

古特水坝索赔仲裁案

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[案件导读]

本案是因加拿大在圣劳伦斯河上建设和运营古特水坝引起的私人财产损失跨国索赔案件。¹ 仲裁庭基于美加两国的协议裁定加拿大负有赔偿美国公民财产损失的严格责任，并建议双方协商确定赔偿数额，快速成功解决了当事方之间的争端。但仲裁庭回避了本案的核心问题，即建造或运营古特水坝与美国公民财产损失之间的因果关系，仲裁庭也未对跨境损害责任的相关国际法规则做出任何阐释。

[关键词]

边界河流，建设和运营大坝，跨境损害，因果关系，严格责任，合同责任，侵权责任

一、古特水坝索赔争端的产生与发展

1900 年，加拿大决定在美加边界的圣劳伦斯河上修建一座水坝，以提高该河的通航能力。该水坝被称为“古特水坝（Gut Dam）”，坐落在安略湖下游 110 公里处，位于加拿大的亚当斯岛（Adams Island）和美国的莱斯加洛普斯岛（Les Galops Island）之间。由于计划将水坝的一部分建于美国领土之上，加拿大请求美国给予许可。美国的许可附有两个条件，其中第二个条件是：“如果该水坝的建造和运营对莱斯加洛普斯岛的财产所有者或美国任何其它公民的财产造成损失或损害，加拿大政府应当进行赔偿，赔偿额应由加拿大政府与受损的当事方协议决定，或与美国有管辖权的适当法院可能判赔的数额相等。”为了获得理想效果，加拿大在水坝开始修建后又向美国提出请求，希望能增加水坝的高度。基于同样的附加条件，美国再次给出了许可，水坝最终得以建设完成。

1951 年，美加边界的五大湖经历了史无前例的高水位和罕见的暴风雨，安大略湖南岸的美国领土上发生洪涝灾害，一些美国公民因此遭受了财产损失。

¹ “Canada-United States Settlement of Gut Dam Claims: Report of the agent of the United States before the Lake Ontario Claims Tribunal.” International Legal Materials, vol. 8, no. 1, 1969, pp. 118 - 143.

1952 年 6 月，美加两国联合向两国间专门处理跨界水事务的国际联合委员会（International Joint Commission）发起咨询，请求确认安大略湖水位变化的原因和影响。1958 年，该委员会发布最终报告，认定古特水坝仅是造成安大略湖水位增高并导致损失的众多因素之一。与此同时，加拿大为修建圣劳伦斯海上通道而拆除了古特水坝。

在洪涝灾害中遭受财产损失的部分美国公民在美国纽约北区地方法院对加拿大提起了损害赔偿之诉。² 1952 年 11 月 10 日，加拿大致函美国政府，承认加拿大对因修建或运营古特水坝造成的美国公民财产损失负有赔偿义务，但它同时也强调，承认这一义务并不意味着它放弃在美国法院的主权豁免。最后，加拿大依据主权豁免成功避开了美国法院的送达程序，1956 年美国法院驳回了上述全部诉讼。

1952 到 1953 年间，加拿大建议美国的索赔当事人将此事项诉诸仲裁，但双方并未达成仲裁协议。1954 年 5 月，美国的索赔当事人向美国国务院提出援助请求。两国政府进行了一系列谈判，但未取得成果，直到 1962 年，美国国会通过一项法案，决定将所有索赔请求提交美国外国索赔解决委员会（United States Foreign Claims Settlement Commission）来解决。该委员会关于古特水坝案的工作持续到 1964 年底，期间它遇到了一系列重大难题，例如证据的缺失和评估损失的方法难以确定，其中最复杂的问题是如何确定美国公民的财产损失中可归因于古特水坝的份额。

二、仲裁庭关于赔偿责任问题的裁决

美加两国经过持续磋商，最终决定将争议提交仲裁解决。1965 年 3 月，两国达成了《美国与加拿大政府关于建立仲裁庭处理美国关于古特水坝的索赔的协议》，即《古特水坝仲裁协议》。³ 依据该协议，美国—加拿大安大略湖索赔仲裁庭于 1966 年成立。仲裁庭由三名仲裁员组成，专门处理美国公民对加拿大提起的因古特水坝的建造与运营造成的损失或损害的求偿之诉。

² *Oster v Dominion of Canada*, United States District Court for the Northern District of New York [24 May 1956] 144 Federal Supplement 746.

³ Agreement between the Government of the United States of America and the Government of Canada concerning the Establishment of an International Arbitral Tribunal to Dispose of United States Claims relating to Gut Dam, 17 UST 1566.

《古特水坝仲裁协议》第二条规定，仲裁庭的决议应当基于对以下一个或几个问题的答案：（a）古特水坝的建造是否造成本求偿之诉针对的财产损失的直接原因；（b）如果是，这种财产损失的性质和程度如何；（c）是否存在对这种财产损失进行赔偿的法律责任；（d）如果是，赔偿的数额应当为多少，赔偿责任人是谁。为了回答这些问题，仲裁庭要适用在加拿大和美国有效的实体法，也包括国际法和衡平法（equity）。

美国认为该条中的（a）项和（b）项关涉侵权责任，而（c）项和（d）项关涉违约责任，美国选择追究加拿大的违约责任而非侵权责任，因此仲裁庭可以不考虑（a）项和（b）项，而只依据（c）项和（d）项作出裁定。美国还进一步提出，依据《古特水坝仲裁协议》第二条（c）项和（d）项以及美国在大坝许可文件中附加的条件，只要证明古特水坝是造成美国公民财产损失的原因即可，并不需要证明它是造成损失的直接原因。但加拿大认为，仲裁协议第二条的各项必须一起解读，如果美国要获得赔偿，它就必须证明其求偿满足第二条中的全部四项要求。

1967 年 9 月，仲裁庭决定首先解决赔偿责任问题，即加拿大是否对古特水坝造成的美国公民财产损失负有赔偿责任。这个问题又分为以下两个层次。

1. 确定有权得到赔偿的当事人的范围

加拿大认为，古特水坝据以修建的协议不限于美国的许可文件，还包括两国之间的一系列文件、法令和信函。把所有这些文件放在一起解读，可以看出仅莱斯加洛普斯岛的所有者有权获得损害赔偿。美国则援引许可文件的措辞，主张两国政府的真实用意是让美国所有财产受损的公民都有权获得赔偿。

加拿大提出的另一个主张是，美国战争部长在签发大坝许可文件时附加条件的行为属越权行为，因为 1902 年 6 月的国会法案并没有规定这种条件。⁴ 美国认为战争部长的权限与本案所涉争议无关，不属于仲裁庭的裁判范围。美国还提出，加拿大既然在过去近 50 年中都接受美国的许可文件以及其中的条件，那么依据禁止反言原则（estoppel），它不得再否认这些条件的拘束力。

1968 年 1 月 15 日，仲裁庭做出了第一项决定，一致裁定加拿大的赔偿责任应当无差别适用于任何美国公民。

⁴ Public L 57-164, 32 Stat 392 [1902].

2. 确定赔偿责任的期限

加拿大认为，美加两国在关于古特水坝的协议中规定了一个有限的测试期，在测试期内美国战争部长应当判断水坝是否造成了损害。这一期限始于水坝竣工，终于 1908 年 6 月第一次极端高水位出现之时。加拿大据此主张，即使它根据协议负有赔偿责任，这种责任也已在 1908 年 6 月终止。美国则提出，1952 年加拿大对美国政府发出的外交照会以及 1953 年 5 月经加拿大国务院批准的新闻稿都承认，如果损失由古特水坝造成，那么加拿大即负有赔偿责任。1968 年 2 月 13 日，仲裁庭做出了第二项一致裁定。仲裁庭认为根据加拿大 1952 年外交照会和 1953 年新闻稿，“现在加拿大已无权再主张在本案涉及的时间段其赔偿责任已失效”。显然，仲裁庭认为加拿大承认赔偿责任的行为属于禁止反言范畴。

确定加拿大对 1951 年到 1952 年间因水坝遭受财产损失的任何美国公民都负有赔偿责任后，仲裁庭没有继续处理损害原因和损害定量等问题，而是建议加拿大和美国在不影响求偿请求有效性和实体责任的前提下协商解决所有索赔请求。两国政府接受了这一建议。1968 年 9 月 27 日，两国政府通知仲裁庭，它们已达成协议，加拿大将向美国一次性支付 35 万美元，作为对所有因古特水坝而发生的索赔请求彻底和终局性的解决方案。

三、案件评析

本案共包括 230 项索赔，涉及复杂的问题和海量的材料，而且当事方在几乎所有问题上都持有异议，因此仲裁庭的任务相当繁重艰难。在仲裁庭面对的众多问题中，最复杂的是古特水坝与美国公民财产损失之间的因果关系问题。如国际联合委员会的报告所言，古特水坝仅是造成安大略湖水位增高并导致损失的众多因素之一。那么，古特水坝是否是造成美国公民财产损失的直接原因？美国公民的财产损失有多大比例可归因于古特水坝？这些既涉及复杂的法律问题，也涉及复杂的事实问题。

仲裁庭没有直面上述问题，而是着眼于争端的最终解决，选择了快速、务实和谨慎的解决方案。首先，仲裁庭没有同时审理全案，而是采取了渐进处理的方式。其次，在确定第一个需要解决的问题时，仲裁庭回避了最为复杂的“因果关系”问题，而选择从“赔偿责任”着手。第三，在解决“赔偿责任”问题时，仲

裁庭采取了与拉努湖仲裁案（Lake Lanoux Arbitration）⁵类似的实用主义方法，即充分依赖当事方之间业已达成的协议。从争端解决的最终效果来看，仲裁庭的上述做法是相当明智的。

仲裁庭没有在裁定中充分阐述其回避“因果关系”问题的理由，但显然它在很大程度上采信了美国的主张。就美国的立场而言，本案存在法律责任的竞合，美国既可以选择依据两国之间关于建造古特水坝的双边协议追究加拿大的“违约责任”，也可以依据国际法上的一般原则追究加拿大因修建水坝造成跨境损害的“侵权责任”。在美国看来，美国当初许可加拿大修建古特水坝的文件即是两国关于建造古特水坝的双边协议，其中关于损害赔偿的附加条件非常明晰，据此追究加拿大的违约责任对美国更加有利。仲裁庭没有明言它接受了美国的选择，但显然它也认为依据两国之间的双边协议进行裁判是更简单实用的方法。在这种思路指引下，仲裁庭最后确定了加拿大基于双边协议所担负的严格责任，而没有讨论确定“侵权责任”必然涉及的损害原因与损害结果之间的因果关系问题，也没有对跨境损害责任的相关国际法规则做出任何阐释。

⁵ *Lake Lanoux Arbitration* (France/Spain), 12 R. I. A. A. (1957), pp. 281-317.

CANADA—UNITED STATES SETTLEMENT OF GUT DAM CLAIMS: REPORT OF THE AGENT
OF THE UNITED STATES BEFORE THE LAKE ONTARIO CLAIMS TRIBUNAL

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CANADA-UNITED STATES SETTLEMENT OF GUT DAM CLAIMS*
[September 27, 1968]

REPORT OF THE AGENT OF THE UNITED STATES
BEFORE THE LAKE ONTARIO CLAIMS TRIBUNAL**

1. Introduction

The Lake Ontario Claims Tribunal was established pursuant to the agreement with Canada concerning the Establishment of an International Arbitral Tribunal to Dispose of United States Claims Relating to Gut Dam, signed March 25, 1965, T.I.A.S. No. 6114. Ratifications were exchanged in Washington on October 11, 1966. The Tribunal was composed of the following:

- A. Chairman,
Dr. Lambertus Erades, of the Netherlands.
- B. United States National Member,
Professor Alwyn V. Freeman.
- C. Canadian National Member,
Judge Wilfred D. Roach.

The Tribunal received 230 claims on behalf of United States citizens for flooding and erosion damage to property in the United States allegedly caused by a Canadian dam built across the international boundary in the international section of the St. Lawrence River. The principal amount of all United States claims was \$653,386.02. After the Tribunal had decided certain initial legal questions in favor of the United States, Canada and the United States entered into a compromise settlement whereby Canada agreed to pay the United States \$350,000 in full satisfaction of the claims. This settlement was without prejudice to the legal or factual position of either party. Pursuant to

*[The agreement between Canada and the United States concerning the establishment of an international arbitral tribunal to dispose of U.S. claims relating to Gut Dam appears at 4 International Legal Materials 468 (1965). A map indicating the location of Gut Dam appears at 4 International Legal Materials 472 (1965). A report on the U.S. Foreign Claims Settlement Commission and the Lake Ontario claims program appears at 4 International Legal Materials 473 (1965).]

**[Reproduced from a copy provided by the U.S. Department of State.]

Article II(5) of the Agreement, which provided:

"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."

the Tribunal, at its final meeting on September 27, 1968, recorded its agreement with the settlement.

Mr. Ernest L. Kerley served as United States Agent from December 1965 until March 1967, when I was appointed in that capacity. After I was appointed Agent, he participated in the arbitration as United States Counsel. Without his efforts as both Agent and Counsel the United States would not have obtained the successful resolution of these claims.

2. History prior to the arbitration

In 1874 the Canadian Chief Engineer of Public Works proposed to his Government that it construct a dam between Adams Island in Canadian territory and Les Galops Island in United States territory in the St. Lawrence River. The dam was to be part of a series of projects to improve navigation on the river. This proposal was not acted upon until 1900. At that time, the Government of Canada, through the British Ambassador to the United States, requested the consent of the United States to the proposed construction of a dam from Adams Island to Les Galops Island. This dam was designed to stop the flow of water through the channel which passed between these two islands. This channel was known as the Gut Channel and it is from the channel that the dam acquired its name.

After many investigations, reports, the passage of a United States statute, and discussions with Canadian officials, the Government of the United States, in 1903, permitted the construction of the dam. The Secretary of War, Mr. Elihu Root, sent to the Government of Canada, through the Secretary of State and the British Ambassador, an instrument of approval for the dam which contained the following two conditions:

"1. That if, after said dam has been constructed, it is found that it materially affects the water levels of Lake Ontario or

the St. Lawrence River or causes any injury to the interests of the United States, the government of Canada shall make such changes therein, and provide such additional regulation works in connection therewith, as the Secretary of War may order.

"2. That if the construction and operation of said dam shall cause damage or detriment to the property owners of Les Galops Island or to the property of any other citizens of the United States, the government of Canada shall pay such amount of compensation as may be agreed upon between the said government and the parties damaged, or as may be awarded the said parties in the proper court of the United States before which claims for damage may be brought."

The Government of Canada constructed the dam. However, experience demonstrated that the dam was too low to produce the desired effect and in 1904 permission was requested to increase the height of the dam. The Government of the United States gave the requested permission subject to the same two conditions as set forth above. The Government of Canada increased the height of Gut Dam in 1904.

Between 1904 and 1951 several man-made changes affected the flow of water in the Great Lakes-St. Lawrence River Basin. These changes did not affect Gut Dam which remained in the river at its 1904 height, but did affect the quantity of water flowing into Lake Ontario and the St. Lawrence River. This, in turn, affected the height of water in the lake and river. The most significant changes were two. The first was a diversion of water into the Great Lakes by the Government of Canada, known as the Long Lake-Ogaki Diversion, for increasing the amount of hydroelectric power that could be developed in Ontario and as a consequence at the power plants at Sault Sainte Marie, Niagara Falls and in the St. Lawrence River. This was agreed to by the United States and some of the additional power resulting from it was made available to the United States. The second change was a reduction in the rate at which the United States unilaterally withdrew water from the Great Lakes system at Chicago through the Chicago Diversion.

In 1951-1952 the level of Lake Ontario and the

St. Lawrence River reached unprecedented heights. These heights in combination with storms and other natural phenomena caused extensive flooding and erosion damage to the north and south shores of all of the Great Lakes including Lake Ontario. United States citizens, most of whom owned property on the southern shore of Lake Ontario and some of whom owned property on the southern shore of, or islands in, the St. Lawrence River, believed that at least part of the damage was caused by Gut Dam. These citizens attempted unsuccessfully to negotiate a settlement of their claims with the Government of Canada and were also unable, for procedural reasons, to recover through litigation.

In 1953 the Government of Canada removed Gut Dam as a part of the construction of the St. Lawrence Seaway.

In 1962 the Congress of the United States enacted Public Law 87-587 authorizing the Foreign Claims Settlement Commission of the United States to adjudicate claims of United States citizens against the Government of Canada for damages caused to their property by Gut Dam. Prior to the completion of the Commission's Lake Ontario Claims Program, extensive diplomatic negotiations between representatives of the Governments of the United States and Canada resulted in agreement to establish an international tribunal to resolve this question. The Lake Ontario Claims Tribunal was to be given jurisdiction to adjudicate claims by United States nationals against the Government of Canada for damage caused by Gut Dam. The Agreement establishing the Lake Ontario Claims Tribunal was signed on March 25, 1965, and on that date the Foreign Claims Settlement Commission of the United States, in accordance with Public Law 87-587, ceased processing the claims filed with it. The Agreement entered into force on October 11, 1966, and the first meeting of the Tribunal was held in January 1967.

3. Selection of the Tribunal

Article I, paragraph 2, of the Agreement provided that the Tribunal shall consist of the Chairman and two National Members. The National Members were to be chosen by the respective Governments and the Chairman was to be jointly designated by the two Governments. In the event of inability of the Governments to agree on such third member, either Government might request the President of the International Court of Justice to designate such

third member. This contingency did not arise.

The qualifications of the members of the Tribunal were set out in Article I, paragraph 4, of the Agreement:

"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 related to this Agreement."

Initial discussion with the Government of Canada indicated that Canada intended to appoint a retired judge as its National Member. The United States considered the alternative of appointing either a retired judge or a professor of international law as its National Member. Because the issues involved concerned complex questions of international law the United States chose to appoint an internationally known and highly regarded professor of international law. While recognizing that numerous claims would be filed and that each claim would involve issues that a judge rather than a professor had more familiarity with, the overriding factor in the choice of the United States National Member was the conviction that the individual cases were not as significant as the major issues which the Tribunal would be required to decide as a first step, and which would serve as the basis of its subsequent evaluation of the individual claims. The actual workings of the Tribunal indicate that this assumption was correct, since the Tribunal determined to decide the major issues first and the individual claims were relegated by both the parties and the Tribunal to a position of lesser importance.

In choosing the United States National Member a list of prospective candidates was drawn up and their relative qualifications were analyzed. Professor Alwyn V. Freeman, of Johns Hopkins University, was selected as the first choice for United States National Member. This selection was based primarily on Professor Freeman's previous experience: he had been the United States Agent in a previous arbitration and had been associated with the United States agency in the Mexican arbitration. He possessed, moreover, a deep knowledge of international law, especially in the field of State responsibility.

In the selection of the Chairman the United States

was guided by the following basic considerations: (1) The Chairman should be thoroughly familiar with international law; (2) his reputation as an international jurist should be such that both parties could be confident that they would receive a fair hearing and an informed judgment; (3) he should have judicial experience, preferably with some administrative responsibilities. The United States Agent and the Canadian Agent Designate met in Washington and examined biographic information collected by both Governments concerning prospective candidates. A list of five prospective candidates was prepared in order of preference and it was decided to approach each candidate jointly in order of preference until one accepted the position. Dr. Lambertus Erades, Vice-President of the District Court of Rotterdam, headed the list. Dr. Erades' qualifications included a thorough background in international law, Editor-in-Chief of the Netherlands International Law Review, diplomatic experience in the United Nations, and judicial experience together with administrative responsibilities as the Vice-President of the District Court of Rotterdam. Dr. Erades was offered the position and accepted it.

The selection of all members of the Tribunal proceeded prior to the exchange of ratifications bringing the Agreement establishing the Tribunal into force. Article I, paragraph 2, of the Agreement provided that the members of the Tribunal be named within certain time periods after entry into force of the Agreement. Accordingly, formal naming of the members of the Tribunal was delayed until after the exchange of ratifications.

4. Tours of inspection

Prior to the ratification and entry into force of the Agreement establishing the Tribunal, I travelled to Albany, Syracuse, Rochester, and Buffalo in order to ascertain the availability of local government records which might be of use in establishing both the nationality of claimants and ownership of property damaged in 1951-1952. In addition, in Buffalo I conferred with the District Office of the United States Army Corps of Engineers and obtained information regarding the 1951-1952 damage. While in Rochester I conferred with Mr. Donald Forsyth, counsel for the Lake Ontario Land Development and Beach Protective Association and representative of most of the prospective claimants. We toured the lake shore in the area near Rochester and examined many of the properties

which were damaged during 1951-1952 and for which claims would be filed.

In January 1966 Mr. Kerley and I travelled to Buffalo, Rochester and Syracuse for the purpose of holding open meetings with prospective claimants and/or their attorneys. At these meetings we explained provisions of the March 1965 Agreement, indicated how we intended to present the case, discussed the elements of a valid international claim, the type and form of evidence required to establish those elements and described future correspondence which they could expect to receive from the United States Agency. The meetings in Rochester and Syracuse were especially well attended and we were able to establish a cooperative relationship and a more complete understanding of the difficulties the case presented.

In July 1966 the United States Agency moved its headquarters to Ottawa, Ontario, Canada. En route we stopped and examined from the shore and with the aid of maps the site where Gut Dam had been located.

Article X of the Agreement provided:

"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."

After all United States claims had been filed, the Canadian Agent advised the United States Agency that his representatives (an engineer and real estate appraiser) wished to examine some of the properties which were the subject of claims. The United States Agent corresponded with the claimants or their attorneys advising them of the Canadian Government's desire to inspect the subject property, indicating that such inspection was permitted under Article X of the Agreement and requesting full cooperation so that the Government of Canada could exercise its right of inspection. I accompanied the Canadian engineer and real estate experts on two tours of property on the southern shore of Lake Ontario and islands in the St. Lawrence River.

During the summer of 1967 the Tribunal, accompanied

by the Agents and the Joint Secretaries, examined the site where Gut Dam had stood. This examination was conducted in the St. Lawrence River by use of a motor vessel and smaller boats. We passed through the Gut Channel, up the now defunct Galops Canal and the North Channel. We were able to gauge the size of the dam and, by means of rubble left on the shores of Les Galops and Adams Islands, could determine the actual place where the dam had stood. Moreover, we were able to experience the swift cross current through the Gut Channel which had been the reason the Government of Canada wished to construct the Gut Dam. Through the use of navigational maps prepared in the early 1900's (prior to and just after the construction of Gut Dam) and current navigational maps we were able to determine the changes made in this section of the river as a result of the construction of the St. Lawrence Seaway.

The Government of Canada provided the vessel and crew for the tour of the site of the dam. All other expenses were joint expenses of the Tribunal. The tour was helpful and enabled both the Governments and the Tribunal to understand better the nature of the dam and its purpose.

5. Rules of Procedure

Article VI of the Agreement provided:

"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 can contravene any of the provisions of this Agreement. The rules shall be designed to expedite the determination of claims."

Prior to the entry into force of the Agreement it became clear that certain ground rules regarding procedure would have to be established before the first meeting of the Tribunal in order for the United States to be able to present its claims without fear of technical error. For example, questions arose as to the method of certification of documents, the originals of which were held by local government officials (e.g., birth certificates, copies of which were certified by local health officials). Accordingly, consultations were held with the Government of Canada as to various rules concerning written evidence such as birth certificates, deeds, and affidavits. During

these consultations representatives of the Government of Canada exhibited concern about the ability to verify affidavits and other written testimonials. The United States Agent wrote to the Canadian Agent Designate pointing out that false statements in affidavits and other statements submitted to the Agency for submission to the Tribunal were subject to the criminal sanctions of 18 U.S.C. §1001. The letter also set out the qualifications and authority of notaries public in New York State. As a result of these consultations, agreement was reached as to the basic rules for the admission of documentary evidence.

Prior to the first meeting of the Tribunal the Governments exchanged drafts of suggested rules to be submitted to the Tribunal. Consultations were held and an almost complete agreed draft set of rules of procedure resulted. The Governments determined that this draft would be presented to the Tribunal at its first meeting as an aid to the Tribunal in its task of adopting rules of procedure.

The Governments were able to agree as to all rules of procedure except those governing the oral testimony of witnesses. Each Government submitted to the Tribunal at its first meeting its own draft of the rules to govern the matter of oral evidence. The Governments were agreed that the Tribunal would need the advice of experts and that oral expert testimony from witnesses such as engineers would be necessary. The Government of the United States was opposed to calling individual claimants and other fact witnesses before the Tribunal, for reasons involving time, proper arbitral practice, the possibility that the oral examination of claimants might give rise to tensions affecting the relations between the United States and Canada, and the failure of the Agreement to provide specifically for such procedure.

The Government of Canada apprehended being placed in the position of "defendant" without actual knowledge of the facts in each claim. Accordingly, it urged that it should have the right to obtain factual information and that the right to call claimants and other fact witnesses was necessary in order to achieve this end.

In order to solve the impasse, and recognizing the need of the Government of Canada to have a means of ob-

taining factual information, the Government of the United States proposed a rule, later modified and adopted as Article XI of the Rules of Procedure, providing for the use of written interrogatories to be submitted by the Government of Canada to claimants and other fact witnesses through the United States Agent. Under this procedure the Government of Canada could obtain the factual information without unduly delaying the proceedings, in conformity with proper arbitral practice, and avoiding the possible tensions inherent in the examination of fact witnesses and claimants.

In addition to the interrogatory procedure, the Tribunal insisted that it have the right, in extraordinary circumstances, to hear testimony from witnesses. Article XIII of the Rules of Procedure provided in part:

"2. ... either government may submit or the Tribunal may call for written or oral evidence of expert witnesses and in either case the Tribunal and both Governments may question each such witness under procedures to be determined by the Tribunal.

"3. Oral testimony by persons who are not experts shall not be taken except that where the Tribunal considers that extraordinary circumstances require the taking of such testimony and that the procedures contemplated in Article XI do not suffice, it may, after consultation with both Governments, determine to hear such oral testimony under procedures to be determined by the Tribunal."

These provisions incorporated the desire of both parties to be able to present oral testimony from expert witnesses and reserved to the Tribunal the right, where necessary, to hear testimony from other witnesses.

Because Article XIII limited the taking of testimony from fact witnesses to extraordinary circumstances it ensured that testimony would not unduly delay the proceedings and provided a basis for limiting oral testimony in accordance with general arbitral practice. The provision to the effect that Article XI must be used before such testimony could be taken was designed to provide guidance to the Tribunal as to the circumstances under which testimony could be taken and to provide a

means for testing whether oral testimony was necessary. During the course of the arbitration the Government of Canada submitted to the United States Agent for transmission to the claimants and other fact witnesses more than 150 sets of interrogatories. The United States Agent examined each set of interrogatories to determine whether the individual questions or the totality of the questions was "unreasonable, burdensome, or otherwise onerous." Whenever a question was considered objectionable the United States and Canadian Agents consulted and in each case appropriate action was taken to remedy the objection. The United States did not refuse to forward any set of interrogatories delivered to it by the Government of Canada. Almost all questions were answered by the parties to whom they were directed and the answers were given to the Government of Canada in sufficient time for that Government to incorporate the information received in its Answers to the Memorial in each claim. In those few cases where answers to interrogatories were received after the Canadian Answer was filed, the Canadian Agent filed a Supplemental Answer and no objection was made by the United States. In view of the effectiveness of the interrogatory procedure, the problems envisioned from the taking of oral testimony from fact witnesses did not arise. The interrogatory procedure worked smoothly and is considered to be a significant aid in unearthing facts which may be of significance. Under appropriate circumstances, a consideration should be given to incorporating similar provisions in other rules of procedure of ad hoc tribunals.

The Agreement establishing the Tribunal contained no provision for the presentation of oral argument. Nevertheless, both Governments wished to present oral arguments to the Tribunal. Accordingly, Article XIV of the rules of procedure provided that the Tribunal "(a) may, on its own motion order or (b) shall, on application of either government, hear oral argument." This rule was designed to give the Tribunal the authority to call for oral argument on any issue in which it felt oral argument might be helpful to it, and to give the Governments the right to present oral argument on any issue on which they wished to present argument.

During the course of the arbitration extensive oral arguments were presented at the Tribunal headquarters in Ottawa and in Washington. While the rules of procedure granted to the Government of the United States, as the claimant State, the right to present both opening

and closing argument, the Governments, in their desire to see a just result, agreed at the hearings that argument and counterargument would continue until the parties and/or the Tribunal felt that there was no purpose in continuing the debate any further. In fact, very little extra exchange took place because of this agreement. The understanding however is indicative of the friendly atmosphere which prevailed even during the heat of argument and reflects the desire of both Governments to achieve a solution just to all interests concerned.

Oral arguments on substantive issues were presented on behalf of the United States by Ambassador Richard D. Kearney, the United States Agent, Carl F. Goodman, and the Counsel, Ernest L. Kerley. Arguments on behalf of the Government of Canada were presented by the Canadian Agent, H. Courtney Kingstone, and Canadian Counsel, J. W. Swackhammer. A verbatim transcript of the arguments has been retained by each Government. Counsel and Agents for both Governments were extensively questioned by the Tribunal during oral argument and it is apparent that these proceedings did much to isolate contentious issues and give the parties an opportunity to explain their respective positions.

Article VII of the Agreement provides as follows:

"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."

This article clearly provided that all claims were to be filed within 90 days after entry into force of the Agreement, but did not provide for the manner

in which claims would be filed. Accordingly, it was necessary for the Rules of Procedure to provide for the Memorial of claims and the rules governing filing of the claims. The same was true in regard to the Answer required to be filed by the Government of Canada. Article VII of the Agreement did not specify the briefs which the Governments were entitled to file and made no provision as to when such briefs would be filed. This was a cause of substantial delay in the proceedings. Because the Rules of Procedure could not take effect until adopted by the Tribunal and because briefs could not be filed until after the adoption of the Rules of Procedure, a substantial part of the two years allocated by the Agreement for the duration of the Tribunal's existence was taken up by the briefing phase. During this period of time the members of the Tribunal could do little substantive work.

Each Government, anxious to protect its own interests, insisted on the right to file at least one brief in answer to the other Government's position and each insisted on a long enough period of time between briefs to enable it to file an effective brief. The United States, in an effort to expedite the proceedings, filed its main brief within one month after the first meeting of the Tribunal. However, eight months were to elapse before the remaining briefs (a Canadian Answer, United States Reply, and Canadian Rejoinder) were filed.

During the proceedings the Tribunal took advantage of the treaty provision entitling it to request briefs. The Tribunal called for a brief by each Government on certain specific points of law and requested that the briefs be filed concurrently. While this did not give either party the opportunity to respond in writing to the brief of the other party, it somewhat expedited proceedings and did not prejudice either Government as both Governments had the right to respond during oral argument.

It is suggested that future arbitral agreements retain the provision permitting the Tribunal to call for additional briefs and retain the framework wherein briefs are not filed simultaneously but rather in alternative sequence, giving each Government an opportunity to respond in writing to the position of the other Government as set out in its brief. In addition, future agreements should contain all necessary provisions

for the filing of briefs and claims so that the major paperwork can be done and documents filed prior to the first meeting of the Tribunal. This would avoid delay and would enable the Tribunal at its first meeting to begin serious consideration of the issues before it.

6. Financing the Tribunal

Article XV of the Agreement establishing the Tribunal provides:

"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."

Prior to the ratification of the Agreement the Agents consulted with a view towards determining the most expeditious manner of funding the operations of the Tribunal. It was agreed that a joint bank account in the name of the Tribunal would be established in Ottawa and that the Governments would periodically make equal contributions to this account. Checks drawn on the account for the payment of Tribunal expenses would require the signature of two persons, one representing each of the Governments. It was agreed that the Joint Secretary, a foreign service officer appointed by each Government to supervise the administrative work of the Tribunal, or Agent of each Government would have authority to sign on behalf of his Government.

The Tribunal kept accurate financial records recording all Tribunal expenses. These records were kept by the Tribunal Secretariat, the actual accounting being performed by the Office of the Auditor General of the Government of Canada. At the end of each month the Joint Secretaries sent to both Agents a copy of the Tribunal bank statement and a statement indicating the expenses for the month and the accumulated expenses of the Tribunal. The United States Agent periodically gave the Joint Secretary an authorization to draw checks on

the Tribunal's account in various categories and within certain amounts. This financing and accounting system worked smoothly and the accounting aspects and the methods of defraying joint expenses presented no problems.

At the request of the Government of Canada the Tribunal's headquarters were located in Canada. The Government of Canada provided the Tribunal with its headquarters in Ottawa. In turn, when the Tribunal met in Washington the Government of the United States provided a hearing room and offices for the Tribunal and its Secretariat.

7. Tribunal determinations and settlement

As with all international claims it was necessary for the United States to establish the United States nationality of each of the claimants before the Tribunal. In addition we submitted evidence of the ownership and damages sustained as a result of high water conditions in connection with every claim filed. However, these matters did not become the subject of a Tribunal determination because the Tribunal decided to proceed first with the major questions of liability. The theory underlying this decision seems to have been that those questions common to all claims - liability and per cent of damage attributable to the dam - should be determined before the individual claims were analyzed. Since the claims were settled after two determinations by the Tribunal on the issue of liability, the individual claims were never reached.

During the diplomatic negotiations concerning the 1951-1952 damage allegedly caused by Gut Dam, the Government of Canada maintained that its liability, if any, extended solely to a small class of persons, namely, the owner of Galops Island. Galops Island was the island on the United States side of the river which the dam abutted. Since the Government of Canada had received a release in the early part of the 20th century from the owner of this island, the necessary result of this argument would be that Canada had no liability whatsoever.

In presenting its case before the Tribunal the Government of Canada first urged that its obligation under the 1903 agreement extended only to the owner of Galops Island. This position was based on arguments concerning principles of treaty interpretation as well as

those concepts which should be adopted in determining what constituted the Gut Dam Agreement.

Unlike most treaties and other international agreements, the agreement under which Gut Dam was constructed was not formally incorporated in a single bilateral document or an agreed bilateral exchange of documents such as an exchange of notes. Because of this unique circumstance, the Canadian Government argued:

"The agreement giving rise to the issue before this Tribunal is an unusual agreement in the sense that unlike most of the international agreements which have been reviewed by tribunals and international courts, it is not evidenced by one document which was negotiated, revised from its drafts, and finally signed and sealed by the representatives of our respective nations. It consists ... in a series of documents and acts, and it is to that series of documents and acts in the context of the times that we must seek to determine what the agreement was and what it means." (Transcript 247)

It was quite clear that the parties had a basic disagreement as to what constituted the intergovernmental agreement permitting the construction of Gut Dam. The United States took the position that that agreement was evidenced by the two permits issued by the United States Secretary of War and did not incorporate the lengthy correspondence and discussions leading up to the issuance of the permits. The United States view was that the agreement was the permits, which were accepted by the Government of Canada through its actions in constructing and increasing the height of Gut Dam.

On the question of interpretation, the Government of Canada argued that all of the correspondence when taken together demonstrated that the Governments mutually intended that only the owner of Galops Island was to be compensated in the event of damage. The United States, while recognizing that the owner of Galops Island had been the factor in delaying permission for construction of the dam and that the permits clearly intended to protect him, argued that the clear language of the permits indicated the true intent of the Governments to compensate any citizen of the United States whose property was damaged. In concluding the argument on interpretation, the United States Agent submitted:

"The question before the Tribunal today is: Who are the persons to be compensated in the event that the construction and operation of the dam should cause damage or detriment to property?

"The formal document sent to Canada by the United States answered that question in unmistakable language. The owners of Galops Island or any other citizens of the United States whose property suffered damage.

"The words quoted in the Privy Council of Canada answer it just as clearly. The Order-in-Council signed by the Governor General of Canada, the representative of the sovereign in Canada, tell us just as unequivocally. The owners of Galops Island or any other citizens of the United States whose property suffers damage or detriment.

"The conditions which were considered by every single Canadian official who had anything whatsoever to do with this dam tell us in clear English, for the whole world to see: The owners of Galops Island or any other citizen of the United States whose property suffers such damage or detriment.

"The evidence is clear that Canada enjoyed half a century of benefits as a result of, and based on, United States consent subject to this condition. There can be no doubt that Canada is bound by this condition, and that Canada must now pay compensation for damage or detriment to United States citizens caused by the construction and operation of Gut Dam."
(Transcript 189-190)

During the argument on the initial question of whether Canada's obligation under the 1903-1904 agreement extended to citizens of the United States other than the owner of Galops Island, an issue arose whether the obligation was limited not only to persons but also as to time. The United States argued that this issue was not properly before the Tribunal at that session and should be fully argued by the parties at a later date. On January 15, 1968, at the close of oral argument,

the Tribunal rendered its first decision. The decision was in favor of the United States position and as un-animously agreed to by the Tribunal, read:

"The members of this Tribunal are unanimous in the opinion that, on a true interpretation of the Agreement, should Canada become liable to compensate for damages caused by Gut Dam, the obligation extended not only to the owners of Les Galops Island but to any citizen of the United States. This leaves open for argument the further question whether the obligation was to extend over the entire life span of the dam or was limited to a lesser period." (Transcript 589)

On January 30, 1968, the Tribunal reconvened at its headquarters in Ottawa to consider the question of whether there was a time limitation on the obligation of Canada to compensate United States citizens for damage caused by Gut Dam. The Canadian argument in support of such time limitation was based upon a reading of the entire permits and the Act of Congress pursuant to which the permits were issued. Basically, the argument was to the effect that the conditions in the permits were designed to test the judgment of the United States Secretary of War that the dam would not cause damage and that they were valid for only so long a period as was required to test that judgment. In view of water conditions in 1908, it was argued that the testing period expired in 1908.

The United States Counsel argued that the conditions to the permits were continuous and lasted as long as the rights granted by the permits:

"The permits provide for mutuality of rights and obligations. To have given Canada, on United States territory, permanent rights and temporary obligations, would not have been a mutual arrangement, and would have amounted to no less than a servitude in favour of Canada on United States territory." (Transcript 668-669)

The United States Agent followed this argument by urging that no evidence supported the contention that

there was to be a time limit on the conditions. He further argued that even if a period of time was involved that period had not expired in 1952 and that Canada, having sent a diplomatic note to the United States Government in 1952 acknowledging liability if the damage were caused by the dam, could not now argue that its obligation expired in 1908:

"What the Government of the United States was informed by the Government of Canada was, in effect, that in 1952 a reasonable period of time, in terms of this obligation, had not yet expired. Canada acknowledged its obligation to pay compensation if the damage was attributable to the dam. That is what we were told: that is what the claimants were told: that is what the parties understood to be the matters to be resolved in an international arbitration, and even in the later aide memoire which we referred to earlier, in which the Government of Canada denied liability, they did not deny liability on the question now before us. They did not say, 'an unreasonable period of time is involved. They did not say, 'There is a time limitation.' They said, 'Our obligation extended solely to Galops Island,' and this argument has already been rejected by the Tribunal, and there is absolutely no evidence of anything happening between 1953 and today's date to expect this time limited defence. Diplomatic correspondence of 1951 and 1953 sets out guides for what issues would be involved in an arbitration. The Government of the United States was voluntarily advised, and never was informed, except for the argument already rejected, and that diplomatic correspondence, that this position - the Government of Canada would pay compensation if the damage was attributable to the dam - had changed.

"The Government of Canada admitted its liability, and if the 1952 damage were attributable to the dam, we say we should get on to the question of attribution, the question which is not before us now. It is not only an admission, it is a formal advice to the Govern-

ment of the United States. Subsequent practice indicated the interpretation of the agreement by the parties." (Transcript 728-729)

On February 12, 1968, the Tribunal entered its second decision as follows:

"On the threshold of our duties, in view of submissions made on behalf of Canada, the Tribunal had to decide whether or not, on a true interpretation of the agreement providing for construction of Gut Dam, the Canadian obligation was limited to payment of compensation to the owner of Les Galops Island, or whether it extended to every citizen of the United States.

"At the Tribunal's meeting in Washington on January 15, 1968, we held the persons to be compensated included any citizen of the United States whose property suffered damage or detriment caused by the construction and operation of Gut Dam. It appeared to us that the natural and ordinary meaning of the language in its context was unambiguous and permitted no other interpretation. Moreover, Canada not only did not protest against the terms of the second condition in the instrument of approval for construction of the dam, but its subsequent conduct up to its submissions in this arbitration, are wholly consistent with this interpretation.

"The Tribunal then raised as a complementary issue the question whether the obligation assumed by Canada was to extend over the entire life of the dam or was limited to a lesser period. It seems to us now that a more apposite statement of the issue would have been whether the obligation subsisted to cover claims for damage arising during the period of 1951-52. In official diplomatic representations the Canadian Government clearly recognized its obligation to pay compensation so far as the 1951-1952 claims are concerned. Thus, in a letter dated November 10, 1952 from the Canadian Embassy in Washington to the United States

Secretary of State (relative to proceedings pending against Canada in the Oster case) Mr. Acheson was advised:

'I am directed to inform you that the Government of Canada recognizes in principle its obligation to pay compensation for damages to United States citizens provided that they are attributable to the construction or operation of Gut Dam in the sense of condition number (2) in the instruments of approval of the United States Secretary of War of August 18, 1903, and October 10, 1904 ...' (Brief of the United States, Appendix C, Exhibit No. 37)

In a further communication to the Department of State on May 14, 1953, Canadian Minister Pierce informed the United States Government of the terms of a press release to appear the following day, and which was worded in pertinent part as follows:

'The State Department has been informed that the Government of Canada stands ready to compensate United States citizens for any damage attributable to Gut Dam, but that Canada does not admit, on the basis of evidence now available, that Gut Dam was a material cause of the Injury ...' (Brief of the United States, Appendix C, Exhibit No. 40)

It is therefore not now open to Canada to assert that the obligation of compensation was not operative during the period here in question. Indeed, it was partly in reliance upon this acknowledgment of its obligation by Canada that the United States entered into the agreement providing for submission of the present claims to arbitration.

"Accordingly, in view of the recognition

by Canada, in the terms stated, of its obligation to make compensation, it is clear to the Tribunal that the only issues which remain for its consideration are the questions of whether Gut Dam caused the damage for which claims have been filed and the quantum of such damages. Argument on these issues will be scheduled after consultation with the Agents of both Governments."

After entering this decision the members of the Tribunal suggested to the Agents that an attempt be made, without prejudice either to the validity of the claims or to the issue of substantive liability, to try to bring about a negotiated settlement of the claims.

Thereafter negotiations were undertaken between Ambassador Ritchie of Canada, the Department's Canadian country director, United States Counsel and myself in an attempt to resolve amicably the claims. As a result of these negotiations an agreement was reached whereby the Government of Canada would pay to the Government of the United States \$350,000 in full and final settlement of all claims for damage allegedly caused to United States nationals by Gut Dam.

On September 27, 1968 the Tribunal held its last session. Mr. Kerley and I represented the United States and Messrs. Kingstone and Swackhammer represented the Government of Canada. A joint communication by the Agents was recorded by the Tribunal as follows:

"Following the conclusion of the Tribunal's second session in February 1968 it was suggested by the Tribunal that a compromise settlement might be negotiated. We now wish to communicate to the Tribunal a report on a compromise settlement.

"Over the past few months representatives of our Governments have consulted in an effort to resolve amicably this long-standing dispute. These discussions have been held in the atmosphere of good neighbourliness and friendship which has traditionally characterized the relationship of our two Governments. During the discussions the Governments have sought

to find a solution just to all interests concerned and have proceeded on a basis of understanding and goodwill rather than on technical legal grounds.

"As a result, our Governments have concluded, without prejudice to the legal and factual positions maintained in their briefs and their arguments, that a lump sum payment of 350,000 United States dollars by the Government of Canada in full and final satisfaction of all claims of United States nationals for damage allegedly caused by Gut Dam would constitute an appropriate settlement of this matter. This compromise settlement is a further illustration of the goodwill existing between our two Governments.

"After the Tribunal has recorded this arrangement, and in pursuance thereof, the Government of the United States will not further prosecute the claims filed before the Tribunal and the Government of Canada will pay to the Government of the United States the lump sum of 350,000 United States dollars which shall be in full and final satisfaction of all claims of United States nationals for damage allegedly caused by Gut Dam."

Thereupon, the Tribunal entered its final statement as follows:

"Whereas the Tribunal has received a joint communication from the Agents noting that in an atmosphere of understanding and goodwill the parties have agreed to settle all claims relating to Gut Dam for a lump sum payment to the Government of the United States by the Government of Canada of 350,000 United States dollars;

"Whereas the Government of the United States on its part will not further prosecute the claims before the Tribunal and will recognize this payment as being in full and final satisfaction of all claims of United States nationals for damage allegedly caused by Gut Dam;

"Whereas this settlement has been arrived at on the condition that it be without prejudice to the legal and factual positions maintained by the parties and without precedential effect; and

"Whereas the Tribunal, taking into account the joint communication of the Agents, recognizes that this agreement constitutes a compromise settlement of the matter considered a solution equitable and just to all interests concerned.

"Now therefore the Tribunal records this settlement and declares that the business of this Tribunal is concluded successfully and the Tribunal is dissolved.

"A statement in this sense executed by the members of the Tribunal shall be included in the records of the Tribunal."

The provisions of the compromise settlement were also made the subject of diplomatic notes to be exchanged at the same time as delivery of the check for \$350,000.

8. Distribution

It is necessary for the Department to analyze each claim to determine, on the basis of the evidence submitted by the claimant as well as evidence submitted by the Government of Canada, the appropriate percentage of the recovery to be distributed to each claimant. Such re-evaluation of the claims is necessary in fairness to the claimants, since that is what the Tribunal would have done. Following established practice the check for \$350,000 will be covered into the United States Treasury in a special account and the Treasury Department will then issue an individual check representing the recovery in each case. This check will then be sent to the claimant by the Department.

9. Conclusion

The Gut Dam controversy has been a source of irritation in the relations between the Governments of

the United States and Canada. The Agreement to establish an international tribunal to resolve the claims removed this irritant. The negotiated settlement has met with the approval of both Governments and has generally been greeted favorably by the individuals damaged. It is my belief that this matter has been brought to a successful conclusion and that the determinations made by the Tribunal will be of lasting significance.



Carl F. Goodman
United States Agent
Lake Ontario Claims Tribunal

November 22, 1968

Canada and United States: Lake Ontario (Gut Dam) claims arbitration agreement

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CANADA-U.S. LAKE ONTARIO (GUT DAM) ARBITRATION AGREEMENT*
[Signed at Ottawa, March 25, 1965]

U.S. and Canada Sign Agreement on Claims Relating to Gut Dam

Press release 60 dated March 25

DEPARTMENT STATEMENT

An agreement for the final disposition of claims of nationals of the United States against Canada arising out of the construction and maintenance of Gut Dam across the international boundary in the St. Lawrence River was signed on March 25 at Ottawa by United States Ambassador W. Walton Butterworth and Canadian Secretary of State for External Affairs Paul Martin.

The agreement provides for the establishment of a three-member international arbitral tribunal known as the Lake Ontario Claims Tribunal United States and Canada. The tribunal will determine whether Gut Dam caused damage to American property holders by raising the water level of Lake Ontario and, if it did, the amount of damages sustained and who is liable for the damage. The Canadian Government agrees to pay for all damages for which it is found liable.

The agreement will be submitted to the Senate for advice and consent to ratification by the President. After ratification, individual property owners will at the appropriate time be informed about the procedures for filing claims.

The Department of State considers this agreement a further demonstration of the close and

friendly ties which characterize the relationship between Canada and the United States.

TEXT OF AGREEMENT

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

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

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

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*[Reproduced from 52 Department of State Bulletin 643-46 (April 26, 1965). As of May 5, 1965, the agreement had not entered into force. A report on the Lake Ontario Claims Program in the U.S. Foreign Claims Settlement Commission follows the agreement.]

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 the United States of America within two months after this Agreement enters into force; the other national member shall be appointed by the Government of Canada 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 United States and Canadian 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 reports 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.

ion 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.

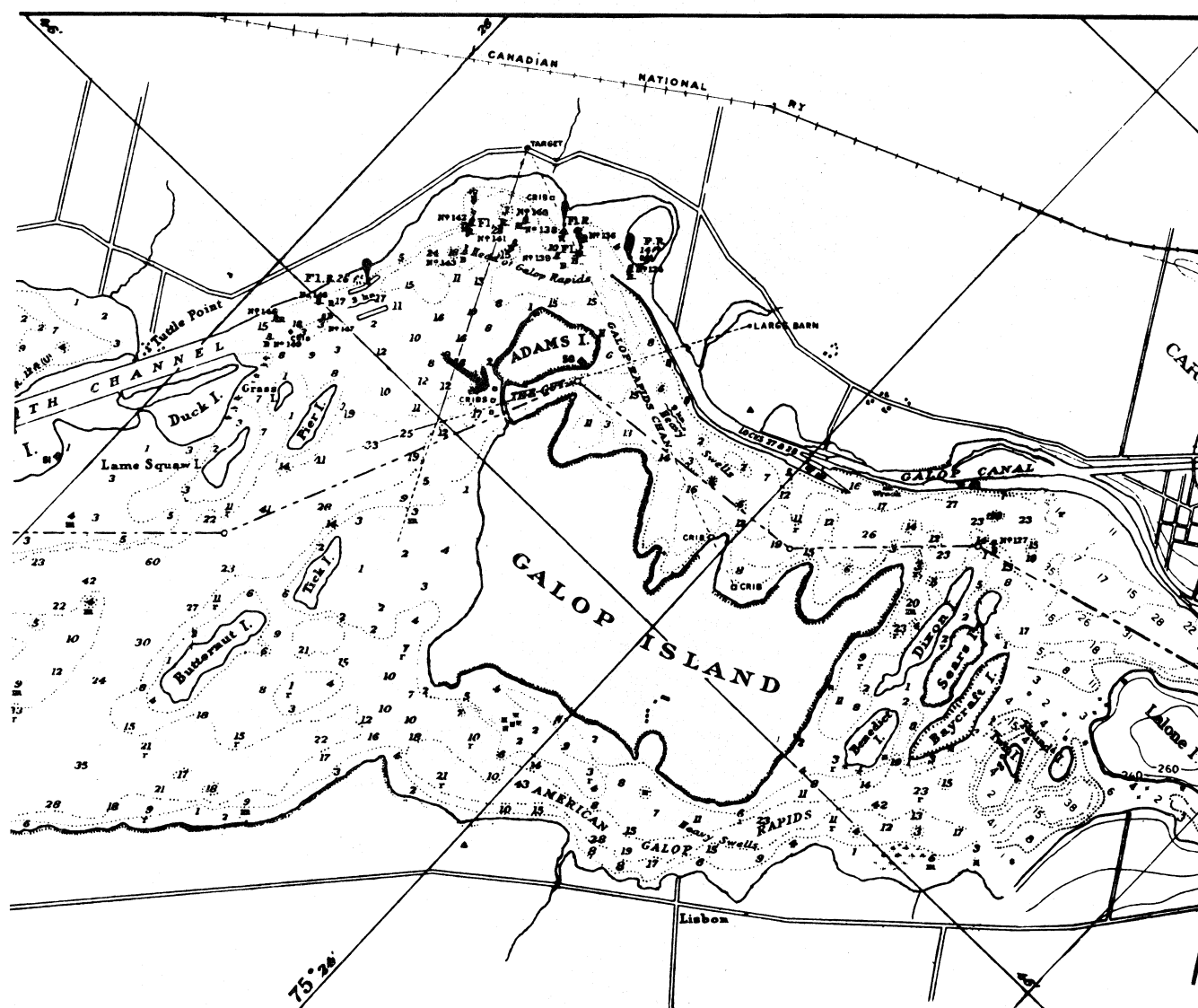
FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

W. WALTON BUTTERWORTH

FOR THE GOVERNMENT OF CANADA:

PAUL MARTIN

LOCATION OF GUT DAM*



*[Reproduced from a map in Figure 1 in Appendix C of the report of the International Lake Ontario Board of Engineers to the International Joint Commission, "Effects on Lake Ontario Water Levels of the Gut Dam and Channel Changes in the Galop Rapids Reach of the St. Lawrence River" (July 31, 1957). The editors of International Legal Materials have indicated the location of Gut Dam by an arrow.]

THE FOREIGN CLAIMS SETTLEMENT COMMISSION
and the
LAKE ONTARIO CLAIMS PROGRAM*

I INTRODUCTION

The Lake Ontario claims program was commenced on November 14, 1962, pursuant to the terms of Public Law 87-587, approved August 15, 1962. This statute authorized the Foreign Claims Settlement Commission of the United States "to accept claims of citizens of the United States for damages caused during 1951 and 1952 by the construction and maintenance of Gut Dam in the Saint Lawrence River by the Canadian Government." The Commission was further "authorized and directed with respect to each such claim to determine the validity thereof and the amount of damages caused by Gut Dam." Upon the determination of all claims presented, the Commission was to submit to the President a report for such action as he deemed appropriate. Although there was no statutory date for completion of the program, the Commission had established October 15, 1965, as the date for completion of the entire program and the submission of its report to the President.

This statute further provided that if the Governments of Canada and the United States subsequently entered into an agreement providing for arbitration or adjudication of the claims, the Commission should discontinue its consideration of them and transfer all records and documents relating to the claims to the Secretary of State or, upon his request, return them to the claimants.

The deadline for filing claims was fixed as October 15, 1963, and appropriate publicity was given to the program. During the course of the Congressional consideration of S. 2978 which became Public Law 87-587, it was estimated "that as many as 1,000 property owners may have sustained damages and that such damages may amount to several millions of dollars." In fact, only 542 claims were received having an asserted dollar value of \$8,473,043.

II CONSTRUCTION OF GUT DAM

The United States consented to the construction by Canada of Gut Dam in the St. Lawrence River across the international boundary between Adams and Les Galops Islands by an act of Congress, approved June 18, 1902 (32 Stat. 392). The purpose of the dam was to improve navigation on the St. Lawrence River. The site of the dam is located about 70 miles northeast of Lake Ontario in the St. Lawrence River.

The statute required that the plans and details concerning the construction of the dam have the prior approval of the Secretary of War. Formal documents approving plans submitted by the Canadian Government were executed by the Secretary of War on August 18, 1903, and October 10, 1904, subject to certain conditions among which was the following:

"2. That if the construction and operation of the said dam shall cause damage or detriment to the property owners of Les Galops Island, or to the property of any other citizens of the United States, the Government of Canada shall pay such amount of compensation as may be agreed upon between the said Government and the parties damaged, or as may be awarded the said parties in the proper court of the United States before which claims for damage may be brought."

Construction of the dam was completed in November of 1903 and no substantial property damage was alleged until 1951. In that year storms, floods and wave action caused serious damage to property owners on the southern shore of Lake Ontario. Those injured complained to the Congress and the Department of State requesting removal or alteration of the dam. They alleged that high waters in Lake

*[A report prepared by Edward D. Re, Chairman, U.S. Foreign Claims Settlement Commission, May 4, 1965.]

Ontario had damaged their abutting properties and that these high waters resulted from the operation and maintenance of Gut Dam.

III LAKE ONTARIO WATER LEVEL

The water level of Lake Ontario in June 1952 reached a record high mean monthly level of 249.29 feet with the help of continued rain. Property owners as a result sustained further damages and their protests led the Governments of the United States and Canada on June 25, 1952, to take action. In view of this the International Joint Commission, organized in 1911 pursuant to the Treaty of January 11, 1909, between the United States and Great Britain, was ordered to study the various factors which affected the fluctuations of the water level of Lake Ontario including the construction of Gut Dam. In April 1953, the Lake Ontario International Board of Engineers established by the International Joint Commission, began an exhaustive investigation of the problems created by the water levels of Lake Ontario; and between March 1955 and December 1958, submitted six lengthy reports which disclosed that a large number of factors, natural and artificial, including the construction of Gut Dam, contributed in a rather complex manner to the damages in question in that they all affected the water levels of Lake Ontario.

These studies disclosed that the highest mean monthly stage ever recorded was 249.29 feet at Oswego for June 1952; that the effect of Gut Dam at this stage was to raise the water level 0.33 feet or 4 inches; and that without the effects of artificial factors, including the construction of Gut Dam, the mean monthly water level in June 1952 would have been 248.77 feet. Eliminating the effect of Gut Dam, the mean monthly water level in June 1952 would, therefore, have been 248.96 feet. [See The International Lake Ontario Board of Engineers, Final Report to the International Joint Commission: Water Levels of Lake Ontario 20-34 (December 1958)].

IV COURT LITIGATION AND NEGOTIATIONS

Beginning in October 1952, eight suits by United States property owners were filed against the Dominion of Canada in the United States District Court for the Northern District of New York. On November 10, 1952, the Canadian Ambassador in a note to the Secretary of State advised that the Government of Canada recognized in principle its obligation to pay compensation for damages to United States citizens provided they were attributable to the construction or operation of Gut Dam, and that it was prepared to facilitate the submission of such claims to an appropriate tribunal empowered to determine the amount of damages attributable to Gut Dam, but requested the sovereign immunity of Canada from such suits as had been filed be recognized by the United States. However, the Department of State rejected the Canadian request for recognition of its immunity, but stated its willingness to discuss means of settling the claims.

Subsequently, on April 28, 1953, the Lake Ontario Land Development and Beach Protection Association which represented the large majority of United States claimants, advised the Department of State that settlement of their claims by international tribunal was unacceptable and that it preferred to negotiate directly with the Canadian Government. However, following a meeting on June 10, 1953, of representatives of the Association and Canadian officials, the Association on May 10, 1954, requested the Department of State to negotiate with Canada an agreement to establish an international tribunal. These negotiations reached substantial agreement on many of the issues involved but several problem areas existed. A major difficulty stemmed from the unwillingness of the plaintiffs in the suits to accept the Canadian condition that they relinquish their suits in the United States District Court. The plaintiffs were also unwilling to accept a decision of the proposed international tribunal as a final adjudication of their claims. Accordingly, when hearings were commenced on these suits in October 1955, the Canadian Government decided to postpone further inter-governmental negotiations until the suits

were resolved. In 1956 all suits were dismissed for lack of jurisdiction [Oster v. Dominion of Canada, 144 F. Supp. 746 (N.D.N.Y.1956), aff'd 238 F2d 400] and on April 22, 1957, the United States Supreme Court refused to review this judgment [cert. denied 353 U.S. 936 (1957)]. Thereafter, at the request of the Association the State Department attempted, without success, to reopen negotiations with Canada for a settlement of the claims or for their submission to an international tribunal for adjudication.

The Canadian Government questioned whether these claims had any merit. This was fortified by the findings published by the Lake Ontario Board of Engineers in December 1958, which disclosed that Gut Dam had in fact raised the level of Lake Ontario in June 1952 by only 4 inches instead of the 7 to 12 inches asserted by the claimants in July 1952; and by the advice contained in a United States Ambassador's letter of July 22, 1959, to the effect that the claimants were now willing to settle their claims for \$875,000. In addition, the report of the Lake Ontario Board of Engineers and International Joint Commission clearly established that Gut Dam was only one of many factors, both natural and artificial, which contributed to the damages in question.

No further progress was attained resulting in enactment of Public Law 87-587 on August 15, 1962.

V COMMISSION ACTION

The first claim was filed in April 1963. In an effort to expedite the submission of claims and to clarify Commission procedures, on June 18, 1963, representatives of the Commission met in Rochester, New York, with representatives of the claimant's Association.

An examination of the claims filed disclosed that, with few exceptions, they were poorly documented. It was recognized that since the Act permitted no assurance that any compensation would be forthcoming, claimants would be reluctant to incur the trouble and expense of properly documenting their claims. Moreover, over ten years had elapsed since the losses were incurred. In order to resolve these difficulties the Commission prepared "development" letters designed to furnish the claimants and their attorneys with as much information and guidance as possible, and that would at the same time specify those elements of the claim that required further proof or explanation.

A. Problem of Joinder

In the course of development of the claims it was ascertained that about 25% of the claims examined presented a problem of joinder. Only one spouse or co-owner had filed although the property in question was owned as tenants in common or by the entirety. Under the law of the State of New York, the law of the situs, the spouse or co-owner who filed would be entitled to recover for only the damage to his interest, namely, one-half of the amount of the established damages. The Commission in such a case would have normally required a petition to amend in order to permit the joinder of the other party. In order to facilitate this procedure, the Commission concluded that the word "validity" as used in Public Law 87-587 be interpreted to include the interests of both co-owners although only one filed.

B. Damage Due to Erosion and Inundation

There were several major deficiencies in the claims filed aside from those in which no supporting evidence was furnished. Thus, the establishment of the amount of erosion damage in claims where the soil had not been replaced was perhaps the most difficult element of proof to secure. Twelve or thirteen years had elapsed and claimants were reluctant because of the cost involved to engage professional appraisers to estimate this loss and preferred to rely solely on estimated replacement costs. Even when appraisers were engaged, it was discovered that most of the appraisals were of questionable value primarily because of the lack of supporting

factual information. Similar difficulties were encountered in establishing the extent of damage caused by inundation.

C. Proportion of Damages

The Commission's most difficult task was in finding a satisfactory solution to the assessment of the proportion of damages caused by Gut Dam. In addition to legal research, the Commission consulted the officials of the Office Chief of Engineers (Army). These engineers were of the opinion that it was impractical to develop a general formula, and that there was no acceptable alternative to a determination based upon a field investigation on a case-by-case basis. However, with their assistance, and particularly that of the Coastal Engineering Research Center, the Commission was enabled to establish satisfactory working guidelines to aid in the adjudication of the claims.

VI TERMINATION OF COMMISSION PROGRAM

The Commission withheld publication of decisions in light of the statutory provision for possible international agreement. This was deemed practical inasmuch as no fund existed from which payments could be made on awards.

Close liaison was maintained with the Department of State and at the close of 1964 the Commission was advised that an agreement was imminent.

On March 25, 1965, the United States and Canada signed an agreement to establish an international arbitral tribunal to hear and finally dispose of claims of United States citizens arising out of the construction of Gut Dam. This agreement requires ratification by the United States Senate and the exchange of instruments of ratification before it enters into force. As a result, the Commission on March 25, 1965, discontinued further preparation of proposed decisions and prepared the records and materials in this Program to be transferred in accordance with the wishes of the Secretary of State.

EL SALVADOR-JAPAN COMMERCIAL TREATY*

[Signed at Tokyo, July 19, 1963;
entered into force, July 1, 1964]

AGREEMENT ON COMMERCE

BETWEEN JAPAN AND THE REPUBLIC OF EL SALVADOR

The Government of Japan and the Government of the Republic of El Salvador, animated by the desire to strengthen the ties of peace and friendship traditionally existing between the two countries and to strengthen and develop the commercial relations between the two countries and to encourage mutually beneficial investments and other types of economic co-operation in order to improve the standard of living of their peoples, have resolved to conclude an Agreement on Commerce which will regulate, on a just and equitable basis, the commercial relations between the two countries, and for that purpose have appointed as their Plenipotentiaries,

The Government of Japan:

Mr. Masayoshi Ohira, Minister for Foreign Affairs

The Government of the Republic of El Salvador:

Mr. Salvador Jáuregui, Minister of Economic Affairs

Who, having exchanged their respective full powers found to be in good and due form, have agreed upon the following articles:

-1-

*[Reproduced from the Japanese Ministry of Foreign Affairs Publication, Collection des Traités, 1964-XLII, No. 18 (No. 1546) (July 1964).]