In the Supreme Court of the United States

No. 41, Original

OCTOBER TERM, 1969.

STATE OF OHIO, *ex rel.*, PAUL W. BROWN,

Plaintiff,

vs.

WYANDOTTE CHEMICALS CORPORATION,
DOW CHEMICAL COMPANY OF CANADA, LIMITED

and

THE DOW CHEMICAL COMPANY,

Defendants.

BRIEF OF THE DOW CHEMICAL COMPANY IN OPPOSITION TO PLAINTIFF'S MOTION TO FILE COMPLAINT.

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QUESTIONS PRESENTED.

I. **Does the court lack jurisdiction because of the provisions of the Boundary Waters Treaty, 1909, between the United States and Great Britain, proclaimed May 13, 1910, 36 Stat. 2448; TS 548 and the Principles of International Law?**

II. **Do the allegations set out in the proposed complaint sought to be filed by the State of Ohio create a cause of action in favor of the State of Ohio under Article III, Section 2, Clause 2 of the Constitution of the United States and Title 28 U.S.C., Section 1251?**

III. **Because of the complex international problems involved, can the court decline jurisdiction and refuse to impose judicial decisions upon the parties sought to be made defendants in the proposed litigation?**

STATEMENT OF CASE.

The State of Ohio (hereinafter referred to as Ohio) seeks to invoke the original jurisdiction of this Court for leave to file a Complaint against Wyandotte Chemicals Corporation (hereinafter referred to as Wyandotte), a Michigan corporation, Dow Chemical Company of Canada, Limited (correct name being Dow Chemical of Canada, Limited), hereinafter referred to as Dow Canada, a Canadian corporation and The Dow Chemical Company (hereinafter referred to as Dow U. S.), a Delaware corporation, as defendants under authority of Article III, Section 2, Clause 2 of the Constitution of the United States and Title 28 U.S.C., Section 1251.

Ohio asserts Wyandotte, Dow Canada and Dow U. S. have, for a number of years, introduced alleged poisonous mercury or compounds thereof, as industrial wastes, into the tributary waters of Lake Erie and therefrom into Lake Erie. Said waters being part of the international boundary waters between Canada and the United States referred to in the Boundary Waters Treaty of 1909 (hereinafter referred to as Treaty) signed January 11, 1909 and proclaimed by the United States and Great Britain on May 13, 1910.

Ohio claims Dow Canada introduced said mercury or compounds thereof into the St. Clair River "at the Canadian side thereof."

Ohio joins Dow U. S. because it says Dow U. S. owns all the outstanding shares of capital stock of Dow Canada and therefore "controls the actions" of Dow Canada. Ohio claims Dow U. S. "is responsible along with" Dow Canada "for the discharge of such mercury or compounds thereof into Lake Erie or tributaries thereto."

Ohio says it is the owner of Lake Erie "from the Ohio shore to the international boundary between Ohio and the

Dominion of Canada"; that it is the owner of all of the fish in Ohio, to the extent said fish can be owned, and that said fish are held in trust by it for its citizens and inhabitants.

Wyandotte has no connection whatsoever with Dow U. S. or Dow Canada.

Ohio's proposed Complaint prays that the defendants be permanently enjoined from discharging "poisonous" mercury or compounds thereof into Lake Erie or tributaries thereto because such conduct constitutes a public nuisance. Ohio asks this Court to ascertain the damages which Ohio has suffered; and that this Court order the removal of said mercury and compounds thereof from Lake Erie and tributaries thereto if that is found to be feasible. Ohio also suggests that relief be granted either by ordering the defendants to remove said mercury and compounds thereof or that the defendants be ordered to pay damages into a trust fund to be used for the sole purpose of removing said mercury and compounds thereof from Lake Erie and the tributaries thereto.

Dow U. S., in opposing Ohio's Motion, denies it is responsible "along with" Dow Canada for the alleged discharge of "poisonous" mercury or compounds thereof into Lake Erie. Dow U. S. has never introduced any "poisonous" mercury or compounds thereof into any of the international boundary waters referred to in Ohio's proposed Complaint.

Dow U. S. does not operate or maintain Dow Canada's Sarnia, Ontario plant.

Dow Canada's chlorine and caustic soda plant is located entirely within Canadian territory, across the international boundary from Port Huron, Michigan. It is managed and operated by Canadians. Dow Canada carries on its business as an independent entity in Canada. It is

subject to the jurisdiction of the Ontario Water Resources Commission and laws of Canada with respect to preventing unsafe mercury discharges into the Canadian side of the St. Clair River.

SUMMARY OF ARGUMENT.

Article VI, Clause 2 of the Constitution declares *treaties shall be the supreme law of the land.*

The Boundary Waters Treaty (hereinafter referred to as Treaty) was negotiated and signed in 1909 by the United States and Great Britain. It was proclaimed on May 13, 1910 (36 Stat. 2448; TS 548). The Treaty provided for the establishment of an International Joint Commission which was given judicial power to approve projects affecting boundary waters and investigative powers to supervise the use or results of the use of the international boundary waters by the United States and Canada. *See* Articles VIII, IX and X of the Treaty and Preamble, 36 Stat. 2448; MacKay, 22 AM. J. INTERNAT. L. 292 at 296-297 and 312-314; Waite, 13 BUFF. L. REV. 93 at 100 (1963-64).

The international boundary waters include the St. Clair River, Lake St. Clair, Detroit River and Lake Erie.

References of August 2, 1912, April 1, 1946 and October 7, 1964 (International Joint Commission Dockets Nos. 4, 53 and 55) under Article IX of the Treaty by the governments of Canada and the United States to the International Joint Commission authorized it to investigate and report to the governments "1. To what extent and by what causes and in what localities have the boundary waters between the United States and Canada been polluted so as to be injurious to the public health and unfit for domestic or other uses." (International Joint Commission Docket No. 4). *See* also *Report to the Interna-*

tional Joint Commission, Vol. 2—Lake Erie at VI—Introduction (1969); 51 Dept. of State Bull. 498 (Oct. 26, 1964).

Said References make it clear that all problems arising as a result of the pollution of international boundary waters be resolved under principles of the Treaty and international law. Since the sovereign powers (United States and Canada) have decided all international boundary pollution problems are to be investigated and supervised by the International Joint Commission, this Court has no jurisdiction over the subject matter of the proposed litigation.

Ohio cannot enact legislation which would have any extra-territorial application upon the conduct of Dow Canada. Such power can only be exercised by the federal government. Thus, Ohio does not have a state-created cause of action in the litigation sought here.

The pollution provision of the Treaty (Article IV) does not conflict with the generally recognized principle of international law to the effect that an individual or a quasi-sovereign (Ohio) has no inherent right to participate in the litigation of international controversies. Under the Treaty, the sovereigns (Canada and United States) have undertaken to supervise and control the activities of their own inhabitants if the effect thereof causes injury to the territory or inhabitants of the other sovereign, under principles of international law.

Therefore, since the subject matter of Ohio's proposed litigation involves the alleged pollution of international boundary waters, the Treaty provisions pre-empt Ohio's claimed right to sue Dow U. S., Dow Canada and Wyandotte.

Ohio has no rights under federal law because the Clean Water Restoration Act of 1966 is limited solely to controlling the conduct of the inhabitants of the United

States, *within the territory of the United States.* The legislation has no extra-territorial application upon the conduct of aliens (Dow Canada) in a foreign territory (Canada).

Further, since the subject matter of the proposed litigation concerns itself with a matter of foreign affairs, to wit: pollution of Lake Erie, an international water basin, Ohio, a quasi-sovereign, cannot bring this proposed action as parens patriae, since the powers and interests of the United States are paramount and pre-empt Ohio's claimed right to litigate the international issues here involved.

The executive and legislative branches of the United States and the government of Canada are committed to the principle that all controversies involving the pollution of the international boundary waters should be resolved by cooperative study and negotiation, rather than by judicial decree.

Judicial action by this Court would be contrary to all of the diplomatic agreements heretofore reached between the United States and Great Britain (Canada) which are now being implemented through the International Joint Commission insofar as all pollution problems involving the international boundary waters are concerned.

Dow Canada has taken effective action to prevent unsafe discharges of mercury into the Canadian side of the St. Clair River pursuant to the orders and continuing supervision of Canadian authorities.

Dow Canada operates and maintains all of its facilities entirely within the territory of Canada. Under the principles of international law, Dow Canada is not subject to the jurisdiction or orders of this Court insofar as the proposed litigation is concerned.

Dow U. S. is not responsible for the alleged wrongful acts of Dow Canada arising as a result of Dow Canada's operation of its Sarnia plant. Dow Canada is a separate business entity, run by its own management. It is solely responsible for its own acts. It is not a mere agent or facility of Dow U. S.

Ownership of the stock of a subsidiary does not make the stockholder liable for the acts of its subsidiary.

The *Report to the International Joint Commission on the Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River,* Vol. 1 (Summary) and Vol. 2 (Lake Erie) (1969), leads to the conclusion that water pollution problems are complex and consequently require an intimate familiarity with scientific and economic facts.

The relief sought by Ohio is either clearly unwarranted or so difficult to effectuate as to make an adjudicative proceeding by this Court inappropriate.

An alternative tribunal to investigate and supervise pollution problems involving Lake Erie has been activated and is functioning under authority of the Treaty.

A prohibitory injunction by this Court pertaining to the operation of Dow Canada's plant in Sarnia, Ontario would be improper and ineffective because the plant's operation is being continuously regulated under orders by the Canadian government.

A judgment for damages would be unprecedented and practically impossible to measure because of the involved complexities of pollution, both as to source and content.

Ohio's prayer for mandatory relief requiring removal of all of the mercury or compounds thereof presently in Lake Erie would embroil this Court in a scientific and administrative morass where professional opinion is sharply divided as to the appropriate course to be followed.

Because an adjudication of the problems of pollution raised in the proposed litigation by this Court, at this time, could not anticipate all of the probable and complex future changes in circumstances, general knowledge, environment, ecology or advances in scientific, engineering and technical knowledge and techniques, this Court should decline jurisdiction and dismiss the action filed by Ohio.

ARGUMENT.

I. DOES THE COURT LACK JURISDICTION BECAUSE OF THE PROVISIONS OF THE BOUNDARY WATERS TREATY, 1909, BETWEEN THE UNITED STATES AND GREAT BRITAIN, PROCLAIMED MAY 13, 1910, 36 STAT. 2448; TS 548 AND THE PRINCIPLES OF INTERNATIONAL LAW?

A. The Subject Matter of the Proposed Complaint.

Ohio's proposed Complaint characterizes the subject matter of the litigation as sounding in negligence and nuisance. Contrary to Ohio's position, it is submitted the subject matter is the alleged pollution of Lake Erie, *an international water basin,* by Dow Canada, a Canadian corporation in Canada and Wyandotte, a Michigan corporation in Michigan. Therefore, since Lake Erie is an international water basin, it is a natural resource of the United States government and the Dominion of Canada.

After difficult and prolonged negotiations, Great Britain and the United States entered into the Boundary Waters Treaty of 1909. By Article IV of the Treaty, the parties agreed that the international boundary waters "shall not be polluted on either side to the injury of health or property on the other." Article VII created the International Joint Commission, consisting of six members. Article X of the Treaty provides, in part, for the reference by Canada or the United States to the International Joint

Commission, by the consent of the two sovereigns, of "Any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada either in relation to each other or to their respective inhabitants, * * * A majority of the said Commission shall have power to render a decision or finding upon any of the questions or matters so referred." The Treaty and the Rules of Procedure adopted thereunder provide the means whereby any problem about the rights or interests of either state, including its inhabitants, along the common frontier may be submitted to the Commission.

Boundary waters are defined in the Treaty's Preliminary Article to include "the waters from main shore to main shore of the lakes * * * along which the international boundary between the United States and the Dominion of Canada passes", thus including all of Lake Erie.

Article VI, Clause 2 of the Constitution declares that treaties shall be the supreme law of the land.

Article I, Section 10 specifically sets out the intention of the framers of the Constitution to leave treaty power solely in the hands of the federal government.

The Treaty References provide that the International Joint Commission shall consider all the pollution problems of Lake Erie. Thus, since the two sovereign powers have agreed to resolve all international water pollution problems under the provisions of the Treaty, the proposed Complaint sought to be filed by Ohio is legally insufficient to give this Court jurisdiction.

In the case of *Ware v. Hylton,* 3 U.S. (3 Dall.) 199 (1796) Mr. Justice Chase said,

> "If doubts could exist before the establishment of the present national government, they must be *entirely*

removed by the 6th Article of the constitution, which provides 'that all treaties made, or which shall be made, under authority of the United States, *shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. (The Federalist,* LXXV, p. 2.)"

* * * * *

"Four things are apparent on a view of this 6th article of the national constitution. 1st. That it is retrospective, and is to be considered in the same light as if the constitution had been established before the making of the treaty of 1783. 2d. *That the constitution, or laws, of any of the States, so far as either of them shall be found contrary to that treaty, are, by force of the said article, prostrated before the treaty.* 3d. That consequently the treaty of 1783 has superior power to the legislature of any State, because no legislature of any State has any kind of power over the constitution, which was its creator. 4th. *That it is the declared duty of the state judges to determine any constitution, or laws of any State, contrary to that treaty, made under the authority of the United States, null and void. National or federal judges are bound by duty and oath to the same conduct."* 3 U.S. (3 Dall.) at 336-337. (Emphasis supplied.) *See* also, *Missouri v. Holland,* 252 U.S. 416, 432 (1920); *First Iowa Hydro-Electric Co-op v. F.P.C.,* 328 U.S. 152 (1946) and *Sanitary District of Chicago v. United States,* 226 U.S. 405 at 425-426 (1925).

And, as this Court has noted on numerous occasions, "Treaties are to be liberally construed so as to effect the apparent intention of the parties." *Neilson v. Johnson,* 279 U.S. 47 at 51 (1929), citing *Jordan v. Tashiro,* 278 U.S. 123; *Geofray v. Riggs,* 133 U.S. 258, *In re Ross,* 140 U.S. 453, *Tucker v. Alexandroff,* 183 U.S. 424.

Since the Treaty of 1909 deals with the utilization and pollution of the international waters of the Lake Erie

Basin, it is proper to state that the rights, responsibilities and liabilities arising from the use or results of the use of the waters or the pollution thereof must be decided under the principles of international law before an international tribunal or commission, such as the International Joint Commission.

In fact, the International Joint Commission is presently examining the problems of the pollution of the boundary waters in depth under Articles IV and IX of the Treaty.

The United States and Canada have made three specific References to the Commission—August 2, 1912, April 1, 1946 and October 7, 1964—to investigate and report on the problems of pollution of the international boundary waters.

The *Report of the International Joint Commission (United States and Canada) on the Pollution of Boundary Waters* (1951) contains the following significant comments:

> "The data presented in chapter IX have shown clearly that there is a transboundary crossing, both of currents and pollution, from each side to the other. Since waste discharges tend to diffuse and become diluted with the receiving waters, it is difficult to trace a specific effluent over the distance required to dissipate its potency. Added dilution through travel downstream and the admixture of similar or other deleterious materials further complicate this difficulty. The intermingling is also influenced by winds, bends in the river, islands or other obstructions, and navigation channels. These effects may not be constant. Under these circumstances it is not feasible to state, in exact terms, the amount of pollution which crosses from each country to the other."
>
> Page 166—*The Report of the International Joint Commission* (1951).

The above Report was followed on September 2, 1969 by the *Report of the International Lake Erie Water Pollution Board to the International Joint Commission* wherein the following conclusions are noted:

"*Transboundary Pollution*

> The Advisory Boards have concluded from flow studies conducted by United States and Canadian agencies, *that there is substantial mixing of waters in the lakes to the extent that concentration levels of polluting materials are remarkably uniform throughout extensive areas of each lake.* Thus, there appears to be no doubt that *all major sources of pollution to the lakes have contributed directly, or indirectly, to their generally degraded condition.*"
>
> *Report to the International Joint Commission,* Vol. I (Summary) at 7 (1969) (emphasis added).

The following specific sources of pollution are identified:

> "1. *the major contribution of many polluting materials to Lake Erie arises from the Detroit River,* which receives very large quantities of pollutants from the heavily industrialized Detroit metropolitan area, and partially treated sewage from the City of Windsor, Ontario."
>
> *Report to the International Joint Commission. Id.* at 8 (Emphasis added).

The *Trail Smelter* case is a classic example of a tribunal empowered by a special convention concluded between the United States and Canada considering the problem of state responsibility for extra-territorial injury.

A claim was brought by the United States against Canada under a special convention between the parties arising out of the operation of a smelter by a private corporation in Trail, British Columbia. The operation of the

smelter resulted in the discharge of sulphur dioxide causing injury to property in the State of Washington. Under the convention, the Dominion of Canada assumed international responsibility for the damage relating to the private corporation's activity within Canadian territory. The tribunal, among other holdings, held that: "Considering the circumstances of the case, the tribunal holds that the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter." *The Trail Smelter Arbitral Decision* (United States v. Canada), 35 AM. J. INT'L L. 684 *at* 716-717 (1939); 3 INT'L ARB. AWARDS 1905 at 1963 (1949). *See* generally, Read, *The Trail Smelter Dispute,* 1 CAN. YB. INT'L. 213 (1963).

By reason of the holding in the above analogous situation, any legal action sought to be initiated by Ohio affecting the international boundary waters and waters flowing across the international boundary between Canada and the United States or into the boundary waters cannot be maintained under the principles of international law.

Therefore, since the United States and Canada have, by the Treaty designated the International Joint Commission as the administrative body to investigate the pollution problems involving the international boundary waters (*See* International Joint Commission Dockets Nos. 4, 53 and 55) the only parties in interest in the proposed litigation are Canada and the United States.

In the treatise, *The Law of International Drainage Basins,* the following conclusions are reached:

> *"In this complex situation, a regulatory rather than an adjudicative process may be appropriate. An international administrative agency with the power of continuing discretion would have sufficient flexibility to cope with such problems. In some cases an adjudicatory process may not be able to provide suitable remedies, even if responsibility in legal terms*

could adequately be assessed. 'A man dying of thirst cannot be revived with monetary compensation for his water, even when tendered in advance.' *And similarly, it is doubtful whether injunctive relief could provide sufficient flexibility. For these reasons many publicists have advocated the establishment of regional commissions to control the use of international river basins.*

"The International Joint Commission's work in regulating the United States and Canada boundary waters is an excellent example of the value of such administrative machinery. It should, however, be recognized that general relations between these two countries have been unusually harmonious. United States interstate compacts and the entire trend of municipal law in technologically developed states towards administrative regulation, provide further evidence of the necessity for the exercise of continued discretion in controlling complex uses of natural resources."

The Law of International Drainage Basins—Edited by A. H. Garretson, R. D. Hayton and C. J. Olmstead for The Institute of International Law, at 110 (Emphasis supplied).

Citing, Laylin and Bianchi, *The Role of Adjudication in International River Disputes,* 53 AM. J. INT'L L. 30, 31 (1959);

International Law Association Committee Report to Tokyo Conference (1964) 31; and

Forer, *Water Supply; Suggested Federal Regulation,* 75 HARV. L. REV. 332, 347-349 (1961).

And, finally, as so aptly written by Alexander Hamilton in the *Federalist,* No. LXXX:

"* * * *the peace of the whole ought not to be left at the disposal of a part.* The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought

> ever to be accompanied with the faculty of preventing it. *As the denial or perversion of justice by the sentences of courts, is with reason classed among the just causes of war, it will follow, that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquillity.* A distinction may perhaps be imagined, between cases arising upon treaties and the laws of nations, and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction; the latter for that of the states. *But it is at least problematical, whether an unjust sentence against a foreigner where the subject of controversy was wholly relative to the lex loci, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations of a treaty, or the general law of nations.* And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion and those of the other. So great a proportion of the controversies in which foreigners are parties involve national questions, that it is by far most safe and most expedient, to refer all those in which they are concerned to the national tribunals.
>
> *The Federalist,* New Edition (1942), Hamilton, Madison & Jay (1788) at 365. (Emphasis added.)

Thus, since the subject matter of Ohio's proposed Complaint is being investigated by the International Joint Commission under the Treaty provisions agreed upon through sensitive, diplomatic discussions between the United States and Canada, this Court does not have jurisdiction over the subject matter. *See The Schooner Exchange vs. McFaddon,* 11 U.S. (7 Cranch) 116 (1812).

Litigation, such as proposed by Ohio, should be negotiated by the cooperative action of the United States and Canada under the provisions of the Treaty *and not by court action.*

II. DO THE ALLEGATIONS SET OUT IN THE PROPOSED COMPLAINT SOUGHT TO BE FILED BY THE STATE OF OHIO CREATE A CAUSE OF ACTION IN FAVOR OF THE STATE OF OHIO UNDER ARTICLE III, SECTION 2, CLAUSE 2 OF THE CONSTITUTION OF THE UNITED STATES AND TITLE 28 U.S.C., SECTION 1251?

A. The State of Ohio Does Not Have a Cause of Action Under Ohio Revised Code, Section 123.03.

In the proposed Complaint, Ohio asserts the defendants have violated the "statutes of Ohio" and that the conduct of the defendants constitutes a public nuisance.

OHIO REVISED CODE, Section 123.03, provides that the waters of Lake Erie consisting of the territory within the boundaries of Ohio to the international boundary line between the United States and Canada, including the soil beneath and their contents, belong to Ohio as proprietor in trust for the people of the state, "* * * *subject to the powers of the United States government.* * * *"

The above enacted legislation does not give Ohio a cause of action insofar as the proposed litigation herein is concerned.

Ohio asserts Section 123.03, OHIO REVISED CODE in an attempt to invoke the parens patriae concept discussed by this Court in *Missouri vs. Illinois,* 180 U.S. 208 (1901), together with the rule of constitutional law which declares that quasi-sovereign states possess dominion over the beds of all navigable streams within their borders. *See Pollard vs. Hagan,* 44 U.S. (3 How.) 212 (1845).

The enabling clauses set forth in Section 123.03 OHIO REVISED CODE are "* * * *subject to the powers of the United States government* * * *". Therefore, since the proposed litigation concerns itself with the alleged pollution of Lake Erie, an international water basin, the ultimate interest of the United States in Lake Erie is stronger and more comprehensive (extra-territorial) than is Ohio's individual, territorial (internal) interest. *The interests of the nation are more important than those of Ohio.*

Therefore, it is submitted Ohio cannot assert any state-created rights or litigate the subject matter of the proposed Complaint because:

(1) The Treaty 1909 is the supreme law of the land (U. S. Constitution, Art. VI) and, as such, is binding upon Ohio insofar as any problems involving the pollution of the international boundary waters are concerned.

Article IV of the Treaty clearly intends that each sovereign makes itself responsible for all pollution originating on its own side of the boundary line which causes injury to the health or property on the other side of the boundary line. A duty is imposed upon each sovereign to prevent its *own* inhabitants from causing injury by pollution on the other side of the boundary line. Thus, *Article IV of the Treaty restates the generally recognized rule of international law which imposes a duty upon a sovereign to prevent its own subjects, within its own territory, from committing injurious acts against another state.* L. Oppenheim, 1 INTERNATIONAL LAW, at 330 (7th Ed., Lauterpacht 1948).

It is well settled that, when the federal government, by statute or treaty, legislates in any area, the application of a state law which in any manner obstructs or impedes the accomplishment and execution of the federal purpose is not permitted. *Pennsylvania v. Nelson,* 350 U.S. 497

(1956); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). This result is mandated by Article VI of the Constitution which declares the Constitution, federal laws and all treaties to be the supreme law of the land.

(2) Section 123.03, OHIO REVISED CODE and any other legislation enacted by Ohio cannot have any extra-territorial effect upon Dow Canada's use or the results of its use of the St. Clair River on the Canadian side.

OHIO REVISED CODE, Section 123.03 does not set forth any rule of law governing conduct nor does it purport to establish a justiciable right on behalf of anyone.

Accordingly, the reference to Section 123.03, OHIO REVISED CODE in the proposed Complaint does not establish or create a cause of action in favor of Ohio insofar as the issues here are concerned.

B. The State of Ohio Does Not Have a Cause of Action Under Federal Law.

The Clean Water Restoration Act of 1966 [Act of November 3, 1966, Section 206, 80 Stat. 1250, amending 33 U.S.C., Section 466 G (Supp. I, 1965)] does not give any right to Ohio under federal law in connection with the proposed litigation. The *provisions* of the Act of 1966 extending federal enforcement authority to international pollution *are limited solely to controlling the conduct of the citizens and inhabitants of the United States within the territory of the United States.* The legislation does not have any extra-territorial application upon the conduct of Dow Canada, an alien, in connection with its operation of its plant in the territory of Ontario, Canada or its use or the results of its use of the Canadian portion of the St. Clair River.

The Act of 1966 specifically provides in paragraph 466 G (d) (2) that "* * * *Nothing in this paragraph*

*should be construed to modify, amend, repeal, or otherwise affect the provisions of the 1909 Boundary Waters Treaty between Canada and the United States * * *"* (Emphasis supplied.)

In order to underline the intent of Congress in enacting the Clean Water Restoration Act, statements made by Murray Stein, Chief Enforcement Officer of the Federal Water Pollution Administration of the Department of Interior, to explain the proposed administration bill, S. 2987, and by Senator Muskie indicate the proposed litigation urged by Ohio is clearly an international problem, in that they said:

> "Mr. Stein. *The waters shared by the United States and Canada, and by the United States and Mexico, comprise a kind of no man's land in rapid, effective water pollution abatement.* The administration bill reflects concern at this kind of situation, wherein pollution originating in one of our States may be impairing the health or welfare of persons in one of our neighboring countries. *Although representations may be made through our Department of State, there is no mechanism for requiring the State to take the necessary action."* Hearings on S. 2987, Senate Doc. 2947, 89th Congress, 2nd Sess. 435 at 436 (1966). (Emphasis supplied.)
>
> * * * * *
>
> "Senator Muskie. * * * If there is a contribution to the pollution problem on both sides of the international stream, *it is only fair and reasonable to suggest that the action should be international and not simply unilateral."* *Id.* at 440 (Emphasis supplied.)
>
> * * * * *
>
> "Senator Muskie. I think what we need is an initiative on both sides. If we could have it from our side, then we would be in a better position to go to

the other side and say, "We are ready. When are you going to be?"

Mr. Stein. Yes, sir.

The Secretary would act whenever he has reason to believe that such pollution, originating in our country and endangering the health or welfare of persons in a foreign country, is occurring, and the Secretary of State requests that he take such action. *This proposed authority is consistent with the treaty obligations in boundary waters and would assist in implementing our responsibilities under these agreements.*" *Id.* at 440. (Emphasis supplied.)

Hearings on S. 2987, Senate Doc. 2947, 89th Cong., 2nd Sess. 435 (1966).

C. Ohio's Proposed Complaint Does Not State a Cause of Action Under Federal Common Law.

Ohio has alleged the conduct of the defendants constitutes a public nuisance and prays for injunctive relief. Ohio apparently seeks to rely upon a federal common law applicable to suits brought by states in their quasi-sovereign capacity. *Such suits may not be brought by a state to abate a nuisance originating in a foreign nation.*

It is clear Ohio's proposed Complaint deals with a problem which is completely extra-territorial and not internal or domestic insofar as Dow Canada is concerned.

Thus, when an extra-territorial issue is raised, only the federal government has inherent power to negotiate such an issue. The federal government's complete power over foreign affairs makes it imperative that the interests of sovereignty be favored. See *United States vs. California*, 332 U.S. 19 (1947).

Therefore, the United States government—not the State of Ohio—is parens patriae for all of the citizens of the State of Ohio. See Massachusetts vs. Mellon, 262 U.S. 447 (1923).

When a claimed nuisance sought to be enjoined originates, not in a sister state, but in a foreign nation, a state (Ohio) cannot initiate litigation seeking an adjudication of the issue. Under international law, a state (Ohio) does not possess the attributes of international sovereignty under the Constitution.

This Court has stated in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 at 316 (1936):

> "[*T*]*he states severally never possessed international powers* * * * During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown * * * As a result of the separation from Great Britain by the colonies acting as a unit, *the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.*" (Emphasis supplied.)

The *parens patriae* cases upon which Ohio relies are not in point because they deal solely with one State's remedy against another or citizens of another. Such cases provide no basis for a suit seeking relief against an alleged nuisance originating in Canada.

D. The State of Ohio Does Not Have a Cause of Action Under the Treaty 1909.

The United States is empowered to exercise its sovereign authority over the use or results of the use of the international boundary waters and can pre-empt Ohio's proposed litigation by virtue of the Treaty 1909. Since the United States has assumed national responsibilities with respect to the pollution of the international boundary waters, the United States can act, in this instance, to prevent Ohio's intended interference with the intentions and obligations of the United States, as set forth in the Treaty.

As pointed out by Trelease in *Federal Limitations on State Water Law,* 10 BUFF. L. REV. 399, at 415 (1961):

> "[A]ny state water law that appeared to authorize a use proscribed by the treaty would have to yield, and such a use could not be initiated, or could not be allowed to continue, though the law stood on the books as applicable to other waters." *See Sanitary District of Chicago vs. United States,* 266 U.S. 405 (1925); 4 A.L.R. 1377 (1915); 17 A.L.R. 635 (1922) and 134 A.L.R. 882 (1941).

The References of August 2, 1912, April 1, 1946 and October 7, 1964, referred to hereinabove, by Canada and the United States to the International Joint Commission clearly demonstrate the two sovereign powers have concluded all problems of pollution of the international boundary waters are international in scope. Accordingly, Ohio, under principles of international law, as a quasi-sovereign, has no right to be heard or to invoke the jurisdiction of this Court.

Since pollution of the international waters of the Lake Erie Basin has been determined to be an international problem, not a domestic one, all solutions have to flow from the results of amicable negotiations between the United States and Canada or from a Reference to the International Joint Commission. The landmark case of *United States vs. Pink,* 315 U.S. 203 (1942) is controlling and decisive. In delivering the opinion of the Court, Mr. Justice Douglas said:

> "All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature, * * *' The Federalist, No. 64. A treaty is a 'Law of the Land' under the supremacy clause (Art. VI, Cl. 2) of the Constitution. Such international compacts and agreements as the Litvinov

Assignment have a similar dignity. *United States v. Belmont, supra,* 301 U.S. at p. 331. See Corwin, The President, Office & Powers (1940), pp. 228-240." *Id.* at 230.

* * * * *

"*But state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement. See Nielsen v. Johnson,* 279 U.S. 47. *Then, the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum (Griffin v. McCoach,* 313 U.S. 498, 506) *must give way before the superior Federal policy evidenced by a treaty or international compact or agreement. Santovincenzo v. Egan, supra,* 284 U.S. 30; *United States v. Belmont, supra.*" *Id.* at 230-231. (Emphasis added.)

* * * * *

"We recently stated in *Hines v. Davidowitz,* 312 U.S. 52, 68, that *the field which affects international relations is 'the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority'; and that any state power which may exist 'is restricted to the narrowest of limits.'* * * * Here, we are dealing with an exclusive federal function. *If state laws and policies did not yield before the exercise of the external powers of the United States, then our foreign policy might be thwarted. These are delicate matters. If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power. Cf. Chy Lung v. Freeman,* 92 U.S. 275, 279-280. Certainly, the conditions for 'enduring friendship' between the nations, which the policy of recognition in this instance was designed to effectuate, are not likely to flourish where, contrary to national policy, a lingering atmosphere of hostility is created by state action.

Such considerations underlie the principle of *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302-303, that when a revolutionary government is recognized as a *de jure* government, 'such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence.' *They also explain the rule expressed in Underhill v. Hernandez,* 168 U.S. 250, 252, *that 'the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." Id.* at 232-233 (Emphasis added.)

* * * * *

"We repeat that there are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts. *For such reasons, Mr. Justice Sutherland stated in United States v. Belmont, supra,* 301 U.S. at p. 331, *'In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist." Id.* at 233-234. (Emphasis added.)

The principles set forth in *United States v. Pink* have been fortified by the following statement from a speech delivered in New York City on April 25, 1970 by William P. Rogers, United States Secretary of State, when he was Attorney General of the United States and said:

"This administration is committed to strengthening the role of international adjudication in the settlement of international disputes. We are taking specific steps to carry out this policy.

In the future, the Department of State will examine every treaty we negotiate with a view to accepting, wherever appropriate, the jurisdiction of the International Court of Justice with respect to disputes arising under the treaty. In a treaty in which we or the other government cannot accept the Court's jurisdiction, we will urge the inclusion of other appropriate dispute settlement provisions.

In addition, wherever disputes arise with other countries, we give active and favorable consideration to the possibility of submitting them to the International Court of Justice. Recently, we asked the Canadian Government to join us in submitting to the Court the differences arising from Canada's intention to establish pollution and exclusive fisheries zones more than 12 miles from her coast."

17 FEDERAL BAR NEWS, June, 1970, No. 6 at 161.

III. BECAUSE OF THE COMPLEX INTERNATIONAL PROBLEMS INVOLVED, CAN THE COURT DECLINE JURISDICTION AND REFUSE TO IMPOSE JUDICIAL DECISIONS UPON THE PARTIES SOUGHT TO BE MADE DEFENDANTS IN THE PROPOSED LITIGATION?

A. This Court Should Decline to Exercise Jurisdiction Over the Subject Matter of the Proposed Litigation.

As has been pointed out, the real parties in interest, Canada and the United States, have undertaken to work out a solution of all of the problems of pollution which have developed in the Lake Erie Basin, an international boundary waterway. Under such circumstances, the theory of sovereign immunity prevails and this Court

should decline jurisdiction. *The Schooner Exchange vs. McFaddon,* 11 U.S. (7 Cranch) 116 (1812).

The general pollution of the Lake Erie Basin has been declared to be a source of international concern. The decision to refer the matter to the International Joint Commission does not bring the subject matter of the proposed litigation sought by Ohio within Article III, Section 2 of the Constitution and 28 U.S.C. 1251 wherein cases or controversies over which this Court will take jurisdiction are enumerated.

In view of the affirmative actions of the sovereign powers (Canada and the United States), the decisions to refer the pollution problem to the International Joint Commission reached by the sovereigns should prevail; and this Court should decline to exercise jurisdiction over the subject matter of the proposed Complaint here involved.

In support, this Court has made the following pronouncements:

[It is necessary to exercise] "a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction * * *" *Massachusetts v. Missouri,* 308 U.S. 1, 19 (1939). Also, as Mr. Justice Douglas stated in *Georgia v. Pennsylvania R.R.,* 324 U.S. 439 at 464 (1945):

> "It does not necessarily follow that this Court must exercise its original jurisdiction. It has at times been held that this Court is not the appropriate tribunal in which to maintain suits brought by a State."

B. The Proposed Complaint Submitted by Ohio Fails to State a Cause of Action Against Dow U. S.

In the proposed Complaint, Ohio alleges Dow U. S. is "responsible along with" Dow Canada for mercury or compounds thereof allegedly discharged by Dow Canada into Canadian international boundary waters because Dow U. S. owns all of the outstanding shares of Dow Canada stock "and therefore controls" Dow Canada.

It is well settled that neither stock control nor common directors and officers are sufficient to hold a stockholder liable for acts of its subsidiary. *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157 at 161 (7th Cir. 1963); *Spears v. Transcontinental Bus System,* 226 F.2d 94 at 98 (9th Cir. 1955), *cert. denied,* 350 U.S. 950 (1956); *Owl Fumigating Corp. v. Calif. Cyanide Co.,* 24 F.2d 718, at 719 (Del. 1928), *aff'd,* 30 F.2d 812 (3d Cir. 1929). "Control through the ownership of shares does not fuse the corporations, even when the directors are common to each." *Kingston Dry Dock Co. v. Lake Champlain Transportation Co.,* 31 F.2d 265, 267 (2d Cir. 1929).

As this Court has pointed out, "As a general rule a corporation and its stockholders are deemed separate entities * * *". *New Colonial Ice Co. v. Helvering,* 292 U.S. 435 at 442 (1934). Separate corporate entities are not to be disregarded unless "ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making (the subsidiary) a mere agent, or instrumentality or department of another company * * *". *U. S. v. Reading Co.,* 253 U.S. 26 at 62-63 (1920).

Also, the Sixth Circuit Court of Appeals has held:

"[I]t is likewise well settled that a corporation is ordinarily an entity, separate and apart from its stockholders, and mere ownership of all the stock of one corporation by another, and the identity of officers of one with officers of another, are not alone sufficient to create identity of corporate interest between the two companies or to create the relation of principal and agent or to create a representative or fiduciary relationship between the two."

* * * * *

"The extent of stock ownership and mere potential control of one company over another has never been regarded as the determining factor in the consideration of such cases. Something must be disclosed to indicate the exercise of undue domination or influence resulting in an infringement upon the rights of the subservient corporation for the benefit of the dominant one."

Kentucky Electric Power Co. v. Norton Coal Mining Co., 93 F.2d 923 at 926 (6th Cir. 1938), cited with approval in

Garrett v. Southern Railway Co., 278 F.2d 424 at 425 (6th Cir.), *cert. denied*, 364 U.S. 833 (1960).

Similarly, in *Lowendahl v. Baltimore & O. R. Co.*, 247 App. Div. 144, 287 N.Y.S. 62 at 72-76 (1st Dep't 1936), *aff'd*, 272 N.Y. 360, 6 N.E.2d 56 (1936), it was held:

"Control through mere ownership of a majority or of even all the capital stock and the use of the power incident thereto to elect officers and directors will not in and of itself predicate liability * * * Liability must depend upon a domination and control so complete that the corporation may be said to have no will,

mind, or existence of its own, and to be operated as a mere department of the business of the stockholder."

Therefore, Ohio's allegations relative to stock ownership and "control" by Dow U. S. do not make Dow U. S. liable for Dow Canada's acts; and Ohio's proposed litigation should be dismissed as to Dow U. S.

C. This Court Does Not Have Jurisdiction Over the Person of Dow Canada.

If this Court should order that a Summons be issued for service upon Dow Canada, under the circumstances of the proposed litigation, this Court would be engaging in judicial aggression against a Canadian corporation. This action would interfere with the course of conduct heretofore evidenced by the United States under the provisions of the Treaty. Such aggression by this Court would infringe upon the sovereignty of the Dominion of Canada and its right to deal with Dow Canada for any acts of Dow Canada initiated entirely within Canada.

By virtue of the Treaty and the acts of the sovereign powers (United States and Canada), this Court does not have jurisdiction over the person of the defendant, Dow Canada, for the purpose of adjudicating any of the issues involved in the proposed litigation insofar as Dow Canada's alleged affirmative acts are concerned.

Further, this Court is not authorized, under either Rule 9 (8) of the RULES OF THE SUPREME COURT or, if applicable, the FEDERAL RULES OF CIVIL PROCEDURE, Rule 4 (E), which authorizes the use of the Ohio State long-arm statutes, to have Summons issue out of this Court to be served upon the defendant, Dow Canada, in the Dominion of Canada.

D. Since the Field of Water Development and Pollution Is Fraught With Complexities, This Court Can Dismiss the Proposed Litigation Because the Treaty 1909 Provides an Alternative Forum.

The parens patriae aspect of Ohio's request to litigate the complex and technical problems involving the pollution of the international boundary waters of Lake Erie immediately suggests difficult questions involving degree of alleged injury and damage and the number of persons involved. Ohio is duty-bound to show the claimed injuries and damages to be either actual or imminent, rather than speculative. Further, Ohio, if allowed to litigate, must show by clear and convincing evidence that the injuries and damages are of serious magnitude.

In considering the problems of proof, how can allowance be made for the fact that the waters of the Lake Erie Basin are in constant motion across state and international boundary lines, as are the fish swimming back and forth across these borders? Further, how can it be decided which of the transient fish or wildlife actually "belong" to Ohio or to Canada?

It is highly unlikely Ohio can prove any of the alleged mercury contamination existing in that portion of Lake Erie "owned" by Ohio is attributable to any of the discharges of metallic mercury from the Dow Canada plant located on the St. Clair River in Sarnia, Ontario, approximately 90 miles away.

The situation is similar to that before this Court in *Missouri v. Illinois,* 180 U.S. 208 (1901), 200 U.S. 496 (1905), where the request of the state of Missouri for an injunction against the discharge of sewage by the state of Illinois was dismissed on the ground that Missouri had not proved the alleged pollution resulted from the discharges in question.

In short, in the current state of scientific knowledge and because of the great number of interacting causes, there is no accurate or fair way of determining specific individual or joint liability or assessing damages, even if damage could be proved.

As pointed out in *Missouri v. Illinois,* the existence of other polluters, both within and without the plaintiff state "makes the case weaker in principle as well as harder to prove than one in which all came from a single source." 200 U.S. at 526.

This Court has previously said that in an original suit, unlike a case on appellate review, "even when the case is first referred to a master, this Court has the duty of making an independent examination of the evidence, a time-consuming process * * *". *Georgia v. Penna. R. R.,* 324 U.S. 439 at 470 (1945). Such cases "consume a disproportionate amount of the Court's time." Note, *The Original Jurisdiction of the United States Supreme Court,* 11 STAN. L.R. 665 at 695 (1959), giving examples of time consumed in specific original jurisdiction cases.

In the *Report to the International Joint Commission on the Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River,* Volume 1 (Summary) (1969), the following is noted:

> *Transboundary Pollution*
>
> The Advisory Boards conclude, on the basis of data and other information developed by the United States and Canada over the last six years, that Lake Erie, Lake Ontario and the international section of the St. Lawrence River are being polluted on both sides of the boundary (United States-Canada) to an extent that is causing and is likely to cause injury to health and property on the other side of the boundary.
>
> The Advisory Boards have concluded from flow studies conducted by United States and Canadian

> agencies, that there is substantial mixing of waters in the lakes to the extent that concentration levels of polluting materials are remarkably uniform throughout extensive areas of each lake. *Thus, there appears to be no doubt that all major sources of pollution to the lakes have contributed directly, or indirectly, to their generally degraded condition. Id.* at 7 (Emphasis added.)

Based upon the foregoing, it is obvious:

(1) There are multiple causes and effects of pollution. Pollution problems are complex and demanding of scientific investigation, all of which will require an intimate familiarity with all of the pertinent scientific, ecologic and economic facts involved; and

(2) It is apparent the two sovereigns (Canada and the United States) have not fully investigated or been completely informed about the alleged mercury pollution problem because the aforementioned Advisory Board Report contains nothing therein about mercury contamination.

Since the issues involved in the proposed litigation are so complex and diplomatically delicate, we invite this Court's attention to what it has said in previous cases concerning similar prolonged and complex issues:

In *Colorado vs. Kansas,* 320 U.S. 383 at 392 (1943), this Court clearly stated its disinclination to decide such cases:

> "The reason for judicial caution in adjudicating the relative rights of States in such cases is that, while we have jurisdiction of such disputes, *they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule.* Such controversies may appropriately be composed by negotiation and agreement, pursuant to

> the compact clause of the federal Constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power." (Emphasis added.)

See also, *New York vs. New Jersey,* 256 U.S. 296 (1921) and *North Dakota vs. Minnesota,* 263 U.S. 365 at 385-386 (1923).

In a complex situation such as is here presented, in which there are multiple causes and effects of pollution, many of which are constantly changing, a regulatory and continuing supervisory solution of the problem is dictated rather than securing a current, unyielding and transient adjudication by this Court.

Finally, the International Joint Commission, as an alternate tribunal, has proved it is well-equipped to handle the alleged pollution problem Ohio seeks to litigate. *See* Waite, *The International Joint Commission—Its Impact on Land Use,* 13 BUFF. L. REV. 93 (1963-4). And, the International Joint Commission has also demonstrated that with its power of continuing supervision it has sufficient flexibility to safely control this complex problem now and in the future.

For all of the reasons stated above, this Court should decline to exercise its jurisdiction and should dismiss Ohio's Motion.

CONCLUSION.

Dow U. S. respectfully submits Ohio's Motion for Leave to file Complaint should be denied and dismissed for the following reasons:

1. The two sovereign nations, United States and Canada, have unequivocably evidenced their vital interest and great concern about the problem of the pollution of the

international boundary waters between the United States and Canada, which include Lake Erie and tributaries thereto.

The United States and Canada have, by References to the International Joint Commission, exercised their sovereign rights to have all problems involving the pollution of the international boundary waters, including Lake Erie, investigated and supervised under the provisions of the Boundary Waters Treaty 1909.

Since pollution of the Lake Erie Basin has been determined to be an international problem, Ohio must yield to the decisions heretofore agreed upon between the United States and Canada.

Superior federal policy has determined the problem of pollution of the international boundary waters between the United States and Canada will be considered through amicable diplomatic international negotiations or References to the International Joint Commission under Article IX of the Treaty 1909. In support see *United States v. Pink,* 315 U.S. 203 (1942); *Neilson v. Johnson,* 279 U.S. 47 (1929); *Santovincenzo v. Egan,* 284 U.S. 30 (1931); *United States v. Belmont,* 301 U.S. 324 (1937); *Hines v. Davidowitz,* 312 U.S. 52 (1941); *Chy Lung v. Freeman,* 92 U.S. 275 (1875); and References to the International Joint Commission (Dockets 4, 53 and 55), April 1, 1946, April 2, 1948 and October 7, 1964.

Therefore, since the United States-Canada international boundary waters pollution problem involves external affairs and foreign policy, this Court has no jurisdiction to adjudicate the issues raised in the proposed litigation sought by Ohio.

2. Ohio does not have any legal right to intervene as a party plaintiff in problems involving the pollution of the international boundary waters between the United States and Canada, because:

a. Ohio cannot assert any state-created rights.

b. Section 123.03, OHIO REVISED CODE cannot have any extra-territorial effect upon Dow Canada's use or results of its use of the St. Clair River on the Canadian side.

c. Ohio, a quasi-sovereign, cannot intervene as a litigant in an area involving international law which has been pre-empted by the two sovereign powers, United States and Canada.

d. Ohio has no right to litigate issues involving the problem of pollution of the international boundary waters since the two sovereign powers, United States and Canada, have invoked the provisions of the Treaty 1909 for the purpose of investigating and supervising this problem. *See United States v. Curtiss-Wright Export Corporation,* 299 U.S. 304 at 316 (1936).

3. Insofar as Dow U. S. is allegedly involved, neither stock control, common directors nor officers are sufficient to hold Dow U. S. liable for any acts of Dow Canada in connection with the operation of Dow Canada's plant in Ontario, Canada. *U. S. v. Reading Co.,* 253 U.S. 26 at 62 (1920); *Steven v. Roscoe Turner Aeronautical Corp.,* 324 F.2d 157 at 161 (7th Cir. 1963); *Spears v. Transcontinental Bus System,* 226 F.2d 94 at 98 (9th Cir. 1955), *cert. denied,* 350 U.S. 950 (1956); *Owl Fumigating Corp. v. Calif. Cyanide Co.,* 24 F.2d 718 at 719 (Del. 1928), *aff'd,* 30 F.2d 812 (3d Cir. 1929), and *Kentucky Electric Power Co. v. Norton Coal Mining Co.,* 93 F.2d 923 at 926 (6th Cir. 1938).

4. The problem of pollution of the international boundary waters, including Lake Erie, involves complex and difficult evidentiary problems of causation, liability

and damage. Since *this* problem of pollution involves the interests of Ohio, Dow Canada, a Canadian Corporation, Dow U. S., a stockholder exercising no control over its subsidiary, extra-territorial acts, foreign policy, the Treaty 1909, intimate familiarity with scientific, ecologic and economic facts, movement of waters and the admixture of all kinds and types of pollutants, this Court should decline jurisdiction since the International Joint Commission, an alternative tribunal, has demonstrated that with its powers of continuing investigation and supervision it has sufficient flexibility to safely control this complex problem now and in the future. *See Report of the International Joint Commission on the Pollution of Boundary Waters* (1951) at 166; Vol. 1—*Summary—Report to the International Joint Commission* (1969), at 7 and 8; Vol. 2—*Lake Erie, Report to the International Joint Commission* (1969), Sec. 3.3.2 at 236; Waite, *The International Joint Commission—Its Impact on Land Use,* 13 BUFF. L. REV. 93 (1963-4); *Georgia v. Penna. R.R.,* 324 U.S. 439 at 470 (1945); 11 STAN. L.R. 665 at 695 (1959), and *Colorado v. Kansas,* 320 U.S. 383 at 392 (1943).

Respectfully submitted,

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