

**American Bar Association  
Section of Environment, Energy, and Resources**

**Commerce Clause and International Trade Concerns Related to the  
Prohibition on Out-of-Basin Diversions in the  
Great Lakes—St. Lawrence River Basin Water Resources Compact**

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**Introduction**

Interbasin diversions (“diversions”), or the transfer of water outside of a watershed, are quite common throughout the U.S.<sup>1</sup> The Great Lakes—St. Lawrence River Basin Water Resources Compact (the “Compact”) would prohibit nearly all diversions. This is a highly unusual condition of an interstate compact.<sup>2</sup> The presence of this diversion prohibition raises questions about whether such a prohibition can be justified in light of the federal Constitution’s Dormant Commerce Clause and international trade law.

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<sup>1</sup> A note on terminology: throughout this paper, the definitions in the Great Lakes—St. Lawrence River Basin Water Resources Compact (Compact) will be used for the terms “diversion”, “withdrawal” and “consumptive use”. These definitions are as follows:

*Diversion* means a transfer of Water [i.e. ground or surface water in the Basin] from the [Great Lakes] Basin into another watershed, or from the watershed of one of the Great Lakes into that of another by any means of transfer, including but not limited to a pipeline, canal, tunnel, aqueduct, channel, modification of the direction of a water course, a tanker ship, tanker truck or rail tanker but does not apply to Water that is used in the Basin or a Great Lake watershed to manufacture or produce a Product that is then transferred out of the Basin or watershed. *Divert* has a corresponding meaning.

*Withdrawal* means the taking of water from surface water or groundwater. *Withdraw* has a corresponding meaning.

*Consumptive Use* means that portion of the Water Withdrawn or withheld from the Basin that is lost or otherwise not returned to the Basin due to evaporation, incorporation into Products, or other processes.

Great Lakes—St. Lawrence River Basin Water Resources Compact § 1.2, found at

[http://www.cglg.org/projects/water/docs/12-13-05/Great\\_Lakes-St\\_Lawrence\\_River\\_Basin\\_Water\\_Resources\\_Compact.pdf](http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Water_Resources_Compact.pdf) (last visited 8/9/07) [hereinafter Compact].

<sup>2</sup> The only other interstate water compact found that prohibits diversions is the Klamath River Basin Compact, which prohibits waters taken from the Upper Klamath River Basin to be used outside that basin. See Klamath River Basin Compact Arts. III(b)(2), III(b)3), V.

## **I. The Great Lakes—St. Lawrence River Basin Water Resources Compact**

The Compact is the product of over four years of negotiations among the eight Great Lakes Governors with substantial public input. As the most recent effort in a process that began as early as the 1985 Great Lakes Charter, the Compact represents the States' best means of providing for wise management of the extraordinary Great Lakes water resource. As an interstate compact, this agreement will need to be ratified by all eight states and consented to by Congress in order to become effective.

### **A. The Need for the Compact**

With nearly 20 percent of the Earth's fresh surface water, the Great Lakes are a vast and important resource. They are vitally important to the region's environment and economy as a center of commerce and industry, supporting agriculture, shipping, heavy manufacturing, and electricity generation. They also support fishing and tourism, and provide a range of recreation opportunities for all the region's residents. The 35 million people who live and work within the basin use 43 billion gallons per day ("bgd") of its water, 5% of which is consumed and does not return to the basin.

However, the Great Lakes are not unlimited. Only about one percent of their water is replenished each year; the remaining 99 percent is not renewed. Harm to the quality of the Lakes' water and water dependent resources have diminished their value. Both in-basin withdrawals and potential diversions could lead to further degradation of the resource. The laws currently in place will not ensure adequate management, conservation and protection of this important resource.

#### **1. In-Basin Water Shortages and Diversion Threats**

Threats to the integrity of the Great Lakes basin come from within and outside of the basin. Localized shortages within the basin result from inadequate planning and management at state and local levels. Threats of diversion of water to areas outside the basin could lead to environmental harm to basin resources and loss of economic competitiveness. The potential impacts of climate change could exacerbate both in-basin shortages and diversion threats.

Water shortages and conflicts within the Great Lakes basin have arisen throughout the basin.<sup>3</sup> Some shortages come simply from the increased demands of population growth, while others result from user-to-user conflicts, typically large-scale users impacting the quantity or quality of homeowner groundwater wells. For example, in Wisconsin's lower Fox River watershed, growth in cities such as Green Bay have raised concerns about the adequacy of future water supplies from that watershed. Another example is the impact of northwestern Ohio large-scale dairy farms on the wells of nearby homeowners.

Schemes for diverting Great Lakes water to places both far away from and very near to the basin have arisen over the years. In the early 1980's, three Great Lakes water diversion proposals surfaced:<sup>4</sup> one to improve navigation on the Mississippi River; another wanted to supply a coal slurry pipeline to Montana; and a third to recharge the Ogallala aquifer. In the late 1990's, Ontario gave approval for a 156 million gallon per year tanker withdrawal from Lake Superior for shipment to Asia. Regional opposition forced Ontario to rescind the approval. Closer to home, communities just outside the basin divide in southeast Wisconsin would like basin water, rather than potentially more expensive supplies in their own watersheds, to replace radium-contaminated groundwater supplies.

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<sup>3</sup> See generally, National Wildlife Federation, Code Red in a Blue Water Basin (2005).

<sup>4</sup> See Chris A. Shafer, Great Lakes Diversions Revisited: Legal Constraints and Opportunities for State Regulation, 17 T.M. Cooley L. Rev. 461, 463-464 (2000) [hereafter Shafer].

## 2. The Inadequacy of Existing Laws

A water resources management regime that provides adequate protection of the quantity of Great Lakes waters and to water dependent resources will have several features: it will be legally binding and enforceable; it will apply throughout the basin; it will impose the same management standards throughout the basin; it will apply to all basin waters (surface and ground); it will have standards that will in fact sufficiently protect basin water quantity and quality. Such a regime does not exist today, but the Compact has been designed to remedy this.

The range of federal and state laws that apply to the Great Lakes, taken together, fail to provide adequate protection of Great Lakes water supplies.<sup>5</sup> Regionally-applicable laws are either insufficiently broad in their coverage (i.e. 1909 Boundary Waters Treaty,<sup>6</sup> 1968 Great Lakes Basin Compact<sup>7</sup>), potentially subject to legal challenge (i.e. Water Resources Development Act (WRDA)<sup>8</sup>), or not binding (i.e. 1985 Great Lakes Charter and its 2001 Annex<sup>9</sup>). State statutory and common law among the eight Great Lakes States is inconsistent and incomplete in its coverage and is an inadequate means of managing a resource such as the Great Lakes that crosses state borders. U.S. Supreme Court decisions have generally allowed diversions when addressing interstate water disputes.<sup>10</sup> Thus, it is clear that existing laws for managing Great Lakes waters do not provide the binding, comprehensive, regionally-applicable mechanism needed to wisely manage this valuable resource.

### a. 1909 Boundary Waters Treaty

This treaty between the U.S. and Great Britain on behalf of Canada governs the two countries' management of their shared boundary waters. These waters include the waters "from main shore to main shore of the lakes and rivers and connecting waterways" of the boundary between the U.S. and Canada (but not the tributary waters flowing into these waters)<sup>11</sup> and include four of the five Great Lakes.<sup>12</sup> This treaty created the International Joint Commission ("IJC"), which has approval authority over certain water uses and jurisdiction over "all cases involving the use or obstruction or diversion of" the boundary waters.<sup>13</sup>

While binding law, this treaty does not apply to all basin waters (it leaves out Lake Michigan, tributary waters and groundwater) and has insufficient standards to ensure adequate resource protection. The treaty establishes (1) an "injury" standard that relies on existing party laws and (2) a very high threshold for triggering IJC approval. First, if one party's use of water on its side of the boundary causes "any injury" to the other side, the injured party is entitled to redress under the laws of the party causing the injury.<sup>14</sup> This provides a remedy, but does not guarantee what that remedy will be. Second, IJC approval is required only for actions "affecting the natural level

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<sup>5</sup> Canadian laws, while important for basin water management, are beyond the scope of this paper.

<sup>6</sup> Boundary Waters Treaty, Jan. 11, 1909, United States—Great Britain (for Canada), 36 Stat. 2448 [hereafter BWT].

<sup>7</sup> Pub. L. No. 90-419, 82 Stat. 414 (1968) [hereafter GLBC].

<sup>8</sup> 42 U.S.C. § 1962d-20 (2000) [hereafter WRDA].

<sup>9</sup> The Great Lakes Charter, Feb. 11, 1985, <http://www.cglg.org/projects/water/docs/GreatLakesCharter.pdf> (last visited 8/3/07) [hereafter GLC]. Annex to the Great Lakes Charter, June 18, 2001, <http://www.cglg.org/projects/water/docs/GreatLakesCharterAnnex.pdf> (last visited 8/9/07).

<sup>10</sup> *See, e.g., Wisconsin v. Illinois*, 278 U.S. 367 (1929).

<sup>11</sup> BWT, *supra* note 6 at Preliminary Art.

<sup>12</sup> Lake Michigan is completely within U.S. jurisdiction; however, the Boundary Waters Treaty gives Canada the right of navigation in Lake Michigan. *Id.* at Art. 1.

<sup>13</sup> *Id.* at Arts. III & VIII.

<sup>14</sup> *Id.* at Art. II.

or flow of boundary waters”.<sup>15</sup> Only a tremendously large volume of water taken from the basin would achieve such an impact. Proper management of the Great Lakes basin requires a more sensitive standard than this.

#### **b. 1968 Great Lakes Basin Compact**

The 1968 Great Lakes Basin Compact has been entered into by all eight Great Lakes states and consented to by Congress. Its purposes include promotion of development, use and conservation of Great Lakes basin water resources. The compact does include water tributary to the Great Lakes, but does not include groundwater.<sup>16</sup> The compact creates the Great Lakes Commission to undertake actions to fulfill its purposes. The Commission’s powers include data collection and reporting, consideration of means of improving water resources management, and making recommendations for policy and law, which the states are to consider.<sup>17</sup> The scope of this compact, and the Commission’s role, are quite limited.

This compact constitutes a binding contract among the member states, providing a regional (on the U.S. side) agreement concerning basin waters. However, it plays only a small role in basin water resources management. This compact is only an information-gathering and idea-generating agreement. It does not provide any standards, processes or other requirements for managing basin water use, it does not include any enforcement provisions, and it does not include groundwater. Additionally, since the Canadian provinces (Ontario and Quebec) are not parties to this agreement, it does not control Canadian management of Great Lakes water resources.<sup>18</sup>

#### **c. 1985 Great Lakes Charter**

The non-binding 1985 Great Lakes Charter has been entered into by all ten Great Lakes states and provinces and sets forth common management principles for basin waters and water-dependent resources. Among the actions called for are

- developing a common database of information about basin resources,
- establishing a water resources management committee,
- prior notice and consultation for very large diversions or consumptive uses,
- development of a water resources management program with a resources inventory, demand assessment, consumptive use minimization and coordinated management, and
- additional scientific research related to water planning and management.<sup>19</sup>

Significant concepts in the Charter include: that the waters of the basin “are interconnected and part of a single hydrologic system”; that the most effective management is through “joint pursuit of unified and cooperative principles, policies and programs”; and that diversions of basin waters should not be allowed if they would have significant adverse impacts.<sup>20</sup> The Charter defines “Great Lakes Basin water resources” to include both surface water and tributary groundwater in the basin and also provides definitions for “withdrawal”, “consumptive use” and “diversion”. The Charter is the source of many of the concepts that have been incorporated into the Compact.

The Charter represents an ambitious effort by the Great Lakes states and provinces to identify and implement principles that would provide for a shared, comprehensive management program.

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<sup>15</sup> *Id.* at Art. III.

<sup>16</sup> GLBC, *supra* note 7 at Art III.

<sup>17</sup> *Id.* at Art. VI, Art. VII.

<sup>18</sup> The Great Lakes states attempted to allow the Canadian Great Lakes provinces to join the compact. *Id.* at Art. II.B. However, Congress expressly refused to consent to the provisions allowing this. *Id.* at § 2.

<sup>19</sup> GLC, *supra* note 9 at Implementation of Principles, pp. 3-5.

<sup>20</sup> *Id.* at Findings and Principles for the Management of Great Lakes Water Resources, pp. 1 & 2.

However, in practice, the Charter has not been effective because its signatories have failed to implement it. Since it is non-binding, the states and provinces cannot be made to do so.

#### **d. 1986 Water Resources Development Act (WRDA), amended 2000**

The federal Water Resources Development Act (WRDA) is a primary means by which the federal government provides financial and technical support to water resources management efforts throughout the nation. In the 1986 update, a provision was added prohibiting diversions of water from the Great Lakes basin without the approval of all eight Great Lakes state governors. This provision was amended in 2000 to clarify that it also applies to “exports” of basin water.<sup>21</sup> The relevant portion reads:

No water shall be diverted or exported from any portion of the Great Lakes within the United States, or from any tributary within the United States of any of the Great Lakes, for use outside the Great Lakes basin unless such diversion or export is approved by the Governor of each of the Great Lake[sic] States.<sup>22</sup>

WRDA thus allows any single governor to veto a proposed diversion of Great Lakes water.

As federal law, WRDA does provide a binding means of protecting against diversions of basin water that applies to all of the Great Lakes states, as well as to all other U.S. states. However, WRDA does not address in-basin management, which is needed, does not apply to Canadian attempts at diversion (although the provinces have their own diversion bans), and might not apply to groundwater. Also, the provision does not define “diversion”, so it is unclear what constitutes a diversion requiring approval. As a federal statute, WRDA could be modified or repealed by Congress, leaving the Great Lakes states vulnerable to the policy decisions of non-basin legislators.

WRDA may also be vulnerable to legal challenge. Its lack of standards and procedures (and the failure of the governors to establish their own) may make WRDA subject to substantive and procedural due process and international trade law challenges. This lack of standards and procedures is also an unreliable means of managing diversions.

#### **e. State Statutory and Common Law**

The Great Lakes states’ common law and statutory schemes for managing Great Lakes water resources vary substantially in the nature and extent of their coverage. All states follow the common law riparian doctrine for surface water use, providing riparian property owners correlative rights in shared water bodies and subjecting their water use to the “reasonable use” standard.<sup>23</sup> The common law for groundwater varies among the states, ranging from a modified rule of “capture” to a reasonable use standard.<sup>24</sup> As judge-made law, the application of these standards can vary from state to state, and the relative lack of conflict over water uses in these water-rich states leaves the details of these standards uncertain.<sup>25</sup> Additionally, neither the surface water nor groundwater standards incorporate an environmental protection component to ensure adequate instream flows for ecosystem functioning.

In all of these states, statutes have modified and supplemented the common law. Statutory schemes vary greatly from state to state, with some providing comprehensive requirements and

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<sup>21</sup> Water Resources Development Act of 2000, Pub.L. No. 106-541, § 504, 114 Stat. 2572, 2644–45 (2000).

<sup>22</sup> 42 U.S.C. § 1962d-20(d). Diversions authorized prior to this provision were made exempt; *see id.* at (f).

<sup>23</sup> Noah Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. Colo. L. Rev. 405, 427 (2007) [hereafter Hall].

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

others regulating minimally. Some states have years of experience regulating water uses, while others are fairly new to the game.<sup>26</sup> These differences result in a wide range of regulatory approaches and water user expectations across the basin. Some of these approaches incorporate environmental protection provisions, while others do not.

These differences between the Great Lakes states' laws result in an inconsistent and incomplete management system for the basin's waters. The common law is uncertain and the regulatory programs vary in their scope and standards, creating a patchwork of protections. These laws are also subject to modification at the discretion of each state, providing no guarantees to neighboring states regarding the extent of their coverage. Most significantly, individual state efforts, no matter how strong, cannot protect the Great Lakes from the harm caused by another state's lax management. While common law and statutory protections are important, the basin needs a regionally-applicable set of standards that ensure at least a minimal level of protections.

#### **f. Judicial Remedies**

States may seek U.S. Supreme Court determination of their disputes over shared water resources. The Great Lakes states took this route in a dispute over the largest existing diversion from the Great Lakes: the Chicago diversion.<sup>27</sup> When, for sanitary reasons, the state of Illinois diverted Lake Michigan by reversing the flow of the Chicago River, this diversion lowered the lake's level by nearly six inches. After over 70 years of costly and lengthy litigation involving all of the Great Lakes states (except Indiana) the Chicago Diversion is subject to Supreme Court decree and the Court retains continuing jurisdiction. Currently, Illinois may divert 3,200 cubic feet per second (2.1 billion gallons per day) of Lake Michigan water, which has permanently lowered the lake by 2 ½ inches.<sup>28</sup>

While the Supreme Court can serve an important function by resolving interstate conflicts over shared water resources, this route is time-consuming, costly, and only provides a *post hoc* remedy to harms rather than preventing them from occurring. Wisconsin and the other states had to wait until sufficient harm had occurred before they could bring suit. Once Illinois began its diversion and had come to rely on it, the Court was not likely to require the state to completely reverse its course. As a result, Illinois has been allowed to continue a very large diversion of water that, if addressed prior to the undertaking, might not have been as large (or even allowed). For long-term, sustainable management of natural resources, judicial remedies alone are insufficient.

#### **B. The Structure of the Compact**

In adopting Annex 2001, an annex to the 1985 Great Lakes Charter, the states and provinces committed to take decisive action to provide a legally defensible, binding management regime for all basin jurisdictions that retained authority within basin. Annex 2001 outlined a common, resource-based standard to be applied throughout the basin with the goal of protecting, conserving, restoring, and improving water resources. Management would extend to both diversions and in-basin uses, to both surface water and groundwater, and to both waters and the resources that depend on water. Finally, the Annex called for the public to be involved in the development and implementation of this new management regime.

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<sup>26</sup> See, e.g., Minn. Stat. Ch. 103G; Wis. Stats. Chs. 30 & 281; Ind. Code Tit. 14, Arts. 25 & 29.

<sup>27</sup> *Wisconsin v. Illinois*, 449 U.S. 48 (1980); *Wisconsin v. Illinois*, 388 U.S. 426 (1967); *Wisconsin v. Illinois*, 289 U.S. 395 (1933); *Wisconsin v. Illinois*, 281 U.S. 696 (1930); *Wisconsin v. Illinois*, 281 U.S. 179 (1930); *Wisconsin v. Illinois*, 278 U.S. 367 (1929).

<sup>28</sup> Shafer, *supra* note 4 at 465.

While the states and provinces could have taken a number of approaches to effectuate the Annex 2001 commitments, the jurisdictions decided upon an overarching, non-binding agreement – the Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement (the “Agreement”)<sup>29</sup> -- and separate actions by the states (via the Compact) and the provinces (via individual provincial legislation) to implement the Agreement.<sup>30</sup> This Agreement-Compact-legislation approach does not remedy the existing lack of a comprehensively binding legal requirement. However, by undertaking the Compact, the jurisdictions will achieve a common, binding approach for the vast majority of basin water use. In addition, if the states are implementing the Agreement via the Compact, the provinces are under much greater political pressure to properly manage their share of the basin.

## 1. Overall Structural Approach

Traditionally, interstate water compacts take either a “western” approach, allocating among the member states and letting them do as they wish with their water, or an “eastern” approach, creating a centralized management authority with fairly comprehensive jurisdiction.<sup>31</sup> The western approach works well when the interstate water resource is insufficient to meet all the states’ needs and a division of the resource is needed to resolve or avoid conflicts over quantity. The eastern approach can also help resolve scarcity issues, but further provides basin-wide water resources management where sufficient water exists to allow consideration of ecosystem health.

The Compact takes a third approach that combines aspects of these two traditional approaches to result in an agreement that establishes a common management system that each member state is to implement and allows them considerable flexibility in doing so. A centralized authority, the “Council”, is created, but this authority plays a relatively small role in basin water resources management, serving a largely administrative and advisory role and placing obligations on the states in limited circumstances. Since the basin does not face overall shortages, allocation is not needed and would not resolve localized in-basin shortages, protect the resource or guard against diversions. Because they are geographically disparate and insufficiently politically motivated to give up sovereignty over basin water resources, a centralized authority would not fit. The Compact’s structure responds to the specific needs of the basin and the basin states by combining elements of both the eastern management approach and the western state autonomy approach.

## 2. Major Compact Elements

The major elements of the Compact are: (1) a program for state management of in-basin water withdrawals; (2) a prohibition on diversions, with limited exceptions; (3) a water conservation and efficiency program; (4) requirements to collect and disseminate data and to improve water resources science; and (5) public participation and enforcement provisions.

Key Compact findings that underlie these major elements include: that the waters of the Basin are a public trust, form a single hydrologic system, and serve multiple concurrent uses; that future diversions and consumptive uses have the potential to significantly impact the basin; and that the

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<sup>29</sup> Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement, Dec. 13, 2005, at [http://www.cglg.org/projects/water/docs/12-13-05/Great\\_Lakes-St\\_Lawrence\\_River\\_Basin\\_Sustainable\\_Water\\_Resources\\_Agreement.pdf](http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf) (last visited 8/10/07).

<sup>30</sup> Adding the provinces to a binding agreement presented daunting legal challenges. A treaty between Canada and the U.S. would have taken authority for Great Lakes water management out of the basin and placed it into the hands of the federal government and might have resulted in a very different agreement than the states and provinces had in mind. And while states can seek compacts with “foreign powers”, subject to Congressional approval, the Great Lakes states’ efforts to do so within the 1985 Great Lakes Charter were not approved by Congress. U.S. Constitution, Art. 1, § 10; *See* n.18, *supra*.

<sup>31</sup> For this section, *see, generally*, Hall, *supra* note 23 at 407-413.

Parties share the duty to protect and manage the basin resources.<sup>32</sup> To provide a management system that takes these findings into account, the Compact has been structured to “facilitate[e] consistent approaches to water management across the basin while retaining state management authority.”<sup>33</sup>

#### **a. In-Basin Management Program**

The Compact requires each state to create and implement “a program for the management and regulation of New or Increased Withdrawals and Consumptive Uses” that is to “assure an effective and efficient Water management program that will ensure that uses overall are reasonable, that Withdrawals overall will not result in significant impacts to the Waters and Water Dependent Natural Resources of the Basin, . . . and that all other objectives of the Compact are achieved.”<sup>34</sup> Proposed withdrawals and consumptive uses subject to this program must satisfy the “Decision-Making Standard”, which contains a reasonable use component based largely upon the Restatement (Second) of Torts plus four additional criteria: (1) return flow (returning unconsumed water to its source); (2) no significant adverse impacts to waters and water-dependent natural resources; (3) water conservation; and (4) compliance with all applicable laws.<sup>35</sup>

This program allows the states to decide which withdrawals are subject to regulation, so long as the program satisfies the program criteria of reasonable use overall, no significant impacts overall and achievement of other Compact objectives. Water uses subject to Compact regulation must then satisfy the Decision-Making Standard. This standard goes well beyond the common law to include protection of the water resource itself and other resources that depend on water. Once effective, this standard will provide a binding, enforceable standard for in-basin water use, apply to all basin waters (both surface water and groundwater) and to all states in the basin.

#### **b. Diversion Prohibition with Limited Exceptions**

The Compact prohibits diversions of water outside of the basin boundary, with only very limited exceptions for transfers between the basins of two Great Lakes (intra-basin transfers) and for public water supply use by communities near the basin boundary. The diversions excepted must undergo varying levels of scrutiny, mostly depending on the type and quantity of the diversion. Most of this scrutiny is greater than that required for in-basin water use.

Existing legal shortcomings with respect to diversions relate to WRDA’s potential legal vulnerability to due process and international trade law challenges.<sup>36</sup> The due process concerns of WRDA should be satisfied as the Compact contains clear standards and describes the process, including public participation and enforcement by persons “aggrieved”, for state application of the diversion exception provisions.<sup>37</sup> Those prohibited from making a diversion because they do not qualify for an exception should have no due process concerns. The potential for dormant commerce clause and international trade law concerns is discussed below in section III.

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<sup>32</sup> Compact, *supra* note 1 at § 1.3.1.

<sup>33</sup> *Id.* at § 1.3.2. Also significant to consideration of these elements are the Compact’s limitations on its reach. The Compact shall not be construed: (1) to “affect, limit, diminish or impair” any existing, valid water withdrawal rights; (2) as “affecting or intending to affect or in any way to interfere with” each state’s common law respecting water rights; and (3) to “repeal, modify or qualify” the authority of any state to enact or enforce any additional water management laws. *Id.* at §§ 8.1.1, 8.1.2, 8.1.4.

<sup>34</sup> *Id.* at § 4.10. States are free to decide how to manage existing water uses in light of the Compact.

<sup>35</sup> *Id.* at § 4.11; *see* Restatement (Second) of Torts § 850(A)(a) (1977).

<sup>36</sup> The lack of Canadian inclusion in a diversion management scheme also applies, but this was addressed for the Compact generally above at § I.B.

<sup>37</sup> *See* Compact, *supra* note 1 at §§ 4.9, 6.2 & 7.3.

### **c. Conservation**

The Compact imposes water conservation and efficiency requirements in two key areas. First, each state must develop and implement a “water conservation and efficiency program”, to be based on the Compact’s common, regional goals and objectives the Council will develop.<sup>38</sup> These goals include improving basin waters and water dependent resources, protecting ecosystem integrity, ensuring sustainable use of basin waters and promoting efficient water use. The states are to include both new and existing water users in these programs. The programs may be voluntary or mandatory, but in any event are required to strive toward achieving the Compact’s conservation goals. The Council and provinces will periodically review the programs, and annual self-assessments are to be made available to the public. Therefore, political, peer and public pressures should keep states moving on a forward path toward greater conservation.

Second, new and increased water withdrawals, consumptive uses and diversions will be required to implement conservation measures (“environmentally sound and economically feasible water conservation measures”).<sup>39</sup> One component of the in-basin standard requires consideration of “whether efficient use is made of existing water supplies” for proposed increases in existing withdrawals. These requirements will ensure that new and increased withdrawals, as well as some existing withdrawals, are not using more water than they need.

### **d. Science and Information**

The Compact continues and expands upon the information gathering activities called for in the Great Lakes Charter. Section 4.1 requires states to inventory their existing water resources and the withdrawals made upon those resources. Both existing and new withdrawals of 100,000 gallons per day (gpd) or more must register and report on their withdrawals. States will share their data with other states and the public.

The Compact also emphasizes the importance of advancing scientific understanding of the hydrologic system, including ground water, and the impacts to ecosystems from withdrawals of water, particularly the cumulative impacts of withdrawals. States are to work together to improve their understanding of the science of water resources management and will use the information gathered to inform their scientific efforts. The gains in scientific understanding are then to be applied to the states’ water resources management programs to make these programs better able to respond to the needs of the basin’s water and water dependent resources.<sup>40</sup>

### **e. Public Participation and Enforcement**

The Compact requires the Council and the states to provide for public and tribal participation in Compact implementation efforts. The Council is to make all its meetings and minutes open and available to the public. Both the Council and the states are to involve the public in decisions on withdrawal proposals, including public notice of and hearings on pending proposals, opportunity to review all documents and to comment, and availability of the record of decision. Tribes and first nations are given additional rights to be consulted with and to participate in the review of very large withdrawal and diversion exception proposals.<sup>41</sup>

Enforcement opportunities are afforded to persons “aggrieved” to challenge the actions of the Council or a state under the Compact. Persons aggrieved may also bring a civil action to compel

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<sup>38</sup> See, generally, *id.* at § 4.2.

<sup>39</sup> *Id.* at § 1.2.

<sup>40</sup> See *id.* at §§ 1.4, 4.1.6, 3.4.3, 4.15.

<sup>41</sup> See *id.* at §§ 5.1, 6.1, 6.2.

any person making an unapproved withdrawal to comply with the Compact, with the costs of litigation, including fees, recoverable by the substantially prevailing party.<sup>42</sup>

## **II. Compact Treatment of Diversions**

Compact provisions regulating diversions from the basin include a general prohibition on all diversions, unless excepted, and a limited number of exceptions to this general prohibition.

### **A. General Prohibition with Exceptions**

Section 4.8 of the Compact provides:

All New or Increased Diversions are prohibited, except as provided for in this Article.

A diversion is defined as:

a transfer of Water [i.e. ground or surface water in the Basin] from the [Great Lakes] Basin into another watershed, or from the watershed of one of the Great Lakes into that of another by any means of transfer, including but not limited to a pipeline, canal, tunnel, aqueduct, channel, modification of the direction of a water course, a tanker ship, tanker truck or rail tanker but does not apply to Water that is used in the Basin or a Great Lake watershed to manufacture or produce a Product that is then transferred out of the Basin or watershed. *Divert* has a corresponding meaning.<sup>43</sup>

This prohibition is a clear blanket prohibition on all diversions, regardless of volume, purpose, location or any other factor, except for the exceptions referenced. These are enumerated in section 4.9 and may be the subject of “Regional Review” (non-binding state and provincial review of certain very large diversion exceptions) and/or Council review per sections 4.5 and 4.7.

### **B. Scope of Exceptions**

Three categories of diversions may be authorized under the Compact: (1) intra-basin transfers; (2) straddling communities; and (3) communities within straddling counties. While technically diversions and with the capacity to cause harm to individual Lake basins, intra-basin transfers are less troubling on principle because they do not remove any water from the Great Lakes basin. The exceptions for straddling communities and communities within straddling counties are limited to water used for “public water supply purposes”<sup>44</sup>, i.e. municipal supply, and so are made for the community as a whole, rather than for individual water users, such as industry or agriculture. These community diversion exceptions represent, in part, a political, practical and somewhat equitable compromise to provide basin water, for limited purposes and subject to strict conditions, to communities very near the basin that can demonstrate a need.

The approval criteria diversion exceptions must meet depend upon the category and amount of the diversion. Larger quantities and increased distance from the basin (e.g., communities within straddling counties) are subject to stricter criteria. The Exception Standard applies to most

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<sup>42</sup> See *id.* at § 7.3.

<sup>43</sup> *Id.* at § 1.2.

<sup>44</sup> Public water supply purposes is defined as “water distributed to the public through a physically connected system of treatment, storage and distribution facilities serving a group of largely residential customers that may also serve industrial, commercial, and other institutional operators. Water Withdrawn directly from the Basin and not through such a system shall not be considered to be used for Public Water Supply Purposes.” *Id.* at § 1.2.

diversion exceptions<sup>45</sup> and is similar to the in-basin Decision-Making Standard, including the four criteria of (1) return flow (returning unconsumed water to its source); (2) no significant adverse impacts to waters and water-dependent natural resources; (3) water conservation; and (4) compliance with all applicable laws. Significantly, non-basin water cannot be used for return flow unless the municipal supply system combines basin and non-basin water, in which case the non-basin water sent to the basin must meet applicable water quality standards and not contain invasive species. Instead of the reasonable use component, the Exception Standard requires demonstration that the need for the water “cannot be reasonably avoided” through conservation of existing supplies and that the quantity will be limited to that “considered reasonable for the purposes for which it is proposed.”

### **1. Intra-basin Transfers**

Intra-basin transfers are “the transfer of Water from the watershed of one of the Great Lakes into the watershed of another Great Lake.”<sup>46</sup> Proposed intra-basin transfers of less than 100,000 gpd (considered a relatively small amount for a water withdrawal) are approved at the discretion of the state in which the transfer takes place. Proposals greater than this amount must meet the Exception Standard and demonstrate that there is “no feasible, cost effective, and environmentally sound water supply alternative”, including conservation of existing supplies, in the basin to which the water will be transferred. Proposals with a consumptive use of less than 5 million gallons per day (mgd) also have to provide pre-decision notice to the other states but do not have to undertake return flow. Proposals with a consumptive use of 5 mgd or more must undertake return flow, undergo non-binding Regional Review and obtain unanimous Council approval (similar to WRDA, but now with a standard the states must apply).<sup>47</sup>

### **2. Straddling Communities**

A straddling community is “any incorporated city, town or the equivalent thereof, wholly within any County that lies partly or completely within the Basin, whose corporate boundary existing as of the effective date of this Compact, is partly within the Basin or partly within two Great Lakes watersheds.”<sup>48</sup> Since straddling communities are already partly within the basin, this exception enables municipal suppliers to keep from having separate basin and non-basin water supply systems in their communities. Proposed straddling community diversion exceptions of less than 100,000 gpd are approved at the discretion of the state in which the diversion takes place but must also satisfy the Exception Standard return flow requirements concerning non-basin water (see above). Proposals greater than this amount must meet the Exception Standard; proposals with a consumptive use of 5 mgd or more must undergo non-binding Regional Review.<sup>49</sup>

### **3. Communities within Straddling Counties**

A community within a straddling county is “any incorporated city, town or the equivalent thereof, that is located outside the Basin but wholly within a county that lies partly within the Basin and that is not a Straddling Community.”<sup>50</sup> Since a community within a straddling county lies completely outside the basin, the criteria imposed on such diversion exceptions is the most stringent. All such diversion proposals, regardless of size, must meet the Exception Standard and

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<sup>45</sup> *Id.* at § 4.9.4. The diversions excepted from the exception standard are straddling community diversions less than 100,000 gpd and intra-basin diversions less than 100,000 gpd. *Id.* at §§ 4.9.1.a, 4.9.2.a.

<sup>46</sup> *Id.* at § 1.2.

<sup>47</sup> *See id.* at §§ 4.9.2.a, 4.9.2.b, 4.9.2.c & 4.7.2.

<sup>48</sup> *Id.* at § 1.2.

<sup>49</sup> *See id.* at §§ 4.9.1.a, 4.9.1.b, 4.9.1.c.

<sup>50</sup> *Id.* at § 1.2.

the following: (i) the community must be “without adequate supplies of potable water”; (ii) there must be “no reasonable water supply alternative”, including conservation of existing supplies, in the community’s watershed; (iii) non-binding Regional Review and unanimous Council approval; and (iv) it “will not endanger the integrity of” the Great Lakes basin ecosystem.<sup>51</sup>

### **III. The Compact vs. Laws Affecting States’ Ability to Limit Diversions**

In prohibiting all but a limited set of diversions from the Great Lakes basin, the Compact faces two potential legal challenges, both commerce-related. One is under the Dormant Commerce Clause of the U.S. Constitution;<sup>52</sup> the other is under international trade laws, specifically the North American Free Trade Agreement (“NAFTA”) and the General Agreement on Tariffs and Trade (“GATT”).<sup>53</sup>

#### **A. Dormant Commerce Clause**

##### **1. Dormant Commerce Clause Doctrine**

The Commerce Clause of the U.S. Constitution empowers Congress “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” This clause has been interpreted by the Supreme Court to include both a “positive” and a “negative” component. The positive component is the authority of Congress to regulate interstate commerce, which it has done over a wide range of economic-related activities<sup>54</sup> in order to create a truly national economy. The negative component is the restriction on state regulation that unduly burdens interstate commerce.<sup>55</sup> This negative component is called the “dormant commerce clause” and prevents states from interfering with Congress’ efforts to ensure a national economy by favoring local commodities. State statutes that affect interstate commerce must satisfy the standard set forth in *Pike v. Bruce Church, Inc.*:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.<sup>56</sup>

State regulation of natural resources, including water, is subject to the dormant commerce clause.<sup>57</sup> The Supreme Court applied this provision to a state prohibition on interstate water transfers in *Sporhase v. Nebraska*, where the Nebraska statute did not allow interstate transfer of

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<sup>51</sup> *Id.* at § 4.9.3.

<sup>52</sup> U.S. Const. art. 1, § 8, cl. 3.

<sup>53</sup> North American Free Trade Agreement, Oct. 7, 1992, text released Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 612 [hereafter NAFTA]; General Agreement on Tariffs and Trade (1947), text found at [http://www.wto.org/English/docs\\_e/legal\\_e/gatt47\\_e.doc](http://www.wto.org/English/docs_e/legal_e/gatt47_e.doc) (last visited 8/10/07) [hereafter GATT].

<sup>54</sup> Shafer, *supra* note 4 at 468, citing Norman Redlich et al., *Understanding Constitutional Law* 90 (1995).

<sup>55</sup> *Id.* at 475.

<sup>56</sup> *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970) (citation omitted).

<sup>57</sup> *See Hughes v. Oklahoma*, 441 U.S. 332, 337 (1979) (the Court found the concept of state “ownership” of natural resource to be a legal fiction that could not withstand commerce clause challenge) [hereafter Hughes].

groundwater unless the state to which the water was transferred allowed similar transfers into Nebraska.<sup>58</sup>

A limitation on interbasin diversions, or unequal treatment of in-basin and out-of-basin water use, can be upheld only if the state can show that the statute serves a legitimate purpose, is narrowly tailored to achieve that purpose, and that no other adequate non-discriminatory alternative exists.<sup>59</sup> Subjecting interbasin diversions to criteria based on water conservation and public welfare constitutes a legitimate purpose that is not facially discriminatory against interstate commerce.<sup>60</sup> To demonstrate narrow tailoring and lack of adequate non-discriminatory alternative, the statute should treat in-basin and out-of-basin uses similarly, to the extent possible.<sup>61</sup>

A ban on interstate trade in resources was upheld in *Maine v. Taylor*, where the state prohibited importation of non-indigenous bait fish. In *Taylor*, the Court found that the state's desire to protect the integrity of its natural resources was a legitimate purpose and that this purpose "could not adequately be served by available nondiscriminatory alternatives."<sup>62</sup>

## 2. The Compact's Escape from the Dormant Commerce Clause

Dormant commerce clause concerns are set aside when Congress authorizes state regulation that would otherwise fail a commerce clause challenge.<sup>63</sup> Congressional consent to an interstate compact makes the compact federal law, thus immunizing states from commerce clause challenges when they act pursuant to the compact. This principle has been upheld in the context of states' restriction of an interbasin diversion under the Yellowstone River Basin Compact. In *Intake Water Co. v. Yellowstone River Basin Comm'n*,<sup>64</sup> the Ninth Circuit Court of Appeals found that the compact provision requiring unanimous state party consent in order to authorize a diversion of water out of the basin was not subject to dormant commerce clause challenges. The Court of Appeals stated that, by approving the compact, "Congress was acting within its authority to immunize state law from some constitutional objectives by converting it into federal law."<sup>65</sup> Therefore, once made effective through state ratification and Congressional consent, the Compact will become federal law and state implementation of its conditions will not be subject to the dormant commerce clause.

If the Compact should fail to gain Congress' consent then it would not become federal law and the states' actions pursuant to it would be subject to the dormant commerce clause. In such a scenario, states' application of the Compact's prohibition on diversions might not survive scrutiny.

While WRDA remains federal law, the states should be able to justify their actions under that law. The Compact could be seen as the much needed process and substance that WRDA lacks. If

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<sup>58</sup> *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) [hereafter *Sporhase*]. After confirming that water is an article of commerce, the Court found this reciprocity requirement unjustified because the requirement was not "narrowly tailored" to achieve the state's asserted local purpose of conservation and preservation of groundwater. *Id.* at 953, 957-958.

<sup>59</sup> Hughes, *supra* note 57 at 336.

<sup>60</sup> *City of El Paso v. Reynolds*, 597 F.Supp. 694, 708.

<sup>61</sup> *Sporhase*, *supra* note 58 at 955-956.

<sup>62</sup> 477 U.S. 131, 151 (1986).

<sup>63</sup> Shafer, *supra* note 4 at 487, citing Norman Redlich et al., *Understanding Constitutional Law* 118-119 (1995).

<sup>64</sup> 769 F.2d 568 (9<sup>th</sup> Cir. 1985).

<sup>65</sup> *Id.* at 570.

one considers the Compact's prohibition on diversions in that light, it becomes a compelling antidote to the overly politicized manner in which WRDA has been applied to date.<sup>66</sup>

If WRDA should be repealed for some reason, then it is possible that the Court would find that a complete prohibition (with only limited exceptions for certain near-basin diversions) is not sufficiently narrowly tailored and that a less-discriminatory alternative, such as a highly regulated scheme that allowed some diversions, would achieve the states' purpose.

However, the counter argument is that, due to the significant time delay between cause (diversion) and effect (harmed basin ecosystem) and the otherwise uncertain science surrounding the measurement of impacts from withdrawals, that a prohibition on diversions, in conjunction with in-basin conservation, is the only means of ensuring needed protections of the Great Lakes basin water resource. With any luck, the Great Lakes states will not have to address this issue.

## **B. International Trade Laws and the Compact's Satisfaction Thereof**

The concern about the consistency of the Compact with international trade laws centers on its discriminatory treatment of non-basin water users through its prohibition on diversions. Similar to the dormant commerce clause, international trade laws disallow discriminatory treatment of foreign entities: specifically, NAFTA and GATT disallow quantitative restrictions on trade. However, if such restrictions are for one of the several purposes for which exceptions are provided, they may be allowed if the exception criteria are met. The jurisprudence in this area has not yet been thoroughly developed, and part of the analysis involves consideration of the application of the restriction, which has not yet occurred, so a conclusive analysis of whether the Compact satisfies one of these exceptions cannot be reached at this point.

The analysis involves several steps. First, it must be determined whether (and when) water may be a "good"<sup>67</sup> subject to international trade laws. If water may be subject to these laws, the next step is to determine whether the Compact's provisions constitute a quantitative restriction on trade. If they do, then the final step is to determine whether the Compact satisfies any of the exceptions to the [ban on] quantitative restrictions on trade. NAFTA has expressly incorporated the relevant GATT Articles (XI and XX), so a similar analysis should apply.<sup>68</sup>

### **1. "Good"**

Both the GATT and NAFTA govern international trade in the U.S. NAFTA and GATT regulate the way member countries control their international trade in "goods". If water is considered a "good", then U.S. federal or state laws that regulate trade in water must do so consistent with the requirements of NAFTA and GATT.

Under both GATT and NAFTA, the better argument is that water may be a "good" subject to the agreements. GATT's Harmonized Commodity Description and Coding System contains a tariff

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<sup>66</sup> In the twenty years since WRDA was passed, only three diversion requests were received by the Governors, and only two of these were approved. It is unlikely that the few requests are due to lack of desire for basin diversions, as a number of southeast Wisconsin communities are in dire need of additional water supplies that Lake Michigan could provide. Rather, the difficulty in getting unanimous state governor approval has likely prevented many would be diversion-seekers from making requests for water.

<sup>67</sup> The term "products" is used in GATT; but "good" will be used here to stand for both.

<sup>68</sup> NAFTA Article 309(1) incorporates GATT Article XI by reference; NAFTA Article 2101 permits GATT Article XX exceptions regarding trade in goods.

The most definitive sources for GATT and NAFTA interpretation are its judicial bodies. A WTO Panel initially hears claims under GATT, with appeals taken to the Appellate Body ("AB"). Since NAFTA has incorporated the relevant GATT provisions, the more extensive GATT jurisprudence is considered here.

item for water: 22.01 "water, including natural or artificial water; ice and snow",<sup>69</sup> which suggests GATT contemplates that water may be a good. NAFTA Article 201 incorporates the GATT definition of "good", plus whatever the parties may additionally agree to. The parties to NAFTA adopted an explanatory Joint Statement in 1993 providing that water should not be subject to any trade agreement unless and until it has entered commerce, and that water "in its natural state" is not a good subject to international trade laws.<sup>70</sup> While this statement describes when water shall not be considered a good, it also makes clear that the parties recognize that there are some instances in which water may be a good subject to trade agreements. GATT jurisprudence has taken a similarly flexible approach, where an item may be a good under some circumstances and not a good under others.<sup>71</sup>

The question raised is: *when* is water a good, and does it become a good at a point at which the Compact's prohibition on diversions would be considered a quantitative restriction on trade. GATT and NAFTA leave room for protecting water from trade laws in some contexts and subjecting it to these laws in others. Water in a lake or stream seems nothing like a tradeable good, but water in a bottle does. The question is at what point between the lake and the bottle does water become a good? If a country has authorized the withdrawal of water provided certain conditions are met, it would seem to be a trade restriction if foreign entities are not entitled to seek such authorization.<sup>72</sup> The means to converting the water from "non-good" to "good" is the authorization, so it should not only be after withdrawal has taken place that the international trade laws begin to apply.

## 2. Quantitative Restriction

Under GATT Article XI, incorporated into NAFTA, quantitative restrictions on trade that discriminate against foreign entities may not be imposed:

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<sup>69</sup> Christine Elwell, *NAFTA Effects on Water: Testing for NAFTA Effects in the Great Lakes Basin*, 2001 *Tol. J. Great Lakes' L. Sci. & Pol'y* 151, 173 (2001).

<sup>70</sup> Statement of Representatives from Canada, the United States, and Mexico Concerning NAFTA and Water (December 2, 1993), *as cited in* Milos Barutciski, *Trade Regulation of Fresh Water Exports: The Phantom Menace Revisited*, *Can.-U.S. L.J.* 145, 146 (2002) [hereinafter Barutciski].

"Unless water, in any form, has entered into commerce and becomes a good or product, it is not covered by the provisions of any trade agreement, including the NAFTA. And nothing in the NAFTA would oblige any NAFTA Party to either exploit its water for commercial use, or to begin exporting water in any form. Water in its natural state in lakes, rivers, reservoirs, aquifers, water basins and the like is not a good or product, is not traded, and therefore is not and never has been subject to the terms of any trade agreement."

The legal effect of this document is unclear, but it does demonstrate the understanding of the parties with regard to when water may and may not be subject to trade laws.

<sup>71</sup> Barutciski, *id.*, at 147-48. While not controlling, U.S. law on this issue can help determine the fairness of subjecting water to the international trade regime. If the U.S. characterizes water as a good for purposes of its internal trade laws, which it has under the Dormant Commerce Clause, then it would be inequitable to allow the U.S. to regulate water for the benefit of interstate commerce but deny it "good" status for purposes of international trade.

<sup>72</sup> See Sanford E. Gaines, *Fresh Water: Environment or Trade?*, 28 *Can.-U.S. L.J.* 157, 158 (2002) ("... if at some point you decide that your water resources can be privately appropriated and put into the stream of commerce... then the management of the water resource may become an issue in terms of the international trade regime. Then... you are in a system where the principles include the rule that you should not discriminate between local users and foreign users... and you cannot, as part of that process, prohibit the exportation of that water. Even so, governments have substantial authority, unconstrained by trade rules, to manage their water resources").

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

The Compact's prohibition on diversions of Great Lakes water outside the basin, with limited exceptions based on geographical proximity to the basin, clearly would prevent a foreign entity from obtaining basin water for use outside the basin.<sup>73</sup>

### 3. Exception

Quantitative restrictions on international trade may be allowed if they satisfy one of the GATT Article XX exceptions, which NAFTA has incorporated as well. Discriminatory restrictions on trade in water might fall within the "conservation" exception at XX(g). Article XX states that

subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party measures:

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(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption....<sup>74</sup>

The WTO Appellate Body ("AB") applies Article XX by first considering whether the criteria of the particular exception are met, and then considering whether the criteria in the generally-applicable introductory clauses (the "chapeau") are satisfied.<sup>75</sup>

#### a. Exception XX(g) Criteria

Paragraph (g) of Article XX contains three elements that must be met: (1) the purpose of the trade restrictive measure must be "exhaustible natural resource"; (2) the measure must "relate to the conservation of" these resources; and (3) the measure must be made effective "in conjunction with restrictions on domestic production or consumption."<sup>76</sup>

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<sup>73</sup> It should be pointed out that the Compact does not discriminate against any entity – domestic or foreign - for use of water *within* the basin. The prohibition on diversions does not prevent a foreign entity from trading in Great Lakes water, provided that entity uses the water within the basin. Once the water has been used, converted into a product, then it can be sent anywhere outside the basin. This is one way in which the Compact does not violate the quantitative restriction on trade requirement of GATT and NAFTA.

<sup>74</sup> GATT, *supra* note 53 at Art. XX(g). Article XX also contains an exception for restrictions that are "(b) necessary to protect human, animal or plant life or health". However, this exception is more difficult to obtain because it requires a showing that the restriction is "necessary", as opposed to the "related to" standard in (g).

<sup>75</sup> WTO Appellate Body Report on United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (April 29, 1996) at 22 [hereafter Reformulated Gas].

<sup>76</sup> Existing case law on this exception has concerned trade restrictions that look to the laws or practices of the countries against whom the restrictions are applied. The Compact, by contrast, does not base its restriction on another country's laws or practices but applies equally to all countries.

### **i. “Exhaustible Natural Resource”**

To decide whether a resource is exhaustible, panels often look to scientific evidence, as well as assessing how other international agreements have treated the resource at issue.<sup>77</sup> Exhaustibility does not require that the resource is incapable of reproduction, such as minerals, but can include living organisms because, as the AB noted, “living species . . . [are] indeed capable of depletion, exhaustion, and extinction.”<sup>78</sup> Being “potentially subject to over-exploitation” can be sufficient grounds.<sup>79</sup> No AB opinion has yet addressed water as an exhaustible resource, but a WTO Panel has held that clean *air* is an exhaustible natural resource under XX(g). The Panel stated simply: “In the view of the Panel, clean air was a resource (it had value) and it was natural. It could be depleted.”<sup>80</sup>

Less than one percent of Great Lakes basin water is replenished annually. While the lakes are vast, there is consensus among the scientific community that they are a finite resource, capable of depletion and in need of legal protections.<sup>81</sup> Similar to clean air, useable and drinkable basin waters are a resource, are natural, and are capable of depletion. Thus, Great Lakes water resources could be considered an exhaustible natural resource.

### **ii. “Relating to Conservation”**

The AB has defined measures that “relate to” conservation as those “primarily aimed at” conservation of the exhaustible natural resource.<sup>82</sup> A “close and genuine relationship of ends and means” is required.<sup>83</sup> There may also be a requirement that the measure have “proportionality”, i.e. that the trade restricting features of the measure have some reasonable connection to the conservation objective.<sup>84</sup>

The Compact’s prohibition on diversions meets this requirement because its purpose is to prevent the reduction in quantity of Great Lakes water resources and it is directly proportional to water conservation – every drop of water that is prevented from leaving the basin is a drop of water that can remain in the basin. In many WTO cases, the challenged measures affect trade in one good to protect a different resource (e.g., limits on shrimp trade to protect turtles; limits on oil trade to protect the air, limits on tuna trade to protect dolphins). However, the Compact’s limits on trade are to protect the good traded: water resources. Thus, the Compact has a direct relationship between the trade restriction and the conservation goal.

### **iii. “In Conjunction with Restrictions on Domestic . . . Consumption”**

This clause “is a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.”<sup>85</sup> The

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<sup>77</sup> For example, in the Shrimp/Turtle case, the panel found it dispositive that sea turtles are classified as endangered under CITES. WTO Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (October 12, 1998) at ¶ 18 [hereafter Shrimp/Turtle].

<sup>78</sup> *Id.*

<sup>79</sup> See United States – Prohibition of Imports of Tuna and Tuna Products from Canada, L/5198-29S/91, 22 February 1982 at ¶ 3.

<sup>80</sup> Report of the Panel, United States - Standards for Reformulated and Conventional Gasoline (1/29/96) ¶ 6.37.

<sup>81</sup> Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States 6 (2000).

<sup>82</sup> Reformulated Gas, *supra* note 73 at 18.

<sup>83</sup> Shrimp/Turtle, *supra* note 75 at ¶ 136, explaining Reformulated Gas.

<sup>84</sup> Robert Howse, The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate, 27 Colum. J. Envtl. L. 491, 503 [hereafter Howse].

<sup>85</sup> Reformulated Gas, *supra* note 73 at 20-21.

domestic regulations need not be imposed in the same legislation or at the same time as those pertaining to trade, as long as the restrictions and penalties are comparable. However, the measures applied to foreign entities and those applied domestically need not be equivalent; foreign entities may have terms “less favorable” than domestic entities.<sup>86</sup> To require complete equivalency would eviscerate the exception.

The Compact imposes a number of requirements upon in-basin consumption that serve the same purpose of the prohibition on diversions: conservation of basin waters. The states must implement water conservation programs applicable to all water users that have the goals of improving basin waters and water dependent resources, protecting ecosystem integrity, ensuring sustainable use of basin waters and promoting efficient water use. New and increased withdrawals and consumptive uses are subject to approval conditions that include water conservation and the requirement that the water use cause no significant adverse impact to both the quantity and quality of basin waters. The registration, reporting and science provisions ensure that the states will have adequate information to monitor and address water resources conservation. In addition to the Compact, state, federal and international laws address Great Lakes basin water quality, which is intimately tied to the value of the water resource. Together, these demonstrate a substantial set of requirements imposed domestically in conjunction with the diversion prohibition.

#### **b. The Chapeau**

Once a measure has been determined to satisfy the particular criteria of the Article XX exception, it must be determined whether it satisfies the chapeau. The purpose of the chapeau is to ensure a balance “between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members” so that no exercise of a right cancels out the right of another.<sup>87</sup>

The chapeau provides that trade restrictive measures satisfying one of the enumerated exceptions not be “applied in a manner which would constitute [1] a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or [2] disguised restriction on international trade . . .” As this language specifies, the chapeau is concerned only with the application of measures, not whether the measures themselves are justified under Art. XX.<sup>88</sup> As the AB has explained: “the chapeau of Article XX ‘by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied.’”<sup>89</sup> Since this analysis considers how a measure has been applied, and since the Compact has not yet been applied, the discussion here contains a degree of conjecture as to how the states will actually implement the Compact.

Another limitation to the chapeau is that it not be applied “so as to vitiate the meaning of the rights contained in the operative paragraphs of Art. XX”.<sup>90</sup> Such an application would be inappropriate and make those rights meaningless.

#### **i. “Arbitrary or Unjustifiable Discrimination”**

The discrimination prohibited here is that “between countries where the same conditions prevail”. This is a consideration of how fairly the trade restrictive country treats the trading partners to

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<sup>86</sup> *See id.* at 19-20.

<sup>87</sup> Shrimp/Turtle, *supra* note 75 at ¶¶ 156, 159.

<sup>88</sup> Howse, *supra* note 82 at 499.

<sup>89</sup> *Id.* citing Report of the Appellate Body, U.S. - Import Prohibitions of Certain Shrimp & Shrimp Products; Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW (Oct. 22, 2001).

<sup>90</sup> *Id.* at 505.

which it applies the restriction; it is not a consideration of the difference between the trade restrictive country and its trading partners. The acceptability of that difference was determined in the first part of the analysis, above.

**Arbitrary Discrimination.** The requirement that a measure not constitute “*arbitrary discrimination*” primarily looks to whether the procedures used to apply the measure are applied in a discriminatory fashion.<sup>91</sup> The AB requires a transparent and fair implementing regime, and will look for familiar factors such as notice and hearing, a written record and a route of appeal. Arbitrary discrimination may result when a measure is applied in a rigid, inflexible, and exclusive manner, or when the procedures are not transparent and appealable.

The states’ process of applying the prohibition on diversions will largely be governed by their individual administrative procedures, supplemented by the Compact’s enforcement provisions. These provisions ensure that any “person aggrieved” by a state’s action under the Compact may seek judicial review of that action in federal court.<sup>92</sup> Any person whose has been denied their request to make a withdrawal would certainly qualify as a person “aggrieved”. This review process will ensure that states apply the prohibition on diversions correctly.

**Unjustifiable discrimination.** The requirement that a measure not constitute “*unjustifiable discrimination*” primarily looks to whether the substance of the measure is applied in a discriminatory fashion. With regard to the Compact’s prohibition on diversions, non-discriminatory application of the substance would be allowing some foreign entities to divert Great Lakes water and not allowing others to do the same. Such discriminatory treatment would be inconsistent with the Compact’s terms and would be likely quickly successfully challenged by the other states. The exceptions to the diversion prohibition should be considered here, because these are instances when diversions are allowed by the Compact. Since all of the exceptions limit diversions to areas geographically near to the basin (and completely within the basin states), application of the exceptions will not allow any foreign entity to divert Great Lakes water, meaning that all foreign entities are treated the same under the exception provisions.

The Compact has no conditions to apply when deciding whether to allow a diversion (aside from the geographically-limited exceptions), so there is no opportunity for a state applying the diversion prohibition to discriminate against one foreign entity in favor of another.

## ii. Disguised restriction on trade

As with the “discrimination” criterion, above, the “disguised restriction on trade” criterion considers the trade restrictive measure as it is applied. The case law on this criterion is the least clear of all of the exception/chapeau criteria. The best statement of this criterion under GATT is in *Reformulated Gas*, where the AB held that the concepts of “arbitrary or unjustifiable discrimination” and “disguised restriction on international trade” were related concepts which “imparted meaning to one another”. The disguised restriction criterion “embraces” restrictions that are arbitrary or unjustifiable “taken under the guise of a measure formally within the terms of” an Article XX exception. “The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the [Article XX] exceptions”.<sup>93</sup>

The disguised restriction criterion seems aimed at ensuring that, after considering whether a measure’s application discriminates arbitrarily or unjustifiably, no other improper purpose is behind the measure’s application. Given the very simple route for application of the Compact’s

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<sup>91</sup> See, generally, *Shrimp/Turtle*, *supra* note 75 at ¶¶ 160, 177-184. “Unjustifiable discrimination” looks to substance. *Id.* at ¶¶ 160-176.

<sup>92</sup> Compact, *supra* note 1 at § 7.3.

<sup>93</sup> *Reformulated Gas*, *supra* note 73, at 25.

prohibition on diversions – if the proposal is to divert water from the basin, it is not allowed – it is difficult to envision a means of applying this prohibition in a manner that would constitute a restriction on trade in something other than water. The simplicity and obviousness of this prohibition makes it incapable of being used to disguise anything.

#### **IV. Conclusion**

It is clear that the Great Lakes need improved water resources management. Such a vast resource that spans two countries and ten sub-federal jurisdictions requires comprehensive planning and foresight on the part of its stewards. Water uses within the basin and threatened diversions of water outside the basin have the potential to cause shortages that could limit the availability of water for basin needs and endanger the resources that depend on this water. The existing legal regime fails to provide the necessary protections. The Great Lakes—St. Lawrence River Basin Water Resources Compact promises to greatly improve the legal protections provided to the Great Lakes by creating a legally binding, regionally-applicable common minimum management standard that protects and conserves all basin water resources.

Part of the Compact's protections include a prohibition on diversions outside of the basin, with limited exceptions for near-basin communities. Potential legal challenges to this prohibition include the U.S. Constitution's dormant commerce clause and international trade law requirements. Once the Compact becomes effective, the dormant commerce clause concerns will disappear because the Compact will then be federal law. If the Compact fails to be consented to by Congress, the diversion prohibition could be viewed as the states' application of process and substance to the authority given them under WRDA. The international trade law concerns should also be satisfied by the prohibition's structure, including the Compact's corresponding in-basin conservation and protection provisions.