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No. 66/35 CANADA'S RECENT EXPERIENCE IN INTERNATIONAL CLAIMS

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Two entirely disconnected situations presently before the Government of Canada offer an opportunity to illustrate Canada's current approach to the question of international claims, both as a claimant and as a respondent. These are: the current efforts to obtain payment from certain Eastern European countries of the claims of Canadian citizens for nationalized property; and arrangements with the United States for the arbitration of claims of American citizens arising out of the Gut Dam controversy. In the former, Canada is the plaintiff, while in the latter she is the respondent. Both questions provide illustration of the Canadian attitude to international disputes and the applicable principles of law.

Perhaps the most useful starting point is from a familiar text, which if not of Biblical origin is at least from the Permanent Court of International Justice, and has found widespread support as a declaration of principle. In its decision on the Mavrommatis Palestine Concessions, the Court remarked:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights -- its right to ensure, in the person of its subjects, respect for the rules of international law.[1]

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[1] *Permanent Court of International Justice*, Series A, No. 2, p. 12 (1924).

The emergence of a Soviet Russia in 1917 and the extension of its communist system to most of the nation-states of Eastern Europe after 1945 brought with it the fundamental social change of abolition of private property. In the case of the nationals of the countries in question, one is compelled to recognize the effectiveness of the power of their governments to carry out expropriation even if one does not sympathize with the underlying political philosophy. What has been hotly disputed and resisted, however, has been the further suggestion that the property of nationals of other states might also be taken without need for compensation.

A generation of international lawyers has been kept busy in defining the rights and obligations of those interested in nationalized property. Canada did not play a prominent role in these earlier negotiations, principally because her nationals did not have as much in the way of foreign interests as other nations.

But Canadian nationals were affected, along with the others, and from the earliest moments of these developments, Canadian governments have shown an interest on their behalf. Effective settlement of these claims at an earlier date was not possible, because earlier Canadian governments lacked the more obvious forms of leverage enjoyed by other Western countries to compel foreign governments to recognize our claims. With some at least of the Eastern European countries, nations like the United States or Switzerland, which had under their control large blocked balances of funds belonging to expropriators, were able to negotiate effective settlements. Equally, nations with whom the Eastern European countries had enjoyed favourable trade balances were able to compel recognition of their rights.

What has produced renewed activity between Canada and many of these countries nearly twenty years after the claims first arose has been the change in attitude of the states in Eastern Europe and their evident desire to establish closer diplomatic and trade relations with Canada along with other Western countries. Canada has made it clear that without a settlement of outstanding claims, better diplomatic relations will be harder to attain, and in the past two or three years negotiations have been opened with some of the countries against whom Canadian nationals have outstanding claims.[2]

These negotiations have assumed a pattern made up of five stages leading to final settlement. In the first stage, Canada enters into an agreement in principle with the foreign nation that outstanding claims are to be negotiated.[3]

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[2]See generally in this connection: Erik B. Wang, "Nationality of Claims and Diplomatic Intervention -- Canadian Practice," *Canadian Bar Review*, Vol. 43, No. 1, March 1965, pp. 136-50; "International Claims," *External Affairs*, Vol. XVIII, No. 1, January 1966, pp. 11-20.

[3]Hungary, Poland, and Bulgaria.

As a second stage, the Government of Canada, through appropriate publicity,[4] invites Canadian nationals to submit details of their claims against the foreign government, and upon their receipt these applications are scrutinized by the Department of External Affairs to determine their appropriateness for negotiations. In the third stage, Canadian representatives enter into detailed discussion of the claims with the foreign representatives. As a fourth step the two governments then arrive at an agreement as to the quantum of the claims to be recognized, and the manner and form of payment. Finally, Canada will no doubt find it necessary to establish a foreign claims commission vested with the responsibility of determining the entitlement of Canadians to share in the lump sum settlement.[5]

What then is the current standing in the national play-offs? Yugoslavia, to its credit, has discharged its obligations to Canadians arising from pre-1948 nationalization decrees. In this case Canada has been the beneficiary of good fortune rather than of skilful play on her part, since she rode in on the coat-tails of the 1948 agreement between Yugoslavia and the United Kingdom, which was extended to include Commonwealth countries including Canada.[6] With Hungary and Bulgaria we are at stage three, having achieved agreement in principle,[7] determined for our own purposes the litigable claims, and are now in the process of bargaining over these claims with the respective governments. With Poland we are just completing stage two, having publicly requested Canadians having claims against Poland to file their claims with External Affairs by May 1, 1966.[8] In the case of Roumania we are still in stage one, endeavouring to negotiate agreement in principle. In the case of Czechoslovakia and the U.S.S.R. we have not yet gained their acquiescence even to discuss the question of an agreement, or they are not even at stage one.

Three other countries which have followed domestic policies similar to those in Eastern Europe are in an analogous but distinguishable position. These are Cuba, Indonesia and the United Arab Republic. In all three cases, representations on specific cases have drawn some favourable response and recognition of Canadian rights. Perhaps the most accurate description of our position vis-à-vis these three is that from a factual standpoint we have not yet determined the approximate dimensions of problems faced by Canadians in those countries. That, of course, does not rule out the possibility of our presenting a body of claims and a request for negotiations to any or all of the three.

Progress in all of these negotiations has not been meteoric, and we have encountered particular difficulty in making ground with countries like Hungary and Bulgaria with whom we are at stage three. By far the greatest difficulty in these two instances has arisen in disputes as to the applicable legal principles, and in carrying them out in particular cases. A number of legal issues which have arisen in the Hungarian negotiations may be referred to by way of illustration.

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[4] *Cf.* re Poland, *Department of External Affairs Press Release* No. 54, Ottawa, September 1, 1965: "Notice concerning claims of Canadian citizens against Poland."

[5] *Cf.* Canadian War Claims Commission established to adjudicate on distribution to Canadian war claimants pursuant to Appropriation Act No. 4, 1952, Vote No. 696, *1952 Statutes of Canada c.55; Statutory Orders and Regulations Consolidation 1955*, Vol. I, p. 134 (P.C. 1954-1809), amended *SOR 1955*, p. 1477, *SOR 1956*, p. 464, *SOR 1958*, p. 1250.

[6] *1948 Canada Treaty Series No. 29.*

[7] Exchange of Notes with Hungary tabled in the House of Commons on June 11, 1964.

[8] See note 2, *supra.*

A critical question is that of the nationality of claimants. In pressing these claims Canada has observed the generally accepted principles of international law with respect to nationality of claimants.[9] A condition precedent to espousal of a claim by the Government of Canada is that the claimant must at the time that the claims arose have been a Canadian national, and that he must have remained so continuously up to the time of award. (To say that the Government of Canada has recognized the generally accepted rules as to nationality is not also to say that it is satisfied with them. Great injustice may be done someone who through inadvertence or accident of time does not fit within the rule. At the root of the Government's dissatisfaction is a fundamental dissent from the Marxist doctrine that it is fair or just to deprive any person of his property without fair and reasonable compensation. But while the Government of Canada remains most sympathetic to the plight of Canadian citizens deprived of property in their lands of origin, the generally accepted rules of international law have become too well established in this area to avoid. Canada has had to make a realistic appraisal that the best interests of a majority of claimants would be served by accepting the more limited class of claimant as defined by international law.)

Even then our difficulties with respect to the nationality of claimants are not over. The Hungarian authorities, basing their position on their nationality laws which declare to be Hungarian even native-born Canadians of Hungarian descent, have denied a substantial number of our Canadian claims on the basis that the claimants are dual nationals. To this the Canadian representatives have replied by asserting the doctrine of dominant or effective nationality, based on the following dictum of the International Court of Justice in the Nottebohm case:

> International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the *real and effective* nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved....[10]

As a measure of the determined nature of the opposition to our claims it may be observed that this argument on the basis of dual nationality was not operative against any of the half-dozen other Western nations with whom Hungary has already concluded settlements.

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[9] L.F.L. Oppenheim, *International Law* (8th ed., 1955), Vol. I, p. 347; Marjorie M. Whiteman, *Damages in International Law* (1937), Vol. I, p. 96; Green Haywood Hackworth, *Digest of International Law* (1943), Vol. I, p. 803; Jean-Gabriel Castel, *International Law* (1965), p. 1023.

[10] *I.C.J. Reports 1955*, p. 22.

A further legal question with respect to the nationality of claimants arises under the Hungarian Peace Treaty of 1947,[11] the benefits of which are extended to "United Nations Nationals" and those persecuted for racial or religious reasons during the conflict. A number of the Canadian claimants become eligible under the provisions of that Treaty.

Another legal problem which has arisen is in connection with the proof of claims, and obtaining evidence to satisfy that proof. In an ordinary law-suit in our courts concerning the title to land, the abstract of title is on public record, available to both parties. The difficulties of a plaintiff in a domestic law-suit would be immensely increased if the abstract of title was under the exclusive control of the defendant. But in the case of the Hungarian claims these difficulties are further compounded by a Hungarian law which prohibits the delivery of information or documentation with respect to nationalized land!

At the root of the legal stand-off which exists at the moment with respect to the Hungarian claims is a fundamental difference in approach. The Canadian claims which have been put forward are founded on the principles of the law of nations. They have been countered by Hungarian negotiators on the basis of domestic Hungarian laws. There has not been a fundamental meeting of the minds on the applicable law. Those who have read Professor McWhinney's recent work on the comparison of Soviet and Western law[12] will recognize that these difficulties spring from the basic difference in approach and philosophy of those under the different systems. It is little wonder that any progress toward final resolution of the claims is hard-won.

As the Canadian Secretary of State for External Affairs, Mr. Paul Martin, pointed out to the International Law Association in 1964,[13] the rules of international law applicable to the rights of aliens, and more particularly those related to the rights of aliens in the face of expropriation, are not satisfactory.

The current negotiations with the countries of Eastern Europe have not produced any amelioration of these rules, and are not likely to do so. In one sense the arrangements between Canada and the various Eastern European states are of a non-recurring, once-and-for-all nature. They reflect the political change from a free enterprise, private property system to a communist one. While the problems are not likely to present themselves in the same fashion with the same parties, these are important lessons to be learned from the Canadian experience, and it would be of value to apply these lessons in the future. For Canada is becoming more, not less, involved in economic development, both private and public, abroad. While it is not anticipated that our foreign interests will be challenged in the exclusive way experienced with the sovietization of Eastern Europe, it is not inconceivable that shifts in policy in even the most friendly of states can pose serious challenges to the Canadian investor abroad. Rather than forgetting our hard-won experience in these negotiations, we would stand to

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[11] *1947 Canada Treaty Series No. 5.*

[12] Edward McWhinney, *Peaceful Coexistence and Soviet-Western International Law.* (Leyden, 1964.)

[13] "International Law in a Changing World: Value of the Old and the New," *External Affairs,* Vol. XVI, No. 12, December 1964, pp. 586, 590-1.

benefit from the development, by groups interested in international law, of techniques, both bilateral and multilateral, for adjusting amicably the competing interests and divergent philosophies of different nations.[14]

While Canada has been an international claimant pressing the claims of individual Canadians who have had property taken in the particular Eastern European countries with whom agreements have been negotiated, Canada has also been the respondent to international claims and is being pressed by a foreign government on behalf of its nationals in respect of damages claimed for Canadian government action. The case in question is that with respect to the Gut Dam which, in the past year, has been the subject of an arbitral agreement between the United States and Canada.[15]

The Gut Dam was erected in the years 1903-1904 by the Government of Canada in the St. Lawrence River about ten miles downstream from Prescott, Ontario. The purpose of the Dam was to assist navigation in the Canadian channel, and since one end of the Dam was to rest on American territory, its construction was the subject of negotiations between Canada and the United States. Strictly speaking, there is no single document which can be referred to as the Gut Dam Agreement. Rather the arrangements for construction of the Dam were the subject of some considerable correspondence between Ministers of the Canadian Government, the British Ambassador in Washington acting on behalf of Canada, and members of the United States Executive, and more particularly, Mr. Elihu Root, the Secretary of State, all of which is, for simplicity, referred to as the Gut Dam Agreement.[16] The Dam was duly constructed, and, for a period of nearly fifty years, it remained as a facility improving navigation, free from notoriety and almost free from public notice.

In the years 1951 and 1952, however, extreme high-water conditions were experienced on Lake Ontario with consequent damage to properties on both sides of Lake Ontario, but more particularly on the southern, or American, shore. The residents on the south shore were particularly vociferous in their claims that the Government of Canada, in its construction of the Gut Dam, had been the author of their troubles. Having formed a protective association, they backed up their words by commencing action first against the United States and then subsequently against Canada in the U.S. Federal Courts. The action against Canada was commenced in the District Court for the Northern District

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[14]Cf. Edward G. Lee, "Proposals for the Alleviation of the Effects of Foreign Expropriatory Decrees upon International Investments," in *Canadian Bar Review*, Vol. 36, No. 3, September 1958, pp. 351-9.

[15]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, signed at Ottawa, March 25, 1965; not yet ratified. And see in this connection, Richard B. Lillich, "The Gut Dam Claims Agreement with Canada," in *American Journal of International Law*, Vol. 59, No. 4, October 1965, pp. 892-8.

[16]British Ambassador's Note No. 336 to United States Government of 8 November, 1900, and British Ambassador's Note of March 28, 1903, to United States Government. Instruments of Approval dated August 18, 1903, and October 10, 1904, signed by the Secretary of War, Mr. Elihu Root.

of New York in 1956,[17] 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.[18]

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.[19] 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.[20]

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,[21] 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,[22] 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,[23] 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

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[17] *Federal Supplement*, Vol. 144, p. 746.

[18] Canadian Ambassador's Note of November 10, 1952, to U.S. Department of State.

[19] U.S. State Department's Note of November 17, 1952.

[20] *U.S. Supreme Court Reports 1957*, Vol. 353, p. 936.

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

[22] Note referred to in footnote 18, *supra*.

[23] U.S. Public Law 87-587, *76 Stat. 387 (1962)*.

with power to determine the claims of American citizens arising out of foreign relations. This action faced Canada with an unpleasant choice: Canada could either not oppose the claims as they were presented to the Commission and thereby be subject to a unilateral finding by a foreign tribunal; or having to accept the jurisdiction of a foreign tribunal, an action which, in relation to the courts, Canada had already refused to do.

What was perhaps an even more fundamental motivation on the Canadian Government was an assessment of Canada's position in this controversy in relation to her customary posture in international relations. An outstanding claim would of course be an irritant in Canadian-American relations, although its importance should not be over-emphasized. While the controversy had been outstanding for over a decade, it had not been an evident source of bad relations. But a more fundamental challenge for Canada lay behind the American claim to litigate the dispute. Ever since her emergence as a sovereign nation (which coincides with the establishment of the Permanent Court of International Justice) Canada has been a firm, some might even say a tiresome, advocate of resort to judicial process for settling international disputes. Canada's was one of the earliest and most unequivocal submissions to jurisdiction of the International Court.[24] In the face of that, how could it be said that we should not agree to adjudication of this dispute? We may indeed regard the claims as frivolous, as over-valued, as without any basis in law, but why then not seek confirmation of our position by an arbitral tribunal? In the light of successive statements by Secretaries of State for External Affairs[25] in favour of establishing the rule of law in international relations, Canada could hardly avoid practising what she had preached. In the face of those considerations, a supra-national arbitration remained the best solution.

The American Executive indicated that it was in favour of the settlement of the question by an international arbitral tribunal in lieu of the decision by the Foreign Claims Settlement Commission, and after negotiations between the two countries, an agreement dated March 25, 1965,[26] was entered into by which the Lake Ontario Claims Tribunal -- United States and Canada -- was established.

The Tribunal is to be made up of three members, one appointed by each of the two states, and the third by agreement between them or, failing such agreement, by the President of the International Court of Justice.[27] The decision of the Tribunal is to be by majority vote, each of the three members having one vote.[28]

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[24] Instrument of ratification deposited on July 28, 1930. See *International Court of Justice Yearbook 1963-64*, pp. 221-2.

[25] See the speech by the Hon. Paul Martin to the Toronto Branch of the International Law Association, October 14, 1964, in *External Affairs*, Vol. XVI, No. 12, December 1964, pp. 586-96, referred to in footnote 13, *supra*.

[26] Cited in footnote 15, *supra*.

[27] Article I.2.

[28] Article I.3.

ARTICLE II of the Agreement sets out the jurisdiction of the Tribunal:

> 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?

The final words cited, "and by whom," indicate a further concession by the United States. The Tribunal is to have jurisdiction to determine what, if any, responsibility the United States must bear for any loss that is found attributable to the Dam.[29]

One can foresee for the Tribunal some difficult decisions on the question of causation. The Joint Reference to the I.J.C. in 1952 of the question of high-water levels in Lake Ontario has been referred to above. The final report of the International Lake Ontario Board of Engineers[30] emphasized the great importance of natural factors such as precipitation, evaporation, wave action, barometric pressure and ice retardation on the variation in levels. In addition the Engineers pointed out that there were three other non-natural factors besides the Gut Dam which, in conjunction with crustal movement (that is observed rising in the earth's crust at the mouth of the Lake) contributed to an elevation of the Lake level by 1.21 feet between 1903-4 and 1962. These are the regulation of Lake Superior, changes in the Chicago water diversion, and diversion of the Long Lac watershed into Lake Superior. These three are all posterior in time to the Gut Dam and

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[29] Lillich, "The Gut Dam Claims Agreement with Canada," pp. 892-8.

[30] *Water Levels of Lake Ontario. Final Report to International Joint Commission, International Lake Ontario Board of Engineers, December 1959.*

produced nearly double the increase in levels that it did. The Tribunal has the unenviable task of determining which, if any, of these factors or what combination of them was the cause of the damage in particular cases. That would be a difficult question under domestic law apart from international law.

One of the difficult questions arising in negotiation of the Lake Ontario Claims Tribunal Agreement was the law which was to be applicable to the termination of liability: American, Canadian or international. The Agreement provides that "the Tribunal shall apply the substantive law in force in Canada and in the United States of America,"[31] including international law as part of the domestic law of each country. It further provides that "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 the United States that it is not possible to make a final decision with regard to any particular claim...the Tribunal shall apply such of the legal principles set forth above as it considers appropriate, having regard to the desire of the parties hereto to reach a solution just to all interests concerned."[32] This solution provides an interesting contrast to the non-consensus on applicable law referred to in the Canadian-Hungarian negotiations. The underlying principles and, of course, the basic philosophies of the U.S. and Canadian systems are very close.

The amount of the claims against Canada has been variously estimated in the course of negotiations as between $875,000.00 and $7.5 million. It might well be contended that the entire negotiation, and indeed the arbitration, is much ado about nothing. Why did Canada not pay up the money and get rid of the difficulty? A primary motivation from Canada's standpoint towards continuing to adhere to the request for arbitration was a reluctance, by entering into a settlement in this case, to create a precedent for a settlement in similar claims in boundary-waters problems in the future. At all times the Canadian negotiators remained wary of the precedent-making possibilities of a quick settlement in this particular case.

On the other hand, it is because of the precedent-making potential of the arbitration and the decision of the Tribunal that the matter will continue to be of interest to international lawyers. The decision of the Tribunal and the principles followed in arriving at it will be an addition to that at-the-moment very slim body of law which was augmented in Canada-U.S. dealings by the Trail Smelter arbitration.[33]

It requires no great foresight to suggest that the number of cross-border contacts with a potential for delictual claim will increase with the expansion of the population on the continent and the expansion of activities by governments on either side of the border. The decisions to be made on the question of causation, on the choice of applicable law and other legal questions which will have to be decided in the course of arriving at a decision by the Tribunal will be of considerable significance in future legal relations between the two countries.

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[31] Article II.2.

[32] Article II.3.

[33] *Trail Smelter Question. Decisions of April 16, 1938 and March 11, 1941* (Ottawa, Queen's Printer, 1941). See also "Trail Smelter Arbitral Tribunal Decision," *American Journal of International Law*, Vol. 33, No. 1, January 1939, pp. 182-212; and Vol. 35, No. 4, October 1941, pp. 684-736.