

M E M O R A N D U M

TO: Hooker File

FROM: Toby

RE: Notes for International Law Section

Bourne: Int'l law + pollution of int'l rivers & lakes

The quality of a community's water resources has become a matter of national and international concern. The law governing the quality of water in international rivers and lakes is rooted in the general principles of law applicable to international resources. } They are summed up in the doctrine of equitable utilization which has now gained the overwhelming support of the international community and is most authoritatively stated in the Helsinki Rules adopted by the International Law Association in 1966 (Report of the 52nd Conference of the International Law Association held in Helsinki August 14-20, 1966, at 484 (1967)). The principle of equitable utilization is stated in Article IV of the Helsinki Rules; it is that 'each basin state is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin'. Article V provides that "what is a reasonable and equitable share within the meaning of Article IV is to be determined in the light of all the relevant factors in each particular case"; it then sets out some of the factors that are deemed to be relevant, concluding with the paragraph stating that "the weight to be given to each factor to be determined by its importance in comparison with that of other relevant factors". That is the essence of the doctrine of equitable utilization.

It merely introduces the reasonable man test for determining what is lawful or unlawful conduct. It is a test that has worked well in

municipal law and it is now hoped that it will work equally well in reconciling the conflicting interests of co-basin states. NOTE: The Rule of International Law stated in this article does not prohibit pollution per se. A complaining state must show that the effect of the pollution is such that it is not consistent with the equitable utilization of the drainage basin. The International Law Association has devoted a separate chapter to it in the Helsinki Rules, three articles, Article IX, X and XI.

The leading international adjudication on the subject of pollution is the Trail Smelter arbitration between Canada and the U.S. The tribunal expressed the opinion that Canada was in any event liable on the ground that "no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another...when the case is of serious consequence...". The tribunal looked to U.S. law. In the Trail Smelter arbitration the problems of international air pollution were deemed to be analogous to those of international water pollution and thus to be governed by the same principles of international law, and American cases on interstate water pollution were considered to be a source of these principles. The Trail Smelter arbitration and the American cases do little more than assert there are legal limits to the changes that may be made in the quality of the water through an international drainage basin, but they leave the precise nature of these limits quite uncertain. New Jersey v. New York (283 U.S. 336, 1931) does make it clear that the legality of an act causing pollution is determined by applying the principle of equitable utilization. The Trail Smelter arbitration merely invoked the rudimentary *sic utere tuo* principle.

The Supreme Court in that case stated again that these problems would be better dealt with by reference than of the states.

Statesmen throughout the world seemed to reach the same conclusion as the Supreme Court, for states have in fact entered into numerous treaties dealing with problems that arise in the exploitation of their common water resources. The IJC created by Canada and the U.S. under the 1909 Boundary Waters Treaty is largely the prototype that joint commissions provided to find modern water treaties. It was not given any specific jurisdiction over pollution; the only reference to that subject is in Article IV which provides 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". Nevertheless, from its earliest days the Commission has had referred to it by the two governments questions of pollution and boundary waters and its work in these fields has been outstanding. It derives its jurisdiction over pollution indirectly from Article IX of the Treaty, which gives it the authority to examine into and report upon any matter referred to it by the governments of Canada and the U.S. Since the Commission's jurisdiction is strictly limited to investigation and recommendation its success depends on persuading federal and provincial or state governments in Canada and the U.S. to implement its recommendations. His conclusion is that the international law on pollution of the waters in an international drainage basin has not evolved beyond the principle of equitable utilization proclaimed in the 1966 Helsinki Rules. He says "if municipal law may be taken as a guide than the existing customary international law on pollution of drainage basins would be largely ignored; it will be displaced by treaties providing for the management and control of international drainage basins by international joint agencies".

NOTE: That was from C.B. Bourne, International Law and Pollution of International Rivers and Lakes, University of Toronto Law Journal, page 193 to 202. Vol. 21.

Pollution of the Great Lakes: A Joint Approach by Canada and the United States, Vol. 2, California Western International Law Journal, page 109 to 127, by Gibson E. Pratt. Winter 1971.

The aesthetic, recreational and economic character of the Great Lakes has served those in the area for as long as the region has been inhabited. Yet the people of both nations have caused such deterioration in these national resources that they are in a very real danger of dying. The governments of Canada and the U.S. have been aware of this deterioration since 1912 when they requested the IJC to study the sources of pollution in all boundary waters between the two countries. The Commission submitted its report in 1918 and recommended that steps be taken to curtail the situation. In 1946 the two countries again referred the issue of boundary water pollution to the IJC with findings released in 1951. One of the most comprehensive studies ever undertaken in the area of water pollution was completed by the IJC in 1969 - The International Lake Erie Water Pollution Board and The International Lake Ontario - St. Lawrence River Water Pollution Board Report to the IJC on the Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River, Vol. 1, 1969. The IJC concluded that the source of the pollution was from both the United States and Canada and that the pollution had reached such an extent that "it is causing and is likely to cause injury to health and property on the other side of the boundary". The governments

of the U.S. and Canada have referred the question of pollution of the waters of the Great Lakes to the IJC on three different occasions - 1918, 1951, and 1969. As a result, both governments have recognized the value in turning to the IJC for pollution research, notwithstanding the fact that the Commission has no enforcement powers. This is in part because the U.S. and Canada have a long history of peaceful settlement and arbitration of disputes. There is no open or international water in the Great Lakes. Each country owns and exercises dominion over its waters as part of its own national territory.

The waters are not international waters in the narrow sense of the term. They are part of the national territories of the U.S. and Canada by virtue of the 1925 Boundary Treaty between the two countries. The Lakes form the international boundary between the two countries and the general principles of international law should be applied to disputes therein. *As former president, Lyndon B. Johnson, stated in 1969, the Great Lakes have an international nature and all dealings with reference to them must be conducted accordingly.

It was the cornerstone of Attorney-General Judson Harmon that a state can do as it pleases with the waters located within its territory. He wrote that "the fundamental principle of international law is the absolute sovereignty of every nation as against all others, within its territory". But this has been characterized as being based upon an individualistic, anarchical conception of international law, in which selfish interests are exclusively taken as a rule of conduct and no solution is offered regarding the opposite interests of upper and lower riparians. There is in contrast a theory in international law which is based on the principle *sic utere tuo ut alienum non laedas* - this means

one must so use his own as not to do injury to another. Every state is obliged not to knowingly allow its territory to be used for acts contrary to the right of other states. A varying theory is that co-riparians have mutual rights and obligations between them and their uses of waters which they share thereby creating a condition of limited sovereignty. The mutual rights theory is lodged in the principle of equitable utilization, see Helsinki Rules.

1. International ~~K-Fall~~ *Case Law*

There have only been two disputes over the economic use of international waters which were resolved by judicial decisions, and neither of them concern the problems of water pollution. Lake Lanu^{du} case, Spain v. France, 24 ILR 101 1957 and Diversion of Waters from the Meuse, PCIJ, SER, A/B, #70, 1937. However in the collateral problem of air pollution the Trail Smelter decision may offer authority for the application of the equitable utilization principle in the area of air pollution.

2. Since there is currently a spirit of cooperation between Canada and the U.S. it would appear that there are more effective areas to curb pollution in the Great Lakes than application on the general principles of international law.

b. Treaties

Treaties will create conciliatory attitudes on the part of each nation and its relations with the other. It comes to the conclusion that only a coordinated effort by Canada and the U.S. is the answer to the current pollution problems says pre-Great Lakes Water Quality

Agreement.

Balancing of interests and international liability for the pollution of international water courses: customary principles of law revisited by Gunther Handl from the Canadian Yearbook of International Law, 1975, page 156 to 194. Customary law is a starting point for further development in the law. This paper is looking into whether international liability is to be viewed as being grounded in a single uniform principle or whether liability does not rather present itself as a result of convergence of different individually identifiable elements.

- ✓ a. The Stockholm Declaration on the Human Environment
- Principles 21 and 22 of the Declaration on the Human Environment UNGOC/CONF 48/14 at 427 1972. Reference is made to the question of state responsibility while principle 22 merely reflects the obligation of states to cooperate in the further development of international law with regard to liability and compensation for extra territorial environmental damage in general, principle 21 expressly stipulates "states have, in accordance with the charter of the United Nations principles of international law, the sovereign right to exploit their own resources pursuant to their own environment policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or to areas beyond the limits of national jurisdiction.
- Responsibility has already been confirmed in a ^{the Corfu} ~~corporate~~ channel case as a consequence of the well established principle requiring a state not to allow knowingly its territory to be used for acts contrary to the rights of others, 1949 FEJ Report 1 at 22.

It does seem clear that on the basis of these criteria for liability, states are responsible also for activities carried on by private individuals if such activities produce detrimental extraterritorial environmental effects.

In the US the concept that international law is the law of the land has been adopted even more forcefully than in Great Britain.

A long list of cases decided by the Supreme Court has firmly established this doctrine. note paquette- According to American practice, all generally accepted principles of international law, or at least such as have received the assent of the United States, and all international conventions ratified by the United States are binding on American Courts, even if they conflict with earlier Acts of Congress. Thus, generally speaking, customary and conventional rules of international law override earlier domestic legislation, provided they do not violate express prohibitions contained in the Constitution of the United States or, in the case of conventional rules, require implementation through legislation which has not yet been forthcoming,

I. The Canadian Public Interest

The goal of the proposed settlement has been stated to be the restoration and protection of the environment against endangerment to human health and the environment in and about the Hyde Park Landfill and the Bloody Run drainage area (p.1 and 6). The parties have further stated that the judgement was intended to further the public interest.

The Court in deciding whether to ratify this agreement must examine the proposed settlement agreement in light of these goals and determine whether the public interest is served. It is our position that the public interest must by the nature of the subject matter of the settlement include the Canadian public interest. The Canadian public interest which is affected by this settlement is the interest of the approximately four million Canadian, who take their drinking water from the Niagara River and Lake Ontario. In addition, there is the public interest of those generations in using these water bodies for sports and commercial fishing, recreational and industrial uses.

Specifically, it has been estimated that approximately 4,052,100 Canadians who border on Lake Ontario use this lake as their source of drinking water. The following is the breakdown by County or Regional Municipality of the Ontario population who use Lake Ontario for drinking Water.

NIAGARA	371,600
HAMILTON-WENTHWORTH	409,400
HALTON	238,100
PEEL	421,800

TORONTO	2,106,400
DURHAM	270,400
NORTHUMBERLAND	66,100
PRINCE EDWARD	22,700
LENNOX-ADDINGTON	34,200
FRONTENAC	111,400

(Statistics Canada Publication #91-206, 1978)

Any continued migration of the toxic chemicals found in the Hyde Park Landfill can only have a devastating impact on the Canadian public health and the environment.

Furthermore, while the protection of health of U.S. citizens in New York State is supposed to be considered in determining the adequacy of the 'Remedial Technology'; Canadian public health is not take into account. This may restrict the ability of the government parties to the agreement to insist on more advanced technology at a future date, *to protect Canadian interests*

While the proposed settlement does not address the implications for Canadian public health and the environment, it does recognize that the environment it is seeking to protect encompasses international waters. The proposed *settlement* agreement states that "groundwater movement (in the overburden and the Lockport Bedrock zones) is generally toward the Niagara River Gorge". Furthermore, surface water from the Landfill site drains into Bloody Run Creek which eventually empties into the Niagara River. The "Hyde Park - Bloody Run area" as defined by the parties includes "that portion of the Niagara River into which Bloody Run empties". The Niagara River and Lake Ontario, into which the Niagara River flows, are both international boundary waters. Migration of chemicals from Hyde

Park Landfill Site inevitably has an impact on these water bodies.

These international boundary waters are subject to international treaties, agreements, and concerns ^{some of which} ~~that~~ have been in existence since the turn of the century. This proposed settlement, if ratified in its present form, could seriously undermine the cooperative arrangements of the two countries. Moreover, if the Niagara River and Lake Ontario are contaminated as a result of the inadequacy of the proposed settlement, it could lead to major damage claims further undermining Canadian-US relations.

II. Application of International Law

It is well established that American courts are competent to enforce international law "not only by virtue of this country's status and membership in the community of nations but also because international law is part of the law of the United States."

Banco Nacional de Cuba v. Sabbatino 193 F. Supp.
375, 381-82 (S.D.N.Y. 1961) rev'd on other grounds,
376 U.S. 298 (1964)

This concept that international law is the law of the land has been adopted even more forcefully in the United States than in Great Britain.

In The Paquete Habana 173 U.S. 677, 20 S.Ct 290, 44 L.Ed 320, (1900), the Court stated that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination". In that case, customary international law was held to apply in the absence of a treaty, executive or legislative act or judicial decision.

As Canadian amicus curiae we submit that this court should take into account international law governing the quality of water in international rivers and lakes in making a decision whether the settlement will adequately meet the public interest.

International laws impose a duty on nations to prevent transboundary pollution injuries. Custom, practice and judicial decisions have established a principle of limited rather than absolute sovereignty, in regard to shared water resources.

The theory that a state can do as it pleases with waters located within its territory was formulated in 1895 by former US Attorney-General Harmon in his reply to a protest by Mexico that the US was diverting waters of the Rio Grande. (See 21 Ops. Attorney-General, 1895). The Harmon Doctrine has been discredited as having been "grounded in an individualistic and anarchical conception of international law, in which personal and egotistical interests are raised to the level of binding principles, and no solution is offered for the conflicting interests of the upper and lower riparians." (J. Berber, Rivers in International Law, (1959) p.14)

The U.S. government itself repudiated the validity of the Harmon doctrine during the Columbia River diversion controversy which Canada submitted to the International Joint Commission for investigation and recommendations pursuant to Article IX of the 1909 treaty. The issue in the Columbia River reference was the extent to which Canada could divert waters in British Columbia from the Kootenay River into the Columbia River

and then to the Fraser River. It stated that the Harmon doctrine "is not, today, a principle of general international law." (L. Bloomfield and G. Fitzgerald, Boundary Water Problems of Canada and the United States 168 (1958)).

The Court should examine the settlement in the light of the international law applicable to international rivers and lakes. This involves an examination of a number of sources of international law in this area including customary international law, the 1972 Stockholm Declaration on the Human Environment, the 1966 Helsinki Rules, the 1909 Boundary Waters Treaty, and the 1972 and 1978 Great Lakes Water Quality Agreements.

A. Customary Law

Customary international law is found in the practices of nations in their relations with one another.

It is submitted that the United States and Canada have clearly established the responsibility of each country to prevent transboundary pollution injuries. The seminal case in customary international law involving pollution is Trail Smelter (United States v. Canada) 3 R. Int'l Arb. Awards 1905 (1941), 35 Am. J. of Int'l Law (1941) 684. This case involved air pollution injury to American citizens and property in *the State* of Washington caused by a smelting operation at Trail, British Columbia. It was referred to an arbitral tribunal established pursuant to an international convention.

The Canada-U.S. Tribunal held that:

"under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury...in or to the territory of another or the properties or persons therein where the case is of

serious consequence and the injury is established by clear and convincing evidence."

In the Trail Smelter arbitration the problems of international air pollution were deemed to be analogous to those of international water pollution and thus to be governed by the same principles of international law. American cases on interstate air and water pollution were considered to be a source of these principles. The tribunal stated that "there are, however, as regards, both air pollution and water pollution, certain decisions of the Supreme Court of the United States which may legitimately be taken as a guide in this field of international law". 35 Am. J. of Int'l Law, p.714. The principle invoked by the Trail Court was the maxim 'sic utere tuo ut alienum non laedas' - (one must so use his own as not to do injury to another). The main important of the sic utere tuo principle is that it acknowledges the limited nature of a state's sovereign right to develop its resources and rejects notions of absolute sovereignty. The case also establishes that states are responsible for activities carried on by private individuals if such activities produce detrimental extraterritorial environmental effects.

B. The Stockholm Declaration on the Human Environment, 1972

Both the United States and Canada have signed the Declaration on the Human Environment formulated at the United Nations Environment Conference held in Stockholm in 1972. Principle 21 of the Stockholm Declaration stipulates that "states have, in accordance with the Charter of the United Nations and principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or to areas beyond the limits of national jurisdiction." (U.N. Doc.A/CONF. 48/14 at 7 (1972)). The generally expressed standard is that states should

use all due diligence to prevent transboundary pollution and to remedy it when it does occur.

C. Helsinki Rules on the Use of the Waters of International Rivers (1966)

The Helsinki Rules adopted by the International Law Association (ILA) in 1966 adopted the doctrine of equitable utilization in regard to international drainage basins (see Report on the Fifty-Second Conference of the International Law Association held at Helsinki, August 14 to 20, 1966, (1967)). The ILA, founded in 1873, is a private body of international lawyers, including representatives from Canada and the United States. The Helsinki Rules are a codification of customary law and international legal principles regarding the use of international waters. According to Article II of the Rules, an international drainage basin is a geographical area extending to or over the watershed extremities of the system of waters, including surface and underground waters, all of which flow into a common terminus. The Great Lakes would be such an international drainage basin. Article IV of the Helsinki Rules states that "each basin state is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin".

Further, Article IX provides a definition of 'water pollution' as referring to "any detrimental change resulting from human conduct in the natural composition, content, or quality of the waters of an international drainage basin".

Article X provides that "consistent with the principles of equitable utilization of the waters of an international drainage basin", a State "(a) must prevent any new form of water pollution or any increase in the

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D R A F T

Addendum IV: Guarantee

It is our position that the Guarantee set out in Addendum IV is inadequate in its present form. Our main concerns are with the maximum amount and duration of the guarantee set out in paragraph 4 and 5. Grant Anderson concludes that, given the nature of the wastes and the site location, a maintenance period of 35 years is naive and that perpetual care will be required. (See affidavit, p.) Further, the cost of removing leachate alone would be substantially more than the \$10,000,000 guarantee. (See Kelppinger)

It is our position that the guarantee should be meaningful in the first instance, to ensure that EPA and the State will not have to return to Court to show cause for an increase in amount or duration of the guarantee.

The definition of liability in paragraph 2, p. IV-1, is unusually restricted. Liability is not the cost to Hooker of performing the containment, monitoring and maintenance required under the settlement. Rather, it is the cost of performing after the Court has found that Hooker or its authorized successor "cannot perform or cause to be performed its obligations pursuant to the judgement due to its insolvency or like financial condition." The significance of this definition is that there is no liability until a court has found that Hooker is insolvent or similarly disabled financially. Hooker could consistently fail to perform its obligations for a host of other reasons without triggering the guarantee.

A further implication of the unusual definition of liability is that Occidental's liability only arises following a demand by the EPA

supported by a determination of the court. In practice, the delay that might be experienced before a demand could be made on the guarantee might be very considerable.

Another problem is that the guarantee is expressed in constant dollars and will therefore be eroded considerably by inflation over the period of the guarantee. The maximum should be increased at a rate approximating the general rate of inflation in New York State.

Paragraph 6 provides that the duration and maximum amount of the guarantee may be modified by EPA or New York State ^{upon a} showing to the court that such modification is necessary to ensure Hooker's obligations.

The term "modification" should be strengthened. Since the guarantee ~~express~~ expresses a maximum amount, "modification" can only refer sensibly to an increase in that amount. Therefore, there should be no reason why the neutral term "modification" should be used. The term should be strengthened so that the possibility of dispute over its intended meaning at some later time is eliminated.

There are several matters not touched on by the Agreement. There is no provision selecting the appropriate law to govern the relations of the parties. Neither is there adequate evidence of the corporate power of Occidental to grant this guarantee nor evidence of due exercise of that corporate power in the authorization of signing officers to execute and deliver the guarantee as the binding obligation of Occidental. Some form of legal opinion from a practitioner competent in the law chosen to govern the

guarantee should be provided to indicate that the statute of limitations or other prescriptive enactment capable of applying to the guarantee will not preclude action until some time after the 35th year.

degree of existing water pollution in an international drainage basin which would cause substantial injury in the territory of a co-basin State."

D. 1909 Boundary Waters Treaty and 1978 Great Lakes Water Quality Agreement

The proposed settlement agreement does not touch upon the international obligations assumed by both the United States and Canada under the 1909 Boundary Waters Treaty, which expressly prohibits pollution of boundary waters causing injury to property or health of persons on either side of the border; nor with obligations assumed by both countries under the 1978 Great Lakes Water Quality Agreement.

The 1909 Boundary Waters Treaty, 36 Stat. 2448 (1910), T.S. No. 548 (effective May 13, 1910) is part of the law of the United States.

Article IV is the relevant section dealing with the Pollution of boundary waters. It states "it is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other".

The Preliminary Article of the Treaty defines boundary waters as the lakes and rivers along which the international boundary passes including all bays and inlets, but not including tributaries flowing into such lakes and rivers or waters flowing from such lakes or rivers or rivers flowing across the boundary. Both Lake Ontario and the Niagara River are Boundary Waters as defined under the Treaty.

A 1970 report of the International Joint Commission, a Canada-U.S. body established under the 1909 Treaty, recommended negotiation of an intergovernmental water quality agreement. In April 1972, such an agreement, known as the Great Lakes Water Quality Agreement was signed. This document was replaced by a subsequent agreement in 1978 which broadened the scope of the programs and emphasized the control of persistent toxic chemicals. The Agreement is designed to prevent future, and abate existing pollution of the Great Lakes Basin ecosystem.

Article II states that the policy of the Parties is that:

- (a) the discharge of toxic substances in toxic amounts be prohibited, and
- (b) the discharge of any or all persistent toxic substances be virtually eliminated.

Annex 12 entitled 'Persistent Toxic Substances', states in section 2(a) (ii) that the philosophy adopted for control of inputs of persistent toxic substances shall be zero discharge. Finally, Annex 12, section 2(b) states that the Parties shall take all reasonable and practical measures to rehabilitate those portions of the Great Lakes system adversely affected by persistent toxic substances. There is no stipulation in the proposed Hyde Park settlement for restoration or rehabilitation of the Niagara River.

The Agreement commits both countries to adopt programs to abate and prevent industrial pollution by December 31, 1983 and to include "requirements for the substantial elimination of discharges into the Great Lakes system of persistent toxic substances." (Article VI, section 1(b)(ii).)

Annex I lists specific objectives for chemicals including persistent toxic substances, such as mirex, which are found in the Hyde Park landfill. Annex I, I(A)(1)(b) states that the concentration for 'Unspecified Organic Compounds' in water or aquatic organisms should be substantially absent, i.e. less than detection levels as determined by the best scientific methodology available. This would include the dioxin found in the Hyde Park landfill.

It is our position that the containment program set out in the proposed settlement agreement will not prevent the migration of these ultra-hazardous chemicals into the Niagara River and Lake Ontario. (See affidavit of Grant Anderson, p.)

Furthermore, according to Dr. Hallett, breaches of the Great Lakes Water Quality Agreement are already taking place, and any further migration will endanger the health of both Canadians and Americans living on the shores of these water bodies. What is especially significant, is that if only "one shovelfull" (3 lbs) of the 3,300 tons of "trichlorophenol still bottoms" were mobilized into the Niagara River over as short a period as 6 months, the levels of TCDD in the water column and biota of Lake Ontario would be elevated between 10 and 100 times the present levels which are already dangerously high". The Court in determining whether this settlement should be ratified must take into account the magnitude of the harm to public health and the environment that would result from further migration of dioxin and other chemicals into the Niagara River and Lake Ontario.

The Court should also recognize that the Canadian public interest will not be protected if the international obligations and principles outlined above are violated.