



International Rivers and Lakes

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I. North American ‘Great Lakes Annex’ released¹

In 2001, the Premiers of Ontario and Quebec Provinces in Canada and the Governors of the eight Great Lakes states in the United States - Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin - agreed to create by 2004 a binding agreement for lake diversion and conservation.

In July 2004, the draft version of a proposed compact to manage water takings from the Great Lakes Basin in North America was released by the Great Lakes Governors. The ‘Great Lakes Annex 2001 Implementing Agreements’ are the product of three years of work by the governors and an advisory group of environmentalists and representatives of local government, business and agriculture. The proposed Annex agreement is particularly important to Michigan because it is the only state in the region that has not enacted laws to regulate large withdrawals, although it was among the states that signed the Great Lakes Charter in 1985.

It could still take as long as 15 years to implement the Annex. Since 1998, the Council of Canadians has been actively advocating for a pact that will establish limits on water takings from the Great Lakes, based on sound science and the precautionary principle. Moreover, the Council has been a vocal opponent of water exports from the Great Lakes, and has called on the Federal Government to exempt water from all trade agreements and to protect all of Canada's waters.

The Great Lakes Region in North America is the largest freshwater ecosystem in the world. However, only 1% of the Great Lake waters are renewable every year. At this time it is unknown whether current withdrawals from the Great Lakes are consuming more than this 1% threshold. Despite this, the Annex pact will only apply to new withdrawals, raising concerns that the pact will do little to protect an ecosystem already in jeopardy. “Before discussing any new water withdrawals, we must make sure that current water takings are not compromising the health of the Great Lakes,” says Sara Ehrhardt, National Water Campaigner of the Council of Canadians.

The proposed ‘Great Lakes Charter Annex’ only allows new or increased withdrawals on any of the five Great Lakes if water immediately is returned and the condition of the lakes are improved. The measure leaves the door open for Great Lakes water to be shipped to areas in the region that are outside the basin, but prevent it from heading to other areas, such as the Southwest United States. “That's intentional”, said Noah Hall, senior manager of Great Lakes Water Resource Program of the National Wildlife Federation. “We basically want to do everything that's possible to stop diversion that is going to hurt water levels.”

A few municipalities in the region - Akron, Ohio, and Pleasant Prairie, Wisconsin - have received approval to withdraw water outside the basin. The proposal would require

¹ Excerpts from an article by Amy F. Bailey, Associated Press, ‘Great Lakes water diversion virtually banned in new agreement,’ Right to Water right-to-water@iatp.org, Posted by mritchie@iatp.org.

municipalities that access new or increased diversions to return cleaned wastewater to the lakes to limit any drawdown of the freshwater supply. The compact would require the eight Great Lakes Governors, in consultation with the Premiers of Ontario and Quebec, to unanimously approve any new diversion that would withdraw an average of 1 million gallons a day over a 120-day period outside the basin. A super-majority vote among the Great Lakes governors (6 to 2) would be needed for a new or expanded withdrawal from the basin that results in a loss of an average 5 million gallons a day over 120 days. It is recommended that smaller proposed diversions would be reviewed by the jurisdictions.,

The Council of Canadians has been working with community water activists, scientists, First Nations, concerned citizens, and legal experts to review the pact and to raise awareness of its potential implications. “This may be our only chance to protect the Great Lakes for future generations,” says Ehrhardt. “We cannot allow political agendas or private interests to prevent us from doing what we know will be best for the Great Lakes ecosystem and for our collective future.”

The release of the Annex started a 90-day public comment period. The Council of Great Lakes Governors was to hold public hearings on the proposal in Chicago on 8 September and in Toronto on 20 September. Each of the Great Lakes states could hold its own public hearings on the proposed agreement during the 90-day comment period. To become law, the compact must be approved by the Congress and the legislatures in each of the Great Lakes states, which means it could be another a few years before the compact becomes law. Mr. Hall, a member of the advisory commission that helped develop the proposal, called it the most sweeping set of environmental changes since the US federal Clean Water Act. “It would create an entirely new set of standards, principles and ethics for how we use water in this region,” he said. “If done right, it could really preserve the Great Lakes.”

The proposal not only would make it difficult for areas outside the basin to divert water from the Great Lakes, it would require conservation by those who live and work in the basin. The conservation provision would require municipalities outside the basin to show that they are doing everything they can do reduce the amount of water they need from the Great Lakes. While the measure requires municipalities and businesses to demonstrate water conservation, it doesn't specifically define conservation. That has some environmentalists concerned. Hall said he would like to see specific conservation measures laid out for each sector interested in diverting water from the Great Lakes. For example, a municipality should have to show that it is losing 4 percent of the water it pumps or that it provides incentives for conservation measures, such as low-flow showers and toilets, he said.

The proposed agreement is expected to face opposition. Scott Piggott, manager of the Michigan Farm Bureau's Agricultural Ecology Department, said he is worried the new regulations will impinge on farmers' ability to use water. “We're not in short supply of water,” Piggott said. “It's hard to tell farmers they need to be cautious of something when it's so plentiful.”

Critics of the Annex have stated that the process of developing the pact has been driven by political agendas and the fear of legal challenges rather than a desire for a broad environmental management plan. As a result, it has been speculated that the pact could have the potential for significant water diversions.

II. Parliament in Argentine Province approves new bill to protect the Guaraní Aquifer²

Provinces in Argentina are now taking steps to protect the Guaraní Aquifer, which is shared by Argentina, Paraguay and Brazil.

On 18 November 2004, the House of Representatives of the province of Santa Fe in Argentina approved a bill, whereby the part of the aquifer underlying provincial territory becomes public property. All actions affecting the aquifer system, from studies to use and exploitation are subjected to Environmental Impact Assessments. Such assessments are to be approved after public hearings, and the water rights can only be granted by law approved by two thirds of the members of the House and the Senate.

The Bill is yet to be approved by the Senate and the Governor of the Province of Santa Fe.

III. United States - Mexico water treaty dispute³

A research report issued in early 2004 details the specifics behind the water dispute between the United States and Mexico, and how it affects agriculture in Texas.

The report includes papers by Susan Combs, Commissioner of the Texas Department of Agriculture (TDA); Katharine Armstrong, former chair of Texas Parks and Wildlife Commission (TPW); and Kathleen Hartnett White, chair, Texas Commission on Environmental Quality (TCEQ).

According to the report, problems with water in Texas are not new. What is new, however, are the issues that have been addressed in recent years either in the Texas Legislature or under the North American Free Trade Agreement (NAFTA), signed by the United States, Canada and Mexico, which took effect in 1994. Agreements really go back to 1944, when the United States and Mexico created a 'U.S.-Mexico Water Treaty' which governed and divided the flow of water in the Rio Grande Basin from the Rio Grande and certain tributaries in the United States and Mexico. The Treaty stated that "... Mexico must provide, at a minimum, an average of 350,000 acre-feet of water per year to the United States over a five-year cycle for a total of 1,750,000 acre-feet of water."

² Personal communication from Ricardo Luis Mascheroni rmascheroni@yahoo.com Received 18 November 2004. For further information on the Guaraní Aquifer Project see: <http://www.sg-guarani.org>

³ From *U.S. Water News Online* "Report delves into details of U.S., Mexico water treaty". See: <http://www.uswaternews.com/archives/arcglobal/4repodelv11.html>, November 2004.

Under the 1944 agreement, Mexico was expected to send to the United States (California and Arizona also receive Colorado River water) 350,000 acre-feet of water each year, which would come from six Rio Grande tributaries. The United States was, in turn, to send Mexico 1.5 million acre-feet of water per year from the Colorado River.

Over the past 60 years, Texans and agricultural producers, especially those in the Rio Grande area, have expected Mexico to abide by the agreement signed in 1944. Unfortunately, Mexico was unable to comply. After years of losing land, money and producers due to a lack of water, 17 irrigation districts, North Alamo Water Supply Corporation, and 29 farmers sent notice to Mexican officials that, under the NAFTA agreement of 1994, unless Mexico delivers what is due, they will seek up to \$500 million in damages from the Mexican government. If nothing is accomplished by the end of the year, it is expected that a federal suit will be filed under NAFTA. Ms. Nancie Marzulla, attorney for the claimants, asserts that, "Mexico has unlawfully taken over 1,000,000 acre-feet of Texas water and given it to Mexican farmers so their farmers can grow crops. All while the crops of farmers in the Rio Grande Valley have dried up and blown away."

According to Ms. Combs and recent reports from the Center for North American Studies, (CNAS, 2002-3)⁴, "... irrigated water use from surface and groundwater sources in Chihuahua (Mexico) more than doubled from 1980 to 1997."

The most accurate figures in Combs' office indicate that the 'official' figure of water in Mexico was 1.42 million acre-feet, plus additional water in reservoirs identified in satellite imagery. "That does not include recent, heavy rains in Chihuahua in October", says Gordon Wells of the University of Texas. Thus, it would seem that there is sufficient water to repay the United States, according to the agreement.

What happens in the future is anyone's guess. What Combs and other Texas officials are aware of is that the water is there for Mexico to return to the United States. Satellite photos show there is an abundance of water in Mexico. Fortunately, the Rio Grande Valley of Texas has received a lot of rain, this year, but an agreement is an agreement, officials feel.

While the state of Texas and its farmers do not have a legal right to demand the return of the water owed to the state and its producers, a suit through NAFTA has a legal 'leg to stand on' for water rights, stated Combs.

Although the Mexico/Texas water problems have received a lot of publicity of late, Combs believes that rural producers need to be vigilant concerning water rights in their areas. "Groundwater conservation districts give the local guys the best opportunities to determine their future," said Combs.

⁴ Rosson III, P.C., Hobbs, A. and Adcock, F., 2002. *The U.S./Mexico Water Dispute: Impacts of Increased Irrigation in Chihuahua, Mexico*. Center for North American Studies (CNAS), Department of Agricultural Economics, Texas A&M University. Paper presented to the Southern Agricultural Economics Association Annual Meeting, Mobile, Alabama, 1-5 February 2003. See <http://cnas.tamu.edu/publications/SAEAWater.pdf>

IV. International Economic Law, water for Money's Sake?⁵

Water resources and their services are increasingly affected by trade, investment, and commerce agreements. While the issue is critical, considering its social, environmental and economic implications, it has not been widely discussed in developing countries.

For this reason, a special paper was commissioned on the subject by the organizers of the Meeting on Water Policies which was held on 22 September 2004 in Brasilia. The meeting was organized by the Brazilian Government, the United Nations Economic Commission for Latin America and the Caribbean (ECLAC), the Inter-American Development Bank, the World Bank, the Global Water Partnership and other institutions.

The overall goal of the paper is to ensure that the challenges to sound water management posed by developments in international economic law are understood, so that they can be addressed through legal, administrative and policy measures that allow their benefits to be captured but their risks to be eliminated, or at least mitigated.

The core question posed in the paper is: for whose sake is water addressed in today's international economic law? The issues for discussion addressed in the paper are: What do specific aspects of international law have to say about meeting this need? What values and demands take priority on water uses under international economic law?

Divided into five main parts, the paper considers the different ways in which two critical branches of international economic law – international trade law and international investment law – can impact water management decision-making at the local or national level.

First, the paper considers how trade law may lead to impacts on access to freshwater resources through trade in those resources. Examples under the North American Free Trade Agreement (NAFTA) and others are cited. Second, it examines how international trade and investment agreements are creating new rights of access by foreign corporations to provide water services. Details of negotiations underway through the World Trade Organization, and specifically the General Agreement on Trade in Services (GATS), are described, even though water and water-related services are not yet included in those negotiations. Third, the role of international investment law and how it protects foreign investors and their access to water resources or responsibility to provide water services under certain circumstances, as well as dispute resolution, are reviewed in the paper.

Finally, the paper considers the political and policy pressures that are being created by the ongoing negotiations at the multilateral, regional and bilateral levels to expand the

⁵ The full paper was written by Howard Mann and presented to the Water Policies Seminar (Seminário Latino-Americano de Políticas Públicas em Recursos Hídricos) organized by the Brazilian Government and several international and regional institutions. It was held in Brasilia on 22 September 2004. The report is available online: <http://www.isdlaw.com/pdfs/WaterandInternationaleconomiclaw.pdf>.

scope of all the areas of law, and what this means for basic issues of water management and access by all to vital water resources and services.

Specific recommendations to address the key problems identified are included in Annex 1 of the paper.

V. The Human Right to Water: Legal and Policy Dimensions ⁶

The new book *The Human Right to Water: Legal and Policy Dimensions*, edited by Salman M.A. Salman and Siobhan McInerney-Lankford at the World Bank in Washington, D.C. analyses the resolutions and declarations of the various conferences and forums that have been held since the early 1970s, and the ways in which they have confronted the issue of the right to water.

The study discusses the evolution of the international legal regime for the protection and promotion of human rights, and pays particular attention to the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, as well as to the International Covenant on Civil and Political Rights. The role of each of the United Nations Committees established to oversee the implementation of the two Covenants is considered in some detail. Particular attention is given to the Committee on Economic, Social and Cultural Rights, its evolution and its strengthening, and the practice of issuing General Comments. The last two parts of the Study are devoted to General Comment No. 15, which recognizes the human right to water. These parts analyse the extent to which the Comment recognizes a legal right to water, and highlights some policy aspects that are related to, and may affect, that right.

The core thesis of this book is that there exists, within the legal framework of the International Covenant on Economic, Social and Cultural Rights, a human right to water because it is a right that inheres in several other rights, and a right without which key provisions of the Covenant would be rendered ineffectual.

This conclusion is buttressed also by the interpretative authority, which lies with the Committee having evolved from its initial form as a Working Group, to what is now undeniably, a fully-fledged entity, with significant formal authority and legitimacy. Although this conclusion acknowledges that General Comments do not create *new rights*, it recognises that General Comment No. 15 extrapolates the normative and practical bases of a human right to water within the fabric of the International Covenant on Economic, Social and Cultural Rights. Together with a number of General Assembly resolutions on the issue, including the Millennium Development Goal related to water, as well as the voluminous body of soft law provisions, the General Comment arguably provides further evidence that there is an incipient right to water evolving in public international law today. Moreover, the Comment has offered a new momentum to efforts aimed at translating those soft law commitments into substantive, precise and legally binding obligations.

⁶ Salman M.A. Salman, Siobhan McInerney-Lankford, 2004: *The human right to water: legal and policy dimensions*, World Bank, Washington, D.C.