

of New York in 1956,<sup>17</sup> and the plaintiffs attempted to effect service on the defendant, styled "The Dominion of Canada," by serving the Canadian Consul in New York. The Consul refused service, and subsequently by a diplomatic note of November 10, 1952, Canada requested of the U.S. Government that it, by note, advise the Court of the sovereign immunity of Canada.<sup>18</sup>

The U.S. government refused to do so on the dual basis that, by the Gut Dam Agreement, Canada had waived the right to object to jurisdiction of the American courts, and also on the ground that, since the suit related to real property in the United States, the defence of sovereign immunity did not apply.<sup>19</sup> Faced with the necessity of defending the action, Canada retained counsel, who successfully objected on procedural grounds to the service of process and the action was dismissed, a dismissal ultimately concurred in when the Supreme Court refused certiorari.<sup>20</sup>

Two additional steps of a non-litigious character may be observed at this point, namely that, in 1952, the United States and Canada submitted a joint reference to the International Joint Commission under the Boundary Waters Treaty of 1909 to enquire into the question of high-water levels on Lake Ontario,<sup>21</sup> and in 1953, in part as a consequence of the St. Lawrence Seaway Development, the Dam itself was removed by Canada.

While the matter was still before the U.S. Courts, Canada submitted the note on November 10, 1952,<sup>22</sup> declaring

- (1) that it recognized in principle its obligation to pay compensation for damage to U.S. citizens, provided damage was attributable to the construction or maintenance of Gut Dam;
- (2) that Canada would not waive its sovereign immunity before U.S. Courts; and
- (3) that it was agreeable to the establishment of an appropriate tribunal to determine the extent to which damage, if any, may have been caused by high water attributable to the existence of Gut Dam, as well as the quantum of damage.

This particular position was rejected by the United States, and intermittent negotiations between the years 1952 and 1962 failed to yield any solution of the question. Finally, in 1962, by Act of Congress,<sup>23</sup> the claims of the American Gut Dam claimants were referred to the United States Foreign Claims Settlement Commission, a quasi-judicial tribunal in the United States

<sup>17</sup> *Federal Supplement*, Vol. 144, p. 746.

<sup>18</sup> Canadian Ambassador's Note of November 10, 1952, to U.S. Department of State.

<sup>19</sup> U.S. State Department's Note of November 17, 1952.

<sup>20</sup> *U.S. Supreme Court Reports 1957*, Vol. 353, p. 936.

<sup>21</sup> Cf. L.M. Bloomfield and Gerald F. Fitzgerald, *Boundary Waters Problems of Canada and the United States* (Toronto, 1958), p. 197.

<sup>22</sup> Note referred to in footnote 18, *supra*.

<sup>23</sup> U.S. Public Law 87-587, *76 Stat.* 387 (1962).