Agreement based upon the legislative authority of Congress.

2. The United States Government has taken the position that it was desirable that procedure by Agreement should be adopted, rather than procedure by Treaty. The United States representatives have urged that such a course would be justified by the provisions of the Boundary Waters Treaty of 1909. Further, they have urged that, apart from the Boundary Waters Treaty, procedure by Agreement could be justified on the basis of the Constitutional Law of the United States and International Law and Practice.

3. The following points need to be examined:—

- (a) Whether procedure by concurrent legislation or by Agreement could be supported by the authority of the provisions of the Boundary Waters Treaty.
- (b) Whether, apart from the Boundary Waters Treaty, procedure by Agreement might be justified. This point would divide itself into two subordinate questions,—
 - (i) Whether an Agreement, based upon the legislative authority of Congress, would give rise to a valid obligation, recognized by the Courts of the United States;
 - (ii) Whether such Agreement would create an obligation recognized in International Law and cognizable by international tribunals.
- (c) Whether an arrangement, based upon the legislative authority of Congress, would give rise to an obligation that would be as effective from the international point of view as an arrangement based upon Treaty.

4. The first point is whether procedure by concurrent legislation or by agreement could be supported by the authority of the provisions of the Boundary Waters Treaty. Article XIII provides:

ARTICLE XIII

In all cases where special agreements between the High Contracting Parties hereto are referred to in the foregoing articles, such agreements are understood and intended to include not only direct agreements between the High Contracting Parties, but also any mutual arrangement between the United States and the Dominion of Canada expressly by concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion.