be able to assure the defense of Canada, is merely the occasion for the application to Canada of a policy long since developed to meet similar situations.

What is novel in the case of Canada is the fact that while Canada, since the Statute of Westminster of 1931, is practically an independent sovereign state, yet it is, under the forms of law, a part of the British Empire and is, moreover, bound to the Empire by very strong ties of sentiment. Neither of these considerations would seem, however, to bear upon the question at issue. All of the Latin American Republics have been at one time or another members of the League of Nations and, as such, under obligation to regard a resort to war against one member of the League as an act of war committed against themselves, with the resulting obligation of severing all trade and financial relations with the covenant-breaking state. Yet the United States, while modifying its neutrality legislation to take account of Latin American states' being engaged in war with a non-American state when coöperating with the League of Nations, has never regarded such a situation as modifying in any degree the necessity of preventing European or Asiatic encroachment upon the same American states. For the Monroe Doctrine, it must be remembered, is a doctrine of long-range self-defense. Not so long-range as if it sought to prevent aggression in any part of the world, but clear and definite as to aggression against the states of America. Even the fact that the American state may have been to some degree responsible for creating the conditions that led to the aggression against it has not altered the determination of the United States to keep any nations that might seek to play the part of the original "Allied Powers" from extending their system to any portion of this hemisphere.

It would seem that the formal application to Canada of the policy of the Monroe Doctrine should properly lead to the formal inclusion of Canada in the circle of "American Republics" and to participation by Canada in the coming Eighth International Conference of American States at Lima. Elsewhere [1] the writer has expressed the view that Canada as a member of the International American Conferences would not only add to the list of states which are carrying on the traditions of democratic government believed by the United States to be essential to peace, but might be expected to take a constructive part in the development of new principles of law to meet the changing conditions of American life.

C. G. FENWICK

THE TRAIL SMELTER ARBITRATION—UNITED STATES AND CANADA

A unanimous decision was handed down on April 16, 1938, by the Mixed Arbitral Tribunal, constituted under the Convention of Ottawa,[2] signed April 15, 1935, between the Government of the United States and the Government of the Dominion of Canada. The Tribunal was established to pass upon the claim of the United States for damages to American citizens, alleged to have

[1] See this JOURNAL, Vol. 31 (1937), p. 473.

[2] U. S. Treaty Series, No. 893. Reprinted in this JOURNAL, Supp., Vol. 30 (1936), p. 163.

occurred since January 1, 1932, by reason of noxious fumes emanating from the stacks of the Consolidated Mining and Smelting Company of Canada, Limited, located at Trail, British Columbia. The Tribunal was also asked to determine whether the smelter should be required to refrain from causing damage in the future in the State of Washington, and if so, to what extent.

The smelter (principally of copper and zinc ores), is described in the opinion of the Tribunal, as "one of the best and largest equipped smelting plants on this Continent." It is located about seven miles in a direct line from the United States boundary. Owners of timber and farm lands, as well as of urban properties in Stevens County, State of Washington, have complained for many years of the serious damage caused by the emanations from the smelter. The potentially widespread character of the damage may be realized by the fact that two stacks of the plant are over 400 feet high, and, as stated in the opinion, have emitted as much as 10,000 tons of sulphur in a single month.

The difference between the two governments over the Trail Smelter is one of long standing. The problems involved were first referred to the International Joint Commission, United States and Canada, pursuant to Article 9 of the Convention of January 11, 1909, between the United States and Great Britain. The International Joint Commission, by its decision of February 28, 1931, awarded damages caused to the United States up to and including January 1, 1932, in the sum of $350,000. It also recommended a method of indemnifying persons in the State of Washington for damage which might be caused by the smelter after January 1, 1932, and it indicated the manner in which the smelter should be operated after that date with a view to abating the nuisance. Two years later, the United States Government was again obliged to make representations to the Dominion Government because the damage was still continuing and existing conditions were entirely unsatisfactory. Accordingly, under the Convention of 1935, a Mixed Arbitral Tribunal was constituted, consisting of three "jurists of repute," one to be appointed by the United States, one by the Dominion of Canada, and a chairman chosen jointly, who should be neither a British subject nor a citizen of the United States. The members of the Tribunal thus chosen were as follows: By the United States, Charles Warren of Massachusetts; by the Dominion of Canada, Robert A. E. Greenshields of the Province of Quebec; by the two governments jointly, Jan Frans Hostie of Belgium.

The first question submitted to the Tribunal was: "Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January 1932, and, if so, what indemnity should be paid therefor?" In answer to this question the Tribunal found that damage had so occurred, and made an award of $78,000 for such damage from January 1, 1932, to October 1, 1937, for cleared and uncleared land. It failed to uphold the contention of the United States, however, that damage had occurred in respect to livestock or to property in the town of Northport, or to business enterprises.

The second question submitted to the Tribunal was: "In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future, and if so, to what extent?" The Tribunal decided that the smelter should refrain from causing further damage to the extent set forth in the decision, until October 1, 1940, and thereafter, to such an extent as the Tribunal should determine.

The third question submitted was: "In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?" As to this, the Tribunal decided that it was not able to agree upon a permanent régime with the information at hand. It therefore established a temporary régime to be put in operation by May 1, 1938, to cover the remainder of the crop-growing season of 1938, and the crop-growing seasons of 1939 and 1940, and for three months after October 1, 1940. This régime is to be under the technical supervision of two experts who will act under the authority of the Tribunal, the expenses to be undertaken by the Dominion of Canada.

The fourth question submitted to the Tribunal concerns the indemnity or compensation, if any, to be paid on account of any decision rendered relating to future damage. The answer to this question is reserved for the final decision.

The present decision is notable in that it establishes a procedure for the maintenance of a régime for controlling industrial operations in one country which are likely to cause continuing damage in another. The questions involved here are not merely concerned with the operation of the plant, but with meteorological conditions in the Columbia River Valley. The Tribunal indicated that an extension and improvement of the methods of operation of the plant may be necessary in close relation to such meteorological conditions. Detailed reports are to be made to the Tribunal by the technical consultants to enable it to arrive at a final decision within three months after October 1, 1940.

The Agent of the United States, Mr. Swagar Sherley, has expressed disappointment at the small indemnity awarded for damages which continued over a period of more than five years and which affect an area of many square miles. Particularly does he emphasize the failure of the Tribunal to make any positive declaration of the injury done to the United States as a nation by the violation of its sovereignty, and also the failure to award costs and expenses incidental to the proof of the damage complained of. The Tribunal drew a distinction between this case and cases involving damage to individual claimants, where it might be appropriate for an international tribunal to award costs and expenses as an incident to other damage proven. The Tribunal was of the opinion that

> such costs and expenses should not be allowed in a case of arbitration and final settlement of a long-pending controversy between two inde-

> pendent Governments, such as this case, where each Government has incurred expenses and where it is to the mutual advantage of the two Governments that a just conclusion and permanent disposition of an international controversy should be reached.

We cannot follow the reasoning of the Tribunal in this respect. The reasoning might be appropriate if the amount of the award had been arrived at by negotiation and compromise between the two governments; but the compromise in this case consists precisely in the reference to arbitration of an issue intended to be decided by a judicial process. One of the parties having been found at fault, the costs and expenses of assembling and presenting the large amount of technical evidence might very well have been considered incidental to the indemnity to be paid. The argument that such expenses might have been awarded if incurred by individual claimants instead of by the complaining government does not seem cogent.

On the other hand, the decision does not appear to be fairly open to criticism merely because no separate award was made for a violation of sovereignty. This element of injury must be taken to have been merged in the *compromis*. The Tribunal was restricted in its jurisdiction to answering the questions presented. It is true a separate award of this nature was paid by the United States to the Dominion of Canada under the decision in the case of the British ship *I'm Alone*.[3] In that case, however, the injury was caused directly by the act of officials of the United States Government, and not, as here, by persons or a corporation acting in an individual capacity.

It is worthy of note that under Article IV of the Convention, it is provided: "The Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America. . . ." The Tribunal therefore was not troubled to determine the nature of the law to be applied. This provision is in accord with the rule of the *lex loci delicti* and also with the principle that where an act begun in one state causes an injury in another state, "the place of the wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place." [4]

The really important issue still to be settled is the abatement of a serious nuisance endangering international good relations in the regions affected. The members of the Tribunal have performed their functions with painstaking care, especially in respect to the detailed régime of observation and report to be made by experts as to the present and future operation of the plant. It is to be hoped that the final decision, when rendered, will eliminate the possibility of future dispute.

ARTHUR K. KUHN

[3] See this JOURNAL, Vol. 29 (1935), p. 331.

[4] See Restatement of the Law of Conflict of Laws, § 377.