



No. 16

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Signing of Canada-U.S. Agreement Concerning Gut Dam
Claims

The Secretary of State for External Affairs, the Honourable Paul Martin, and the United States Ambassador to Canada, His Excellency W. Walton Butterworth, today signed an Agreement between the Government of Canada and the Government of the United States of America concerning the establishment of an international arbitral Tribunal to dispose of United States claims relating to Gut Dam. (A copy of the Agreement is annexed.)

These claims arose in 1951 and 1952. At that time there were unusually high water levels on Lake Ontario. Residents of the United States owning real estate on the south shore of Lake Ontario and the St. Lawrence complained that these high water levels were attributable in whole or in part to the construction by the Government of Canada of a small navigation improvement in the international section of the river known as "Gut Dam".

The construction of Gut Dam was carried out at the beginning of the century in pursuance to arrangements entered into between the Canadian and United States Governments of the day. Gut Dam itself was removed in 1953 as part of the St. Lawrence

Seaway construction programme.

The position which the Government of Canada has maintained from the first is that there is no basis, either in law or in fact, for these claims. The claimants took their dispute before the Courts in the United States where their suits were rejected on procedural grounds without the Courts having gone into the merits.

Over the years intergovernmental negotiations have been in progress with the United States on an intermittent basis with a view to finding a fair solution. The Agreement signed today represents the successful results of these negotiations. Under the terms of this Agreement the United States claimants will be afforded the opportunity to have their claims heard and disposed of on their merits. Any award made by the Tribunal will be final and binding on both Governments. The Government of Canada is not in possession at this time of any precise figure as to the aggregate amount of these claims, but it is believed they will run into the millions of dollars.

As provided for in the Agreement the international arbitral Tribunal, which will be known as the "Lake Ontario Claims Tribunal United States and Canada", will consist of the Chairman and two national members. One nation member will be appointed by the Government of Canada and the other by the Government of the United States; a third member, who will preside over the Tribunal as Chairman will be designated jointly by the two Governments.

There are also on record complaints concerning damage allegedly attributable to Gut Dam from residents of Canada owning

real estate on the north shore of Lake Ontario. Claims by Canadians against the Canadian Government will not be considered by the international Tribunal. However, if the findings of the Tribunal make it desirable to do so, the Canadian Government will at that stage consider the establishment of special procedures for Canadian claimants. In the end, Canadian claimants will receive treatment no less favourable than that accorded to United States claimants.

To provide for the possibility that the decisions of the Tribunal may indicate that the United States Government has at least a partial legal responsibility in connection with the construction of Gut Dam, when signing the Agreement today the Secretary of State for External Affairs contemporaneously delivered to the United States Ambassador a diplomatic Note on this matter. The Note states that the Government of Canada reserves its right to espouse claims of Canadian citizens against the United States Government relating to damage allegedly attributable to Gut Dam should the Tribunal find that the United States Government is in some measure legally liable to compensate the United States claimants for damage caused by Gut Dam or should any award by the Tribunal provide some other basis which would warrant in the opinion of the Government of Canada such a course of action being followed.

AGREEMENT BETWEEN THE GOVERNMENT OF CANADA AND THE GOVERNMENT
OF THE UNITED STATES OF AMERICA CONCERNING THE ESTABLISHMENT
OF AN INTERNATIONAL ARBITRAL TRIBUNAL TO DISPOSE OF UNITED
STATES CLAIMS RELATING TO GUT DAM.

THE GOVERNMENT OF CANADA AND
THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Considering that claims have been made by nationals of the United States of America against the Government of Canada alleging that their property in the United States has suffered damage or detriment as a result of high water levels in Lake Ontario or the St. Lawrence River;

Considering that these claimants have alleged further that the damage or detriment was attributable in whole or in part to the construction and maintenance of a dam in the international section of the St. Lawrence River known as and hereinafter referred to as "Gut Dam" and have claimed compensation for such damage or detriment from the Government of Canada; and

Considering that in the special circumstances associated with these claims the need arises to establish an international arbitral tribunal to hear and dispose of these claims in a final fashion,

HAVE AGREED AS FOLLOWS:

ARTICLE I

1. An international arbitral tribunal, which shall be known as the Lake Ontario Claims Tribunal United States and Canada, hereinafter referred to as "the Tribunal", is hereby established for the purpose of hearing and finally disposing of claims of nationals of the United States of America including juridical persons that are presented to the Tribunal in accordance with the terms of this Agreement.

2. The Tribunal shall consist of the Chairman and two national members. One national member shall be appointed by the Government of Canada within two months after this Agreement enters into force; the other national member shall be appointed by the Government of the United States of America within the same period; a third member, who shall preside over the Tribunal as Chairman, shall be designated jointly by the two Governments within three months after this Agreement enters into force. If the third member has not been designated within three months after this Agreement enters into force, either Party to this Agreement may request the President of the International Court of Justice to designate such third member. In the event of the inability of any member of the Tribunal to serve, or in the event of a member failing to act as such, his successor shall be chosen in accordance with the same procedure and within the same time limits provided herein for the selection of his predecessor.

3. Each member of the Tribunal shall have one vote. Every decision of the Tribunal shall be reached by a majority vote and shall constitute a full and final determination of the subject matter of the decision.

4. Each member of the Tribunal shall be a judge or a lawyer competent to hold high judicial office in his national State. No member prior to his appointment shall have been associated directly or indirectly with any matter relating to this Agreement.

5. Each member of the Tribunal, before entering upon his duties, shall make and subscribe to a solemn declaration before the Joint Secretaries of the Tribunal stating that he will carefully and impartially examine and decide according to his best judgment and in accordance with the provisions of this Agreement all matters presented for his decision. A duplicate of every such declaration shall be filed with each of the Joint Secretaries of the Tribunal.

ARTICLE II

1. The Tribunal shall have jurisdiction to hear and decide in a final fashion each claim presented to it in accordance with the terms of this Agreement. Each decision of the Tribunal shall be based on its determination of any one or more of the following questions on the basis of the legal principles set forth in this Article:

- (a) Was the construction and maintenance of Gut Dam the proximate cause of damage or detriment to the property that is the subject of such claim?
- (b) If the construction and maintenance of Gut Dam was the proximate cause of damage or detriment to such property, what was the nature and extent of damage caused?
- (c) Does there exist any legal liability to pay compensation for any damage or detriment caused by the construction and maintenance of Gut Dam to such property?
- (d) If there exists a legal liability to pay compensation for any damage or detriment caused by the construction and maintenance of Gut Dam to such property, what is the nature and extent of such damage and what amount of compensation in terms of United States dollars should be paid therefor and by whom?

2. The Tribunal shall determine any legal liability issue arising under paragraph 1 of this Article in accordance with the following provisions:

- (a) The Tribunal shall apply the substantive law in force in Canada and in the United States of America (exclusive, however, of any laws limiting the time within which any legal suit with respect to any claim

is required to be instituted) to all the facts and circumstances surrounding the construction and maintenance of Gut Dam including all the documents passing between Governments concerning the construction of the dam and other relevant documents.

- (b) In this Article the law in force in Canada and the United States of America respectively includes international law.
- (c) No claim shall be disallowed or rejected by the Tribunal through the application of the general principle of international law that legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim.

3. In the event that in the opinion of the Tribunal there exists such a divergence between the relevant substantive law in force in Canada and in the United States of America that it is not possible to make a final decision with regard to any particular claim as provided by this Article, the Tribunal shall apply such of the legal principles set forth in paragraph 2 as it considers appropriate, having regard to the desire of the Parties hereto to reach a solution just to all interests concerned.

4. The Tribunal shall not have jurisdiction over any claim presented under this Agreement unless the claim is accompanied by an undertaking, signed by the claimant in a form that is valid and binding under Canadian and United States law on any such claimant and his successors and assigns and indicating that he

- (a) accepts the decision of the Tribunal as final and binding with respect to the matters to which it relates, and
- (b) waives any right he may have to proceed against the Government of Canada otherwise than in a manner consistent with the terms of this Agreement.

5. Nothing in this Article shall be deemed to prevent the Tribunal from making any general finding or findings with respect to all claims submitted to it, or any particular category of claims submitted to it.

ARTICLE III

1. Any claim presented to the Tribunal under the terms of this Agreement shall be considered and dealt with exclusively in accordance with the procedures set out in this Agreement.

2. The Government of the United States of America shall take such action as may be necessary to ensure that the Foreign Claims Settlement Commission of the United States shall discontinue its investigation and determination of all claims relating to Gut Dam.

ARTICLE IV

1. Each Government shall appoint a Secretary of the Tribunal. The persons so appointed shall act as Joint Secretaries of the Tribunal and shall be subject to its instructions.

2. The Tribunal may appoint such other persons, including engineers, as are considered necessary to assist in the performance of its duties, on such terms and conditions as the Tribunal may see fit, subject only to the availability of funds provided by the two Governments for the expenses of the Tribunal.

ARTICLE V

The Tribunal shall meet at such times and places as may be agreed upon by the members of the Tribunal, subject to instructions of the two Governments.

ARTICLE VI

The Tribunal shall, with the concurrence of the two Governments, adopt such rules for its proceedings as may be deemed expedient and necessary, but no such rule shall contravene any of the provisions of this Agreement. The rules shall be designed to expedite the determination of claims.

ARTICLE VII

1. Within 90 days after this Agreement enters into force, the Government of the United States of America shall file with the Joint Secretaries of the Tribunal three copies of the claim of each national of the United States of America alleging damage or detriment caused by the construction and maintenance of Gut Dam that it is submitting for adjudication. It shall also within the same period transmit three copies of each such claim to the Government of Canada. The claims shall be accompanied by all of the evidence on which the Government of the United States of America intends to rely.

2. Within 120 days after the receipt of each claim by the Government of Canada, in accordance with the terms of paragraph 1 of this Article, the Government of Canada shall file with the Joint Secretaries of the Tribunal three copies of the answer it is submitting with respect to such claim. It shall also within the same period transmit three copies of each such answer to the Government of the United States of America. The answer shall be accompanied by all of the evidence on which the Government of Canada intends to rely.

3. Within such time as may be prescribed by the rules adopted by the Tribunal:

- (a) The Government of the United States of America shall file with the Joint Secretaries of the Tribunal three copies of a brief with reference to the construction and maintenance of Gut Dam and to any damage or detriment caused thereby and three copies of all briefs being submitted in support of the claims;
- (b) The Government of the United States of America shall transmit three copies of each such brief to the Government of Canada; and
- (c) The Government of Canada shall file with the Joint Secretaries of the Tribunal three copies of one or more briefs in reply to the briefs of the Government of the United States of America and transmit three copies of the brief or briefs of the Government of Canada as so filed to the Government of the United States of America.

With the briefs each Government may submit evidence to rebut evidence submitted by the other Government.

4. No other pleadings or other briefs may be submitted by either Government except at the request of or with the approval of the Tribunal.

ARTICLE VIII

1. Each Government shall designate an Agent who shall present to the Tribunal all the pleadings, evidence, briefs and arguments of his Government with respect to any claim filed with the Tribunal in accordance with the provisions of this Agreement. To assist the Agent, each Government may employ or appoint such counsel, engineers, investigators and other persons as it may desire.

2. All individual claims shall be presented to the Tribunal through the Agent of the Government of the United States of America.

ARTICLE IX

Whenever under the terms of this Agreement the approval or other form of instructions of Governments is required, such approval or other form of instructions shall be communicated by the Agent of such Government. All other communications required to be made to or by either Government under the terms of this Agreement shall be channeled through its Agent.

ARTICLE X

The Governments shall make all reasonable efforts to ensure that the members of the Tribunal, Agents, counsel and other appropriate persons shall be permitted at all reasonable times to enter and view and carry on investigations upon any of the property covered by any claim presented under the terms of this Agreement.

ARTICLE XI

The Tribunal shall keep accurate permanent records of all its proceedings.

ARTICLE XII

1. The Tribunal shall in an expeditious manner render decisions on the matters referred to it and shall from time to time make such interim records as are requested by the two Governments or as the Tribunal deems advisable.
2. The Tribunal shall submit to the Agents a copy of each decision when rendered. Each such decision shall be supported by reasons in writing and shall be accompanied by a copy of the record of all the proceedings maintained in relation to the hearing of the claim with which the decision is concerned.
3. A minority member may report a dissenting opinion in writing, which shall accompany any decision of the Tribunal submitted under the provisions of paragraph 2 of this Article to the Agents.
4. The decisions of the majority of the members of the Tribunal shall be the decisions of the Tribunal and shall be accepted as final and binding by the two Governments.

ARTICLE XIII

Awards of the Tribunal shall be entered in United States dollars. Every award made by the Tribunal shall be paid in United States dollars within one year from the date the Tribunal submits the decision to which the award relates to the two Governments in accordance with the provisions of Article XII.

ARTICLE XIV

The Tribunal shall determine and render decisions on all claims submitted to it within a period of two years from the date of the first meeting of the Tribunal, unless the two Governments agree to extend the period.

ARTICLE XV

Each Government shall defray the expenses incurred by it in the presentation of claims, pleadings, evidence and arguments to the Tribunal and shall pay the salary of its national member. All other expenses of the Tribunal, including the honorarium of the Chairman of the Tribunal, which shall be fixed by agreement of the two Governments, shall be defrayed in equal portions by the two Governments.

ARTICLE XVI

1. This Agreement shall be ratified, and the instruments of ratification shall be exchanged at Washington as soon as possible.

2. This Agreement shall enter into force on the day of exchange of the instruments of ratification.

IN WITNESS WHEREOF the respective Plenipotentiaries
have signed the present Agreement.

DONE in duplicate at Ottawa, this twenty-fifth day
of March, one thousand nine hundred sixty-five.

FOR THE GOVERNMENT OF CANADA:

....."PAUL MARTIN".....

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

....."W. WALTON BUTTERWORTH".....



CANADA

No. 22

The Secretary of State for External Affairs presents his compliments to His Excellency the Ambassador of the United States of America and has the honour to refer to the Agreement they signed today on behalf of their Governments concerning the establishment of an international arbitral Tribunal to dispose of United States claims relating to the construction and maintenance of a navigation improvement dam in the international section of the St. Lawrence River known as "Gut Dam".

The Secretary of State for External Affairs wishes to state that the Government of Canada expressly reserves its right to espouse claims of Canadian citizens against the Government of the United States of America with respect to damage to property allegedly attributable to Gut Dam should the Tribunal to be established under the terms of the Agreement find that the U.S. Government is in some measure legally liable to compensate its own citizens for damage caused by Gut Dam or should any award by the Tribunal provide some other basis which would warrant, in the opinion of the Government of

TAWA, March 25, 1965.

Canada, such a course of action being followed.

The Secretary of State for External Affairs avails himself of this opportunity to renew to the Ambassador of the United States of America the assurances of his highest consideration.

"P.M."