A CONSIDERATION OF THE WILEY-DONDERO ACT OF 1954 AS AN INTERNATIONAL AGREEMENT

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Donald J. Evans

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A CONSIDERATION OF THE WILEY-DONDERO ACT OF 1954 AS AN INTERNATIONAL AGREEMENT

By

DONALD J. EVANS

AN ABSTRACT

Submitted to the College of Business and Public Service
Michigan State University of Agriculture and
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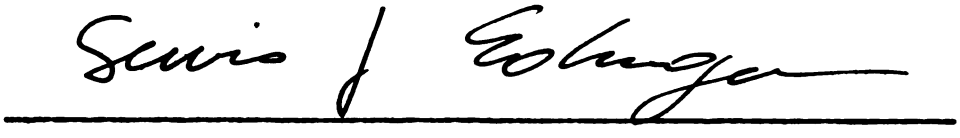
Approved 

Donald J. Evans

The research was designed to supply information on the problem of fashioning instruments of international agreement. The focus of study is on the Wiley-Dondero Act of 1954, the instrument providing for the St. Lawrence Seaway Project in the United States. International agreements between the United States and Canada are examined as they relate to the Wiley-Dondero Act.

The thesis is divided into five chapters. The first chapter traces the history of attempts to accomplish the St. Lawrence Seaway Project. The second chapter is concerned with the legal bases for the proposed treaties of the 1930's, the 1941 Executive Agreement and implementing legislation, and the use of concurrent legislation. This chapter treats both executive and legislative actions in the formation of international agreements.

The third chapter is an analysis of the St. Lawrence Seaway Project first as an international issue and secondly as a domestic issue. From this analysis two conclusions are formed: The United States Senate waived its treaty prerogative by permitting the Project to be accomplished through the use of concurrent legislation, and the Wiley-Dondero Act is only domestic legislation despite the attempts to make it an international agreement.

The fourth chapter presents possible United States and Canadian developments in the St. Lawrence River with emphasis upon the all-Canadian route. The fifth chapter gives the author's conclusions and possible courses of action available to the United States if this country is to share with Canada the control of shipping on the Great Lakes.

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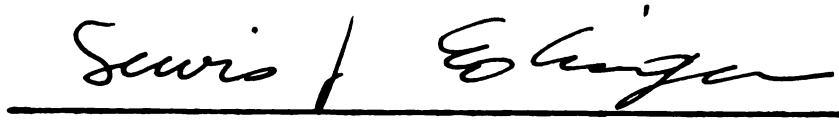
Approved 

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PREFACE

Several reasons prompted the author to undertake this study of the Wiley-Dondero Act of 1954. Primarily, it was the desire to study an area of international relations close to the State of Michigan. Since Canada was across the Great Lakes, a study of some aspect of American-Canadian relations appeared promising. Inquiry was made into the St. Lawrence Seaway Project. Michigan would benefit from the proposed Seaway, probably more than any other state. A project so large in scope as the Seaway might yield some interesting, international problems.

This work is a study of one international problem created by the Wiley-Dondero Act. This problem was how concurrent legislation could be made an international agreement. Since domestic legislation created the Seaway, might such legislation be given wider application in some future agreement between the United States and another nation?

This study has been limited to a particular area of investigation, namely, the negotiation stages of Seaway legislation and agreements. Further limitation has been made by restricting the study to those stages relating to the legal basis for agreements, the question of senatorial waiver of its treaty power, and the possibility of an all-Canadian seaway. Outside the scope of investigation are the economic values of the Seaway, the engineering problems, and the political and social consequences of ocean-going ships upon the Great Lakes.

The author wishes to express his gratitude to Doctor Lewis J. Edinger and other members of the Department of Political Science for their encouragement and helpful criticism during the preparation of this thesis.

He is also indebted to Mr. Raymond F. Stellar, Engineer, St. Lawrence Seaway Development Corporation, who suggested the direction in which this work followed; to George S. Vest, Canadian Desk, U. S. Department of State; to the staff of the Library of Congress for their aid in obtaining many of the documents; and to my wife, whose patience during the preparation of this thesis was a work of love.

INTRODUCTION

The international relationship between the United States and Canada is unique for several reasons. First, a discussion of the "serious" problems facing the United States in world affairs usually is directed towards Europe, the Middle East, or Asia. Infrequently is the discussion directed towards Canada. The word "serious" is rarely used to describe the present diplomatic relations between America and Canada. The past has often seen tensions between the United States and Canada, but the present relations are not troublesome to either party.

Another unique feature is that both countries have the same English heritage and both have developed British forms of political democracy. The common heritage is not the only feature which has lessened strains between the two nations. They also have mutually beneficial economic ties.

Perhaps the most frequently mentioned fact evidencing the splendid relations between the United States and Canada is that between these two countries exists the longest unguarded boundary in the world. The only armaments, provided by the Rush-Bagot Agreement of 1817, are three gun boats for Canada and three for the United States upon the Great Lakes. Such a boundary is in sharp contrast to the boundaries of most pairs of nations, which place steel against steel.

Many disputes between the two countries have had to do with boundary questions, which have been settled by

treaty. Between 1710 and 1929 fourteen important treaties were negotiated between the United States and Great Britain, who controlled Canada's foreign affairs until 1931 when Canada became independent by the Statute of Westminster. The treaties with Great Britain were primarily concerned with waterways and boundaries. According to Samuel W. Boggs, whose study of boundaries has made him an authority in the field, the United States-Canadian boundary is "now one of the best-marked frontiers in the world."[1]

Since about 1911 the United States and Canada have been concerned with the development of a St. Lawrence Seaway. The Seaway, as it is now planned, will consist of a series of locks and dams between Montreal and Lake Ontario, a distance of approximately 185 miles. A secondary consideration is the deepening of existing channels throughout the entire Great Lakes-St. Lawrence system, including the twenty-seven mile Welland Canal. Such a system will allow most sea-going ships to enter and sail the Great Lakes. The two governments hope that a huge economic boom in the entire Western United States and Canada will result from such a system. Former President Franklin Delano Roosevelt stated his opinion in these words in 1941, "I know of no single project of this nature more important to this country's future in peace or war."[2]

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[1]Samuel W. Boggs, International Boundaries, (New York: Columbia University Press, 1940), p. 54.

[2]U.S., President, 1933-45 (Roosevelt), Communication, Senate Doc, No. 63, 1941, p. 2.

Several methods were attempted in the efforts to launch this important project. The method which finally launched the St. Lawrence Seaway was that of concurrent legislation. In this case the concurrent legislation was legislation, passed by the Congress of the United States and the Parliament of Canada, which provided for the building of the Seaway by both nations. In the United States the enabling legislation was the Wiley-Dondero Act of May 13, 1954.[3]

To consider how the bilateral constructed Seaway was accomplished, it is necessary to examine the history of other attempts to accomplish the same project. These attempts may be grouped into three periods.

The Treaty Attempts.--During the first period, from about 1928 to 1940, attempts were made to accomplish the Seaway by use of a treaty which was based on the Boundary Waters Treaty of 1909.[4] The purpose of this treaty was twofold: to settle questions pending at the time the Treaty was written and to permit the settlement of future, frontier problems.[5] The High Contracting Parties, the United States and Canada, agreed in Article III that any use of the boundary waters affecting the natural level or flow of boundary waters on the other side of the line could not

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[3]U.S., Statutes at Large, LXVIII, 92.

[4]U.S., Statutes at Large, XXXVI, Part 2, 2448.

[5]Robert A. Falconer, The United States As a Neighbour from a Canadian Point of View, (London: Cambridge University Press, 1925), p. 79.

be made except by authority of the two parties with the approval of the International Joint Commission created under Article VII of this same treaty.[6]

The International Joint Commission so created is composed of six commissioners, three from each country. Article VIII sets forth the jurisdiction of the IJC. Under Article IX differences between the United States and Canada may be submitted to the IJC for examination and report.[7]

In July, 1913 Senator Townsend of Michigan proposed a resolution calling for an agreement concerning navigation improvements in the international boundary.[8] With this resolution there began a series of actions culmunating in the treaty between the United States and Canada of July 18, 1932.

After World War I the IJC made an investigation and report of the situation under Article IX of the 1909 Treaty. The IJC recommended on December 19, 1921 that a treaty be made between the two countries for the improvement of navigational facilities between Montreal and Lake Ontario.[9] Interest in a treaty continued. In a note dated April 13, 1927 Frank B. Kellogg, Secretary of State, declared that the

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[6]U.S., Statutes at Large, XXXVI, Part 2, 2448.

[7]Ibid.

[8]U.S., Congressional Record, 63rd Cong., 1st Sess., L, Part 3, 2367.

[9]U.S., Senate, Report of the International Joint Commission, 67th Cong., 2nd Sess., Senate Doc. 114, 1921.

United States was willing to enter into negotiations with a view of framing a convention regarding the subject matter reviewed by the IJC.[10] A year later Mr. Kellogg again stated the need for a treaty.[11]

The Canadian Government was also considering a treaty for the St. Lawrence Seaway. The Report of the Canadian National Advisory Committee appointed on May 7, 1924 to advise the Government on the wider aspects of improving the St. Lawrence Waterway, declared that a treaty should be regulated and governed by existing treaties.[12]

The United States note of April 13, 1927 was answered by Canada on January 31, 1928. The answer suggested a delay in construction in the International Rapids Section until the Ontario Province could absorb more of the hydroelectric power to be created by the project.[13] A U.S. note of March 12, 1928 proposed a discussion of the problems.[14] On April 5, 1928 the Canadian Legation again emphasized that power development should not run ahead of demand.[15] The U.S. suggested that the treaty negotiations run concurrently with the engineering discussions.[16] On September 2, 1930 the U.S. Minister to

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[10]Canada, Department of External Affairs, St. Lawrence Waterway Project (Ottawa: 1928), pp. 5-6.

[11]Ibid., pp. 12-14.

[12]Ibid., p. 21.

[13]Ibid., pp. 7-12.

[14]Ibid., pp. 12-14.

[15]Ibid., pp. 15-16.

[16]Ibid., pp. 16-17.

Canada declared that his country was ready to go ahead with the development of the Seaway.[17]

A year later Canada expressed her willingness to discuss the Seaway by diplomatic channels rather than by a special commission.[18] The final report of the Joint Board of Engineers, announced on April 9, 1932,[19] served as the basis for negotiation of the proposed treaty. On July 18, 1932 the United States and Canada signed a treaty which provided for both navigational and hydroelectric developments.[20]

The treaty was sent to the United States Senate. The Senate Committee on Foreign Relations voted 15 to 5 for approval of the treaty with certain reservations respecting the private diversion of water on the St. Lawrence River.[21] The Senate debated the treaty from January 12 to March 14, 1934. The treaty was defeated by a roll-call vote of 46

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[17]Canada, Department of External Affairs, Correspondence and Documents Relating to St. Lawrence Deep Waterway Treaty, 1932, Niagara Convention, 1929, and Ogoki River and Kenogami River (Long Lake) Projects and Export of Electrical Power, (Ottawa: 1938), p. 7.

[18]U.S., President, 1933-45 (Roosevelt), Text of the Treaty Between the United States and Canada, signed at Washington July 18, 1932; Statements of the President and the Department of State; and Report of the Joint Board of Engineers of April 9, 1932, Department of State Publication No. 347 (Washington: U.S. Government Printing Office, 1932).

[19]Ibid.

[20]Ibid.

[21]U.S., Congressional Record, 73rd Cong., Special Sess., 1933, LXXVII, Part 1, 907.

ayes, 42 nays, 5 not voting.[22] Lacking the necessary two-thirds vote for passage the treaty was never again brought to a vote.

However, there were new treaty proposals. The negotiation of a new and more comprehensive treaty was urged by the American Minister to Canada on February 25, 1936.[23] Cordell Hull, Secretary of State, sent a letter of transmittal on May 28, 1938 to the Canadian Minister to the United States, Sir Herbert Marler. The letter contained "an informal and tentative draft of a proposed general treaty establishing what is, in effect, a broad plan covering the future utilization of the Great Lakes-St.Lawrence Basin to assure the maximum advantages to both peoples."[24] A reply dated December 26, 1939 by Loring C. Christie, Canadian Minister, expressed the desire for an informal meeting to iron out details.[25] Secretary Hull replied on January 3, 1940 the Messrs. Berle and Hickerson of the Department of State and Mr. Leland Olds, Chairman of the Federal Power Commission, would meet with him on January seventh.[26] Negotiations continued through correspondence.

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[22]U.S., Congressional Record, 73rd Cong., 2nd Sess., 1934, LXXVIII, Part 4, 4474-4475.

[23]Canada, Department of External Affairs, Correspondence and Documents, 1938.

[24]Canada, Department of External Affairs, Correspondence and Documents Relating to the Great Lakes-St. Lawrence Basin Development, 1938-1941, (Ottawa: 1941), p. 20.

[25]Ibid., p. 33.

[26]Ibid., p. 34.

On March 5, 1941 Canada inquired whether the 1936 and 1938 proposals should be explored or set aside because of the war effort.[27] The U.S. answered that funds and manpower should be made immediately available for the completion of the Seaway.[28] World War II acted as a catalyst to the negotiations. Immediate steps were taken to provide for expansion of navigational facilities upon the St. Lawrence River and for the creation of additional hydroelectric power. The result of these steps was the conclusion of an executive agreement dated March 19, 1941, which provided for the construction of works in the International Rapids Section of the St. Lawrence River and for completion of navigation improvements in other parts of the Great Lakes-St. Lawrence System.[29] The Agreement, subject to approval by reciprocal legislation, was a departure from attempts to build a Seaway by the treaty method.

The Executive Agreement Attempt.--The second period of attempts to accomplish the Seaway was from March 19, 1941 to November 4, 1952. During this period a number of bills were proposed in both the U.S. Senate and the House of Representatives for the approval of the 1941 Executive Agreement.[30]

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[27] Ibid., pp. 38-39.

[28] Ibid., pp. 39-42.

[29] U.S., Congressional Record, 77th Cong., 1st Sess., LXXXVIII, Part 3, 2521.

[30] U.S., Congress, Senate, Committee on Foreign Relations, The St. Lawrence Manual: A Compilation of Documents on the Great Lakes Seaway Project and Correlated Power Development, 83rd Cong., 2nd Sess., Senate Doc. 165, Presented by Mr. Wiley, 1955, pp. 17-18 and 175-200. A chronology of legislative attempts to approve the agreement is given.

The Concurrent Legislative Attempt.--The third period of attempts to build a Seaway began with the Canadian announcement of November, 1952 that the 1941 Agreement was obsolete and therefore was to be terminated.[31] As a consequence of this Canadian action, Senator Wiley of Wisconsin introduced a bill, S. 589, on January 23, 1953, authorizing completion of the project without reference to the 1941 Agreement. Bill S. 589 was one of a number of bills which authorized the completion of the project without reference to the 1941 Agreement.

On June 18, 1953 a new bill, S. 2150, was introduced by Senator Alexander Wiley. This bill resulted in the Wiley-Dondero Act of May 13, 1954. The Act created the St. Lawrence Seaway Development Corporation to construct navigation facilities in the International Rapids Section. Senator Wiley stated that four developments had transpired before the introduction of S. 2150, which no longer permitted the Seaway project to be considered in the form of a treaty or executive agreement. The new developments were (1) the Canadian note of November 4, 1952, (2) the approval by the International Joint Commission on October 29, 1952 of a new cost allocation plan, (3) the Canadian plan to build the

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[31] U.S., Congress, House, Committee on Public Works, Report, on S. Res. 2150, The St. Lawrence Seaway, Report No. 1215, 83rd Cong., 2nd Sess., 1954, pp. 80-81, and U.S., President, 1945-53 (Truman), Communication from the President of the United States, House Doc. No. 528, 82nd Cong., 82nd Cong., 2nd Sess., 1952.

Seaway phase of the project entirely within the boundary of Canada, and (4) the amending by the Power Authority of the State of New York of its application to conform with the new plans of the International Joint Commission for building the power project in the United States.[32]

The four new developments caused the Congress of the United States to consider bill S. 2150. The Committee on Foreign Relations approved S. 2150 by a 13 to 2 vote on June 16, 1953.[33] President Eisenhower urged the Congress to approve U.S. participation in the St. Lawrence Seaway Project[34] From January 13 to 20, 1954 the Senate debated S. 2150. Approval came on January 20 by a vote of 51 to 33.[35] The House Committee on Public Works voted 23 to 6 in favor of S. 2150 with minor amendments on February 3[36] and reported the bill to the floor on February 19.[37] The House of Representatives voted on May 6 in favor of the bill, 241 to 158.[38]

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[32]Alexander Wiley, "The St. Lawrence Project Will Be Built!," The Heartland, I (Summer, 1953), pp. 39-40.

[33]U.S., Congress, Senate, Committee on Foreign Relations, Report, on S. Res. 2150, The St. Lawrence Seaway, Report No. 441, 83rd Cong., 1st Sess., 1953.

[34]U.S., Congress, House, Committee on Public Works, Report, on S. Res. 2150, 1954.

[35]U.S., Congressional Record, 83rd Cong., 2nd Sess., 1954, C, Part 1, p. 525.

[36]U.S., Congressional Record, 83rd Cong., 2nd Sess., 1954, C, Part 2, 2090.

[37]U.S., Congress, House, Committee on Public Works, Report, on S. Res. 2150, 1954.

[38]U.S., Congressional Record, 83rd Cong., 2nd Sess., 1954, C, Part 5, 6160.

The bill was signed by President Eisenhower and became Public Law 358 of the 83rd Congress on May 13, 1954.[39]

Thus, after almost a half century of negotiation and attempted legislation a St. Lawrence Seaway bill became law. The attempts to provide an accomplishing instrument had effects upon American constitutional practice. The effects related to the conduct of foreign affairs by the executive and legislative branches of the national government. Molded by two generations of changing ideas in the executive and legislative branches, fluctuations were bound to exist in the various proposals envisioning ocean-going ships passing through the great waterway dividing the United States and Canada.

The friendly attitude that existed between these two countries influenced the final method by which the Seaway was brought into being. This same friendly attitude presumably will continue to affect the future control of the Seaway. There is no guarantee that the friendly relations which were the basis for the concurrent legislation will prevent Canada from proceeding in this area alone. Without an explicit bilateral guarantee covering the St. Lawrence system, Canada could build an all-Canadian Seaway and accomplish her national interest at the expense of the United States.

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[39]U.S., Statutes at Large, LXVIII, 92.

CHAPTER II

BASES FOR THE SEAWAY

ALTERNATIVES

The Treaty Method

Several questions may be raised as a result of two generations of negotiation and attempted legislation for the St. Lawrence Seaway: Why was the treaty method attempted? Why was the treaty method replaced by the executive agreement method? Why was the executive agreement method replaced by concurrent legislation? What were the legal bases given for the above alternatives? What alternatives were available to the executive and legislative branches for accomplishing the Seaway? Was the accomplishing method the result of executive and legislative co-operation? An attempt to answer these questions is set forth in this chapter.

The definition of a treaty is established. However, the subject matter and the uses to which the treaty may be put do not appear to be settled. "In the jurisprudence of the United States . . . the term 'treaty' is properly to be limited, although the Federal statutes and the courts do not always so confine it, to agreements approved by the Senate."[40]

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[40]John B. Moore, "Treaties and Executive Agreements" Political Science Quarterly, XX (September, 1905), 388.

Green H. Hackworth has noted in his Digest of International Law that:

> The Constitution of the United States provides in article II, section 2, that the President shall have power "by and with the Advice and Consent of the Senate, to make Treaties." The term "Treaties" as there used includes any international agreement, regardless of the terminology by which it is described, if it is of such a nature as to require the advice and consent of the Senate to ratification by the President.[41]

Additional support for the definition of a treaty, as an agreement which requires the advice and consent of the Senate, has been given by Myres S. McDougal and Asher Lans.

> Just as often these same writers and speakers fail, on the one hand, to make certain necessary distinctions between the very different steps, or governmental activities, that are involved in the total process of "making" and international agreement and, hence, fail also to make necessary distinctions between the sometimes very different, appropriate constitutional bases for each of the different steps involved in the total process... By common practice under that law, the term "treaty" is used to refer to every agreement whether written or verbal, important or unimportant, with one or more foreign nations which prior to ratification by the President receives the consent of two-thirds of the Senate, and which is never submitted for approval to the House of Representatives.[42]

Therefore, it may be concluded that a treaty is any agreement made with another nation which receives the consent of the Senate and is thereafter ratified by the President.

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[41](Washington: U.S. Government Printing Office, 1943), V, 1.

[42]"Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy", The Yale Law Journal, LIV (March, 1945), 195, 197-199.

The treaty method was used in 1932 in an attempt to create the project. During the period of treaty negotiation from about 1911 to 1932 no justification was given for using the treaty as the accomplishing instrument to the exclusion of any other method. The treaty method was accepted as the proper method. Though Senator Townsend of Michigan proposed in 1911 only an agreement concerning navigation improvements, the negotiations following his proposal were concerned with a treaty to the apparent disregard of all other methods. However, whether existing treaties or a new treaty was necessary in order to build the seaway was of concern to the Canadian National Advisory Committee.[43]

Justification for the treaty as the method of implimentation did not appear until an alternative to the treaty method was proposed to the Congress of the United States in the form of the Executive Agreement of 1941.

The first evidence of an alternative method to a treaty was given by Adolf A. Berle, Jr., Assistant Secretary of State. He testified on June 17, 1941 that agreement had been reached by a group of experts in the Department as early as 1932 that concurrent or reciprocal legislation was a possible alternative method to the treaty.[44] Secretary

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[43]Canada, Department of External Affairs, St. Lawrence Waterway Project (Ottawa: 1928), p. 21.

[44]U.S., Congress, House, Committee on Rivers and Harbors, Hearings, Great Lakes-St. Lawrence Basin, XVII, 1941, 52.

of State Cordell Hull, under whose responsibility the proposed 1936 and 1938 treaties were negotiated, expressed the opinion in a letter dated May 23, 1944 that it was a question of little importance whether the treaty method or the executive agreement method was to be pursued.[45]

The Seaway Project had been presented to the Senate in treaty form before it appeared as an executive agreement. This fact supported the argument that the treaty method was the method of accomplishing the Seaway and formed a background for the thoughts of the Senate. Following the failure of the treaty method the Senate was asked to consider another method of creating the same project. For the Senate to have agreed to a new method proposed by the executive branch would have resulted in a diminishing of the Senate's treaty prerogative. Precedent was established by the 1932 treaty to which the proponents referred throughout their arguments.

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[45]U.S., Congress, Senate, Subcommittee of the Committee on Commerce, Hearings, on S. 1385, Great Lakes-St. Lawrence Basin, 1945, p. 75.

The Executive Agreement Method

The Constitution of the United States uses both the words treaty and agreement. The treaty is an agreement formally ratified by the Senate. Agreements made by the president without the consent of the Senate are known as executive agreements.

Hunter Miller has written that the term "executive agreement is doubtless generally used to include international agreements made by the Executive (whether under statutory authority or not), but excluding those made by and with the advice and consent of the Senate."[46] Agreement with the above definitions has been given by Wallace McClure who has defined a treaty as "an international act approved by the Senate under the two-thirds rule. All other international compacts of the United States are called 'executive agreements'."[47]

However, while there is agreement as to the definitions of a treaty and the executive agreement, there is an apparent lack of agreement among the authorities as to the proper subject matter of these instruments. Charles C. Hyde looked upon the subject matter or character of the objectives sought by the agreement as the factor which would determine the

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[46]Hunter Miller (ed.), Treaties and Other International Acts of the U.S. of America (Washington: U.S. Government Printing Office, 1931), I, 9-10.

[47]International Executive Agreements: Democratic Procedure Under the Constitution of the United States (New York: Columbia University Press, 1941), p. 3.

proper method to be used.[48] Frances B. Sayre, former Under-Secretary of State, stated that international agreements which involve political issues or changes in the national policy of the United States and those international agreements having a permanent character usually take the form of treaties.[49]

The question of whether the St. Lawrence Seaway was the proper subject of a treaty, executive agreement or both appeared in much of the testimony given during the Congressional hearings.

The bulk of this testimony was given from 1941 to 1952 when implementing legislation for the 1941 Agreement was considered by Congress.

The proponents of the treaty method gave several reasons why the Seaway Project should not be accomplished by executive agreement. Mr. Edwin Borchard, legal consultant for the St. Lawrence Project Conference, a group opposing the project, stated that the size of the project necessarily called for a treaty. Incorporated into the word size were the huge cost, the length of time for construction, a special governmental commission, and the obligations to be imposed

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[48]"Constitutional Procedures for International Agreement By The United States," Proceedings of the American Society of International Law, 31st Meeting (Washington, 1937), pp. 45-46.

[49]"The Constitutionality of the Trade Agreements Acts," Columbia Law Review, XXXIX (May, 1939), 755.

at a future date.[50] In addition the Minority Report on S. J. Res. 104 stated that the treaty method should have been employed because of the importance of the project.[51] Tyre Taylor, general counsel, Southern States Industrial Council, declared that the use of the executive agreement was an attempt to by-pass the constitutional requirement of a treaty. He further stated that, should such a change of label be allowed, a "vast additional authority will accrue to the executive branch of the Government."[52]

Support for the executive agreement method of authorizing the Seaway Project came from the Department of State. Following the rejection of the 1932 treaty and the proposed treaties of 1936 and 1938 the Department supported the building of the Seaway Project under the aegis of the executive agreement. The shift from the treaty method to the executive agreement method came about because the Department, as represented by Secretary of State Hull, believed either method was legal. To Secretary Hull the

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[50]Edwin M. Borchard, Opinion on the Question Whether the St. Lawrence Waterway and Power Project Can be Concluded by Executive Agreement with Canada or Requires a Treaty (Washington: Press of Byron S. Adams, 1944), p. 21.

[51]U.S., Congress, Senate, Committee on Foreign Relations, Report, on S. J. Res. 104, Great Lakes-St. Lawrence Basin, Together with Minority Views of Mr. White, Report No. 1499, 79th Congress, 2nd Sess., 1946, p. 96.

[52]U.S., Congress, Senate, Subcommittee of the Committee on Foreign Relations, Hearings, on S. J. Res. 104, 1946, p. 713.

question was of little importance in his letter of May 23, 1944.[53] Assistant Secretary of State Adolf A. Berle, Jr. had stated on June 17, 1941 that a group of State Department experts in 1932 were agreed that there were alternatives to the treaty method.[54]

However, there are limitations upon the substitution of the executive agreement for a treaty. Under Secretary of State Dean Acheson set forth some of these limitations when he noted in 1946 the limitations upon executive agreement making. "The most important limitation is that the subject matter of the agreement must be in the field of Congressional responsibility under the Constitution."[55] Mr. Acheson expanded this remark by saying:

> "...that whether the action of the Congress with respect to a foreign government takes the form of (a) authorization, (b) approval, or (c) enactment of implementing authority, the substantive result in each case is precisely the same. Whichever method may be used, the power of Congress to act in the matter rests upon its delegated powers under the Constitution."[56]

The Department of State believed that the Seaway Project was such an important measure that it should have

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[53]U.S. Congress, Senate, Subcommittee of the Committee on Commerce, Hearings, Great Lakes-St. Lawrence Basin, 1945, p. 75.

[54]U.S., Congress, House, Committee on Rivers and Harbors, Hearings, Great Lakes-St. Lawrence Basin, XVII, 1941, 52.

[55]U.S., Congress, Senate, Subcommittee of the Committee on Foreign Relations, Hearings, on S.J. Res. 104, Great Lakes-St. Lawrence Basin, 79th Cong., 2nd Sess., 1946, p. 1038.

[56]Ibid., p. 1044.

been presented to the House of Representatives. This reason was expressed by Assistant Secretary Berle on June 17, 1941 when he spoke before the Committee on Rivers and Harbors.

> I propose to close this phase of the subject by saying that it did seem that in an issue of this size and of this importance, it was hardly fair to place in the hands of the minority of one house the ultimate decision on a measure of very great importance to the entire country. For that reason the agreement form was selected, and it is in that form that it is here.[57]

Mr. Hackworth, legal advisor of the Department of State, was also concerned over whether the House of Representatives would have granted the necessary funds for the Seaway.[58] He viewed action by the House as necessary and proper since, if the House passed upon the agreement, it could be reasonably assumed that this same body would co-operate in appropriating the funds. He further reasoned that action taken by the House would be evidence to Canada that funds would be appropriated by the House. No such evidence would have appeared if the agreement took the form of a treaty and was ratified only by the Senate.[59] Another reason for bringing the agreement to the House was that the whole Seaway Project was considered as a domestic project. Secretary Hull held to this opinion. He also held that the House should pass upon the agreement because the House would have to appropriate the funds.

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[57] U.S., Congress, House, Committee on Rivers and Harbors, Hearing, Great Lakes-St. Lawrence Basin, XVII, 1941, 45.

[58] U.S., Congress, Senate, Subcommittee of the Committee on Commerce, Hearings, on S. 1385, 1945, pp. 27-28.

[59] Ibid.

> The issues involved in the project are largely domestic rather than international.
> ...It therefore seemed appropriate that the House of Representatives should have a voice in passing on an international obligation involving so large an appropriation of Federal funds.
> To my mind it is a question of little importance which method is pursued.[60]

The Department of State presented argument on February 18, 1946 to show how the St. Lawrence Seaway Project was within the scope of the delegated powers of Congress. In his testimony, Under Secretary Acheson stated that the Agreement of 1941 could be accomplished because of (1) the powers given Congress under the commerce clause, (2) the right of Congress to legislate on financial and monetary matters, and (3) the historical precedent established "through agreements entered into by the executive branch with legislative action."[61]

An added reason for using the executive agreement was that it was permitted under the Boundary Waters Treaty of 1909. Permission was said to exist under Article XIII which pointed to such "special agreements" as that of 1941.[62]

Furthermore, geography influenced the Department to change from a treaty to an executive agreement. Mr. Acheson viewed the St. Lawrence Seaway system as something out of the ordinary because of the geographical considerations surrounding the Great Lakes-St. Lawrence Seaway.

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[60] Ibid., p. 75.

[61] U.S., Congress, Senate, Subcommittee of the Committee on Foreign Relations, Great Lakes-St. Lawrence Basin, 1946, p. 33.

[62] Ibid., p. 58.

> Although it could not be claimed that the United States has acquired sovereignty to or title in any part of the Great Lakes-St. Lawrence system lying outside of its boundaries, the rights which it has acquired therein by previous treaties--in recognition of its natural interest in navigation in such system by virtue of geographical consideration--are of such special character as to lift any agreement with Canada relating to construction by the United States in connection with navigation in such waters, outside of the usual class of foreign agreement.[63]

Canada's geographical position to the United States was mentioned repeatedly in much of the testimony before the Congress and in the official reports. The influence that geography had in determining the method of agreement appears to have been large. As pointed out by Mr. Acheson, geography lifted any agreement with Canada in the area of the Seaway as beyond the scope of the normal agreement.

Conclusions--The failure of the Senate to pass the 1932 treaty gave the Department of State an opportunity to present an alternative to the Congress in the form of an executive agreement. Opinion within the Department was that either method was legal. Several reasons were stated by members of the Department as to why the executive agreement might replace the treaty. This second alternative for building the Seaway was not implemented by the Congress of the United States. The termination of the Agreement by Canada in November, 1953, provided the opportunity for a third alternative.

The third alternative for building the Seaway originated with the Congress of the United States and not with the

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[63] Ibid., p. 1048.

Department of State. This third alternative took the form of concurrent legislation. Concurrent legislation in this case meant joint action by the United States and Canada. These two nations are to complete the Seaway construction according to a previous plan of joint co-operation provided by legislation enacted within each nation. Such legislation in the United States was the Wiley-Dondero Act.

This Act provided for navigation facilities in the St. Lawrence River. An executive order provided for the power development.[64] Thus, what had been provided in the Treaty of 1932 and the Executive Agreement of 1941 was in 1954 provided by two different instruments, legislation and an executive order. Although, the navigation and power developments are to be built concurrently, the St. Lawrence Seaway Corporation will build the Seaway while the New York State Power Authority will build the hydroelectric power project. Thus, what was to have been built by two nations is being built by the federal government, the State of New York, and Canada.

Congress moved from an executive agreement with implementing legislation to concurrent legislation. The transition was an easy one. The preliminary negotiations with Canada had been accomplished. The technical details of the Seaway had been blueprinted. However, this third alternative needed legal justification, very similar to that given by the Department of State in support of the agreement method.

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[64]U.S., Federal Register, XVIII (November 6, 1953), 7005.

Refusing to implement the 1941 agreement, Congress presented an alternative justified on grounds closely resembling those given in support of the Agreement. Instead of an agreement based on the delegated powers of Congress there was legislation based on the same powers. Instead of an agreement based on the commerce clause of the Constitution there was legislation based on the same clause. Previously implementing legislation was necessary because the House must appropriate the funds for the Seaway; now, concurrent legislation was necessary for the same reason. In place of an executive agreement stemming from Article III of the 1909 Treaty was substituted concurrent legislation stemming from the same article. If, geography lifted any agreement with Canada in this area beyond the scope of the normal agreement, then concurrent legislation received such a lift.

CHAPTER III

THE SEAWAY PROJECT--POINTS OF VIEW

An International Issue

The Seaway Project may be considered from two points of view. First, it may be considered as an international issue; the project may be viewed as requiring a treaty even though this was not the accomplishing instrument. If the project is an international issue, the passage of the Wiley-Dondero Act by the Senate was a waiver of its treaty prerogative. Secondly, the project may be considered as a domestic issue; the project may be viewed as requiring only domestic legislation which is the form of the accomplishing instrument.

One reason for the Senate's failure to pass implementing legislation for the 1941 Agreement was that such legislation would have resulted in a diminishing of the Senate's treaty prerogative. Previous to the use of concurrent legislation the executive department had sponsored implementing legislation. Thereafter, the legislative department sponsored concurrent legislation. The passage of this legislation supposedly resolved the waiver problem because the Senate, whose ratification was necessary for a treaty, was a sponsor of its own legislation. The Senate's argument resolved itself. The Senate had saved "face" by presenting its own version of an accomplishing Seaway instrument.

However, while the Senate may have been reconciled, knowing that it was not waiving its two-thirds rule as a

result of executive compulsion, a problem yet remained. Did the Senate waive its two-thirds rule by passing the Wiley-Dondero Act? If so, is this action justifiable? A brief review of the two-thirds rule may be helpful at this point.

The two-thirds rule in this case may have been waived by a navigation consideration. This rule was influenced originally in its adoption by two specific aims, navigation and fisheries.[65] Dissatisfaction with the rule came after the rejection of the Treaty of Versailles.[66] However, the effectiveness of the rule in the rejection of treaties has not been as effective as has been the strong opposition of influential Senators.[67] The opposition of these Senators has resulted in the formation of other methods of accomplishing what the rejected treaties were to have accomplished. From the executive branch has come the wider use of executive agreements; from the legislative branch has come the wider use of acts and joint resolution. According to James W. Garner in "Acts and Joint Resolutions of Congress as Substitutes for Treaties", there is no legal reason why the easier method may not be used.

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[65]R. Earl McClendon, "Origin of the Two-Thirds Rule in Senate Action Upon Treaties:, American Historical Review, XXXVI (July, 1931), 768.

[66]R. Earl McClendon, "The Two-Thirds Rule in Senate Action Upon Treaties, 1789-1901", American Journal of International Law, XXVI (January, 1932), 37.

[67]Royden J. Dangerfield, In Defense of the Senate: A Study in Treaty Making (Norman: University of Oklahoma Press, 1933).

> In short, the power of the President and the Senate to regulate foreign relations is not an exclusive power; it is only when an agreement takes form of a "treaty", as that term is used in the Constitution, that this power belongs to them. There is no inconsistency between the authority of the President and the Senate to regulate foreign relations through agreements in the form of "treaties" and the power of the President and Congress to deal with matters of foreign policy through legislative action. Which of the two procedures shall be employed in a give case is a matter of practical convenience or political expediency rather than of constitutional or international law. If the procedure of treaty regulation proves ineffective in a particular case because of the constitutional impediment relative to ratification, there is no reason of constitutional or international law why recourse to the easier alternative or legislative action cannot be had, if the President and a majority of the two Houses of Congress so desired as has been done with success on various occasions in the past.[68]

Charles C. Hyde looked upon the expansion of Congressional agreement making to be of vast potentialities as now interpreted under the commerce clause.[69] It is to be remembered that this was the interpretation given by the Department of State.[70]

History yields past attempts at by-passing the treaty method by waiving the two-thirds rule. The Canadian Reciprocity Agreement of 1911 was viewed as a waiver of the treaty prerogative although it was not an issue at that time.[71]

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[68]"Acts and Joint Resolutions of Congress as Substitutes for Treaties," American Journal of International Law, XXIX (July, 1935), 488.

[69]Charles C. Hyde, "Constitutional Procedures for International Agreement by the United States," Proceedings, 1937, pp. 53-54.

[70]Supra, Chap. II, p. 25.

[71]Borchard, Opinion ..., 1944, p. 24.

Another attempt to by-pass the two-thirds rule was the adoption of the Panama Joint Resolution of 1943 as noted by Herbert W. Briggs.

> Even from those Senators who favored the passage of the Panama Joint Resolution came expressions that it should have taken the form of a treaty, and that the post-war peace settlement should be embodied in a treaty subject to the advice and consent of the Senate.[72]

A parallel may be drawn from the justifications given in support of the Panama Joint Resolution of 1943 and the Wiley-Dondero Act of 1954.

> The specific justifications alleged for embodying the Panama transaction in the form of a joint resolution instead of in a treaty were: (1) that it involved an appropriation, and, even if a treaty had been made, the subsequent action of both houses of Congress would have been necessary; (2) that it involved the disposition of property belonging to the United States, a power given to Congress by Art. IV, Sec. 3, of the Constitution; and (3) that it "really" carries out certain obligations assumed under the treaties of 1903 and 1936 with Panama.
> .....
> However, the mere fact that legislation is necessary to implement a treaty is not conclusive on the question whether, in principle, the method of joint resolution should be substituted for the treaty method envisaged by the Constitution. Even as a matter of expediency, there appear to have been cogent arguments for embodying the Panama transaction in an international agreement. Examination of the joint resolution reveals that it seeks to impose at least two obligations of an international legal character on the government of Panama.[73]

Both the Resolution and the Act were justified in place of a treaty because they involved an appropriation. If a

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[72]"Treaties, Executive Agreements, and the Panama Joint Resolution of 1943," American Political Science Review, XXXVII (August, 1943), 687.

[73]Ibid., 688.

treaty was made in either case, the Congress would have had to make the appropriation. There was unnecessary danger in twice exposing the issues to the Senate. If the issues were decided by either a resolution or an act only one defeat was possible and that not by a two-thirds vote of the Senate but only by a majority vote.

Both the Resolution and the Act were justified as permissable under the delegated powers of the Constitution. The Resolution was based on Article IV, Sec. 3. The Act was based on Article I, Sec. 8, the commerce clause.

Both the Resolution and the Act were justified on the grounds that they were carrying out the provisions of a treaty. The Resolution was related to the treaties of 1903 and 1936 with Panama, whereas the Act was related to the Boundary Waters Treaty of 1909, as a "special agreement," although this treaty is not mentioned in the Wiley-Dondero Act.[74]

The waiver problem did appear in the testimony relating to the Seaway Project. The Department of State viewed the problem not as a legal question but as one of senatorial prerogative which could be waived if the Senate wished to do so.[75]

Senator Ferguson of Michigan posed this question to Mr. Borchard. "Now can a constitutional body like the Senate and the Congress be estopped or waive its rights?" The reply

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[74]U.S., Statutes at Large, LXVIII, 92.

[75]U.S., Congress, Senate, Subcommittee of the Committee on Foreign Relations, Hearings, on S. J. Res. 104, 1946, p. 1040.

was that it could only be done by the "continuous disregard of its own rights."[76]

A co-author of the Wiley-Dondero Act believed that it was possible for the Senate to waive its two-thirds right.

> Senator Overton. I don't think it is a question of waiver altogether, but if in one instance you ratify what is unquestionable a treaty by majority vote, and the Senate consents to it through a majority vote of its members in the future when another treaty is submitted they cannot with any degree of force or reason say, "We require a two-thirds vote in this particular instance." The Senate of the United States can't blow hot and cold.
>
> Senator Wiley. Nothing is impossible for the Senate of the United States.[77]

Conclusions.--General dissatisfaction with the two-thirds rule appeared as a result of the Senate's refusal to ratify the 1932 Treaty. In order to avoid the rule several alternatives to a treaty were introduced. Two of the alternatives were the Executive Agreement of 1941 and the Wiley-Dondero Act of 1954. The possible use of these alternatives raised the problem of whether the Senate could waive its treaty prerogative. Both the executive and legislative branches believed that a waiver could be accomplished if the Senate so desired. Among those who believed that a waiver was possible was Senator Alexander Wiley of Wisconsin, co-author of the Wiley-Dondero Act. Thus, if the Seaway Project was an international issue, that is, a project necessitating a treaty, the passage of the Act has resulted in a waiver of the Senate's treaty prerogative, an abrogation of the two-thirds rule.

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[76]U.S., Congress, Senate, Subcommittee of the Committee on Commerce, Hearings, on S. Res. 1385, 1945, p. 151.

[77]Ibid., pp. 151-152.

A Domestic Issue

The Seaway Project may be considered as a domestic issue; the project may be viewed as requiring only domestic legislation.

The Wiley-Dondero Act will bring changes to the St. Lawrence River system: the Long Sault Canal will be built; there will be a deepening of the navigation channel in the open river; there will be dredging in the Thousand Island Section. These developments, together with those in Canada, will permit ocean-going ships to enter the Great Lakes. The Barnhart Island Powerhouse will be built to supply the United States and Canada with additional hydro-electric power.

The changes given above will give to the United States additional responsibilities in the area: shipping traffic will have to be regulated in the new canal and improved channel; tolls will be levied; and if so, the toll rates must be fixed; the United States will determine which nations may use the Seaway. These responsibilities may be imagined, but there may also exist for the United States new additional, unseen responsibilities.

With these new responsibilities there will come rights which the United States gains as a result of the changes and obligations. These may be new rights, or an extension of older rights. Along with changes in the obligations and the physical appearance of the St. Lawrence River system may come changes in United States' rights in the St. Lawrence River.

Because the St. Lawrence River is regulated jointly by the United States and Canada, the rights of the United States in the river are those expressed in agreement form with Canada. The Wiley-Dondero Act will bring changes in the river which may affect the rights of the United States and Canada. Thus, the problem is to determine if and how the rights of the United States may be affected by the Wiley-Dondero Act. As domestic legislation, the Act may not give any new rights to the United States. However, such domestic legislation may be its union with some international agreement secure for the United States new rights or guarantee existing rights in the St. Lawrence River.

This possibility, that the Act affects the rights of the United States because it is related to some agreement or action of the United States Government, may be considered in five points. These five points are (1) the geographical proximity and friendly relations between the United States and Canada, (2) the "international co-operation" proposed by the Act, (3) the Boundary Waters Treaty of 1909, (4) the use made of the International Joint Commission, and (5) the exchange of diplomatic notes following the passage of the Act.

Geographical proximity and friendly relations.--As previously shown the proximity of the St. Lawrence River, flowing as it does between the United States and Canada, has played a major role in determining the type of agreement necessary to build the Seaway. That geography influenced the

negotiations was proved by the frequent references of both American and Canadian officials to the nearness of each country to the other and to the political harmony between the two nations.[78] Whether such friendly cooperation could have existed if the Seaway were built thousands of miles from the two countries may be doubted. The problem of distance cannot be compared in scope to the British and French positions while negotiating, constructing, operating and defending the Suez Canal.

Reference has been made to the friendly relations between the United States and Canada as a reason for replacing international agreements with concurrent legislation. Senator George, Chairman of the Senate Committee on Foreign Relations, viewed the construction of United States' foreign relations upon friendly attitudes between nations, as one of the major defects of the whole foreign relations program. In public hearings on the Seaway Project, Senator George elaborated on this theme.

> What alarms me and always has alarmed me is that in an enterprise of such vast importance to the United States we are not willing to negotiate a treaty which will fix our rights and give us some assurance that treaty rights will be respected....
>
> I understand that Canada has always historically been very friendly to us, and that our relations are very fine. But I do not think it takes any prophet to forsee that Canada will become one of the real competitors of the United States in many fields of endeavor in some remote period in the future....

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[78] Supra, chap. ii, p. 25.

> At the same time I have never been able to see why, in a matter of such a vast project which will last through the indefinite future we should not have a treaty rather than a legislative act, here and in Canada.
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> ....
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> ....When I came to the Senate we were considering a treaty dealing with this matter which failed of ratification. Because it required a two-thirds vote to ratify that treaty there was then a switch over to the legislative process, because there a bare majority was necessary. We abandoned, it seems to me, the real assurance that we might have had through treaty negotiations, because I think it is impossible for Canada and the United States to agree thoroughly. I think it is possible when we look at this problem in the long light that we ought to rely again on the treaty rather than legislative acts....
>
> I understand that between Canada and our Government there has always existed, in the large sense, at least, very amicable and friendly relations, and I hope this always will continue, and I have no doubt it will. But this is essentially a foreign problem because it involves two separate governments wholly independent of each other. When we base transactions of this kind upon the assumption that friendly relations and unselfish action will always be continued by the governments, we are doing exactly what I think has been one of the real defects in our whole foreign relations program. I do not think you can safely do it, because in the long run I do not think you can depend upon disinterested action by any government towards another government. It is always going to be controlled by the self-interest, in the long run, of the two parties in interest or several parties in interest.[79]

The friendly relations mentioned above were not strong enough to overstep the traditional practice of non-interference by a foreign nation with the internal affairs of another. There was no official Canadian attitude towards the Wiley Bill. The reason given by the Assistant Secretary of State for Economic Affairs, Livingston T. Merchant, was that it was

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[79]U.S., Senate, Subcommittee of the Committee on Foreign Relations, Hearings, on S. Res. 589, 1953, pp. 30-31, 56, 479-480.

not the practice of Canada to comment "on internal domestic legislation of the United States."[80]

The attitude of Canada toward United States legislation for the Seaway could be used to the benefit of Canada and the detriment of the United States. Canada could use this record of non-interference as a basis for not considering any official United States opinion towards an all-Canadian route. Canadian legislation for such a route would be domesitc legislation beyond interference by the United States.

The "international cooperation" proposed by the Act.-- Basically, the Wiley-Dondero Act provided that the United States would construct certain locks, canals and other waterway features on its side of the International Section of the St. Lawrence River. In addition, the United States Secretary of Defense for International Security Affairs, Frank C. Nash, viewed the management, control and protection of the Seaway as requiring the co-operation of the two nations.[81] The Corporation created by the Act was authorized to make certain arrangements with the St. Lawrence Seaway Authority of Canada relative to construction and operation of the Seaway. This authorization is not indicative of anything more than a statement to work with Canada in harmony during the construction of the Seaway. The Act provided that the Corporation shall not proceed with any construction until its Canadian counterpart provides assurances that it will complete the Canadian

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[80] Ibid., pp. 486-487.

[81] Ibid., p. 531.

works. Such a feature does not illustrate the type of governmental sanction which could be given under some type of international agreement.

The Minority Report on the Wiley Bill recorded in strong tones its disapproval of using concurrent legislation as the "agreement" for making the waterway a joint cooperation.

> 9. No agreement for making the waterway through the St. Lawrence River a joint cooperative project exists between Canada and the United States, and this legislation would not create one. Until there is such an agreement this legislation merely provides for useless navigation works in the International Rapids Section duplicating those already planned on the Canadian side of the river. An agreement making the waterway a joint cooperative project and setting forth all the terms and conditions of such an agreement should be reached before this legislation is considered, not afterwards, especially in view of the publicly expressed disinterest in such an agreement by Canada.[82]

The immediate Seaway problem was the construction of certain navigational facilities with long range economic and political consequences. The use of concurrent legislation, while satisfying the demands for construction of the Seaway, opened floodgates through which have come a multitude of problems, real or imagined. One such problem is the future control, joint or otherwise, of the St. Lawrence River System.

An internal legislative instrument such as the Wiley-Dondero Act, which provides for co-operation in the international area, may not be binding in the sense that a treaty is binding.

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[82]U.S., Congress, House, Committee on Public Works, Report, on S. 2150, 1954, p. 110. Italics are present in the original.

The following opinion by Dean Acheson, Under Secretary of State, supports this conclusion:

> The fact that the Congress may condition an otherwise valid piece of legislation upon the existence of similar legislation in another country does not in any way bind future actions of the United States.[83]

Promises of internal improvements, though they may benefit a riparian state, may not be regarded as international promises.

The construction of the Seaway could not be improved by a type of co-operation not permitted by the Wiley-Dondero Act. The whole project depended upon the attitude of Canadian officials who are not bound by any international agreement. However, since the Canadian government wished to co-operate, the construction was undertaken. The physical result will be the same whether accomplished by an international agreement or by a spirit of co-operation through concurrent legislation.[84]

The Boundary Waters Treaty of 1909.--Another international reference by which the Wiley-Dondero Act was justified, was the attachment of the Act to the Boundary Waters Treaty of 1909.[85] The rights of the United States in the St. Lawrence River are those guarantied by the 1909 Treaty and the Order of Approval issued by the International Joint Commission in 1952.[86] Since this 1909 Treaty is of such importance to the

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[83] U.S., Congress, Senate, Subcommittee of the Committee on Foreign Relations, Hearings, on S. J. Res. 104, 1946, p. 278.

[84] Interview with Raymond F. Stellar, Engineer, St. Lawrence Seaway Development Corporation, March 21, 1956.

[85] U.S., Statutes at Large, XXXVI, Part 2, 2448.

[86] Interview with George S. Vest, Canadian Desk, U.S. Department of State, January 25, 1957.

United States, a clearer understanding of its purpose and provisions is necessary.

The 1909 Treaty had a two fold purpose; to settle questions pending at the time the Treaty was written, and to permit the settlement of future, frontier problems.[87]

The preliminary article of the 1909 Treaty defined the boundary waters as "...from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes..."[88]

Article I states "...that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally..."[89]

The International Joint Commission created under Article VIII is composed of six commissioners, three from each country. Article VIII of the 1909 Treaty sets forth the jurisdiction of the IJC. Under Article IX differences between the United States and Canada may be submitted to the IJC "for examination and report."[90]

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[87]Falconer, The United States as a Neighbour..., 1925, p. 79.

[88]U.S., Statutes at Large, XXXVI, Part 2, 2448.

[89]Ibid.

[90]Ibid.

Mr. Percy E. Corbett in his work, The Settlement of Canadian-American Disputes, states that the earliest attempts for an international commission were started in 1894-1895 at the Irrigation Congresses attended by the United States, Mexico, and Canada. A resolution was adopted urging that an international commission be established to settle conflicting claims along international streams.[91]

The resolution was accepted by Canada and the International Waterways Commission was established with very limited powers.

> It could merely investigate and report. It had none of the semi-judicial or administrative duties which in certain respects have been entrusted to its successor. At the same time, the range of territory over which it exercised its powers was greater than that in which the International Waterways Commission was empowered to investigate and report on questions dealing with "waters adjacent to the boundary between Canada and the United States, including all the waters finding their way by the River St. Lawrence to the sea"; so, you will see that its scope was quite wide geographically though the powers were limited merely to investigation and report.
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> ....
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> One thing the old International Waterways Commission did was to lay down certain conditions of priority in the use of boundary waters, domestic and sanitary uses being first, navigation next, and power and irrigation third, and so on. Another thing they did was to recommend to both governments that they should set up a permanent body which would take the place of this temporary body and to use it for the settlement of all boundary waters questions. That was agreed to by both governments, a treaty was eventually ratified which provided not merely for the

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[91] The Settlement of Canadian-American Disputes: A Critical Study of Methods and Results (New Haven: Yale University Press, 1937), p. 50.

> establishment of a permanent body - the International Joint Commission of today - but referred to it certain boundary water problems and also made it possible to refer to this commission certain broader questions in dispute between the two countries that had no special reference to the boundary waters; in other words, making it, as Sir Allen Aylesworth said, a miniature Hague Tribunal.[92]

The International Waterways Commission was superseded by the International Joint Commission in 1909 within the provisions of the Boundary Waters Treaty of that same year. Thus the 1909 Treaty established a boundary and the International Joint Commission, built upon the historical foundations of the International Waterways Commission.

Opinions were not in harmony over the particular mission to be undertaken by the International Joint Commission during its juvenile period. Secretary of State Charles Evans Hughes suggested in 1923 that another commission be established to settle the "domestic questions" between the United States and Canada. The St. Lawrence waterway question was thought by some to be a "domestic question" during this period.[93]

Speaking in the year 1926, Henry Lawrence viewed the International Joint Commission as already having served several valuable functions up to that time. He also stated that the great hopes held out by some onlookers never materialized. The International Joint Commission had not

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[92]Canada, Parliament, Senate, Special Committee, Proceedings, To Inquire Into the Development and Improvement of the St. Lawrence River, (Ottawa: 1928), pp. 78-80.

[93]"Arsenals versus Courts," (editorial), The New Republic, LIX (July 17, 1929), 221-222.

become a "miniature Hague Tribunal," although "it has given admirable service on specific boundary issues."[94]

And there were those in Canada who held still another view as typified by the author of The St. Lawrence Deep Waterway: A Canadian Appraisal, when referring to Senator Townsend's resolution of July, 1913, which proposed that improvements be made for navigation in the boundary waters. The Canadian author viewed the United States suggestion to place the resolution in the hands of the International Joint Commission as an illogical scheme.[95]

The extent of participation by the International Joint Commission took on a greater importance as the number of problems along the boundary increased. Article III of the Treaty attempted to outline the role of the IJC regarding the level of boundary waters. Since the creation of a St. Lawrence Seaway might affect the level of the waters, the IJC would in some manner enter into the discussion. Various alternatives by which Article III could be implemented were given on May 9, 1928 by Dr. O. D. Skelton, Under-Secretary of State for External Affairs. First, there may be a treaty between the two countries without any reference to the IJC. Secondly, the governments may decide that the contemplated works would not affect the waters and, if agreed to by both

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[94]"Water Problems of the Canadian Boundary," Foreign Affairs, IV, (July, 1926), 551-558.

[95]Conrad P. Wright, The St. Lawrence Deep Waterway: A Canadian Appraisal (Toronto: The Macmillan Company, 1935), pp. 16-17.

governments, then the matter would not be referred to the IJC. Of course the third possibility was that there would be navigational works which do materially affect the level of the waters on both sides of the boundary. Such matters would go directly to the IJC.[96]

The use of Article III of the 1909 Treaty and the subsequent uses of the International Joint Commission were not always applicable to any question concerning the international boundary. While advocating the 1932 Treaty on November 28, 1932 prior to its defeat in the Senate, James Grafton Rogers, Assistant Secretary of State, sensed the basic understructure of the Boundary Treaty when applying this same treaty to the Chicago Diversion problem. The basic understructure, according to Secretary Rogers, was the operation of principles, international law, comity or simply working agreements. The use to which he put the 1909 Treaty, when dealing with the Chicago Diversion problem, was permissable since he was only forwarding the principles of the Treaty. The 1932 Treaty was applied to a particular problem which was seemingly omitted "under rather ambiguous language in the 1909 Treaty."[97]

It appears that (1) the 1909 Treaty was hoped to provide a solution to future problems through the use of special agreements, (2) specific boundary issues were to be resolved under

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[96]Canada, Parliament, Senate, Special Committee, Proceedings . . ., 1928, pp. 85-86.

[97]U.S., Congress, Senate, Subcommittee of the Committee on Foreign Relations, Hearings, on S. Res. 278, St. Lawrence Waterway, 72nd Cong., 2nd Sess., 1932, p. 298.

the 1909 Treaty and, (3) the exact role of the International Joint Commission was not clear with regard to the types of problems which could be presented to it.

Article XIII defines what is meant by the use of "special agreements" of the 1909 Treaty.

> In all cases where special agreements between the High Contracting Parties hereto are referred to in the foregoing articles, such agreements are understood and intended to include not only direct agreements between the High Contracting Parties but also any mutual arrangement between the United States and the Dominion of Canada expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion.[98]

The question with which the United States became involved after the failure of the 1932 Treaty and the attempts to implement the 1941 Agreement was what use, if any, should be made of the International Joint Commission if concurrent legislation was to create the St. Lawrence Seaway? As spokesman for the opponents of the Seaway, Mr. Borchard refuted the use of concurrent legislation.

> Passing reference may be made to the Treaty of 1909 between Canada and the United States, establishing the International Joint Commission, and the suggestion that has occasionally been made that the St. Lawrence Waterway Project might, under Articles 4 and 13 of that Treaty, be considered as legislation supplementing Article 3, i.e., a special agreement concerning the "uses, obstructions and diversions" of boundary waters, entrusted to the International Joint Commission or to special agreement or concurrent legislation. The Honorable J. E. Read, Legal Advisor of the Department of External Affairs of Canada, in a memorandum of March 12, 1941, seems to have denied this contention, as does Mr. Johnson of the Lake Carriers Association, in a brief submitted to the Committee on

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[98]U.S., Statutes at Large, XXVI, Part 2, 2448.

> Rivers and Harbors, August 1, 1941. It is not insisted upon by Mr. Berle, in his testimony before the Committee, except that he suggests that the same method, concurrent legislation, is provided for in Article 3 of the 1909 Treaty and is now undertaken in the St. Lawrence Waterway Project. A material difference, however, is that the collateral supplementary agreements contemplated in 1909 were based on a formally ratified treaty, whereas the St. Lawrence project has no such foundation.[99]

Whatever the arguments for or against the use of the treaty or executive agreement these agreements were international in character and could be made apart from the 1909 Treaty. However, justifying concurrent legislation as an international agreement by mere reference to the 1909 Treaty appears to be weak. Such a reference does not bind the actions of either the United States or Canada, nor does such a reference appear in the Act.

The Use Made of the International Joint Commission.--A much stronger justification is found in the use made of the International Joint Commission as the mediator for the planning stages of the Seaway and the ultimate approval by the International Joint Commission for the construction of the locks and other structures. Does the use of an international body such as the International Joint Commission constitute an "agreement" in the sense that an agreement has been herein discussed? The work of James L. Kunen is most pertinent at this point.

> But did the concurrent applications of the parties constitute an "agreement" within the meaning of Article XIII of the Treaty, and hence operate to remove the international agency's authority over the

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[99] Opinion . . ., 1944, pp. 45-46.

> matter? Clearly, there was no concurrent or reciprocal legislation here on the part of Congress and the Canadian Parliament. While the Federal Government of Canada and the Province of Onatrio had enacted authorizing legislation, the Congress of the United States had not, nor was there any evidence that it intended to do so in the near future. There was no formal, direct agreement between the Governments; at least, this was the interpretation placed upon the exchange of notes and concurrent petitions of the two parties, and it must be conceded that this interpretation ought to be given considerable weight.
>
> ...
>
> In point of fact; it is to be doubted that the agreement to submit an application to an international tribunal, acting in a quasi-judicial capacity, and the preliminary negotiations leading up to the concurrent submissions constitute executive agreements, in the traditionally accepted sense.[100]

Subsequent action by the United States Government.--An additional reason for maintaining that the Act was an international agreement was the subsequent action taken by the United States and Canada. This action took the form of an agreement between the two nations effected by an exchange of notes signed at Ottawa on August 17, 1954.[101]

This agreement effected a modification of the notes between the two nations dated June 30, 1952 in the light of Public Law 358, May 13, 1954.[102] According to an official of the United States, the legal basis for United States' rights

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[100]"International Negotiations Concerning the St. Lawrence Project," University of Detroit Law Journal, XXXIII (November, 1955), 20, 21.

[101]U.S., President, 1953 - (Eisenhower), Saint Lawrence Seaway, Treaties and Other International Acts Series 3053, Department of State Publication No. 5666 (Washington: U.S. Government Printing Office, 1955).

[102]Ibid.

in the International Rapids Section of the River, along with the Boundary Water Treaty of 1909, were the notes of June 30, 1952 by which the United States and Canada agreed to accept the decision of the International Joint Commission for the construction of power facilities and subsequently the navigational works since navigation has preference over power development according to the 1909 Treaty.[103] The Canadian note of June 30, 1952 expressed the desire to construct locks and canals on the Canadian side of the international boundary according to the standard expressed in the Agreement of 1941. Furthermore, Canada stated at that time that it was Canada's desire that the navigational and power projects be proceeded with concurrently.

The Order of Approval by the International Joint Commission on October 29, 1952 gave the order for construction of navigational and power works according to the applications submitted by the two governments.[104] The Order of Approval gave Canada permission to proceed with navigational works, the Seaway, without the aid of the United States, except as the power projects related to navigation. Canada was to build the Seaway according to the proposed Agreement of 1941.

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[103] Interview with George S. Vest, Department of State, Canadian Desk, Washington, D.C., January 25, 1957.

[104] "United States-Canadian Construction of Power Works in St. Lawrence River Authorized (Text of order of authorization, dissenting opinion, and the majority opinion of the International Joint Commission dated October 29-November 28, 1952)," Bulletin (Department of State), XXVII (December 29, 1952), 1010-1024.

Before the Wilen-Dondero Act was passed in May, 1954, it was necessary for Canada to terminate the proposed Agreement of 1941 since the United States by the Wiley-Dondero Act could not implement the Agreement without the Senate's waiving its treaty prerogative. Canada terminated the Agreement on November 4, 1952, thus avoiding for the United States the ambiguity of having before the Congress an executive agreement and concurrent legislation for the same project.

Thus, the notes of August 17, 1954 were to give added documentation to the joint applications submitted by the two nations together with the exchange of notes of June 30, 1952. Apparently the action of August 17, 1954 was to bind the rather shaky "international agreement" of submitting concurrent applications to the International Joint Commission. It is suggested that the conclusions stated by James L. Kunen might be projected to include not only the preliminary negotiations and concurrent action of the two governments but subsequent negotiations as well. That is, the action of the United States and Canada following the Order of Approval may not bind the United States since the notes of August 17, 1954 were modifications of the notes of June 30, 1952 in the light of domestic legislation, and domestic legislation cannot bind the actions of the United States or Canada in an international project. It may be doubted whether subsequent negotiations following concurrent submission of applications to an international tribunal constitute executive agreements.

Conclusions.--The Wiley-Dondero Act, the end of a long series of attempts to create the St. Lawrence Seaway, had as its purpose the historical purpose of the United States and Canada in this area, namely, the joint control of the St. Lawrence River by both countries. The international foundation for the Act appears to be weak.

Geographical proximity and friendly relations are not sufficient to warrant the use of concurrent legislation. The international "co-operation" proposed by the Act does not justify it as an international agreement. The Act does not mention the Boundary Waters Treaty of 1909, the treaty which guarantees United States' rights in the St. Lawrence River. Furthermore, the use of the International Joint Commission as the mediator for the planning stages of the Seaway and the ultimate approval by the International Joint Commission for the construction of the locks and other structures, together with subsequent action by the two governments, do not make the Act an international agreement.

Because the Act was domestic legislation and therefore cannot bind the actions of either the United States or Canada, and because the Act lacks a strong international foundation to be considered as an "international agreement", the Act may not guarantee the continued historical policy of co-operation with Canada in the Great Lakes-St. Lawrence River System.

CHAPTER IV

THE ALL-CANADIAN ROUTE

The Canadian Government gave serious consideration to an all-Canadian Seaway during the years 1950-1954.[105] Some people were of the opinion that Canada was merely bluffing and was trying to prod the United States toward quick construction by use of an economic threat. Others looked upon the threat as being of a more serious nature. Various reasons for United States' participation with Canada were set forth when Canada threatened to build the Seaway Project alone.

WHY THE UNITED STATES SHOULD PARTICIPATE:

1. This is a vital and strategic waterway that leads directly to the heart of the United States. No nation has ever voluntarily forfeited control over a major waterway. Witness the Dardanelles, Suez, and Panama, because control of such a waterway means control over commerce, a major barbaining point in international relations.

2. The economy of the United States because of greater population and industry will pay for the seaway anyway, by paying the major proportion of the revenues in navigation tolls. Eventually Canada will both own and control it and the people of the U.S. may be called upon to pay tolls forever.

3. Failure to join with Canada would be a serious default in the interest of national security because:
   A. Admission of Foreign Ships to American waters would be in the hands of a foreign, albeit friendly, nation.
   B. Defense of the Seaway from sabotage and military action would be beyond U.S. responsibility, except as permitted by Canada by mutual agreement.

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[105] U.S., Congressional Record, 83rd Cong., 2nd Sess., 1954, C, Part 1, 238. A list of sources is herein cited by Senator Kennedy to this effect.

C. Rights of entry and navigation might well differ in the event of difference between a neutral and belligerent status of U.S. and Canada.

D. In the event of capacity operation of the Seaway, Canada would have control over priorities on Seaway use for various ships and cargoes, in wartime or peacetime.[106]

The effects of an all-Canadian route as set forth above would still exist if Canada were to build the route after the construction, authorized by the Wiley-Dondero Act, was completed.

A map of the International Section of the St. Lawrence River shows that an all-Canadian route is entirely within the realm of the possible.[107] All that is necessary for Canada to possess a Seaway for herself is to twin her locks at Iroquois, deepen the existing fourteen foot channel around the new Barnhart Island Power House and add new locks. The effects of such construction may be of grave consequence to the United States.

The Canadian Government was well aware of the future possibility of gaining control over the economic lifeline at her southern border, as evidenced by the agreement between the United States and Canada signed at Ottawa on August 17, 1954.

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[106] Great Lakes-St. Lawrence Association, The St. Lawrence Seaway Project; Should the United States Participate? (Washington, D.C.: Great Lakes-St. Lawrence Association, 1953), pp. 6-7.

[107] Appendix, p. 77.

> Accordingly the Canadian Government is prepared to modify the arrangements set forth in the Notes of June 30, 1952, to the extent that Canadian Government will be relieved of the obligation towards the United States Government to provide forthwith the navigation works in the general vicinity of Barnhart Island on Canadian territory and in the Thousand Islands section.
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> 4. (a) The Canadian Government wishes to state, however, that it will construct forthwith a canal and lock at Iroquois and that in addition it intends, if and when it considers that parallel facilities are required to accomodate existing or potential traffic, to complete 27-foot navigation works on the Canadian side of the International Rapids Section.
>
> ....
>
> 5. The Canadian Government reserves the right to decide whether and in what manner it will continue 14-foot navigation works through the International Rapids Section but agrees to consult the United States Government on the question of levying tolls in connection with such works.[108]

These reservations by Canada, as described above, leave the door open for the expansion of existing facilities entirely within the Canadian border, providing for an all-Canadian route.

In the light of these facts, old issues are resurrected; old problems become new problems. James L. Kunen saw the major negotiation for the future as that of tolls. The future control of the Great Lakes-St. Lawrence River System may be a greater problem.

> Since enactment of the Seaway law minor issues such as the applicability of customs and immigration laws have been resolved. Canada was firm in its position that it will build the portion of the deep canal around the Iroquois dam on its side of the line.

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[108] U.S., President, 1953-(Eisenhower), Saint Lawrence Seaway, 1955, pp. 1-2.

> Canada would not agree not to construct a parallel canal around the Barnhart power-house and dam in the future. Whether these negotiated concessions needed to have been made by the U.S. it is not now necessary to discuss.
>
> The major negotiation which lies ahead is also probably the most complicated. This concerns the levels at which tolls will be fixed.[109]

The problems which were to be alleviated by the Wiley-Dondero Act may be the same problems facing the United States at some future date in the economic expansion of Canada.

Although the Wiley-Dondero Act appears to be successful, this apparent success may be a great burden on the future action of the United States. Expediency was served admirably by the Act. Where the treaty and executive agreement "failed," in the ratification stages only, the Act succeeded. The international instruments were never permitted to be put into operation. The dams, navigational aids and other physical features of the Seaway are being constructed under the Act.

The Act gives positive impetus to an all-Canadian plan and the loss of the International Section of the St. Lawrence River under joint control. A map of the proposed lock and dam construction shows five locks being built entirely within the Canadian boundary. This construction is a necessary part of the International Section farther up stream.

Furthermore, a map of the proposed construction shows that additional locks are being built entirely within Canada.

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[109]Kunen, University of Detroit Law Journal, XXXIII (November, 1955), pp. 35-36.

These locks were included in the original all-Canadian plan for the development of the area. The lock at Iroquois was originally designed to be within the American boundary. Under the guise of concurrent legislation, Canada was allowed to build the Iroquois lock within her boundary. The Canadian authorities also reserved the right to build locks, again within her boundary, around the Barnhart Dam at a latter date. It should be apparent that the United States may not be able to negotiate with Canada to prevent the building of locks around the Barnhart Dam without some concession, even if possible, being offered to Canada in return. The Seaway is being built under the instrument of concurrent legislation which may not be used as a foundation for claiming for the United States any rights or obligations in the matter.

> The Canadian Government cannot accept the opinion of the United States Government that the Canadian decision to undertake twenty-seven foot excavations in the Cornwall north channel is not in accord with the exchange of notes of August 17, 1954, or other arrangements between the two countries. In its note of August 17, 1954, the Canadian Government declared its intention to complete twenty-seven foot navigation works on the Canadian side of the International Rapids Section, if and when it considered, after consulting your Government, that parallel facilities were required. The Canadian Government does not propose to complete parallel navigation facilities at Cornwall at an early date. However, it considers that the Canadian right to build such facilities, including twenty-seven foot excavations north of Cornwall Island, was reserved in the 1954 exchange of notes and in the other exchanges of notes and letters on the St. Lawrence Projects, whereas these exchanges of notes and letters cover only by implication the navigation excavations in the south channel. Moreover, the north channel excavations

> will compensate for the south channel excavations and thus serve the purposes of the Boundary Waters Treaty.[110]

That Canada is moving in the direction of the all-Canadian plan is becoming increasingly apparent. The Canadian Government is dredging the north channel around Cornwall Island while at the same time the south channel is being dredged as part of the Seaway construction. The United States Government looked with displeasure upon the action.

> The Government of the United States has given careful consideration to the situation which will exist if the Government of Canada proceeds to carry out its announced plan. While it believes that the proposed Canadian action is not in accord with the agreement which this Government entered into as a result of the enactment of PL-358, 83rd Congress (2nd Session) and with the other arrangements which have been made between our two Governments with respect to the St. Lawrence Seaway, the Government of the United States does not wish to delay the construction of the joint Seaway project, in which both Governments are mutually interested, and consequently it is bound by events to take cognizance of the de facto situation which is created by the decision of Canada to proceed with deep-water dredging in the channel north of Cornwall Island.
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> In the circumstances, the Government of the United States deems it important to record that the United States reserves all its rights to protect its interests in this matter.[111]

The rights of the United States in the St. Lawrence River are those guaranteed by the Boundary Waters Treaty

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[110]U.S., President, 1953-(Eisenhower), Saint Lawrence Seaway; Deep-Water Dredging in Cornwall Island Channels, Treaties and Other International Acts Series 2708 (Washington: U.S. Government Printing Office, 1957), p. 2.

[111]U.S., President, 1953-(Eisenhower) Saint Lawrence Seaway, 1957, pp. 1-2.

of 1909 and the Order of Approval issued by the International Joint Commission in 1952. Furthermore, anxiety over an all-Canadian route is said to be the result of "over-fed fears."[112]

The United States should not become alarmed over an all-Canadian route, says Mr. Vest, since the sailing course within the International Section of the St. Lawrence River crosses the International Boundary nine times between a point where the all-Canadian route would enter into the main channel of the River and the end of the International Rapids Section at Chimney Rock.[113] It can be questioned, however, whether all of the effects previously mentioned as resulting from an all-Canadian route would be eliminated by existing control over the present sailing courses which can be changed by plan and engineering.

Conclusion.--The threat of an all-Canadian route to the Great Lakes was a reason for the passage of the Wiley-Dondero Act of 1954. The Act, since it was not an international agreement, cannot prevent Canada from proceeding unilaterally in this area. In actuality, the provisions of the Act promote the all-Canadian route, thereby breaking the historical policy of bilateral control over the International Section of the Seaway and thus, the Great Lakes System. Apparently all that is necessary for Canada to have an all-Canadian version of the Seaway, when present locks become inadequate,

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[112] Interview with George S. Vest, Canadian Desk, U.S. Department of State, January 25, 1957.

[113] Lionel Chevrier, The St. Lawrence Seaway; A Series of Maps of the Seaway with Commentary (Ottawa: The St. Lawrence Seaway Authority, 1955), Map-The International Rapids Section.

is the futher development of existing facilities and the changing of the sailing course to be solely within her boundary.

CHAPTER V

CONCLUSION

The Wiley-Dondero Act, together with like legislation at Ottawa, has cast the mold for the St. Lawrence Deaway of 1959. The Act is the culmination of many attempts to authorize construction of a Seaway. Earlier attempts were by use of treaties and an executive agreement. The use of concurrent legislation as embodied in the Wiley-Dondero Act was a marked departure from previous attempts. The Act was domestic legislation while the other attempts were international agreements. Since the Act is not an international agreement, it does not guarantee for the United States the bilateral control of shipping in the Great Lakes-St. Lawrence River System. The building of an all-Canadian Seaway would give Canada the exclusive control of all ships passing through her Seaway since there is no international agreement whereby the United States would have joint control.

The role of Congress in the control of United States and Canadian relations, concerning the St. Lawrence Seaway Project, has been great. The result of this control may be a loss for the United States.

> "In international affairs a country can control the formulation of policy, but not its determination. It must share the determination with others. It can proceed only as far as others are willing or can be persuaded or coerced to proceed. Such matters are beyond the scope of national law. Clearly their conduct is not legislative. This does not mean that the

> legislature, cannot in the last analysis control the executive's action in conducting international relations; but it does recognize that the legislature cannot determine the positive outcome of international relations. Failure of legislatures to realize the truth in this respect leads to frequent absurdities and occasional calamities."[114]

It is not too late for the United States to seek the bilateral control of a changed Great Lakes-St. Lawrence System, resulting from an all-Canadian Seaway. A discussion of the toll arrangements for the present Seaway should be taken as an opportunity for the United States to enter into a discussion of the future control of this international intercourse without the use of economic or political aggrandizement. Under Section 12 of the Wiley-Dondero Act, the Corporation is "authorized and directed to negotiate", concerning tolls, rules for measuring vessels and the establishing of an "equitable division of the revenues of the seaway between the Corporation and the Saint Lawrence Seaway Authority of Canada."[115] Actual construction, which had been planned for years through governmental and diplomatic negotiation, was a relatively easy starting point from which the Corporation could launch the Project. The formation of toll agreements is to be left for future negotiation, which may have to be undertaken not by the Corporation but by the United States and Canadian Governments.

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[114]Wallace McClure, International Executive Agreements: Democratic Procedure Under the Constitution of the United States (New York: Columbia University Press, 1941), p. 256.

[115]U.S., Statutes at Large, LXVIII, 96.

A spokesman for the St. Lawrence Seaway Corporation has expressed the opinion that the Corporation believes a satisfactory system of tolls can be worked out with its Canadian counterpart.[116] Any such settlement would last only so long as Canada did not twin-up her locks. The future control of the Great Lakes-St. Lawrence River System should be settled prior to the tolls discussion.

There appear to be several alternatives for the United States if she is to have an equal share in the control of the System. The alternatives are also applicable in part to the settlement of all future questions over this international boundary.

First, if the United States Government is to take advantage of every opportunity to maintain equal control over the System, it should use the tolls agreement discussions as a splendid opportunity to proceed to a settlement of the control of the Seaway under the assumption that Canada will in the future have an all-Canadian route. An opportunity for the United States to broaden the scope of the tolls discussions will be lost should the respective agencies settle the tolls question.

The failure of the United States to expand the tolls discussions should not be taken as the last opportunity which this country has in order to have equal control of this internal lifeline to the sea. As disastrous as this failure

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[116]Interview with Raymond F. Stellar, Engineer, St. Lawrence Seaway Development Corporation, March 21, 1956.

might be, a second alternative is open; a greater use may be made of the International Joint Commission. Should the future control of the Seaway be placed in the hands of this commission, the United States would have joint control. The previous discussion has shown that a greater use of the International Joint Commission was contemplated. Such a use is not outside the realm of the possible. "Furthermore, it is not only disputes which may be brought before the International Joint Commission, but also, according to the Treaty's preamble, the adjustment and settlement of all questions involving the rights, obligations, or interests of either country or its citizens, in relation to the other."[117]

The third possibility, and the one which holds the least promise, is that this country should depend upon the present friendly relations with Canada to guarantee the United States equal control over the Great Lakes-St. Lawrence River System. The agreement between the United States and Canada of August 17, 1954 provides that each country shall notify the other if either country should undertake to construct any navigation works in addition to those provided in Public Law 358. This agreement must be the starting point for a discussion of the future control of the System, based upon friendly relations with the nation to the north.

Perhaps an unusual feature of this study has been the viewing of the Wiley-Dondero Act as an international agreement.

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[117]Kunen, University of Detroit Law Journal, XXXIII (November, 1955), p. 20.

Domestic legislation in usually not viewed in this manner. However, if the Congress exercises an influence in foreign affairs beyond the accepted sense, legislation, such as the Wiley-Dondero Act, may be viewed as coming within the general area of international agreements. The word international would then take on another shade of meaning, since the Act was not agreed to by the Canadian Parliament. Serious doubt remains whether such a view would find legal justification. The author's purpose in taking this viewpoint was to show that the Act was in the historic span of attempts to accomplish the Seaway Project and that the Act fulfilled the same purpose as a treaty or executive agreement.

The author hopes that he has restated the argument for the need of an international agreement beyond what has been developed in other studies. There are a relatively large number of writings which attempt to prove that the treaty was the proper method for authorizing the Seaway Project. Likewise, there are numerous writings supporting the executive agreement method. The author has attempted to show the need for any international agreement, since the Wiley-Dondero Act was only domestic legislation.

There are several limitations placed upon the research, including the multitude of material available to the author who did not have the time, patience, or interest to examine the numerous aspects of the Seaway Project. Unexplored were those additional documents available at the Department

of State and the Department of External Affairs. Another limitation was the changing character of the Project. New problems appeared at frequent intervals during the preparation of this study. The author found it difficult to decide where to limit the discussion of the current aspects of the Project. Also, the author was perhaps hypersensitive to the thought of using domestic legislation where a treaty was once thought to be necessary. The practice of replacing international agreements with domestic legislation may have escaped the author's notice, thereby giving the author an exaggerated importance of the problem.

A modification of the study would include additional research into the rights of the United States in the St. Lawrence River. Several related topics to this study may be developed into worthwhile research problems. First, the Canadian attitude toward other countries which use the St. Lawrence Seaway System might be examined. Another topic of interest is the treaty with Canada for the development of water power in the Niagara River. The reservation clause of this treaty, placed therein by the United States Senate, providing that Congress must approve any license for the United States Development of the River, appears to be another example of the conduct of American foreign affairs by the national legislature. Water pollution in the St. Clair and Detroit Rivers and Lake St. Clair is a topic of concern to the State of Michigan. The current status of maritime law and the number of cases resulting from

increased traffic on the St. Lawrence Seaway would be a useful study. The author hopes to examine these or related problems in the near future.

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APPENDIX

ST. LAWRENCE POWER PROJECT

PRESCOTT TO CORNWALL

GENERAL PLAN

THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO
GENERATION DEPARTMENT

DATE – OCT., 1958

2 0 2 4 6 8 10
SCALE IN THOUSANDS OF FEET

LEGEND

- STRUCTURES
- WATER SURFACE
- CHANNEL IMPROVEMENTS
- PARK LANDS
- DYKES
- NEW TOWN SITES
- RAILWAY
- HIGHWAYS & ROADS
- NEW HIGHWAYS & ROADS
- ORIGINAL SHORELINE
- NEW SHORELINE
- OVERLOOK