SUBMISSIONS BY
WEST COAST ENVIRONMENTAL LAW
TO THE
INTERNATIONAL JOINT COMMISSION

IN REGARD TO THE APPLICATION OF THE
CANADIAN COLUMBIA INTER-TRIBAL FISHERIES COMMISSION

CONCERNING THE GRAND COULEE DAM

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This Submission is a response to the International Joint Commission's (IJC) requests for comments on the application of the Canadian Columbia River Inter-Tribal Fisheries Commission (CCRIFC) to have the IJC enforce the conditions of its Order of Approval for the Grand Coulee Dam and reservoir (the "1941 Order"). Specifically the CCRIFC has asked the IJC in its letter dated April 23, 2003 to make further orders necessary to protect and indemnify the fisheries interests of the indigenous communities located along the Columbia River on the Canadian side of the border; specifically the CCRIFC are looking for orders to restore salmon to this stretch of the Columbia.

The relevant conditions read as follows:

> That the Applicant make suitable and adequate provision, to the satisfaction of the Commission, for the protection and indemnification of all interests in British Columbia by reason of damage resulting from the construction and operation of the Grand Coulee Dam and reservoir.
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> That the Commission expressly reserves and safeguards its right under the aforesaid Treaty further to exercise its jurisdiction over such effects on the natural levels or stages of the Columbia River at and above the international boundary as might actually result from the operation of said Grand Coulee dam and reservoir, and to issue such further order or orders in the premises as the Commission may deem to be appropriate and justified for the protection and indemnification of the Province of British Columbia or of any private or municipal corporation or citizen thereof that might be found by the Commission actually to have sustained damage on account of the raising of the natural levels of the Columbia River at and above the international boundary; Provided, that any such further order or orders shall be issued only after the Commission shall have received and considered formal applications filed by aggrieved parties in accordance with the Rules of Procedure.[1]

We support the CCRIFC's request for an investigation as to whether further orders should be made by the IJC in respect of the loss of anadromous fish habitat above the Grand Coulee Dam.

In addition to the destruction of an indigenous fishery, the dam also destroyed the public's right, at common law, to the use of the fish. This is not a modern legal spin on an historic decision; the common law courts recognized the legal rights of the public to fish well before the dam was constructed. Nor does the fact that the federal and provincial governments have not advanced this right prevent the IJC from considering such rights; the Canadian courts have recognized the inability of government to interfere with this right absent explicit statutory authority,[2] and have more recently gone so far as to suggest that the government may owe a legally enforceable fiduciary duty to the public in respect of such public rights.[3] This represents a parallel and complementary basis for considering the request for an order or orders aimed at restoring anadromous fish stocks above the Dam. If the IJC does convene a panel of experts as suggested by the IJC, or

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1 Order of Approval in respect of the Construction and Operation of the Grand Coulee Dam. Order of the International Joint Commission, dated 15 Dec 1941.

2 *Reference re Fisheries Act, 1914 (Canada),* [1929] 3 W.W.R. 449 (Canada P.C.).

3 *British Columbia v. Canadian Forest Products Ltd.,* [2004] SCC 38.

holds further hearings on this matter, we would hope that the process will be broad enough to consider further submissions on the damage to the public's rights and the government's fiduciary obligations in that respect.

For the moment, however, we confine ourselves to addressing the issues raised in the Commission's letter to Mr. Fred Fortier of the CCRIFC dated February 28, 2005. The Commission is seeking submissions as to whether or not it has the jurisdiction to consider CCRIFC's original application of April 25, 2003. In other words, the issue at present is the Commission's jurisdiction, not the merits of CCRIFC's application. The comments that follow argue that the Commission has both the jurisdiction and the duty to consider the merits of this application.

FACTUAL CONTEXT

The historical record is clear.

(1) The Grand Coulee Dam cut off the escapement of anadromous fish to the Upper Columbia Basin.

(2) In so doing, the dam destroyed the fishery of the indigenous peoples of the Upper Columbia who had historically depended upon that anadromous fishery for subsistence, livelihood and cultural purposes.

We are entitled to assume for the purposes of ascertaining the IJC's jurisdiction that the CCRIFC is able to establish all of the above (causation and damage).

ISSUES

The only question is whether the damage suffered by the indigenous people of the Upper Columbia is damage over which the IJC has jurisdiction and in respect of which it may make an order or whether it is a case without recourse to the IJC. If the latter is the case, it may well be that this is a case of damage without legal wrong (*damnum absque injuria*), meaning that the responsibility for the loss that occurred, the loss of livelihood, cannot be transferred to those who caused the loss but must continue to rest, as it has to this point, with those who suffered the loss.

Interpretation of the Boundary Waters Treaty of 1909

The jurisdiction of the Commission is based upon the Boundary Waters Treaty of 1909 (the "BWT") and the question is therefore fundamentally a question of treaty interpretation and the interpretation of the IJC's Order of 1941.

The rules regarding the interpretation of international treaties have been codified in the Vienna Convention on the Law of Treaties (the "VCLT"). While the VCLT technically does not apply directly to the BWT, as the VCLT only applies (Article 4) on its terms to treaties concluded after the entry into force of the VCLT, Articles 31 – 33 of the VCLT are broadly understood to have codified customary international law as it relates to the interpretation of treaties.[4]

We wish to rely upon the principle of customary international law reflected in Article 31(3)(c) of the VCLT. Section 31 provides, in part:

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[4] Kasikili/Sedudu Island (Botswana/Namibia) [1999] ICJ Rep. 1045 at 1059, para. 18 applying Articles 31 and 32 to a treaty concluded in 1891.

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

3. There shall be taken into account, together with the context:

   (c) any relevant rules of international law applicable in the relations between the parties.[5]

The recent award of the distinguished arbitral panel of the Permanent Court of Arbitration, *In the Arbitration Regarding the Iron Rhine Railway*,[6] confirms the view taken in earlier cases (such as the decision of the International Court of Justice in the *Gabcikovo-Nagymoros case*)[7] that the reference to "relevant rules of international law" must be read as a reference not only to those rules in existence at the time the treaty was negotiated, but also to all other relevant legal developments. This seems to be particularly the case where:

(1) the subject matter of the treaty concerns human rights,[8]

(2) where the subject matter of the treaty deals with environmental issues,[9] and

(3) where the treaty uses conceptual or generic terms.[10]

Each of the above factors is relevant here.

Human rights. While one would not ordinarily classify the *Boundary Waters Treaty* as a human rights treaty, it is clear that the protection of property rights and compensation owed by the state for the taking of subsistence entitlements may be framed as a matter of human rights.[11] Subsequent developments in this area that should be relevant to the interpretation of the *Boundary Waters Treaty* include the human rights instruments to which both the United States and Canada are party. For present purposes, we emphasise:

- the protection of private property in Article XXIII of the American Declaration of Rights of Man – which was held in the *Report N1 40/04: Case 12.053, Merits: Maya Indigenous Communities of the Toledo District and Belize*,[12] a decision of the Inter-American Commission of Human Rights, to apply to the property interests of indigenous peoples;
- the final sentence of Article 1(2) of the International Covenant on Civil and Political Rights to the effect that: "In no case may a people be deprived of its own means of subsistence", and

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5 Vienna Convention on the Law of Treaties, s. 31.

6 *In the Arbitration Regarding the Iron Rhine Railway*, 24 May 2005 (available at http://www.pca-cpa.org/ENGLISH/RPC/BENL/BE-NL%20Award%20corrected%20200905.pdf, especially at paragraphs 59 and 79 et seq.).

7 *Gabcikovo-Nagymoros case*, [1997] ICJ Rep. 7.

8 See, for example, the recent jurisprudence of the Inter-American Court of Human Rights in the *Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, judgment of August 31, 2001 at paras 146 – 148, available at http://www.corteidh.or.cr/seriecpdf_ing/seriec_79_ing.pdf .

9 *Gabcikovo-Nagymoros*, supra, note 7.

10 *Aegean Sea Continental Shelf Case (Greece/Turkey)*, [1978] ICJ Rep. 3.

11 See for example the decision of the Inter American Court in *Awas Tigni*, supra, note 8.

12 Decision of the Inter-American Commission of Human Rights, especially at paras 112 – 117 et seq. This decision is available at http://www.cidh.org/annualrep/2004eng/Belize.12053eng.htm

- the jurisprudence of the Human Rights Committee on the International Covenant emphasising that the protection afforded to minorities and particularly to indigenous peoples by Article 27 of the International Covenant on Civil and Political Rights extends to protecting the link between indigenous communities and their access to resources.[13]

Environmental issues. It is clear that the facts on which the CCRIFC rely raise concerns about the loss of anadromous fish within the upper Columbia ecosystem. While environmental values were of less concern when the *Boundary Waters Treaty* was negotiated in 1909, the value that the world community now attaches to the environment and which is evidenced by numerous bilateral, regional and global instruments as well as customary norms[14] requires that the *Boundary Waters Treaty* be interpreted in light of these new norms.

Conceptual or generic terms. We simply emphasise here that the term "interests" as used in paragraphs of Article VIII is an example of a conceptual or generic term and is therefore a term that should be interpreted in light of a changing understanding as to "interests" that merit the protection and indemnity afforded by these paragraphs.

It is not suggested that the IJC has jurisdiction over any of the instruments mentioned in the previous paragraphs, merely that they form part of the interpretive matrix for the Commission in discharging its responsibilities in relation to the application brought by the CCRIFC. To give two specific examples: (1) we submit that the term "interest" as used in Article VIII should be interpreted by the Commission as including the subsistence and cultural interests of the applicants in being able to continue to harvest anadromous fish in the upper Columbia River, and (2) we submit that the Commission should have regard to these other instruments when exercising its mandatory authority under Article VIII (7).

Interpretation of Article VIII of the Boundary Waters Treaty

The Commission's Letter directs the CCRIFC to comment on the applicability of the "penultimate paragraph" of Article VIII of the BWT, as well as the conditions of its 1941 Order. Article VIII, of course, explains the "rules or principles" that the IJC should apply in considering cases under Articles III or IV of the Treaty:

> This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Article III or IV of this Treaty the approval shall be governed by the following rules of principles which are adopted by the High Contracting Parties for this purpose:

Thus the "penultimate paragraph" should not be interpreted in isolation but in the context of the entire treaty, and particularly Articles III and IV of the Treaty.

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[13] The three *Lansman* decisions of the Committee and the Committee's interpretive comment on Article 27 (*General Comment No. 23: The rights of minorities (Art. 27): . 08/04/94 CCPR/C/21/Rev.1/Add.5, General Comment No. 23. (General Comments*) especially paras 6.2 and 7 available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument).

[14] See the Advisory Opinion of the International Court of Justice in the Legality of the Threat or Use of *Nuclear Weapons Advisory Opinion* ICJ Rep.1966 at para. 29.

Article III deals with the obstruction or diversion of boundary waters that may affect the natural level or flow of those boundary waters on the other side of the line and is therefore not directly engaged here since the Columbia River is not a boundary water within the meaning of the BWT. Article IV deals with transboundary waters and is more directly engaged.

As with Article III, Article IV(1) establishes a precondition to the exercise of jurisdiction by the IJC. The IJC can have no jurisdiction over a project involving either boundary waters or transboundary waters unless that project has an effect on the level of boundary waters or, as Article IV puts it "the effect of which is to raise the natural level of waters on the other side of the boundary". It is this paragraph that gave and continues to give the IJC jurisdiction over the Grand Coulee project.

As we have already seen, Article VIII of the BWT instructs the Commission as to the matters that it must consider in passing upon an application under Articles III or IV. The substantive matters covered by Article VIII following its preliminary paragraph or chapeau are as follows:

(2) A statement that each party shall have equal and similar rights with respect to boundary waters.

(3) A statement of a binding order of precedence.

(4) A proviso to protect existing uses.

(5) A proviso permitting departure from the requirement of equal division in particular temporary cases.

(6) A clause conferring upon the Commission the jurisdiction (but not the duty) "in any case" to condition its approval upon the construction of remedial or protective works and also the jurisdiction (but not the duty) *in such cases* to require "suitable and adequate provision" for the "protection and indemnity against injury" of "any interests" on either side of the boundary.

(7) A clause conferring upon the Commission both the jurisdiction and the duty to condition its approval of any project that affects the level of boundary water or the level of transboundary waters at the boundary "suitable and adequate provision" for the "protection and indemnity against injury" of "any interests" on the other side of the line "which may be injured thereby". It is this clause to which the Commission has, in particular, drawn our attention.

(8) The final clause specifies the decision rule that the Commission is to apply to any application brought under Article III or IV.

Reading Articles III, IV and VIII together suggests the following observations:

(1) Articles III and IV serve as *triggers* to the IJC's compulsory jurisdiction. In each case the trigger is an interference with levels.

(2) Neither Articles III or IV, however, prescribe the substance of the IJC's jurisdiction once it has been triggered, i.e. the jurisdiction is not confined to that which triggers the jurisdiction, levels, but may extend to other considerations such as safety and environmental concerns.

(3) By its terms Article VIII does not, in general, confine the IJC's attention to the matter of levels. Indeed, various paragraphs of Article VIII invite or require the IJC to consider other matters in passing upon applications under Articles III and IV. These include such

matters as priority of uses, the grandparenting of existing uses and the protection and indemnity of "interests".

(4) It is apparent that the drafters chose to use broad and general language when describing the powers and duties of the IJC with respect to matters of protection and indemnity. In particular, the drafters did not explicitly limit the Commission's duty to award compensation to those interests affected by a change in levels. The word "thereby" may relate back either to damages that flow from a change in levels or to damages that flow more generally from the construction or maintenance "of dams or other obstructions". Read in the overall context of Article VIII, the latter seems preferable and is more in line with other relevant rules of international law as outlined above.

(5) The Commission's duty to ensure suitable and adequate compensation is an independent duty of the Commission and not a duty of the Parties to the treaty. The Commission must exercise its duty independently of the Parties.[15]

(6) The mandatory compensation clause (paragraph (7)) requires the IJC to ensure that affected interests are compensated. In other words, and by contrast perhaps with national decision making, the BWT instructs the IJC that it is not enough that the IJC determine that a cost benefit analysis favours the project, it must also go the extra step to ensure a just distribution and ensure that those who benefit from the project actually compensate those who suffer losses. This is a very stringent decision rule.

As we have noted paragraph (6) of Article VIII confers a discretionary jurisdiction on the IJC in respect of "any case" but we should recall that "any case" must in fact be a levels case under Articles III or IV of the Treaty. On the other hand, paragraph (7) *requires* the IJC in a levels case to make provision for protection and indemnity for all interests "which may be injured thereby". We have argued that the reference to "thereby" is reference back not to the issue of levels but more generally to the construction and maintenance of the dam or other facility.

Interpretation of the 1941 Order

We can now turn to look at how the IJC actually exercised its authority under the terms of its 1941 order. We have already quoted condition 1 of the Commission's approval, *supra*. The language of that condition is broad and indeed seems to confirm the view just expressed to the effect that the Commission's indemnity jurisdiction relates broadly to damage suffered from construction and maintenance of the dam. For ease of reference we repeat the clause here with emphasis supplied:

> That the applicant make suitable and adequate provision, to the satisfaction of the Commission, for the protection and indemnification of all interests in British Columbia <u>by reason of damage resulting from the construction and operation of the Grand Coulee Dam and reservoir</u>.

The Commission went on to expressly reserve its continuing jurisdiction in the following terms in condition 2:

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[15] For discussion of this point, see Samuel Wex, "The Legal Status of the International Joint Commission under International Law and Municipal Law" (1978) Canadian Yearbook of International Law 276 and esp. at 289 et seq. where Wex also emphasises the continuing jurisdiction and overview of the Commission when acting under Article 3, 4 and 8.

> [1] That the Commission expressly reserves and safeguards its right under the aforesaid Treaty further to exercise jurisdiction over such effects on the natural levels or stages of the Columbia River at and above the international boundary as might actually result from the operation of the said Grand Coulee dam and reservoir; and
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> [2] to issue such further order or orders in the premises as the Commission may deem to be appropriate and justified for the protection and indemnification of the Province of British Columbia or of any private or municipal corporation or citizen thereof that might be found by the Commission actually to have sustained damage on account of the raising of the natural levels of the Columbia River at or above the international boundary.

It is submitted that these conditions must be read as a whole, and in harmony with the *Boundary Waters Treaty*. Taken as a whole:

(1) The Commission has clearly and explicitly claimed a continuing jurisdiction over the terms of its Order of Approval. Condition 2 is intended to "safeguard" the IJC's jurisdiction and as such should be interpreted as affirming its continuing role in the protection and indemnification of citizens under the Treaty. The Condition should thus not be read as excluding protection and indemnification from the impacts of operations that are necessary and inseparable from the physical raising of water levels behind the dam.

(2) There is no indication in Condition 2 that the IJC was seeking to limit its jurisdiction to focussing artificially on the changes in physical water levels without reference to the construction and operation of the dam which resulted in such changes. The language used seems intended to clarify and affirm, rather than to limit.

(3) However, if the IJC is suggesting that Condition 2 limits its jurisdiction, such a limitation would conflict with the clear and mandatory language of Article VIII (7). In electing to retain jurisdiction the Commission cannot limit the scope of that jurisdiction and in particular cannot limit the scope of its mandatory jurisdiction under Article VIII (7).

(4) Hence, if it is correct that the Commission's duty under Article VIII (7) extends to ensuring that "all interests" are compensated who suffered damage arising from the construction of any dam or other facility that changes levels at the boundary then it must follow that the Commission cannot abdicate that jurisdiction by the terms of its Order of Approval.

The third condition in the Order of Approval deals with Pend d'Oreille River and the future Waneta Dam and does not concern us here.

Condition 4 deals with fisheries concerns. While the condition is expressed in hortatory rather than mandatory terms, it is still a condition of the approval. While the condition does not deal with compensation it confirms the view that the Commission's jurisdiction is not confined to levels once its jurisdiction is triggered, but extends to other aspects of the construction of the facility and the steps to be taken to minimize its impact. This approach is confirmed by other decisions of the IJC in issuing Orders of Approval under Articles IV and VIII. For example, the amended Order of Approval for Osoyoos Lake provides as follows:

> 2. The principal works shall include a reinforced concrete control structure with appropriate power operated control gates, an overflow

weir section, stop logs, piers having adequate capability for breaking ice, a stilling basin, fish passage facilities, appropriate seepage and erosion controls, and measures required pursuant to Condition 4.[16]

ADDITIONAL ISSUES

We submit that based upon both the BWT and the 1941 Order, the IJC does have jurisdiction to issue further orders in respect of the Grand Coulee Dam.

We emphasise that this is not a case of opening up an existing Order to review (i.e. it is not a case such as that presented by Montana in relation to the Commission's "directive" jurisdiction under Article VI (3)), rather it is a case of the Commission giving full effect to its existing Order and to its onerous responsibilities Article VIII (7) of the Treaty.

Furthermore, neither is it a case such as the Osoyoos (Zosel) Dam decision of the IJC where the First Nation whose interests were affected did make submissions at the original hearing of the matter.[17] In the case of Grand Coulee, it is clear that no First Nation nor any Indian Agent or government department representing any First Nation appeared before the IJC in its original hearing on this matter.[18]

CONCLUSION

In conclusion, it is our view that the Commission has both the jurisdiction and the duty to consider the application brought by the CCRIFC. The BWT contemplates a broad jurisdiction over transboundary waters, and the 1941 Order indicates an intention to exercise that jurisdiction fully. The IJC explicitly kept the option of supplemental orders open in order to fully protect and indemnify affected interests.

Moreover, if the 1941 Order is interpreted narrowly as attempting to limit the IJC from exercising its full jurisdiction (which is not admitted but denied), then the Order would be beyond the authority of the IJC. The IJC cannot restrict its broad jurisdiction under the BWT.

We hope that the IJC will, as requested by the CCRIFC, appoint a panel of experts to look at all options for restoring salmon to the Canadian portions of the Columbia River Basin.

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[16] International Osoyoos Lake Control Board Supplementary Order, dated October 25, 1985.

[17] Ibid.

[18] See Supplementary Order of Approval, October 17, 1985, preamble.