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 REPLY TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE.

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BRIEF OF THE DOW CHEMICAL COMPANY IN REPLY TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE.

STATEMENT.

The Solicitor General, in the Brief filed on behalf of the United States as *amicus curiae,* has concluded "* * * there is no *legal* bar to this Court's granting Ohio's motion for leave to file the complaint in this original action." See Conclusion, Brief of the United States, Page 34. (Italics supplied.)

In reaching the conclusion stated, the Solicitor General argues that Ohio, as *parens patriae,* unless precluded by treaty or federal law, "* * * may validly apply its common law to actors outside its territory who create a public nuisance within its boundaries." Brief of the United States, second paragraph, Page 6.

The Solicitor General bases the above statement upon the tenuous conclusion that "* * * so long as the federal government has not prescribed, by treaty or statute, a system of regulation of water pollution which precludes state action in this field, * * * Ohio may apply its common law against those whose acts created nuisance within the state." Brief of the United States, page 13.

Despite the above statements, there runs throughout the Brief of the United States an underscoring that this Court, upon consideration of the complexity of the issues and problems presented, could, exercising its discretion, refuse to entertain Ohio's Complaint.

I. UNDER PRINCIPLES OF INTERNATIONAL LAW APPLICABLE TO OHIO'S PROPOSED COMPLAINT, OHIO IS NOT THE PROPER PARTY TO INITIATE THE PROPOSED SUIT.

The *parens patriae* argument advanced by the Solicitor General (Brief of the United States, Pages 7-13) runs counter to the principles of international law. On this point, it is submitted the cases upon which Ohio and the Solicitor General rely (Pages 7-13 of the Brief of the United States) are not in point or determinative re Ohio's Motion. The cases cited are not authority for establishment of the conclusion that Ohio, as *parens patriae* for its citizens, may apply Ohio common law in seeking to obtain a judgment against a foreign national (Dow Canada) for the claimed results of an alleged nuisance which originated in Ontario, Canada.

Ohio's proposed Complaint involves issues which are extra-territorial. The international issues raised by the proposed litigation (pollution of international boundary waters) have long been of paramount interest to the governments of Canada and the United States. Joint

References to the International Joint Commission by the United States and Canada, April 1, 1946, and October 7, 1964, Appendix 1 & 2 attached.

Application of Ohio's common law would cloak Ohio, a quasi-sovereign, with the sovereign power reserved to the United States in dealing with foreign affairs. Such abdication and yielding of sovereign power by the federal government to Ohio not only establishes a singular precedent, but is contrary to principles of international law and runs counter to Articles II and IV of the *Boundary Waters Treaty 1909*.

The conclusion that *Ohio's common law* should be applicable and decisive, in adjudicating Ohio's claims with reference to a claimed public nuisance allegedly resulting in Ohio's portion of Lake Erie because of the introduction of mercury or compounds thereof into the Canadian side of the St. Clair River, will undoubtedly cause the Canadian government grave concern. Canada will certainly want to question the proposed application of Ohio's common law by Ohio, a quasi-sovereign, and the propriety of courts in the United States pre-empting Canada's sovereign right to exercise its own jurisdiction and to apply Ontario law to deal with the boundary waters pollution problem which Ohio asks leave to litigate. This is particularly true if the government of Canada diplomatically suggests Article II of the *Boundary Waters Treaty of 1909* is applicable and controlling of the issues raised by Ohio. See App. 1 and 2.

The Federal Water Pollution Control Act, as amended (1970), does not give Ohio the right to assert its common law in the proposed litigation. The **provisions 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 extra-territorial application upon the conduct of Dow Canada, an alien, in connection with the operation of its plant in Sarnia, Ontario, Canada or its use or the results of its use of the Canadian portion of the St. Clair River.

The Act of 1948, as amended, specifically provides in Section 1160 (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); and further provides in Section 1174, "*This chapter shall not be construed as* * * * (3) *affecting or impairing the provisions of any treaty of the United States.*" (Emphasis supplied.)

When an extra-territorial issue is raised, only the federal government has inherent power to negotiate such an issue. The federal government's complete sovereign power over foreign affairs makes it imperative that its sovereign interests be regarded as paramount over the interests of a quasi-sovereign (Ohio). *United States vs. California,* 332 U.S. 19 (1947).

In the case of *Sanitary District of Chicago vs. United States,* 266 U.S. 405 (1925), Mr. Justice Holmes said:

> "*This is not a controversy between equals. The United States is asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction.* It has a standing in this suit not only to remove obstruction to interstate and foreign commerce, the main ground, which we will deal with last, *but also to carry out treaty obligations to a foreign power bordering upon some of the Lakes concerned, and, it may be, also on the footing of an ultimate sovereign interest in the Lakes.*" (Emphasis supplied.)
>
> "*With regard to the second ground, the Treaty of January 11, 1909, with Great Britain, expressly pro-*

vides against uses 'affecting the natural level or flow of boundary waters' without the authority of the United States or the Dominion of Canada within their respective jurisdictions and the approval of the International Joint Commission agreed upon therein. As to its ultimate interest in the Lakes the reasons seem to be stronger than those that have established a similar standing for a State, as the interests of the nation are more important than those of any State. In re Debs, 158 U.S. 564, 584, 585, 599. *Georgia v. Tennessee Copper Co.,* 206 U.S. 230. *Hudson County Water Co. v. McCarter,* 209 U.S. 349, 355. *Marshall Dental Manufacturing Co. v. Iowa,* 226 U.S. 460, 462 (Emphasis supplied.)

"The main ground is the authority of the United States to remove obstructions to interstate and foreign commerce. There is no question that this power is superior to that of the States to provide for the welfare or necessities of their inhabitants. In matters where the States may act the action of Congress overrides what they have done. *Monongahela Bridge Co. v. United States,* 216 U.S. 177. *Second Employers' Liability Cases,* 223 U.S. 1, 53. *But in matters where the national importance is imminent and direct even where Congress has been silent the States may not act at all. Kansas City Southern Ry. Co. v. Kaw Valley Drainage District,* 233 U.S. 75, 79." *Sanitary District of Chicago v. United States,* 266 U.S. 405 at pages 425-426. (Emphasis supplied.) See also, *Missouri v. Holland,* 252 U.S. 416 (1920); *First Iowa Hydro-Electric Co-op v. F.P.C.,* 328 U.S. 152 (1946). To the same effect see *Kansas v. Colorado,* 185 U.S. 125, 144 (1902); *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907) ("[T]he alternate to force is a suit in this Court").

Even the principles of international comity or equitable apportionment do not dictate Ohio's common law can properly be applied or controlling in a suit seeking

remedial action involving an alleged extra-territorial act of pollution by a foreign national, to-wit Dow Canada. Article II of the *Boundary Waters Treaty 1909,* specifically reserves Canada's sovereign right to deal with all pollution problems originating in the boundary waters within its territory.

II. ADJUDICATION OF OHIO'S COMMON LAW INTERESTS IN LAKE ERIE, AS PARENS PATRIAE FOR ITS CITIZENS, COULD INVOLVE THIS COURT IN LITIGATION INITIATED BY THE STATES OF NEW YORK, PENNSYLVANIA AND MICHIGAN, AS WELL AS THE PROVINCE OF ONTARIO AGAINST INNUMERABLE DEFENDANTS, AS WELL AS RAISING DIPLOMATIC ISSUES HERETOFORE RESOLVED BY THE 1909 TREATY AND THE INTERNATIONAL JOINT COMMISSION.

Consideration necessarily must be given to the interests and laws of the States of New York, Pennsylvania, Michigan and the Province of Ontario, as well as the interests and laws of Ohio when claims of the pollution of Lake Erie are sought to be adjudicated, to say nothing of the sovereign interests of Canada and the United States.

The fact that Ohio seeks to name only Dow Canada, Dow United States and Wyandotte as defendants raises a a serious question as to whether any meaningful adjudication of any of the problems of the pollution of Lake Erie can be had if this Court, exercising its discretion, decides to entertain Ohio's Complaint.

If Ohio is given leave to file its Complaint, then, should not the States of New York, Pennsylvania and Michigan, as well as all of the municipalities and industrial plants bordering the shores of Lake Erie known to have discharged mercury or compounds thereof into the boundary waters of Lake Erie be joined as parties?

Then, too, before environmental and water pollution problems can be eradicated or protected against, definite quality standards and guidelines should be established to achieve the quality level desired.

It is submitted the goals settled upon can only be reached by scientific expertise, inspection, investigation, surveillance, protection, curtailment and enforcement extending over a long period.

In 1943, this Court was involved in a highly technical and abrasive dispute involving Colorado and Kansas and their respective rights to the beneficial use of the Arkansas River. After considering the problems involved, this Court held in *Colorado v. Kansas,* 320 U.S. 383 (1943) as follows:

> "In controversies involving the relative rights of States, the burden on the complaining State is much heavier than that generally required to be borne by private parties, and *this Court will intervene only where a case is fully and clearly proven.* (Headnote).
>
> "Kansas' allegations that Colorado's use has materially increased since the decision in Kansas v. Colorado, and that the increase has worked a serious detriment to the substantial interests of Kansas, are not sustained by the evidence. (Headnote).
>
> "Relief other than the restraint of further prosecution of suits by the Kansas user against Colorado users is denied to both States. (Headnote).
>
> *"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 our adjudicatory power. (p. 392) See *Washington v. Oregon,* 214 U.S. 205, 218; *Minnesota v. Wisconsin,* 252 U.S. 273, 283; *New York v. New Jersey,* 256 U.S. 296, 313. Compare the Colorado River Compact of Nov. 24, 1922, authorized by Act of August 19, 1921, 42 Stat. 171, and dismissed in Arizona v. California, 292 U.S. 341, 345; and compare *Hinderlider v. La Plata River Co.,* 304 U.S. 92. (Footnote p. 392)

"In such disputes as this, the court is conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved. Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a State, for the burden on the complaining State is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. And in determining whether one State is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one State or the other must be weighed as of the date when the controversy is mooted. (pp. 393-4) *Missouri v. Illinois,* 200 U.S. 496, 520-521; *New York v. New Jersey,* 256 U.S. 296, 309; *North Dakota v. Minnesota,* 263 U.S. 365, 374; *Connecticut v. Massachusetts,* 282 U.S. 660, 669; *Alabama v. Arizona,* 291 U.S. 286, 292; *Washington v. Oregon,* 297 U.S. 517, 522." (Footnote p. 393)

In considering the situations prognosticated above, questions immediately arise as to the "right" of Ohio, as *parens patriae,* to assert its common law seeking an injunction or damages because of the alleged negligence of a Canadian corporation occurring in Canada resulting in

a claimed nuisance in Ohio's portion of the international boundary waters.

In a report to a special commission (1966-7) authorized under the *National Science Foundation Act of 1960* (Act of May 10, 1950, ch 171, § 2, 64 Stat. 149, as amended, 42 U.S.C. 1861 to 1875) entitled, *Weather Modification, Law, Controls, Operations, Report to the Special Commission on Weather Modification,* the following significant observation is made:

> "One of the glories of the common law in its period of greatest development was the ability of its judges, at least the best of them, to meet the challenge of new factual situations through the application of rules developed in precedents and in related and analogous cases. *One of its greatest defects, if not its chief failing, was its inability to preview new situations and to help adjust men's affairs so that new and preventable conflicts would not arise." Report to Special Commission,* 1966-7, above, p. 1. (Emphasis supplied.)

III. OHIO'S CLAIM FOR DAMAGES AS PROPRIETOR IS NOT FOUNDED UPON LEGAL PRINCIPLES WHICH WILL PERMIT THE RECOVERY OF DAMAGES.

Despite more than a century of adjudication of disputes involving individual states, there has never been a case within this Court's original jurisdiction in which damages have been awarded to a state in its *parens patriae* capacity. The reason for this fact is clear. Damages may be suffered by individuals, but a state may sue as *parens patriae* only on behalf of its citizenry as a whole, and not in the interests of particular groups of its citizens, as the Solicitor General admits at Page 8 of the United States Brief. See *Georgia vs. Tennessee Copper Co.,* 206 U.S. 230, 239 (1907); *Pennsylvania vs. West Virginia,* 262 U.S. 553 (1923).

The impropriety of damage awards in a *parens patriae* case is exemplified by the Ninth Circuit's decision that Hawaii may not maintain a *parens patriae* antitrust action for injury to the economy of the state, even though the damages claimed were asserted to have independent existence apart from injuries to citizens or classes of citizens of Hawaii. 1970 Trade Cases 73 at page 340 (September 25, 1970). On this point, the Court stated:

> "* * * The general economy is an abstraction. It has no value in itself, save as it may (in a representational capacity on behalf of business and property generally) serve to confer value on the specific items of business or property it affects. It exists only as a reflection of the business or property values it represents."

The Ninth Circuit's decision recognizes damages for injury to a State's general economy may be impossible to assess separate and apart from damages suffered by the State's citizens; and that to allow both to maintain an action would make possible double recovery for the same harm. As Professor Freund has pointed out with respect to *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945):

> "Whatever strategic end may have been achieved through the earlier overruling of a motion to dismiss (324 U.S. 439), the complete inability of the state to make good its claim of injury as parens patriae suggests that in the future the Court may be more wary of sweeping allegations of detriment to a state's economy as a basis of a case or controversy." Freund, *Book Review*, 3 J. LEGAL ED. 643, 644 n. 2 (1951).

It is well settled that, while a state may regulate and protect fish and wildlife in waters within its boundaries, such power is an incident of its police powers. *Anthony v. Veatch*, 220 P.2d 493, 504, 509 (Sup. Ct. Ore. 1950). "Fish and game are owned by the states, *not as proprie-*

tors, but in their sovereign capacity as the representatives and for the benefit of all their people in common." *Organized Village of Kake v. Egan,* 174 F. Supp. 500 (D. Alaska 1959). (Headnote) (Emphasis supplied). See *United States v. Shauver,* 214 F. 154 (D.C. E.D. Ark. 1914).

In *Missouri v. Holland,* 252 U.S. 416 (1920), the Court said, with respect to wild birds:

> "To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away." 252 U.S. at 434.

The State of Ohio accordingly has no proprietary interest in the water, fish and wildlife of Lake Erie sufficient to sustain any damage claim based on injury thereto.

When this Court decided *North Dakota v. Minnesota,* 263 U.S. 365 (1923), this Court said, in dismissing North Dakota's suit to enjoin the State of Minnesota:

> "2. In a suit of that character, the burden upon the plaintiff State of sustaining her allegations is much greater than that imposed upon the plaintiff in an ordinary suit between private parties. (Headnote) See also *New York v. New Jersey,* 256 U.S. 296, 309; *Missouri v. Illinois,* 200 U.S. 496, 521.
>
> "North Dakota, in addition to an injunction, seeks a decree against Minnesota for damages of $5,000 for itself and of a million dollars for its inhabitants whose farms were injured and whose crops were lost. It is difficult to see how we can grant a decree in favor of North Dakota for the benefit of individuals against the State of Minnesota in view of the Eleventh Amendment to the Constitution, which forbids the extension

of the judicial power of the United States to any suit in law or equity of another State or by citizens and subjects of a foreign State. 263 U.S. at 374-5.

"The right of a State as *parens patriae* to bring suit to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continued action of another State, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens *as their trustee* against a sister State. For this reason the prayer for a money decree for the damage done by the floods of 1915 and 1916 to the farms of individuals in the Bois de Sioux Valley, is denied, for lack of jurisdiction." 263 U.S. at 375-6.

The claims for damages sought by Ohio cannot be determined with anywhere near the degree of certainty required to satisfy settled judicial principles. It will be most difficult to prove whether any mercury discharged from Dow Canada's Sarnia plant actually traveled down the St. Clair River, through Lake St. Clair, down the Detroit River, past the Wyandotte plant (where mercury is also alleged to have been discharged) and finally was deposited in Lake Erie within Ohio's borders. Also, there is no evidence any fish, wildlife or vegetation within Ohio territory were actually exposed to the mercury or compounds thereof discharged from Dow Canada's Sarnia plant, even if such mercury or compounds thereof did reach Ohio's borders. Nor is there any known way of ascertaining whether the same fish, wildlife or vegetation have also been exposed to the mercury or compounds thereof introduced into Lake Erie by the numerous other plants and municipalities located on the shore of Lake Erie; and, if so, how much mercury or compounds thereof such fish, wildlife or vegetation may have absorbed from such sources.

Ralph W. Purdy, Deputy Director of the Michigan Department of Natural Resources, in testifying before the Subcommittee on Energy, Natural Resources and the Environment of the Committee on Commerce of the U. S. Senate, 91st Cong., 2nd Sess., May 8, 1970, reported that tests of sediment samples of Lake St. Clair showed "* * * no significant amounts of mercury in the sediments of the Michigan portion of Lake St. Clair." (p. 11.)

Ralph W. Purdy further stated:

> "In investigating possible sources of mercury, we learned that mercury and mercury compounds are used in numerous and diverse everyday operations such as: in diaper laundries; in marine and acrylic based paints; in the manufacture of acetylene, polyvinylchlorides, chlorine and caustic soda; in seed, lawn and pulpwood fungicides; in hospitals; in mercury seals in trickling, filter sewage treatment plants; in mercury batteries; and in paper making plants."

This is of particular importance when a report entitled *Investigation of Mercury in the St. Clair River-Lake Erie Systems,* prepared by the United States Department of the Interior, Federal Water Pollution Control Administration presented at the June 3, 1970, Conference on Lake Erie in Detroit, Michigan, contained the following information:—"*List of Companies known to discharge or to have discharged mercury to Lake Erie or its tributaries*: Wyandotte Chemical Co., Wyandotte, Michigan; Detrex Chemical Industries, Ashtabula, Ohio; General Electric Chemical Products Plant, Cleveland, Ohio; Harshaw Chemical Co., Div. of Kewanee Oil Co., Elyria, Ohio; Mallinckrodt Chemical Works, Calsical Division, Erie, Pennsylvania; Nosco Plastics, Erie, Pennsylvania; Allied Chemical Co., Buffalo Dye Div., Buffalo, New York; and National Aeronautics & Space Administration, Lewis Research Center, Cleveland, Ohio."

Further, it is known mercury appears naturally in rocks and sediments prevalent in the Great Lakes region and may become methylated and harmful when covered by water, particularly when municipal sewage has been discharged into the water. Recently, it has been reported mercury has been found in substantial amounts in remote locations where there are no industrial facilities nearby to explain its presence. ENVIRONMENT, Nov. 1970 at S-1.

On December 16, 1970, the *Wall Street Journal* quoting The Food and Drug Administration and "Federal experts," reported:

> "Canned tuna sampled from all fishing grounds of the world showed unacceptable amounts of mercury 23% of the cases, * * *"
>
> "Federal experts said there wasn't any reason to believe the mercury contamination detected in tuna was peculiar to this year's pack. The reasons for the contamination of the deep sea fish aren't known and are puzzling to scientists.
>
> * * * * *
>
> "Dr. Albert Kolybe, Jr., deputy director of the Bureau of Foods, said it appeared that large, predatory fish with long life spans, such as the tuna, appear to concentrate mercury from the material on which they feed. Yesterday, FDA experts said they had confirmed findings by New York professor, Bruce McDuffie, of excess mercury levels in frozen swordfish. But FDA testing for mercury in shrimps and salmon has shown these smaller fish don't have levels above the 0.5 parts per million guideline."

The same *Wall Street Journal* article also reported:

> "FDA experts said that only two instances are known to have occurred in which mercury in fish caused health damage to humans. Both were in Japan and were caused by much higher levels of mercury

in fish and shellfish, ranging from 15 to 40 parts per million."

* * * * *

"FDA Commissioner Edwards said the 0.5 guideline has sufficient safety built into it that consumers needn't worry if they eat some cans of tuna containing excess levels of mercury."

It seems reasonable to conclude that as scientists and researchers become more knowledgeable concerning the exposure of humans to mercury and methyl mercury, tests might well prove most people can consume fish containing levels of methyl mercury or other mercury compounds in excess of 0.5 parts per million of mercury without suffering adverse health effects. This is particularly so since methyl mercury has been present in the boundary waters, rivers, streams and other water sources for at least ten years before scientific investigations revealed its potential toxicity.

In short, because of the current state of scientific knowledge, and the great number of interacting causes and conflicting opinions, there is no accurate or fair way of determining if the average ingestion of methyl mercury "contaminated" fish by humans will proximately result in such humans suffering adverse health effects; nor is there any known way to manage the isolation of the cause or causes, if toxic; or to fairly and accurately assess individual liability for damages, even if damages can be proved.

Ohio's ban on commercial fishing in Lake Erie, ordered by Governor James A. Rhodes on April 12, 1970 was removed on April 22, 1970. The 10 day ban was removed as to all fish, except walleye pike, when laboratory tests showed more than 87% of the fish tested were within federal safety standards.

Clearly, mercury is only a part of the pollution problem of Lake Erie. The many causes of pollution which have interacted, *even prior to discovery of the presence of mercury,* cannot be effectively dealt with independently of each other.

As reported by Reitze, "The various pollutants (in Lake Erie) must also be considered in totality as the synergistic effect of these inputs requires a comprehensive abatement program." Even in 1964, the central basin "was found practically devoid of oxygen below the thermocline" and algae were blamed for "ecological change in the Lake that is destroying commercial fishing." Reitze, *Wastes, Water, and Wishful Thinking: The Battle of Lake Erie,* 20 CASE W. RES. L. REV. 5, 6, 19 (1968).

Thus, a fundamental question is raised as to whether Ohio has presented issues which require such immediate and emergency relief and decision as to justify and warrant this Court exercising its discretion to entertain Ohio's Complaint.

IV. THE BOUNDARY WATERS TREATY OF 1909, THROUGH THE INTERNATIONAL JOINT COMMISSION AND THE JOINT REFERENCES OF APRIL 1, 1946 AND OCTOBER 7, 1964 BY THE GOVERNMENTS OF CANADA AND THE UNITED STATES, PROVIDES AN ALTERNATIVE SUITABLE FORUM WHEREBY THIS COURT, EXERCISING ITS DISCRETION, MAY PROPERLY REFUSE TO ENTERTAIN OHIO'S COMPLAINT.

The thrust of the Brief of the United States in dealing with the Boundary Waters Treaty of 1909 focuses upon the following conclusions:—(1) no provision of the Treaty grants a direct remedy for its violation; (2) its enforcement depends upon further action by the United States and Canada; (3) binding determinations are not authorized within the powers given the International Joint Commission; and, (4) the Treaty is not self-executing.

The conclusions reached by the Solicitor-General appear to be in conflict with opinions and conclusions of other scholars and students concerning the value and importance of the International Joint Commission in mediating the rights, obligations, or interests of the governments of Canada and the United States and the inhabitants of said governments along the common frontier, as defined in the Preamble of the 1909 Treaty.

The International Joint Commission has used its investigative and "judicial," see Bloomfield and Fitzgerald, *Boundary Water Problems of Canada and the United States*, pages 17-37, powers on various occasions to bring about the sought-after mediation between the Canadian and United States governments defined in the Premable. Confirmation of the effectiveness of the International Joint Commission is demonstrated in reviewing the U. S. Department of the Interior, *Documents on the Use and Control of the Waters of Interstate and International Streams: Compacts, Treaties and Adjudications*, Boundary

Waters Treaty, 1909 (1956) [hereinafter referred to as Documents.] See Documents, Art. IX, at 384 and Documents, Art. IV at 381.

It is argued here the Joint References of April 1, 1946 and October 7, 1964 to the International Joint Commission by the governments of Canada and the United States execute all the provisions and articles of the Treaty of 1909 insofar as the International Joint Commission's inquiries and findings concerning the pollution of Lake Erie on either side of the international boundary are concerned.

Pertinent comments are found in G. Graham Waite's article entitled: *The International Joint Commission—Its Practice and Its Impact on Land Use,* 13 BUFFALO LAW REVIEW, pages 111-112 (1963-4), wherein the following appears:

> "Although references may only be made by the national governments, private and public groups may stimulate the governments to act. Writing in reference to a water pollution matter, a former chairman of the United States section, IJC, once stated that to start an IJC investigation 'the first requirement is for interests on one side of the line to call attention' to the undesirable condition. 'If,' the chairman continued, 'the two Governments agree that the problem merits study, they may ask the International Joint Commission to investigate and make recommendations.'
>
> "In the same letter the chairman wrote that, to obtain an IJC investigation, the pollution of boundary waters or waters crossing the boundary must allegedly be 'detrimental to health or property interests.' Here the chairman's language was more conservative than that of the treaty. It is true the pollution forbidden by Article IV is only that which occurs on one side of the boundary 'to the injury of health or property on the other,' but no such

restriction appears in Article IX. Yet the reference ultimately made of the pollution problem interesting the chairman's correspondent stated that the two Governments had agreed upon reference pursuant to Article IX, but 'having in mind the provisions of Article IV * * * that 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 side.' Identical language appears in the 1946 reference of the pollution of boundary waters.

* * * * *

"Perhaps the references used the language only because the situation alleged happened to violate Article IV. If so, there would be no implication that violation of Article IV must be alleged to cause a water pollution reference. It is hard to see any justification for restricting IJC power to investigate water pollution. It is almost equally hard to imagine a water pollution situation referable under Article IX that would not also violate Article IV, assuming a liberal construction of 'property.' "

Professor Robert A. MacKay, Professor of Government and Political Science, Dalhousie University, Halifax, N.S., in his manuscript "*The International Joint Commission Between the United States and Canada,*" MacKay, 22 AM. J. INTERNAT. L. 292, wrote as follows:

"IV. ARBITRAL JURISDICTION UNDER ARTICLE X.

By virtue of Article X the Commission is also a permanent court of arbitration between the two countries. The article states:

'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, may be referred for decision to the International Joint Commission by the consent of the two Parties.'

"This article may be open to two interpretations. In the first place, it may be limited by the preamble, which expressly states that the purpose of the treaty is to settle questions then pending or which might thereafter arise 'along the common frontier.' If the preamble governs Article X, it would then be limited to 'frontier' questions. As such, its purpose would be largely to supplement Articles VIII and IX, either in order to constitute a 'last-resort' method when the Commission would be evenly divided over an application under Article VIII, or to settle questions which had already been investigated under Article IX, or probably to decide any controversy arising along the frontier which had escaped settlement under either of those articles.

"On the other hand, if Article X be construed at its face value, there would appear to be no limit as to the geographical location of differences which might be submitted. This view is further supported if we compare Article X with Article IX, which relates to investigations. The phraselogy as to the kinds of questions is identical with the striking exception that Article IX includes the qualifying phrase, "along the common frontier between the United States and the Dominion of Canada." This difference is surely not without meaning. Since Article X contains no such exception, nor indeed any express exceptions, it would appear that the framers contemplated the submission of 'any question or matter of difference' whatsoever. 22 AM. J. INTL. L. at 311-312.

* * * * *

"If the Commission should ever be called to function under Article X, it is believed that its members could be relied upon to act as judges rather than as advocates, just as they have acted in all other instances." 22 AM. J. INT'L. L. at 314.

In conclusion, Honorable Matthew E. Welsh, former Chairman, United States Section, International Joint Com-

mission, United States and Canada, in a Panel Discussion on International Cooperation in Curbing Water Pollution —Subject, The International Joint Commission, reported at pages 77-84 in the *Proceedings of the Conference on International and Interstate Regulation of Water Pollution —March 12-13, 1970,* Columbia University School of Law, made the following comments:

> "The Legal Advisor's office of the State Department has commented to me that the International Joint Commission (IJC) may well be the most developed organization in existence among the international institutions dealing with problems of international cooperation in curbing transnational pollution." At 77.
>
> * * * * *
>
> "As early as 1912 the governments of the United States and Canada requested the Commission to investigate and report upon the extent, causes, location and remedies for pollution of *all* boundary waters, of which four of the Great Lakes are the major part." At 78.
>
> * * * * *
>
> "It is interesting to note that this IJC report, made more than fifty-one years ago, after commenting that its comprehensive survey had disclosed 'a situation along the frontier which is generally chaotic, everywhere perilous, and in some cases disgraceful,' recommended, * * * it is advisable to confer upon the IJC ample jurisdiction to regulate and prohibit this pollution of waters crossing the boundary." At 78.
>
> * * * * *
>
> "When the Commission is charged with a mission by the Governments, just how does it go about this business of determining the facts? In every case the problem area is, by definition, intersected by an international boundary; and within each country there are numerous overlapping jurisdictions, Federal, Provin-

cial, and State, each of which in turn has an interest. *The energies and talents of all these agencies must be harnessed so that they are all working together toward an agreed solution rather than at cross purposes, since it is not possible to regulate only one side of a river or control pollution of only part of a lake.* Unless there is general agreement by all concerned, the mere obtaining of accurate and complete data for an entire river basin, for example, would be very difficult, and the attainment of a solution even more so." At 82 (Emphasis supplied.)

* * * * *

"* * * the IJC provides a vehicle which encourages frank and constructive discussion on a continuing basis between the best scientific and technical experts in both countries who have been charged by their governments—Federal, State and Provincial—with administrative responsibility for the particular matter at issue." At 82.

* * * * *

"An additional device or technique has recently been developed by the IJC in discharge of its growing responsibilities in the field of transboundary water pollution, namely, the calling of public international meetings to inquire into the progress being made by administrative agencies responsibile." * * * [A meeting was held] "at Windsor, Ontario, concerning [the pollution of] the St. Clair and Detroit Rivers." At 83.

* * * * *

"While the number of new dockets of the Commission is small, the scope and magnitude of each of the more recent tasks referred to it by the two Governments can only be described as enormous. Regulation of the levels of the entire Great Lakes system, *investigation into causes of and means of control of pollution of Lakes Erie and Ontario,* and investigation

of air pollution along the entire boundary are examples. Well over 1,000 engineers, scientists, and specialists and their supporting personnel, all drawn from the public service of both countries, are involved in studies of the Great Lakes under supervision of the IJC on these three references alone." At 84. (Emphasis supplied.)

* * * * *

"Thus, the Governments are increasingly making use of the IJC to investigate and make recommendations concerning problems of mutual concern along the boundary and entrusting it with the responsibility of supervising efforts at solution." At 84.

CONCLUSION.

For all of the reasons stated above, it is submitted Ohio's case is not an appropriate one for the exercise of this Court's original jurisdiction. Leave to file Ohio's Complaint should, therefore, be denied.

Respectfully submitted,

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APPENDIX 1.

Excerpt from Report of The International Joint Commission United States and Canada On The Pollution Of Boundary Waters.

The Secretary of State for the Government of the United States and the Secretary of State for External Affairs for the Government of Canada on April 1, 1946, made the following Reference to the International Joint Commission through identical letters addressed to the United States and Canadian sections of the Commission.

> "I have the honor to advise you that the Governments of the United States and Canada have been informed that the waters of the St. Clair River, Lake St. Clair and the Detroit River are being polluted by sewage and industrial wastes emptied into those waters. Having in mind the provisions of Article IV of the Boundary Waters Treaty signed January 11, 1909, that 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 side, the two Governments have agreed upon a joint Reference on the matter to the International Joint Commission, pursuant to the provisions of Article IX of said Treaty. The Commission is requested to inquire into and report to the two Governments upon the following questions:
>
> (1) Are the waters referred to in the preceding paragraph, or any of them, actually being polluted on either side of the boundary to the injury of health or property on the other side of the boundary?
>
> (2) If the foregoing question is answered in the affirmative, to what extent, by what causes, and in what localities is such pollution taking place?
>
> (3) If the Commission should find that pollution of the character just referred to is taking place, what measures for remedying the situation would, in its judgment, be most practicable from the economic, sanitary and other points of view?

(4) If the Commission should find that the construction or maintenance of remedial or preventive works is necessary to render the waters sanitary and suitable for domestic and other uses, it should indicate the nature, location and extent of such works, and the probable cost thereof, and by whom and in what proportions such cost should be borne.

For the purpose of assisting the Commission in making the investigation and recommendations provided for in this Reference, the two Governments will, upon request, make available to the Commission the services of engineers and other specially qualified personnel of their governmental agencies, and such information and technical data as may have been acquired by such agencies or as may be acquired by them during the course of the investigation.

The Commission should submit its report and recommendations to the two Governments as soon as practicable."

APPENDIX 2.

Text of Letter Containing a Reference Calling for a Report on Pollution in Lake Erie, Lake Ontario and the International Section of the St. Lawrence River.

October 7, 1964

The International Joint Commission,
United States and Canada,
Washington, D.C., U.S.A.,
and Ottawa, Ontario, Canada.

Sirs:

I have the honor to inform you that the Governments of the United States and Canada have been informed that the waters of Lake Erie, Lake Ontario and the international section of the St. Lawrence River are being polluted by sewage and industrial waste discharged into these waters. Having in mind the provision of Article IV of the Boundary Waters Treaty signed January 11, 1909, that 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 side, the two Governments have agreed upon a joint Reference of the matter to the International Joint Commission, pursuant to the provisions of Article IX of said Treaty. The Commission is requested to inquire into and to report to the two Governments upon the following questions:

(1) Are the waters of Lake Erie, Lake Ontario, and the international section of the St. Lawrence River being polluted on either side of the boundary to an extent which is causing or is likely to cause injury to health or property on the other side of the boundary?

(2) If the foregoing question is answered in the affirmative, to what extent, by what causes, and in what localities is such pollution taking place?

(3) If the Commission should find that pollution of the character just referred to is taking place, what remedial measures would, in its judgment, be most practicable from the economic, sanitary and other points of view and what would be the probable cost thereof?

In the conduct of its investigation and otherwise in the performance of its duties under this Reference, the Commission may utilize the services of engineers and other specially qualified personnel of the technical agencies of the United States and Canada and will so far as possible make use of information and technical data heretofore acquired or which may become available during the course of the investigation.

The two Governments are also agreed on the desirability of extending this Reference to other boundary waters of the Great Lakes Basin at an appropriate time. The Commission is requested to advise the Governments when, in its opinion, such action is desirable.

The Commission should submit its report and recommendations to the two Governments as soon as practicable.

Very truly yours,

For the Secretary of State:

/s/ WILLIAM R. TYLER,
Assistant Secretary.