

To Whom It May Concern

From: David Naftzger, Executive Director, and Peter Johnson, Program Director,  
Council of Great Lakes Governors

Subject: The relevance of international trade law to the implementation of the  
Great Lakes—St. Lawrence River Basin Water Resource Compact

Date: July 25, 2008

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Thank you very much for the opportunity to meet with you to discuss the Great Lakes—  
St. Lawrence River Basin Water Resources Compact (Compact). Based on past  
discussions, it is our understanding that there may be questions regarding the relevance of  
international trade law to the implementation of the Compact. Please find below further  
information that we have put together to assist in answering these types of questions. Of  
course, please let us know if there is interest in additional information.

We look forward to continuing to work with you as Congress considers its consent for the  
Compact.

**The relevance of International Trade Law to the implementation of the Compact.**

Based on our review of statements and actions by both the U.S. and Canadian  
governments, it appears that there is a clear consensus that international trade agreements  
do not impact either the national governments' nor the States'/Provinces' ability to  
manage or limit the removal of water from the Great Lakes, even if some removals of  
Great Lakes water are allowed.

On February 10 1999, the U.S. and Canadian federal governments asked the International  
Joint Commission (IJC) to, among other issue areas, study “[t]he current laws and  
policies as may affect the sustainability of the water resources in boundary and  
transboundary basins.” In response to that reference, the IJC held a series of public  
hearings and on February 22, 2000, issued its report entitled “Protection of the Waters of  
the Great Lakes—Final Report to the Governments of Canada and the United States.”<sup>1</sup> In  
this report the IJC states:

“The public hearings and written presentations revealed a profound concern on  
the part of the public that international trade law could prevent proper protection  
of the waters of the Great Lakes Basin. This view is not shared by the Canadian  
and U. S. governments, and it is not supported by the statements and writings of  
many experts in international trade law who appeared before the Commission.  
**These experts agreed that international trade agreements do not prevent  
governments from protecting the waters of the Great Lakes Basin.**”  
[Emphasis added.]

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<sup>1</sup> <http://www.ijc.org/php/publications/html/finalreport.html>

The following two documents (attached) were submitted to the IJC during the course of its investigation.

- a. *Letter from the Deputy United States Trade Representative to the IJC (Appendix 8 of the IJC's 2000 Report)*

In particular, please note that where it is stated that:

“There is a long-standing, well-developed body of international law – reflected in thousands of international agreements over literally hundreds of years – on the non-navigational uses of watercourses. Under this body of law, water resource management rights belong to the country or countries where the watercourse flows. We are not aware of any government having challenged this principle in any forum, let alone before an international trade body such as the World Trade Organization.

Indeed, there is no indication in the negotiating history of, or over 50 years of practice in, the General Agreement on Tariffs and Trade and the WTO that governments have ever suggested that international law governing water rights and water management should be modified or superseded in any way through the application of international trade rules. This is hardly surprising given the fact that water resource management issues have been and continue to be addressed through specific water rights treaties between the countries where the watercourses and located.

Given the web of bilateral, regional, and international treaties governing water rights and obligations between WTO member governments, as well as the sovereign interest of all governments in managing the water resources in their territories, we consider it highly improbable that any government would seek to bring international water rights issues before the WTO. Even more extraordinary would be such a claim by a country that has no territorial nexus to the watercourse at issue. **Over the past 50 years, there has been no shortage of disputes between governments around the world over water rights claims. Notwithstanding that fact, no government seeking access to water resources controlled by another nation has ever sought to bring the matter before the GATT or the WTO. We do not expect that situation to change.**” [Emphasis added].

- b. *Document from the Canadian Department of Foreign Affairs and International Trade (DFAIT) to the IJC on Bulk Water Removals and International Trade Considerations (Appendix 9 of the IJC's 2000 Report)*

In particular, please note where it is stated that:

“...[A]ny federal or provincial measure regulating the extraction of water in its natural state, would not be subject to international obligations concerning trade in goods.

...A second issue is whether allowing some water to be extracted and put into commerce as a good, including for export, would create a precedent requiring that all other requests to extract water and transform it into a good for commercial purposes, including for export, be granted, anywhere in Canada. There is nothing in international trade agreements which would require that future projects for the bulk extraction or removal of water, including for export, be approved just because previous bulk water removal projects have been approved. **From the standpoint of trade obligations, the fact that a government has allowed the extraction and transformation of some water into a good, including for export, does not mean it (or another government within Canada) must allow the extraction and transformation of other water into a good in the future.**” [Emphasis added]

c. *Canada’s International Boundary Waters Treaty Act : International Boundary Waters Regulations.*

Subsequent to the issuance of the above referenced document by DFAIT, in 2001 the Canadian federal government amended the International Boundary Waters Treaty Act to state that “...no person shall use or divert boundary waters by removing water from the boundary waters and taking it outside the water basin in which the boundary waters are located.”<sup>2</sup> The new language in the Act also stated that this prohibition “...does not apply in respect of the exceptions specified in the regulations.”

Section 2(2) of the regulations to enact the International Boundary Waters Treaty Act (attached) states that:

“[t]he removal of boundary waters in bulk does not include taking a manufactured product that contains water, **including water and other beverages in bottles or packages**, outside a water basin.” [Emphasis added].

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<sup>2</sup> Section 13 of the International Boundary Waters Treaty Act (<http://laws.justice.gc.ca/en/showdoc/cs/I-17///en?page=1>)

