

# THE GARRISON DIVERSION PROJECT: NEW SOLUTIONS FOR TRANSBOUNDARY POLLUTION DISPUTES

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## History of the Dispute

### Early Action

This drama had its beginnings almost 100 years ago, when North Dakota became the 39th State of the United States.<sup>1</sup> Imagine the scene, if you will, of settlers moving across the prairies in search of farmland. In what became eastern and central North Dakota they found suitable land, made rich and black by a receding glacier many years before.

The climate, however, was harsh. The winters were cold with temperatures sometimes reaching 50 degrees below zero and the summers blazing hot with temperatures at times reaching above 100 degrees. The continuing problem was lack of water;<sup>2</sup> but drought often alternated with floods<sup>3</sup> from the two mighty rivers in the region, the Missouri to the West and the Red to the East.

The solution to alleviate the continuing water problem was obvious. If the waters of the Missouri could be harnessed, the floods could be controlled and water provided for irrigation. Later it was realized that this water could also be tapped for recreational, municipal, and industrial uses.<sup>4</sup>

The script for this play, however, was not written until the 1940's. The severe droughts of the 1930's and a disastrous flood in the early 1940's pushed the United States' federal government to lift the statutory pen. *The Flood Control Act of 1944*<sup>5</sup> originally authorized a plan for flood control and irrigation in the Missouri Basin. Construction began in 1946 and by 1955, the initial flood control works, the Garrison Dam which formed Lake Sakakawea, were complete.<sup>6</sup>

A period of study then commenced to formulate plans for the irrigation project. On August 5, 1965, the plan, renamed the Garrison Diversion Unit, was reauthorized by Congress.<sup>7</sup> The plan envisions the irrigation of 250,000 acres in central and eastern North Dakota. It consists of a series of dams and reservoirs connected by pumping plants and canals and ultimately

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1. The Act dividing the Dakota Territory into North and South Dakota was passed February 22, 1889, 25 Stat. 676 (50th Cong. 2nd Sess.) c. 180 and proclaimed into force on November 2, 1889, 26 Stat. 1548 (Proclamation No. 5). At that time, Congress was called on to study a program to divert water from the Missouri River to the eastern part of the State. Letter from U.S. Senator Milton R. Young to the author, April 24, 1980.
2. Annual precipitation ranges from 16 to 18 inches, while evaporation 30 to 35 inches. U.S. Department of the Interior, *Special Report on Reevaluation and Modification of the Garrison Diversion Unit* (February, 1979) 13.
3. For instance, the droughts which occurred in the 1930's are well-known. *Ibid.* This was followed by a severe flood in 1944. "An analysis of the scope of the Final Environmental Impact Statement on the Garrison Diversion Unit Project: Applying a Totality of Circumstances Test" (1977), 53 N.D.L. Rev. 427, at 429. In 1979, severe flooding of the Red River again occurred, only to be followed in 1980 by an equally severe drought.
4. U.S. Department of the Interior, *Garrison Diversion Unit Final Comprehensive Supplementary Environmental Statement*, Vol. I (February, 1979) 1-1.
5. P.L. 534, 58 Stat. 887 (78th Cong., 2nd Sess.) c. 665.
6. "Selected Environmental Law Aspects of the Garrison Diversion Project" (1974), 50 N.D.L. Rev. 329, at 330-31.
7. *Flood Control Act of 1965*, P.L. 89-298, 79 Stat. 1073 (89th Cong., 1st Sess.). See *supra* n. 2, at 5.

leading to the areas to be irrigated. The main source of the water is the Garrison Dam, providing water from the Missouri River.

This water would be pumped from Lake Sakakawea through the McClusky Canal to the Lonetree Reservoir and then on to the various irrigation areas.<sup>8</sup> This is the crux of the problem: the water transferred from the Missouri River crosses the continental divide into the Hudson Bay Drainage Basin.<sup>9</sup> Return flows from the irrigation would flow into the Red and Souris Rivers which flow into Manitoba. Work was begun on the plan in 1967 and to date the initial stages including the McClusky Canal are complete.<sup>10</sup> The costs so far are estimated at \$145 million.<sup>11</sup>

### *Enter the IJC*

The transfer of water from the Missouri River to the Hudson Bay Drainage Basin forms the main cause for concern to Canada. Three main problems loom from this transfer to Manitoba rivers: (1) changes in water quality, (2) increases in water quantity, and (3) the introduction of foreign fish species, parasites, and diseases.<sup>12</sup>

Canadian concern was first voiced in a note to the United States government in 1969. In October, 1973, Canada requested a moratorium on construction of the Garrison Project until achievement of a mutually acceptable solution which protected Canadian interests. Assurances were given in February, 1974, by the United States that no construction would be undertaken which would damage Canadian interests. Further negotiations led to the reference of the problem to the International Joint Commission (IJC) in October, 1975.<sup>13</sup>

The Canadian government expressed the fear that the Garrison Diversion Unit could have "an irreversible adverse impact on [the] existing aquatic systems and on commercial and recreational fishing in Manitoba."<sup>14</sup> This would contravene Article IV of the *Boundary Waters Treaty of 1909* which reads, in part, "It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."<sup>15</sup> Under Article IX of the *Treaty*, questions "shall be referred from time to time to the International Joint Commission for examination and report." The IJC was asked to examine and report on "the transboundary implications of the proposed completion and operation of the Garrison Diversion Unit in the State of North Dakota," and, in addition, "to make recommendations as to such measures, including modifications, alterations or adjustments to the Garrison Diversion Unit, as might be taken to assist governments in ensuring that the provisions of Article IV of the *Boundary Waters Treaty* are honoured."<sup>16</sup>

8. International Joint Commission, *Transboundary Implications of the Garrison Diversion Unit* (1977) 13.

9. *Ibid.*

10. *Supra* n. 2, at 7.

11. *Ibid.*

12. International Garrison Diversion Study Board, *Report to the International Joint Commission* (October, 1976) 1.

13. *Id.*, at 3.

14. *Supra* n. 8, at 2.

15. *Treaty Between the United States Great Britain Relating to Boundary Waters Between the United States and Canada*, 36 Stat. 2448; T.S. No. 548 (hereinafter referred to as the *Boundary Waters Treaty*).

16. *Supra* n. 8, at 131.

The IJC was asked to submit its Report by October 31, 1976,<sup>17</sup> and actually completed its studies by January, 1977,<sup>18</sup> conducted public hearings, and made its final Report by August, 1977.<sup>19</sup>

The IJC examined the possible impacts of the Garrison Diversion Unit on water quality and quantity and the introduction of foreign biota into the water systems of Manitoba.<sup>20</sup> They concluded "that the construction and operation of the Garrison Diversion Unit as envisaged would cause significant injury to health and property in Canada as a result of adverse impacts on the water quality and on some of the more important biological resources in Manitoba."<sup>21</sup> However, various measures were reviewed which would mitigate such potential adverse impacts.<sup>22</sup> The proposals to reduce the risks of adverse impact in the area of water quality and quantity and waterfowl resources were considered acceptable by the Commission.<sup>23</sup>

Two suggestions were made to prevent the transfer of biota from the Missouri River to the Hudson Bay Drainage Basin: (1) implementation of a closed system designed to eliminate direct connections between the basins,<sup>24</sup> and (2) a fish screen in the McClusky Canal acting as a barrier to transfer of foreign biota.<sup>25</sup> The Commission concluded that

the McClusky Canal fish screen, even if modified, together with the closed system, cannot be relied upon to prevent the transfer of biota from the Missouri River to the Hudson Bay Drainage Basin. The Commission further concludes that the predicted impacts of a biota transfer are so potentially damaging that the closed system does not provide a sufficient guarantee against such an occurrence.<sup>26</sup>

On the basis of these conclusions, the IJC recommended that

because the 'closed system' and the McClusky Canal fish screen cannot with any certainty prevent biota and disease transfers which would cause severe and irreversible damage to the ecosystem and, in particular, to the commercial and sport fisheries in Canada, those portions of the Garrison Diversion Unit which could affect waters flowing into Canada not be built at this time.<sup>27</sup>

The potential impact on Manitoba's commercial fishing is indeed great. The value of fish from Lake Winnipeg alone is on average over \$3 million annually.<sup>28</sup> The projected reduction of over 50% of the catch would result in a direct loss of approximately \$1.5 million annually.<sup>29</sup>

### *Litigation Intervenes*

While the IJC was in the process of preparing its Report, environmentalists in the United States mobilized against the Garrison Diversion Unit. The National Audubon Society sued the United States Department of the

17. *Id.*, at 132.

18. International Joint Commission, *Annual Report* (1977) 18.

19. *Supra* n. 8, at 123.

20. *Id.*, at 41-61. See also *supra* n. 12, at Appendices A, B, and C.

21. *Id.*, at 105.

22. *Id.*, at 106-13.

23. *Id.*, at 110-13.

24. *Id.*, at 106.

25. *Id.*, at 107.

26. *Id.*, at 109.

27. *Id.*, at 121.

28. *Supra* n. 12, at 150.

29. *Ibid.* The total annual value of fisheries was estimated at approximately \$6 million, with total annual loss attributable to Garrison projected at approximately \$3 million. *Ibid.* See also Table 1X-3, *Id.*, at 154-56.

Interior in May, 1976, asking for an injunction against further construction and land acquisition for the Project.<sup>30</sup> Their claims were based on the inadequacy of the 1974 Environmental Impact Statement required under the *National Environmental Policy Act (NEPA)*<sup>31</sup> and on certain violations of wildlife statutes.<sup>32</sup>

A settlement was reached in May, 1977, which required the Department of the Interior to (1) prepare a revised environmental impact statement, (2) propose legislation to Congress in light of the revised statement, and (3) submit a fish and wildlife plan.<sup>33</sup> Construction on the Project was halted until the Department complied with the court order.

The two-volume *Final Comprehensive Supplementary Environmental Statement* was prepared by February, 1979. It examined seven plans, including the original plan of 250,000 acres, as well as proposed reductions from 215,000 to 96,300 acres or no further development at all. Of the six plans which proposed continuation of the Project, the Interior Department recommended the scaled-down version of 96,300 acres.<sup>34</sup>

Even in this reduced plan, the Interior Department acknowledged that "[i]nterbasin transfer of fish from the Missouri River Basin to the Hudson Bay could result from the project."<sup>35</sup> Portions of the recommended plan could result in passage of fish into Lake Winnipeg in Manitoba in that "there is presently no screening device that can be guaranteed to be 100 percent effective."<sup>36</sup> The Interior Department also stated that fish diseases "would be able to move through the project works from the Missouri River drainage into the Hudson Bay drainage."<sup>37</sup>

### *Recent Action*

Construction on the Garrison Diversion Project has resumed. In fact, the McClusky Canal, which is in the Hudson Bay Drainage Basin, was filled on July 18, 1979, with four earthen barriers holding back the potentially harmful flow of water. The recommended plan has not been enacted by the United States Congress; the originally authorized plan remains as the blueprint for the Project.

The National Audubon Society suit was revived in September, 1979, when an Amended Supplemental Complaint was filed. The Complaint seeks an injunction against the Department of the Interior from continuing action on the Garrison Diversion Unit until the 250,000 acre plan is reauthorized or the 96,300 acre plan enacted. It is claimed that continuation of spending on the 250,000 acre plan is arbitrary, capricious, and an abuse of discretion in light of the rejection of that plan by the Interior Department.

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30. *Supra* n. 4.

31. 42 U.S.C.A. s.4321.

32. *Fish and Wildlife Coordination Act*, 16 U.S.C.A. s.661; *Migratory Bird Treaty Act*, 16 U.S.C.A. s.703. See S. Margolin, "Liability Under the Migratory Bird Treaty Act" (1979), 7 Ecology L.Q. 989.

33. *Supra* n. 2, at 9.

34. *Id.*, at 1.

35. *Id.*, at 59.

36. *Id.*, at 60.

37. *Ibid.*

While Canadian government protests seemed to have fallen on deaf ears, Manitoba fishermen and environmental groups decided to take action of their own. Although the option was available to file their own suit to United States' courts, the Manitoba groups joined the ongoing Audubon suit as an *amicus curiae*. The *amicus* brief filed in November, 1979, argues that the Interior Department's proceeding with the 250,000 acre plan is arbitrary and capricious in that completion of the Project (1) would violate Article IV of the *Boundary Waters Treaty* and (2) disregards the recommendations of the IJC. The denouement of the Audubon suit at present awaits the decision of the federal District Court in Washington, D.C.

Political maneuvering is undoubtedly a part of this process. This is particularly evident in the tensions between the President and the powerful Senators from North Dakota. For instance, even though the Garrison Diversion Unit was on President Carter's so-called "hit list" of water projects designated for review in 1977,<sup>38</sup> Congress continued appropriating money for the Project.<sup>39</sup>

It has been suggested that "particular attention must be paid to the legislative branch in Washington."<sup>40</sup> This statement takes on even greater significance in light of recent legislative action. In June, 1980, an additional \$9.7 million appropriation for construction of the Garrison Diversion Unit was attached to an emergency funding bill by the North Dakota Senators. Despite a meeting of Canadian federal Minister Lloyd Axworthy with the United States legislators<sup>41</sup> and an urgent telegram from Manitoba Premier Sterling Lyon,<sup>42</sup> the appropriations were signed into law by President Carter on July 8, 1980.<sup>43</sup> Little faith is put in the assurances by the United States Senators that the money will not be spent on construction that would damage Manitoba.<sup>44</sup>

These scenes are becoming part of a continuing saga. While Canadians protest both in the private sphere through litigation, and in the public sphere through reference to the IJC and consultations with the United States government, political pressure by the North Dakota legislators pushes the Garrison Diversion Unit toward completion. Although the Garrison drama seems to run the gamut of options available for settling a trans-

38. *Id.*, at 8.

39. K. R. Nossal, "International Joint Commission and the Garrison Diversion," *International Perspectives*, Nov./Dec. 1978, at 24.

40. *Id.*, at 25.

41. *Winnipeg Free Press*, June 24, 1980, at 13, col. 5-7.

42. *Winnipeg Free Press*, June 27, 1980, at 5, col. 6.

43. *Winnipeg Free Press*, July 10, 1980, at 12, col. 1-3.

44. *Winnipeg Free Press*, June 23, 1980, at 14, col. 5-6. (Statement of Manitoba Natural Resources Minister Brian Ransom). Mr. Ransom's fears seemed reduced by the condition placed on the appropriations that none of the money will be used on parts of the project that could pollute Manitoba and by reliance on the *Boundary Waters Treaty*. *Winnipeg Free Press*, June 30, 1980, at 12, col. 1-3; *Winnipeg Tribune*, July 10, 1980, at 4, col. 3-7. The opposition New Democrats still doubt that Manitoba is safe from pollution from Garrison. *Winnipeg Free Press*, Aug. 7, 1980, at 14, col. 1 (In a telegram to federal External Affairs Minister Mark MacGuigan, Opposition Leader Howard Pawley calls plans to proceed with the Lonetree Dam "a danger and betrayal."). *Winnipeg Free Press*, Aug. 12, 1980, at 9, col. 1-3 (In a letter to Minister MacGuigan, New Democrat MP Terry Sargent expresses the opinion that "our 'friends' in North Dakota are trying to sneak another little trick by us."). Such doubts are not limited to the political arena. The Manitoba Action Committee against Garrison fears violence if Garrison is completed. The Manitoba Indian Brotherhood opposes Garrison as disaster for northern communities. C. Picard, "Diversion foe fearful of violence," *Winnipeg Tribune*, July 21, 1980, at 1, col. 6. See Letter to Editor, *Winnipeg Tribune*, Aug. 11, 1980, at 9, col. 1-2. More recently, the U.S. Interior Department decided to hold up \$4.2 million in spending until consultations with Canada are concluded. *Winnipeg Free Press*, Nov. 19, 1980, at 1, col. 4-6; Nov. 21, 1980, at 11, col. 5. However, caution and skepticism still abound. *Winnipeg Free Press*, Nov. 20, 1980, at 16, col. 1-4; Editorial, Nov. 24, 1980, at 6, col. 1-2.

boundary pollution dispute amicably, the question remains whether any other procedures could settle this dispute to the satisfaction of the parties on both sides of the border.

### New Procedures in Transboundary Disputes

On the governmental level two options remain if further negotiation fails: arbitration and adjudication. The possibility of arbitration already exists under the *Boundary Waters Treaty*. Under Article X, "any questions or matters of difference . . . may be referred for decision to the International Joint Commission by the consent of the two Parties." It must be noted that this type of arbitration depends on agreement of the parties and has never been used in the long existence of the *Treaty*.<sup>45</sup> Adjudication by the International Court of Justice is also an option, yet even less attractive than arbitration, primarily due to the difficulties relating to the jurisdiction of the Court.<sup>46</sup>

Disuse of voluntary arbitration by the United States and Canada and difficulties surrounding Court action on the international level leads to consideration of another procedure: compulsory arbitration. By this method, Canada and the United States would agree in advance that intractable transboundary pollution disputes would be submitted to an arbitration panel at the request of either party. The remainder of this paper will analyze various provisions which prescribe such compulsory procedures. The focus will be on formulas found in two European treaties and a draft treaty proposed recently by the Canadian and American Bar Associations.

### *Nordic Environmental Protection Treaty*

The first compulsory negotiation and arbitration provisions to be considered are found in the *Convention on the Protection of the Environment*<sup>47</sup> among Denmark, Finland, Norway, and Sweden. It was completed in 1974, and came into effect in 1976.<sup>48</sup> Its main purpose is to assure the consideration of potentially harmful effects to the environment in other states in the undertakings by the Contracting States.<sup>49</sup> This is accomplished by two mechanisms: (1) equal access of citizens and governments to the courts and the administrative processes of any Contracting State causing environmen-

45. *Supra* n. 18, at 2. See L. Bloomfield and G. Fitzgerald, *Boundary Water Problems of Canada and the United States* (1958) 55; C. Chacko, *The International Joint Commission Between the United States of America and the Dominion of Canada* (1968) 328-35. See also A. Heeney, "The International Joint Commission" (1963), 15 *External Affairs* 141; "The Work of the International Joint Commission" (1971), 23 *External Affairs* 208; F. Jordan, "The International Joint Commission and Canada — United States Boundary Relations" in R. MacDonald, G. Morris, D. Johnston (eds.), *Canadian Perspectives on International Law and Organization* (1974) 522; "A Primer on the Boundary Waters Treaty and the International Joint Commission" (1975), 51 *N.D.L.Rev.* 493. Between the United States and Canada, arbitration was agreed to in the celebrated *Trial Smelter Arbitration* (1941), 3 *R.Int'l.Arb.Awards* 1905; see J. Read, "The Trial Smelter Dispute," [1963] *Can. Yearbook of Int'l. L.* 213. Another major transboundary dispute settled by arbitration is the *Lake Lanoux Arbitration* (1957), 12 *R.Int'l.Arb. Awards* 281; trans. and digested in (1959), 53 *Am.J. of Int'l.L.* 156.
46. W. Bishop, *International Law* (3rd ed. 1971) 69-74 (U.S. acceptance of Court's jurisdiction). R. MacDonald, "The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice" (1970), 8 *Can. Yearbook of Int'l. L.* 3. See R. Ianni, "International and Private Actions in Transboundary Pollution" (1973), 11 *Can. Yearbook of Int'l. L.* 258, at 264.
47. Printed in (1974), 13 *Int'l. Leg. Materials* 591 (hereinafter referred to as the *Nordic Treaty*).
48. (1977), 16 *Int'l. Leg. Materials* 765. To date, no disputes have arisen under the *Treaty*. Letter from Bitte Bagerstam, Swedish Delegation to the Nordic Council, to the author, Aug. 29, 1980.
49. "Current Legal Developments" (1974), 23 *Int'l. & Comp. L. Q.* 880, at 886.

tal harmful activities,<sup>50</sup> and (2) compulsory negotiation and/or arbitration.<sup>51</sup>

Article 11 of the *Nordic Treaty* provides for negotiation upon the request of a Contracting State:

Where the permissibility of environmentally harmful activities which entail or may entail considerable nuisance in another Contracting State is being examined by the Government or by the appropriate Minister or Ministry of the State in which the activities are being carried out, consultations shall take place between the States concerned if the Government of the former State so requests.

It must be noted that Article 11 covers activities by one State "which entail or *may* entail considerable nuisance in another Contracting State." (emphasis added). This means that potential damage, if considerable, is enough to trigger a request for consultations under this Article. If such a treaty provision were operative in the Garrison Project dispute, it would not be necessary to show an actual nuisance, but only that the potential was there and that the nuisance was substantial.

The Article also limits the provisions to case "where the *permissibility* of environmentally harmful activities is being examined by the Government . . ." (emphasis added). This means that the Article is to have effect on the process of the issuance of a permit for the activity. It would assure that the transboundary environmental effects would be considered. This is somewhat comparable to the provisions of the *National Environmental Policy Act*<sup>52</sup> in the United States which requires the consideration of foreign effects in the mandatory environmental impact statements.<sup>53</sup> However, the *Act* does not go so far as to require consultation on the request of another State. Article IX of the *Boundary Waters Treaty* provides a comparable provision assuring consideration of transboundary environmental effects. Reference to the International Joint Commission may be made of any "questions or matters of difference . . . whenever *either* the Government of the United States or the Government of the Dominion of Canada shall request. . . ." This was done by agreement of both countries in the Garrison dispute and leads to the discussion of how the International Joint Commission's recommendations could be made binding on the parties to the dispute.

Article 12 of the *Nordic Treaty* provides:

In cases such as those referred to in Article 11, the Government of each State concerned may demand that an opinion be given by a Commission which, unless other-

50. *Nordic Treaty*, Arts. 3-4, *supra* n. 47, at 592. This important mechanism will not be discussed here, since it has been established that Canadians have standing in U.S. courts. *The Wilderness Society v. Morton* (1972), 463 F. (2d) 1261 (D.C. Cir); see *People of Enewetak v. Laird* (1973), 353 F. Supp. 811 (Hawaii D. Ct.); *People of Saipan v. U.S. Department of Interior* (1973), 356 F. Supp. 645 (Hawaii Dt. Ct.). The problem is more difficult for Americans suing in a Canadian court. D. Arbitblit, "The Plight of American Citizens Injured by Transboundary River Pollution" (1979), 8 Ecology L. Q. 339. See S. McCaffrey, "Trans-boundary Pollution Injuries: Jurisdictional Considerations in Private Litigation Between Canada and the United States" (1973), 3 Calif. W. Int'l. L.J. 191. Recommendations to rectify this inequity have been made by the OECD and the Canadian and American Bar Associations. The OECD recommendations are found in (1977), 16 Int'l. Leg. Materials 977. See T. Shoesmith, "Transfrontier Pollution — OECD Council Recommendation on Implementing a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution" (1978), 19 Harv. Int'l. L.J. 407. The American and Canadian Bar Associations suggest that equal access and remedies be embodied in a treaty. See American and Canadian Bar Associations Joint Working Group on the Settlement of International Disputes, *Report and Recommendations* (March 20, 1979) paras. 304-36.

51. *Nordic Treaty*, Arts. 11-12, *supra* n. 47, at 595.

52. 52 U.S.C.A. s. 4321.

53. See Executive Order No. 12114, "Environmental Effects Abroad of Major Federal Actions" (Jan. 4, 1979), 44 Fed. Reg. 1957, reprinted in (1979), 18 Int'l. Leg. Materials 154.

wise agreed, shall consist of a chairman from another Contracting State to be appointed jointly by the parties and three members from each of the States concerned. Where such a Commission has been appointed, the case cannot be decided upon until the Commission has given its opinion.

The operative language providing for a compulsory mechanism is "each state may demand an opinion be given by a Commission." This provides the impetus for reference to a seven-member Commission on the demand of one State.

Also relevant is that "the case cannot be decided upon until the Commission has given its opinion." This means that the action of the Government examining the permissibility of the environmentally harmful activity must be suspended until the Commission renders its decision. Presumably, this is meant to apply before permission for the environmentally harmful activity has been granted. Yet the *Treaty* is silent on two important questions: (1) Is the opinion of the Commission binding on the State considering the activity? and (2) Is this mechanism available if the activity has already received permission? The answer to both questions seems to be negative from a literal reading of the *Treaty*. Thus, a Contracting State would not be bound by the Commission's opinion beyond considering it in issuing a permit. Also, other mechanisms would have to be resorted to if the dispute were beyond the early stages.

In the Garrison dispute, a treaty provision like Article 12 would have been valuable in one important aspect: any decision to proceed would have been halted until the International Joint Commission had rendered a decision. Although usually action is suspended while the International Joint Commission is making its studies, this is not guaranteed. It is particularly evident in the case of Garrison that the United State Congress may continue appropriating moneys for potentially harmful activities despite recommendations of the Joint Commission or the Executive. This provision would provide at least for temporary suspension of the activity. It is submitted that a clause rendering the Commission's opinion binding on the Contracting State considering the undertaking or proceeding to undertake an environmentally harmful activity would better assure the prevention of such activities.

### *The Rhine Treaty*

The second compulsory arbitration provision to be considered is found in the *Convention on the Protection of the Rhine Against Chemical Pollution*.<sup>54</sup> Like the *Nordic Treaty*, it is a multilateral treaty. The parties include the Federal Republic of Germany, France, Luxembourg, the Netherlands, Switzerland, and the European Economic Community. It was completed in 1976, after pollution of the Rhine had "reached an absolute limit."<sup>55</sup>

Its objective is "to improve the quality of the Rhine waters" and the

54. Printed in (1976), 16 Int'l. Leg. Materials 242 (hereinafter referred to as the *Rhine Treaty*). This *Treaty* is not in force to date due to lack of ratifications. Letter from Erik Harremoes, Director of Legal Affairs of the Council of Europe, to the author, July 30, 1980.

55. "Rhine pollution 'limit reached,'" *The Times*, May 7, 1974, at 5, col. 3 (statement of Mrs. Irene Vorrink, Dutch Minister of Public Health). See "17 European countries call for international laws against pollution," *The Times*, Mar. 31, 1973, at 4, col. 1; D. Van der Vat, "EEC to help stem pollution of the Rhine," *The Times*, Dec. 4, 1976, at 3, col. 6; "Responsibility for Polluting the Rhine," *The Times*, Dec. 6, 1976, at 23, col. 5.



bulk of the *Treaty* deals with measures to meet this objective.<sup>56</sup> Article 15 prescribes for the settlement of disputes:

Any dispute between the Contracting Parties as to the interpretation or application of this Convention that cannot be resolved through negotiation shall, unless the parties to the dispute decide otherwise, be submitted at the request of one of the parties to arbitration in accordance with the provisions of Annex B, which is an integral part of this Convention.<sup>57</sup>

This language differs markedly from Article X of the *Boundary Waters Treaty* which provides arbitration only "by the consent of the two Parties" and is further limited by the Commission being "subject . . . to any restrictions or exceptions which may be imposed with respect thereto by the terms of reference." In contrast, Article 15 of the *Rhine Treaty* does not require that the parties agree to arbitration but instead that the dispute "shall . . . be submitted at the request of one of the parties." Arbitration is thus compulsory. This puts a powerful tool in the hands of the potentially injured State to coerce an upstream polluter to suspend his action.

The only provisos in Article 15 are that the dispute "cannot be resolved by negotiation" and "unless the parties decide otherwise." As in all international agreements, negotiation is the preferred method for resolving disputes, therefore this provision could not be invoked prior to some attempt at resolution of the dispute through less formal measures. The threat of submission to binding arbitration might be enough to cause the Parties to "decide otherwise." Article 15 does not preclude such methods, e.g., mediation or conciliation.<sup>58</sup>

Annex B is incorporated by reference into the *Treaty*. It provides the procedural outlines for setting up a three-member Arbitral Tribunal. Each party is allowed to name one arbitrator with the Chief Arbitrator appointed by common accord. If there is delay in appointment of either an arbitrator or the Chief Arbitrator, procedures are provided for alternative appointment.<sup>59</sup>

56. *Rhine Treaty*, Art. 1, *supra* n. 54 at 243. E.g., The *Treaty* provides for the monitoring and prior authorization by the States of discharges into the Rhine, Arts. 2-3. An International Commission is set up to formulate emission standards and time limits, to evaluate the pollution in the Rhine, and to propose measures to reduce such pollution. Art. 5. The parties also undertake to limit discharges into the Rhine through national programs. Art. 6.

57. Other variants of compulsory provisions include:

(1) "Any dispute between two or more Parties to the Convention concerning the interpretation or application of the present Convention shall, if settlement by negotiation between the Parties involved has not been possible, and if these parties do not otherwise agree, be submitted upon request of any of them to arbitration . . ." Art. 10, *International Convention for the Prevention of Pollution from Ships*, printed in (1973), 12 Int'l. Leg. Materials 1319, at 1326.

(2) "Any dispute between Contracting Parties relating to the interpretation or application of the present Convention, which cannot be settled otherwise by the parties concerned, for instance, by means of inquiry or conciliation within the Commission, shall, at the request of any of those Parties be submitted to arbitration . . ." Art. 21, *Convention for the Prevention of Marine Pollution from Land-Based Sources*, printed in (1974), 13 Int'l. Leg. Materials 352, at 364. See "Current Legal Developments" *Supra* n. 49, at 884. See e.g., Art. 22, *Draft European convention for the protection of international watercourses against pollution*, *United Nations Yearbook of the International Law Commission* 1974, Vol. II, Pt. 2, U.N. Doc. A/CN. 41 ser. 4/1974/Add. 1 (Part 2), at 348. It is often disappointing that Parties will not agree to compulsory measures. B. Coczec, "International Protection of the Baltic Sea Environment Against Pollution: A Study in Marine Regionalism" (1978), 72 Am. J. Int'l. L. 782, at 810. On the international level, this is most difficult. See J. Bernhardt, "Compulsory Dispute Settlement in the Law of the Sea Negotiations: A Reassessment" (1978), 19 Va. J. of Int'l. L. 69; A. Adede, "United Nations Efforts toward the Development of an Environmental Code of Conduct for States concerning Harmonious Utilization of Shared Natural Resources" (1979), 43 Albany L. Rev. 488, at 504.

58. See A. Levin, *Protecting the Human Environment* (1977) 21-27.

59. *Rhine Treaty*, Annex B, ss. 2-4, *supra* n. 54, at 252.

The most salient provision found in the Annex states "The decisions of the Tribunal shall be binding on the parties."<sup>60</sup> Although limited to disputes as to the "interpretation or application of this Convention," the Tribunal's decisions are not strictly advisory. This is a significant step in international law in providing remedies for protracted transboundary pollution disputes. Canada and the United States may have been leaders in this area when the *Boundary Waters Treaty* was concluded in 1909, but it is time that this European solution be considered here.<sup>61</sup>

### *Draft Treaty*

This conclusion was endorsed by a Joint Working Group on the Settlement of International Disputes of the American and Canadian Bar Associations which stated that "for public or inter-Governmental disputes there is nothing, no system in place which can assure a definitive resolution."<sup>62</sup> The Joint Working Group recommended two draft treaties: (1) on a regime of equal access and remedy in cases of transboundary pollution<sup>63</sup> and (2) on third-party settlement of disputes.<sup>64</sup> The second treaty is broader in scope than the first. It "proposes that an arbitration system be created to fill the need for an available mechanism for binding settlement . . . of fundamental legal disputes — those relating to treaty interpretation."<sup>65</sup> This would extend to all treaties between the United States and Canada, but its value can be seen in an environmental dispute like Garrison where negotiations have failed to assuage Canadian fears or stop American legislators. "Because of the two countries' success in negotiations, binding procedures are possible. Because of their negotiating failures, binding procedures are necessary."<sup>66</sup>

### Article 1 of the proposed treaty states

In any dispute between the States Parties, any question of interpretation, application or operation of a treaty in force between them, which has not been settled within a reasonable time by direct negotiations or referred by agreement of the Parties to the International Court of Justice or to some other third-party procedure, shall be submitted to third-party settlement at the written request of either Party addressed to the other's cabinet officer in charge of foreign affairs, or an exchange of notes between the two.<sup>67</sup>

This Article takes the step of requiring arbitration at the request of Canada or the United States when there is a dispute. However, this is less than a giant step, in that the jurisdiction of the tribunal is limited to "any question of interpretation, application or operation of a treaty in force between them." Also, this mechanism is to be used only as a last resort if negotiation

60. *Rhine Treaty*, Annex B, s. 7, *Id.*, at 253.

61. See D. Arbitblit, *supra* n. 50, at 353-54; but see R. Ianni, *supra* n. 46, at 264-65. See also L. Kutner, "The Control and Prevention of Transnational Pollution: A Case for World Habeas Ecologicus" (1977), 9 *Lawyer of the Americas* 257.

62. *Report and Recommendations*, *supra* n. 50, at para. 337. This Report received the endorsement of the Canadian Bar Association, August 30, 1979. Similarly, The American Bar Association recommended that the proposed treaties be negotiated. To date, no action has been taken by either government on implementing the recommendations. Letter from Harry T. King, Jr., Co-Chairman of the Joint Working Group, to the author, July 29, 1980.

63. *Supra* n. 50.

64. *Id.*, at paras. 337-413.

65. *Id.*, at para. 338.

66. *Id.*, at para. 337.

67. *Id.*, at para. 343.

or reference to the International Court of Justice or another third-party had not settled the dispute "within a reasonable time."

If this proposed treaty were in effect, would it be of use in the Garrison dispute? Two questions immediately come to mind. First, does Article X of the *Boundary Waters Treaty* preclude resort to the proposed treaty? In other words, since the *Boundary Waters Treaty* already provides a mechanism for dispute settlement, albeit only by agreement of the parties, is that the only means for settling disputes concerning the treaty? There is no definite answer to this threshold question, which would have to be answered by the arbitral tribunal itself. It may be determined by the clause in the proposed treaty specifying "any question . . . which has not been . . . referred to some other third-party procedure." Therefore, if the procedure in the *Boundary Waters Treaty* had not been used, the arbitral tribunal might decide that it would have jurisdiction to determine other questions such as whether the United States' actions constitute pollution under Article IV of the *Boundary Waters Treaty*. On the other hand, the arbitral tribunal may decide on the basis of Article VIII of the *Boundary Waters Treaty* that the International Joint Commission has sole jurisdiction: "This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this treaty the approval of this Commission is required . . . ." One way to prevent this particular question from arising would be either to list the treaties subject to or those excluded from compulsory jurisdiction. The Joint Working Group recommends listing those excluded from the treaty.<sup>68</sup>

The second area of ambiguity which is sure to be questioned concerns the clause "within a reasonable time." For instance, does the clause refer to the settlement of the entire dispute or to the particular treaty question only? In the Garrison dispute, Canadian concern was first expressed in 1969, but the International Joint Commission Report conclusions concerning potential pollution under Article IV were not reached until 1977. It is possible to say that negotiations concerning the dispute arose as early as 1969, but negotiations concerning the treaty question did not arise until after the International Joint Commission Report in 1977. This time difference may be significant in deciding whether the dispute is ripe for arbitration. There are various ways to prevent this controversy. The phrase "in the opinion of the party making the request" or "as decided by the tribunal" could be added. Alternatively, the formulation found in the *Rhine Treaty* could be used: "Any dispute as to the interpretation, application, or operation of a treaty in force between them that cannot be resolved within a reasonable time through negotiation . . . ." It is submitted that this alternative would best avoid uncertainty.

As presently formulated, the proposed draft treaty seems to say that the dispute or question must not have been settled within a reasonable time by direct negotiation or not referred to the International Court of Justice or other third-party procedure. If this refers to both negotiation and other reference procedures by agreement, the language should state this more clearly. It could easily be reworded to read "which has not been, within a

68. *Id.*, at paras. 352-53.

reasonable time, either settled by direct negotiation or referred by agreement . . . .” This gives the parties a chance to use all the voluntary methods before resorting to the compulsory arbitration procedures. However, the formulation found in the *Rhine Treaty* is preferable in this writer’s opinion. It shows clearly that only resolution by negotiation must prove impossible, unless the parties decide otherwise, before resorting to the compulsory arbitration procedures.

The proposed draft treaty also provides for third-party settlement by agreement of the parties,<sup>69</sup> and for procedures for setting up a three-member arbitral tribunal<sup>70</sup> similar to that described in the *Rhine Treaty*. The arbitral tribunal, under Article 5 of the proposed treaty, is given “the power to prescribe, by order, any provisional measures which it considers appropriate to preserve the respective rights of the Parties pending final adjudication.”<sup>71</sup> The order can be made for a specified period not longer than six months and is renewable. For instance, if such a tribunal were requested and constituted in the Garrison dispute, and it considered that it had *prima facie* jurisdiction, an order could be made halting any release of water or further construction on portions of Garrison which would adversely affect Manitoba rivers.

Article 9 prescribes that the decisions reached would be “final and binding, and shall be complied with by both Parties.”<sup>72</sup> This gives the tribunal’s decision binding force. The Joint Working Group also considered two additional clauses, one for enforcing judgments in cases of non-compliance and the other for voiding decisions in cases where the tribunal exceeded its authority or acted improperly. These were thought to be unnecessary in light of the close and friendly relations between Canada and the United States.<sup>73</sup>

The final Article of the proposed treaty suggests an alternative to binding arbitration. Through Article 10, “In any particular case, the Parties may agree that, instead of a binding judgment, an arbitral tribunal constituted in accordance with paragraph (a) of Article 3 should render an advisory opinion.”<sup>74</sup> The Joint Working Group expects that “the availability of advisory opinions would greatly increase the use of third-party procedures in a variety of subject areas, and make it much easier for the parties to agree to submit difficult cases to such procedures.”<sup>75</sup> Although this may provide for increased use of third-party settlement, for a solution in difficult political situations, for independent advice in technical areas, and for settlement of particular questions arising in domestic litigation,<sup>76</sup> it will also defeat the primary purpose of compulsory and binding arbitration: the settlement of difficult disputes which have already proved intractable by existing methods. This is most obvious in the Garrison dispute. Here, the International Joint Commission has already rendered independent advice and

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69. Art. 2, *Id.*, at para. 360.

70. Art. 3, *Id.*, at para. 367.

71. *Id.*, at para. 381.

72. *Id.*, at para. 400.

73. *Id.*, at para. 405-06.

74. *Id.*, at para. 407.

75. *Id.*, at para. 408.

76. *Id.*, at para. 410-11. This might also make the treaty easier to negotiate.

litigation in the United States has been in progress over four years while the construction of Garrison continues unabated. The answer does not seem to lie in another advisory group.

### Conclusion

The *Nordic Treaty*, the *Rhine Treaty* and the proposed ABA-CBA draft treaty provide concrete examples of solutions in the area of protracted transboundary pollution disputes. Paramount are provisions which prescribe arbitration at the request of one Party to the dispute. Also essential are the mechanisms which assure a halt to potentially harmful activities until a decision can be made and which provide for final and binding decisions which will be complied with by both Parties. It is submitted that the Canadian and American governments should move quickly either to amend the *Boundary Waters Treaty* in this manner or to negotiate a new treaty to cover all transboundary pollution disputes.

The final act of the drama of Garrison has not yet been written. The procedures discussed above give the greatest hope that the ending, if not happy, will at least be final and fair. They are worthy of consideration on both sides of the border.

