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National Sovereignty in International Environmental Decisions

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NATIONAL SOVEREIGNTY IN INTERNATIONAL ENVIRONMENTAL DECISIONS†

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The negotiations leading to the Boundary Waters Treaty of 1909[1] provide much food for thought for those who are currently attempting to resolve international environmental problems. The key figures in the negotiations were George Clinton, a Buffalo lawyer and a member of the International Waterways Commission, and George C. Gibbons, a lawyer from London, Ontario, a member of the Canadian section. These two individuals, particularly the latter, together with Elihu Root, the Secretary of State, and Chandler P. Anderson, his legal advisor, were generally considered the architects for the Boundary Waters Treaty of 1909.

The negotiations leading to the ultimate adoption at such an early date of the "Thou shalt not pollute" commandment of the treaty is quite interesting. For example, Article IV provides:

> The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission.
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> *It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.*[2] (Emphasis added.)

Clinton and Gibbons, in preparing an early draft for submission on September 24, 1907, had drafted language which stated that:

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†The author wishes to acknowledge his use of an unpublished Annotated Digest of materials relating to the establishment of the International Joint Commission prepared by F. J. E. Jordan, Dep't of Public Law, Carleton University, Ottawa, Canada, for use as a reference volume by the IJC, the U.S. Dept. of State, and the Canadian Dept. of External Affairs.

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1. Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, 36 Stat. 2448 (1910) (effective May 13, 1910), often referred to as The Boundary Waters Treaty.

2. *Id.*

> 6. The said waters must not be polluted in one country to the injury of health or property in the other.[3]

Clinton, in explaining the draft to Secretary Root, stated that the clause

> was inserted to take care of cases which are likely to arise in the future when the Northwest becomes more densely populated; perhaps the language is too strong.[4]

As it turned out, the language was almost too strong, though it did ultimately survive. At first it failed to attract too much attention as it survived in succeeding drafts proposed by Canada. It was eliminated together with all specific principles in a later draft by Secretary Root, who, at that time, was interested solely in the creation of a Commission of Inquiry. However, the so-called Anderson-Gibbons draft of December 1908 did include the prohibition against pollution.[5] This provision aroused the ire of Senator K. Nelson of Minnesota who, during the Senate hearings, objected on the grounds that Article IV created a police power over water pollution at the federal and international levels. Each of these was an invasion of state's rights and should be amended to preserve the rights of the states in dealing with their waters.[6]

Senator Nelson's problem with Article IV did not prove insurmountable, though, during passage in the Senate, Anderson was ready to strike the pollution clause if it would make the treaty more acceptable. Gibbons replied that the clause should remain "but only be enforced in more serious cases."[7] Apparently, because of more serious problems regarding diversion, the clause was retained. Citizens in both countries should give thanks that such was the case because it has served as a springboard to launch a slow and tedious counterattack against pollution.

Before discussing the development of the different pollution control philosophies which have arisen between the two countries in recent years and exemplified during the hearings on the problem of

3. Dep't of State, Numerical File 1906-10, 484 Nat'l Archives 5934, 5936-7 (proposed treaty clauses submitted by Clinton to Root, Sep. 25, 1907).

4. Dep't of State Numerical File 1906-10, 484 Nat'l Archives 5934, 5936-7 (letter from Clinton to Root, Sep. 25, 1907).

5. Letter from Anderson to Root, Nov. 24, 1908 (Anderson Papers, box 68); International Waterways Treaty: Revised Draft, Nov. 27, 1908; Treaty Relating to Boundary Waters and Questions Arising Along the Boundary Between the United States and Canada (Revised Draft), Dec. 2, 1908.

6. Letter from Sen. K. Nelson to Chairman Sen. S. M. Cullom, Jan. 29, 1909 (Anderson Papers, box 69).

7. Telegram from Gibbons to Anderson (confidential), Feb. 1, 1909 (Gibbons Papers, 8 Letterbook No. 1 at 507).

pollution control in the Great Lakes, a brief description of the IJC is in order. As the preamble to the Treaty states, the IJC was formed:

> . . . to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests either . . . along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise. . . .[8]

The Commission consists of six members, three from each country. The United States Commissioners are appointed by and serve at the pleasure of the President. The Canadian Commissioners are appointed by Order in Council of the Canadian Government and serve at the pleasure of the Government.

The High Contracting Parties have used both Article IV and Article IX[9] frequently throughout the history of the IJC as a means to provide an orderly solution to a number of vexing problems involving matters of water pollution as well as a host of other problems, such as air pollution, water supply problems, navigation, power development, irrigation, recreation and scenic beauty.

These problems have been dealt with in a unique fashion under the Treaty. The Commission was to act as a Unit. Decisions were to be made by a majority of the Commissioners irrespective of nationality and it was believed and hoped that the Commissioners could act in

8. Boundary Waters Treaty.

9. Article IX states:

> The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.
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> The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.
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> Such reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the charater of an arbitral award.
>
> The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports to their respective Governments. In case the Commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the Commissioners on each side to their own Government.

unison to achieve the best solution in the common interest of the two countries. Thus, in the words of former Chairman Heeney, we "act, not as delegates striving for national advantages under instructions from their respective governments, but as members of a single body."[10] In the whole history of the Commission there have been only three instances out of eighty-odd cases upon which the Commissioners have divided or failed to reach an agreement. It is true that this unanimity has not been easily won. Tempers have flared occasionally, but more often than not, it has been a case of controlled desire to find the facts and the recognition of the necessity to find a fair and equitable solution. The philosophy underlying the Treaty has served primarily to bring out the best in the Commissioners, the Staff, and the members of the invaluable boards.

Administratively, the Commission is to be noted for its lack of size. It really is only a skeleton organization. The Canadians have a Legal Advisor and an Environmental Engineer in addition to the Secretary, while the United States has only recently added an Environmental Advisor to its long-standing position of Secretary. This scarcity of manpower is more than compensated for by the power under the usual term of reference to call upon any department in either country for technical assistance. Invariably this is done and the usual procedure is to establish specific boards of advisors to handle each reference, thus attempting to take advantage of the expertise at all levels, the federal, state, provincial and even the local level.

Casting aside administrative details, the records of the IJC in pollution problems has not been without criticism, a good deal of which the Commission agrees with. A review of the deteriorating condition of the Great Lakes will highlight this.

On August 1, 1912, the Governments referred to the Commission for examination and report the following questions:

> 1. To what extent and by what causes and in what localities have the boundary waters between the U.S. and Canada been polluted so as to be injurious to the public health and unfit for domestic or other uses?
> 2. *In what way or manner,* whether by the construction and operation of suitable drainage canals or plants at convenient points or otherwise, *is it possible and advisable to remedy or prevent the pollution of these waters,* and by what means or arrangement can the proper construction or operation of remedial or preventive works, or a system or method of rendering these waters sanitary and suitable for domestic and other uses, be best secured and maintained

10. Heeney, *Diplomacy With a Difference* 3 (International Nickel Company, Inc. Reprint, 1966).

> in order to insure the adequate protection and development of all interests involved on both sides of the boundary *and fulfill the obligations undertaken in Article IV of the Waterways Treaty* of January 11, 1909, between the United States and Great Britain, in which it is agreed that the waters therein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other?[11] (Emphasis added.)

This study was limited to the Great Lakes, the connecting channels, the St. Lawrence from Lake Ontario "to a point as far below the international boundary as should be thought necessary," the Rainy River and the St. John River from Grand Falls to Edmundston.

In 1918 the Commission reported back to the Governments that:

> the lakes themselves beyond their shore waters and their polluted areas at the mouths of the rivers that flow into them, were pure but that the "entire stretch of boundary waters, including Rainy River, St. Mary's River, St. Clair River, Detroit River, Niagara River, St. Lawrence River from Lake Ontario to Cornwall, and the St. John River from Grand Falls to Edmundston is polluted to an extent which renders the water in its unpurified state unfit for drinking purposes."

Following this, in March 1919, the two Governments requested the Commission to prepare a draft convention granting the Commission the necessary authority to remedy existing conditions of pollution. About eighteen months later on October 6, 1920, the Commission submitted its draft and stated, in a covering letter, among other things, that:

> *The Commission is firmly of the view that the method best adapted to avoid the evils which the Treaty is designed to correct is to take proper steps to prevent dangerous pollution crossing the boundary line rather than wait until it is manifest that such pollution has actually physically crossed,* to the injury of health or property on the other side; and that to this end the *Convention should clothe the Commission with authority and power,* subject to all proper limitation and restrictions and to give such directions as may be proper and necessary *to maintain boundary waters in as healthful a condition as practicable* in view of conditions already created, and should contain proper provisions for the enforcement of such orders, rules and directions. (Emphasis added.)

For a number of reasons too long to detail here, there was no action taken upon this Convention even though both Governments

11. Int'l Joint Comm., Pollution of Boundary Waters (Docket No. 4, Aug. 1, 1912).

had reached substantial agreement by 1926. In fact, according to a letter written to the Canadian Minister to the United States by N. A. Robertson for the Secretary of State for External Affairs, negotiations came to "an untimely end in 1929."[12] This attempt to improve the machinery of the Commission is of critical importance when one considers what has happened to the Great Lakes in the interim. Despite the warning of the Commission as long ago as 1918, the Great Lakes are subjected to ever increasing despoilation until now Lake Erie has become the household word for the ultimate in man's disregard for the impact of his activities on his environment. A "cess pool" and words of similar nature recall to all the failure of our two nations to heed the warnings of the IJC.

It is true that during this period the Governments did show some interest. In fact, on April 1, 1946, at the initiative of the Canadian Government another reference was made under Article IX (Docket No. 54) as a result of representations of persons in the Detroit River area. It is interesting to note in passing that at that time there were again suggestions to the effect that the best solution might well be the draft Convention. However, that was not to be the case, and the Commission, still earnestly striving to find another acceptable solution, recommended the adoption of "Objectives For Boundary Waters Quality Control," which were criteria to be met in maintaining the boundary waters in satisfactory condition. This was one of the very early attempts to establish specific water quality criteria in connection with effluent limitations.[13] Had these Objectives been complied with, the Great Lakes would be in much better condition than they are. However, though it did not seem possible at the time, the quality of the waters went from bad to worse. Eutrophication became the "in" word. It became necessary to institute yet another reference to cover Lake Erie and Lake Ontario and the international portions of the St. Lawrence.[14]

On December 9, 1970, after a long and exhaustive study and investigation, the IJC made a number of recommendations "as the minimum basis for programs to achieve and maintain waters in satisfactory condition as contemplated by Article IV." A series of twenty-two specific recommendations were made. Certain water quality objectives and schedules for phosphorus control were proposed and the Governments were urged to agree to put them into effect as set forth. Last but not least, the Governments were urged to confer

12. Canada, Department of External Affairs, Letter No. 1618, Dec. 19, 1941.
13. Int'l Joint Comm., Pollution of Boundary Waters (Docket No. 54, Apr. 1, 1946).
14. Int'l Joint Comm., Great Lakes Pollution (Docket No. 83, Oct. 7, 1964).

> upon this Commission the authority, responsibility and means for coordination, surveillance, monitoring, implementation, reporting, making recommendations to governments, all as outlined in Chapter XIII of this Report, and such other duties related to preservation and improvement of the quality of the boundary waters of the Great Lakes–St. Lawrence System as may be agreed by the said Governments; the Commission to be authorized to establish, in consultation with the Governments, an international board or boards to assist it in carrying out these duties and to delegate to said board or boards such authority and responsibility as the Commission may deem appropriate.[15]

Since the issuance of the report there have been several meetings at the ministerial level in an attempt to implement recommendation twenty-two. This is highly encouraging. Contrasted to this progress, however, is the diverging viewpoints of the two countries on pollution control which surfaced during the course of the hearings held by the IJC. To those who participated throughout the investigation, it was no particular surprise, particularly in light of the history of industrial and residential development in the Great Lakes Basin by the two adjoining nations.

The investigation indicated clearly that in terms of gross volumes of pollutants, the United States was contributing and had contributed by far the larger share. In fact, in terms of assimilative capacity, as our recommendations indicate, a reduction in the quantities of several pollutants was in order immediately. The Canadians, who have watched with a certain degree of envy as our industries prospered and our standard of living rose, became concerned that the assimilative capacity of the Lakes, Erie in particular, was being preempted by the United States. Thus Canada would be left with no alternative but to adopt a closed cycle, or no discharge philosophy at a possibly very high economic cost. To them it could well appear to be a question of the "fustest with mostest."

Being somewhat behind the United States in economic development and wishing to maximize the use of all its resources, Canada is reluctant to allocate resources for what it considers to be unnecessary pollution control. This attitude is best illustrated by the contrasting positions of the State of Michigan and the Province of Ontario. Time and time again, the Ontario Water Resources Board took the position that standard effluent criteria such as secondary waste treatment made no sense by itself. It was and is their position that it is a waste of their resources to require this degree of treatment

15. Pollution of Lake Erie, Lake Ontario, and the Int'l Section of the St. Lawrence River, Final Report to the Two Governments, Dec. 9, 1970, at 92.

if the receiving waters can withstand a lower degree of treatment. This position is to be contrasted to that adopted by a number of States and encouraged by the Environmental Protection Agency that secondary treatment be the goal regardless of the assimilative capacity.

The contrasting positions of the two countries is even more clearly reflected when one compares the underlying philosophy of the so-called Muskie Act, S.2770 with the philosophy set forth in a joint report by the Ontario Water Resources Board and the Quebec Water Board entitled "Water Quality and its Control in the Ottawa River", Volume 1, issued June 11, 1971.

In the former case, the United States Senate unanimously departed from a long-standing policy of water quality standards control in the United States in favor of a no discharge policy by 1985. While, at the time this paper is being prepared, the House of Representatives has not acted, nevertheless, it seems reasonably certain that there is a significant shift underway in the United States to effluent standards as the primary means of control, partly because of the difficulty of relating the impact of any one or more discharges on the quality of a particular receiving body of water, and partly, I suspect, because of the feeling that most of the pollutants end up in the oceans where the accumulations may be building up to a dangerous level.[16]

As a matter of international environmental relations, S. 2770, Section 310, retains a hearing procedure to handle situations where pollution of United States waters endangers the health and welfare of persons in a foreign country. This is comparable to existing legislation and was not joyously received by Canadians. This feeling results, I believe, because the Act seems to place a foreign country in the position of a complaining party in the courts of the United States and also because it requires such foreign country to give the United States essentially the same rights.

There are those in the developing nations who will term the type of approach under S. 2770 as "Environmental Imperialism" or "Environmental Elitism." At times during the Lake Erie hearings it was apparent that there was some resentment against the United States for seeking to require other nations to adopt certain effluent limitations without particular regard to the alternative means and the costs and benefits thereof, especially in view of the fact that much of the United States prosperity may well have been at the cost of using up this public good. Some indicated, "Well, now, you can afford it, but we can't." The United States position became even harder to

16. An Act to Amend the Federal Water Pollution Control Act, S. 2770, 92nd Cong., 1st Sess. (Nov. 2, 1971).

understand for the Canadians when the United States refused to adopt the recommendations of the IJC as to limitations on the phosphorous content of detergents even though Canada instituted certain controls on a federal level, despite the fact it is often alleged that Canadian federal-provincial problems usually prevent coordinated national action. Throw in the recommendations of the United States Surgeon General, and everything becomes confused.

In the Ottawa River situation previously referred to, there is a much different approach adopted which should be examined closely. Here the two provinces, after an exhaustive investigation of the water quality of the Basin, were able to establish existing BOD loadings, for example, and calculate on the basis of mathematical models permissible BOD loadings.

> [A] reserve portion of these loadings (were) set aside to provide: 1) an adequate margin of protection in recognition of the limitations of water management theory and practice; 2) the maintenance of adequate water quality in the face of population and industrial growth, urbanization and technological change. Approximately one-third of the receiving capacity of the river was maintained in reserve.[17]

In the judgment of the two Boards, water quality control can be classified in terms of cycles which would be the time necessary to analyze problems, establish a basis for treatment, design and build and operate the facilities so as to utilize an appropriate proportion of the receiving capacity of the water course. Such a cycle was considered to be twenty years and during this time no user could discharge more than was permitted him and the treatment plant specified would be capable of the highest practicable degree consistent with current technology. The report calls for a reasoned approach to the use of the river with social and economic pressures dictating future uses. In the latter case, limitations of future industrial development as well as possible relocation of existing industries is forecast. In conclusion, the report discusses additional studies which might be required and states that:

> The changes in water quality as anti-pollution programs are implemented must be carefully documented. This will provide a basis for rationally evaluating the expected benefits in relation to the cost of future water quality programs. As the country continues to develop, greater pressures will be placed on all water resources and cost of maintaing the quality of all waters at desirable levels for all uses will,

17. Ontario Water Resources Comm. (jointly with) Quebec Water Board, 1 Ottawa River Basin Water Quality and Its Control in the Ottawa River 45 (1971).

> even if attainable, require such a large committment of our economic resources that it may no longer be justifiable solely on the basis of pollution control.[18]

What lessons can we draw from this? First of all, it was fortunate that Elihu Root failed to persist in his position to limit the IJC to an advisory body on ad hoc resource matters. While the IJC may not have solved the problem of the pollution of the Great Lakes, nevertheless, it has been the conscience of the two nations some sixty-three years and an organization to which citizens can turn for support.

Secondly, by making the most expert manpower available to the Commission, it not only enables the Commission to speak with authority but also has resulted in a unique but extremely valuable international environmental esprit de corps. The proper and correct solution becomes the goal, not which nation has the most clout. National sovereignty becomes lost in the shuffle. The experts dedicate themselves to solving the riddle of how man and our nations can have, in the words of Lewis Mumford, "the right quantity of the right quality at the right time and the right place for the right purpose."[19] Whether to resort to water quality criteria or to use effluent standards is the type of question, as we have seen, which is hammered out together in an atmosphere of mutual respect.

A third feature is that slowly but surely the independence and stature of a body, which concentrates on its principle role of recommending what is best but not necessarily what is the easiest to get accepted, begins to carry weight of its own. The force of public opinion is not a force to be ignored, as the original supporters recognized.[20] It must be nurtured it is true, but it is a resource that is to be treasured.

A fourth point concerns the composition of this body. It does not require representation on the basis of one man, one vote. Rather, it requires the acceptance of the fact that the dominant power must always rely upon the force of its technical and moral position rather than upon economic imperialism. Issues seen through the eyes of the smaller power may appear to be far different than issues seen through the eyes of those "who have made it good".

The fifth point is that it is absolutely imperative that water resource development not be done in the abstract. It must be done in light of the realities of economics and politics. National pride should be used constructively, not destructively. I am convinced beyond

18. *Id.* at 49.
19. Mumford, R.D. #1, Amenia, New York (source of direct quote unknown).
20. Reader is referred to documentation in first six pages of this paper.

question that the Canadian action on detergents, particularly being the less wealthy nation, has had a tremendous impact in the United States, particularly in the local community and at the state level.

In conclusion, the case histories seem to suggest that some declaration of principle is needed as to our long range environmental goals. One goal would be to seek to affirm the ultimate necessity of imposing absolute limitations on the right to discharge waste materials. As the IJC pointed out in 1918, the time to correct the problem is before the waters are polluted to the degree that one country's action endangers the health and welfare of another country. Furthermore, the determination of the exact time when a certain build-up of wastes in any receiving body of water becomes detrimental is most difficult. The gradual accumulation of nutrients in Lake Erie with no obvious harm in the early years misled both nations into failing to realize that a specific rate of discharge of waste material may have an entirely different impact depending upon the particular history of the receiving water. Who knows for certain when the assimilated capacity is reached? It was apparently for this reason that Ontario and Quebec very properly established a reserve margin.

While our attention should be directed to the ultimate limitation of discharges, it would be most beneficial to have both nations continue to concentrate upon seeking to determine the impact of the discharge of any pollutant upon the waters. This is necessary because of economic reasons. No one sovereign nation, or even a combination of sovereign nations, can afford unnecessary allocation of its resources for unessential purposes. There must be a continuous monitoring, together with constant assessments, of the damage done, cost incurred and benefits received. If this is not done, no individual nation can long look for public support of its programs, nor can a sovereign nation look to support from the international community.

As Secretary Root pointed out, there is a very different attitude depending upon whether you are Big Brother or Little Brother, a strong or weak nation, a rich or poor country, a developed or developing nation.

Big Brother, who is usually strong, rich and a developed nation, is much more apt to act as some cost-plus utility might act. In other words, "Let's stop all discharges now, why worry about costs; after all, we were initially responsible for most of it anyway. Moreover, since other nations are dependent upon our good will, we can force them to comply. Furthermore, we obviously know best, otherwise we would not be such a successful nation."

Little Brother, on the other hand, is equally righteous. Such a nation, whose natural resources are coveted by those who do not

want to exploit their own, is eager to compete in the International GNP (Gross National Product) Grand Prix. It is urged that, "You have had yours, now let us have ours. There is no valid reason why we are not entitled to a fair share of the assimilative capacity of any receiving body to use as we see fit." The very essence of assimilative capacity suggests certain rights or equitable entitlements. Moreover, it is oftentimes alleged that technology can come up with the answer to any problem, "so why get all worked up?". When such positions are set forth by underdog nations and the sympathies of the world are enlisted to support a nation's right to pollute, the confrontation becomes a very serious matter indeed.

In fact, both positions can be most appealing, depending upon where you sit. Too frequently one's position may be influenced by the ability of one party to predict more dire consequences than the other.

Fortunate for all of us, however, is the fact that, for those who urge the right to pollute their own share of the world, there has to be established some competent, credible body to determine the particular method of sharing—unless we continue to resort to war for solutions. It can start off on an ad hoc basis as did Ontario and Quebec, but ultimately, as Secretary Root discovered, the adoption of an international body, "a practical tribunal" in his words, based upon some agreed principles is required.

It is also fortunate that those who would ignore the laws of economics invariably find out that this is impossible. Moreover, those nations who try to do so cannot help but suffer the same fate as those nations who have sought to practice colonialism or economic imperialism. Environmental imperialism is no better, for those who practice it will ultimately find to their sorrow that an environmental dictator is as arbitrary and unreasonable as is a military or economic dictator. Freedom of any nature obviously will be more limited as man seeks to survive. Any restrictions on one's freedom, however, must be based upon sound social and scientific reasoning.

Disheartened as I am at times, I am encouraged, however, by the example of Canada and the United States, two great nations which, over the years, have mobilized the best brains in each country in a common effort to improve the quality of life of their citizens. That two nations situated next to each other can understand that political boundaries and nationalistic fervor must be laid aside speaks well for man's survival.

Nations, no more than man himself, cannot expect to subjugate the natural world to their wishes without understanding the relationship of living things to their environment. With the growing aware-

ness that geographical proximity is no longer a necessary condition precedent to environmental damage, it is not unreasonable to believe that nations facing one another across an "Iron Curtain" may well join hands in the most important war of all—the war to insure man's survival—a survival dependent upon the recognition of the utter necessity of accomplishing that delicate balancing task required within a total ecosystem for the survival of the entire system. If it can be done, we may have taken the most important step of all towards "Peace With Freedom".