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A. Dan Tarlock

IIT Chicago-Kent College of Law, dtarlock@kentlaw.iit.edu

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THE GREAT LAKES AS AN ENVIRONMENTAL HERITAGE OF HUMANKIND: AN INTERNATIONAL LAW PERSPECTIVE

A. Dan Tarlock*

Since 1985, the eight Great Lakes states and the Canadian provinces of Ontario and Quebec have cooperated to prevent almost all diversions of water from the Great Lakes basin. In 2005, the eight states signed an Agreement to create a tiered system of reviews for diversions and a draft interstate Compact, which creates a binding process to regulate diversions. This cooperation is primarily a state initiative, supported by the federal governments in both countries, which has paid little attention to the international character of the lakes. This Essay argues that there are three major benefits to the region from the incorporation of international environmental law into the anti-diversion regime. First, the recent Compact is an important recognition of the Lakes as a common heritage of human kind. Second, the success of the regime will be aided by the involvement of the International Joint Commission (IJC) in diversion issues because of its broader perspective on Great Lakes issues. Third, international law serves as an additional buffer against the invocation of international and domestic free trade laws to unravel the proposed environmental-navigation protection regime.

INTRODUCTION

In the 1980s, the eight Great Lakes states and two littoral Canadian provinces began cooperating to develop a proposed legal regime to prohibit most diversions of water out of the Great Lakes watershed. This cooperation has produced two important soft law agreements¹ and a draft interstate compact² among the eight Great Lakes states, Ontario, and Quebec. The latest agreements, the 2005 Great Lakes-St. Lawrence Basin Sustainable Water Resources Agreement (“Agreement”),³ along with the proposed Great Lakes-St. Lawrence Basin Water Resources Compact (“Compact”),⁴ virtually prohibit all diversions from a

* Professor of Law, Chicago-Kent College of Law, A.B. 1962, LL.B. 1965, Stanford University.

1. GREAT LAKES SUSTAINABLE WATER RESOURCES AGREEMENT (2005), http://www.mnr.gov.on.ca/mnr/water/greatlakes/GL_BASIN_SUSTAINABLE_WATER_RESOURCES_AGREEMENT_6-30-05.pdf [hereinafter AGREEMENT]; COUNCIL OF GREAT LAKES GOVERNORS, PRINCIPLES FOR THE MANAGEMENT OF GREAT LAKES WATER RESOURCES (1985), <http://www.dec.state.ny.us/website/greatlakes/glchart.pdf> [hereinafter CHARTER].

2. GREAT LAKES BASIN WATER RESOURCES COMPACT (2005), http://www.mnr.gov.on.ca/mnr/water/greatlakes/GREAT_LAKES_BASIN_WATER_RESOURCES_COMPACT_6-30-05.pdf [hereinafter COMPACT].

3. See AGREEMENT, *supra* note 1.

4. See COMPACT, *supra* note 2.

Great Lakes sub-watershed to a watershed outside of the Great Lakes watershed. With the exception of Michigan, the watershed boundaries do not encompass the entire territory of a state. Therefore, limited exceptions exist for those communities located just outside the watershed, but these exceptions will be difficult to invoke.⁵ State and provincial cooperation has been supported by U.S. federal acquiescence in an anti-diversion regime and more actively by the cooperation of the Canadian national government. For example, in 2002, Canada enacted a law that prohibits virtually all diversions from her portion of the Great Lakes either by traditional conveyances or bulk tanker transport,⁶ and if the Compact is approved, Ontario and Quebec will adopt parallel legislation.⁷

However, the true significance of the Agreement and Compact are not in the anti-diversion regime, which will seldom, if ever, be invoked. Rather, the proposed and existing hard and soft laws effectively prioritize ecosystem conservation, along with complementary navigation uses, as the highest use of the Lakes. The net result of this dedication is an increasing recognition, especially in Canada,⁸ that the Lakes are a heritage resource that should be conserved for the benefit of present and future generations.⁹

This remarkable dedication to ecosystem conservation of the Lakes is a happy accident of two domestic political factors in Canada and the United States. First, there are no foreseeable competing consumptive uses. The costs, low present value of the water in the Lakes, and environmental problems ensure that for the foreseeable future there will be no serious efforts to pipe water from the Lakes to the more arid regions of either Canada or the United States or to move it by tanker to other countries.¹⁰ Thus, the

5. See Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 424–48 (2006) (discussing the background of the Agreement and Compact).

6. International Boundary Waters Treaty Act, R.S., ch. I-20 (2002).

7. See Bob Kelleher, *Minnesota Considers Plan to Keep Great Lakes Waters in Great Lakes* (Minnesota Public Radio broadcast Feb. 11 2007), <http://minnesota.publicradio.org/display/web/2007/02/09/gtlakescompact>.

8. See SIERRA CLUB OF CANADA, *THE GREAT LAKES PRIMER: A CITIZEN'S PRIMER TO PROTECT THE GREAT LAKES AND THE ST. LAWRENCE RIVER* (2005), <http://www.sierraclub.ca/national/great-lakes/great-lakes-primer.pdf>.

9. INTERNATIONAL JOINT COMMISSION, *PROTECTION OF THE WATERS OF THE GREAT LAKES: FINAL REPORT TO THE GOVERNMENTS OF CANADA AND THE UNITED STATES* 35–36 (2000) (The Lakes are “a central feature of the natural and cultural heritage of the Great Lakes region.”) <http://www.ijc.org/php/publications/html/finalreport.html>.

10. See generally PETER ANNIN, *THE GREAT LAKES WATER WARS* (2006) (describing the history of Great Lakes diversions from the reversal of the Chicago River to the negotiation of the Compact).

usual political opposition to environmental protection does not exist in the region. Second, the protection of the Lakes from phantom diversions makes for good domestic politics on both sides of the border. Canadian nationalist greens have supported a strong anti-diversion regime by stoking the traditional fear that the United States is always poised to grab and export all of Canada's natural resources, including its abundant clean water, which has resulted in strong national and provincial anti-diversion legislation.¹¹ In the United States, the continued erosion of political power in the Great Lakes region, as the nation's population drifts south and west,¹² has provided the necessary urgency for the eight Basin states to maintain the Lakes as a functioning ecosystem in a way that they hope will be difficult to change as the Basin's federal political power erodes.

This happy accident has led to a positive example of enlightened international water management, but the process by which the Lakes have been dedicated to environmental protection presents a striking paradox. The Lakes are international waters,¹³ but the protection did not take the form of an amendment to the Boundary Waters Treaty of 1909¹⁴ or a new bi-national agreement under the Treaty, such as the 1978 Canada-United Water Quality Agreement.¹⁵ Throughout the process, the international character of the Lakes has been consistently, albeit reflexively reaffirmed, but

11. See generally MAUDE BARLOW & TONY CLARK, *BLUE GOLD: THE FIGHT TO STOP CORPORATE THEFT OF THE WORLD'S WATER* (2002) (describing the loss of government control over water resources that will result from the use of international trade laws and corporate control of water).

12. TRANSPORTATION RESEARCH BOARD, *TCRP REPORT 74: COSTS OF SPRAWL 67* (2000) (projecting a 13.5 percent population gain for the Midwest versus gains of 27.2 and 33.4 respectively in the South and West), http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_rpt_74a.pdf.

13. Sharon A. Williams, *Public International Law and Water Quality Management in a Common Drainage Basin: The Great Lakes*, 18 *CASE W. RES. J. INT'L L.* 155, 155 (1985). Technically, the Great Lakes are bi-national waters; the Boundary Waters Treaty classifies the Lakes as either boundary waters or tributary waters. Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448. Lake Michigan is a tributary water. Richard B. Bilder, *Controlling Great Lakes Pollution: A Study in United States-Canadian Environmental Cooperation*, 70 *MICH. L. REV.* 469, 482 (1972). Thus, diversions, such as the Chicago diversion, are not subject to the Treaty, since the city of Chicago, located on the shore of Lake Michigan, diverts water only from Lake Michigan. However, subsequent agreements include the entire Great Lakes system, including Lake Michigan, tributary rivers, and associated ground water. See, e.g., Great Lakes Water Quality Agreement, U.S.-Can., Nov. 22, 1978, 30 U.S.T. 1384.

14. Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448 [hereinafter *Boundary Waters Treaty*].

15. Great Lakes Water Quality Agreement, *supra* note 13.

largely ignored in actual decision-making. International law, including the Boundary Waters Treaty of 1909, has played a minimal role in the development of the Agreement and Compact. Instead, from the 1980s to the present, the United States process has been under the almost exclusive control of the individual states, although the states have cooperated closely with Ontario and Quebec.¹⁶ The U.S. Congress has merely endorsed state efforts.¹⁷ The Canadian national government, with its weaker central authority, has more jealously asserted its power to decide the fate of the Lakes under the foreign affairs power of the Canadian constitution.¹⁸

The failure to follow traditional international forms or to stress the international character of the Lakes does not necessarily compromise their international character. The important outcome is that the Lakes are protected for future generations, and one can argue that the process is superior to an international law approach. Professor Noah Hall has characterized the Agreement and Compact as a praiseworthy experience in U.S. horizontal cooperative federalism and argues:

In the United States, the cooperative horizontal federalism approach is uniquely able to incorporate the international concerns for the Great Lakes demonstrated by the Boundary Waters Treaty (through consultation with the Canadian provinces and congressional approval), while encouraging state participation in comprehensive water management that may not be politically possible through a federally negotiated international treaty.¹⁹

There is much merit in this argument, but this Essay argues that there are at least three potential benefits from the greater recognition of the international character of the Lakes. Each benefit is highly contested and problematic in theory and practice, but a greater recognition of the international dimension of the Lakes can strengthen domestic ecosystem protection efforts. In descending order of importance, the three benefits are:

16. INTERNATIONAL WATER USES REVIEW TASK FORCE, PROTECTION OF THE WATERS OF THE GREAT LAKES: THREE YEAR REVIEW 7 (2002). *See also* DON C. PIPER, THE INTERNATIONAL LAW OF THE GREAT LAKES: A STUDY OF CANADIAN-UNITED STATES CO-OPERATION (1967) (tracing the deep roots of the cooperation).

17. *See infra* notes 24–25.

18. *See* P.H. PEARSE, F. BERTRAND & J.W. MACLAREN, CURRENTS OF CHANGE 63–75 (1985) (providing an excellent discussion of federal-provincial powers to manage water).

19. Hall, *supra* note 5, at 419.

1. The incorporation of general principles of international environmental law into the Great Lakes governance regime.
2. The involvement of the International Joint Commission (IJC) in diversion issues because of its broader perspective on Great Lakes issues.
3. The use of international law as an additional buffer against the invocation of international and domestic free trade laws to unravel the proposed environmental-navigation protection regime.

I. AN OVERVIEW OF THE ANTI-DIVERSION REGIME

A brief overview of the proposed governance regime is necessary to provide context for the potential role of international law. In 1985, fears that Lake Superior diversions would be used to bail out the mined Ogallala Aquifer in the Great Plains produced the Great Lakes Charter signed by the eight Great Lakes states and the provinces of Ontario and Quebec.²⁰ The Charter is a “soft law” (non-binding) regime.²¹ Principle IV of the Charter requires that a signatory state or province notify, consult, and seek the consent of the other signatories before approving any new or increased diversion or consumptive use “of the water resources of the Great lakes” of more than five million gallons over a thirty-day average.²² The Charter was further implemented or “hardened” by the adoption of state laws that prohibited all basin diversions, not just those over five million gallons per day.²³ In 1986²⁴ and again in 2000,²⁵ the U.S. Congress passed legislation which allows the governor of any Great Lakes state to veto a trans-basin diversion. Since 1985, the Charter

20. See CHARTER *supra* note 1.

21. In the first litigation to consider the Charter, a federal district court described it as “a kind of gentleman’s agreement between the Governors of the Great Lakes States and the Provinces of Ontario and Quebec.” *Little Traverse Bay Bands of Odawa Indians v. Great Springs Waters of America, Inc.*, 203 F. Supp. 2d 853, 858 (W.D. Mich. 2002) (holding the Charter creates no implied private or Tribal rights).

22. CHARTER, *supra* note 1, at 5.

23. See, e.g., MICH. COMP. LAWS ANN. § 324.32703 (West 1999); IND. CODE § 14-25-1-11 (1995).

24. Water Resources Planning Act, 42 U.S.C. § 1962d-20(d) (1986) (prior to 2000 amendment).

25. *Id.* (amended 2000).

has successfully warded off large diversions and developed standards to evaluate small ones.²⁶

The Agreement and Compact further “harden” the Charter. They divide proposed withdrawals into four different tiers.²⁷ Under the Agreement, states will exercise primary regulatory authority for smaller withdrawals.²⁸ For larger withdrawals, regional consultation or review is required.²⁹ The state must give notice to other states and allow comments for mid-range diversions.³⁰ Diversions of five million gallons per day are subject to a non-binding regional review process and must be approved by a unanimous vote of the Great Lakes governors.³¹ In addition, larger withdrawals must meet common basin-wide standards.³² The June 2005 draft of the Compact³³ divides withdrawals into four major categories. New and increased diversions, which are defined as transfers of water outside the Great Lakes basin or between the watersheds of one Lake to another, are prohibited subject to limited exceptions.³⁴ New or increased *intra-basin* withdrawals under 100,000 gallons per day over a ninety-day period are regulated only by the jurisdiction from which they originate.³⁵ Proposed *intra-basin* uses between 100,000 and five million gallons over a ninety-day period must meet stringent basin-wide standards.³⁶ Withdrawals over five million gallons over a ninety-day period must meet the same standards and are subject to regional review.³⁷ The only *inter-basin* transfers allowed are those for cities or counties that straddle the Basin.³⁸ One of the major political issues in the diversion debate was the question of whether small, trans-basin diversions should be allowed.³⁹ Water-

26. See James P. Hill, *The New Politics of Great Lakes Water Diversion: A Canada-Michigan Interface*, 2 TOL. J. GREAT LAKES' L. SCI. & POL'Y 75, 80 (1999) (citing the proposed anti-diversion regime as a prime example of the states to bypass the federal government in engaging with other national governments as well sub-units); see also Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380, 2398–2413 (2006) (arguing that the states have considerable discretion to act and that federal preemption should be the primary check on state initiatives). *But see* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 374–88 (2000) (reserving the foreign affairs exclusively to the federal government); Zschernig v. Miller, 389 U.S. 429, 432–41 (1968).

27. AGREEMENT, *supra* note 1, § 201(2); COMPACT, *supra* note 2, § 4.7(2).

28. AGREEMENT, *supra* note 1, §§ 201(2), 205.

29. AGREEMENT, *supra* note 1, §§ 201(2)(c), 204.

30. AGREEMENT, *supra* note 1, §§ 201(2)(b)(iv), 503.

31. AGREEMENT, *supra* note 1, § 201(2)(c); COMPACT, *supra* note 2, § 4.7(2)(c).

32. COMPACT, *supra* note 2, § 4.7(2)(b).

33. *Id.* §§ 4.6–4.8.

34. *Id.* § 4.6.

35. *Id.* § 4.8.

36. *Id.* § 4.7(2)(b).

37. *Id.* § 4.7(2)(c).

38. *Id.* § 4.6.

39. See SIERRA CLUB OF CANADA, *supra* note 8, at 6.

shed boundaries, do not follow political boundaries, and in many areas, the Great Lakes basin extends only a few miles or less from the shore of a Lake. In these areas, or where there is a difference between the surface and groundwater boundary, there can be great pressure for the use of Lake water if local supplies are depleted or contaminated. The question is whether such diversions should be allowed and if so, under what conditions.⁴⁰ Originally, the governments of the eight basin states thought that such diversions should be allowed under conditions that included a “resource improvement” standard.⁴¹ Such a standard, modeled on United States wetland mitigation policy,⁴² would have allowed ecosystem improvements to offset diversions. The kind and location of the improvements occupied the time of consultants but the governors and premiers took the idea no further.

On the whole, the two Canadian provinces, the national government of Canada, and Canadian national greens thought that diversions should only be permitted if there were a “no net loss” standard.⁴³ There was great concern that the resource improvement standard “commodified” the Lakes and would pave the way for diversions and bulk water transport.⁴⁴ In addition, the standard

40. The current focus is on rapidly growing Waukesha County, Wisconsin. The county lies just outside the Great Lakes watershed, although there is some evidence that the area’s groundwater pumping has reserved the flow of the aquifer and may actually be drawing water that would otherwise reach Lake Michigan. Dan Egan, *Water Pressures Divide a Great Lakes State*, MILWAUKEE J. SENTINEL, Nov. 30, 2003, at 1S.

41. The 2000 amendment to the 1986 Water Resources Planning Act required the states to develop a decision-making standard that included “resource improvement.” 42 U.S.C. § 1962d-20(b)(2). A 1999 legal opinion recommended that the Great Lakes states and provinces adopt a diversion standard to avoid a court holding that the Water Resources Planning Act of 1986 was an unconstitutional delegation of power. ANNIN, *supra* note 10, at 198–207. The opinion suggested that the states and provinces adopt a “resource improvement” standard that would allow an activity, such as the restoration of a water-related ecosystem, to offset the adverse environmental impacts of a withdrawal. *Id.* at 206. Canadian environmentalists objected to the recommendation because it opened the door to increased diversions. *Id.* at 218. Industrial users objected to having to pay for the use of the Lakes that have historically been an open access commons. *Id.* The standard was dropped without a word of explanation from the July 2005 Annex 2001 Draft.

42. See WILLIAM WANT, LAW OF WETLANDS REGULATION §§ 6:36–44 (2006) (stating that Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344 (2007), allows the filling of natural wetlands in return for the preservation of other natural ones or the creation of new ones).

43. SIERRA CLUB OF CANADA, *supra* note 8, at 8.

44. INTERNATIONAL WATER USES REVIEW TASK FORCE, *supra* note 16 (detailing the three part strategy that the federal government of Canada adopted in 1999 for Great Lakes diversions). The federal government of Canada amended the Boundary Waters Treaty Act, joined with the United States in the 1999 reference to the IJC on diversions, and sought provincial endorsement of a Canada-wide ban on bulk water removals. *Id.* at 18.

raised all of the problems of valuing ecosystems services.⁴⁵ This political gap was considerably narrowed when the Council of Great Lakes Governors withdrew a draft that included a resource improvement standard and issued the final standard that omitted it.⁴⁶

II. THE INCORPORATION OF GENERAL PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

The major advantage of viewing the Agreement and Compact through the lens of international environmental law is that the area has developed fundamental principles based on modern science and ethics. Canadian and U.S. environmental law tends to be media or resource specific and resistant to the incorporation of new scientific understanding and ethical ideas. Thus, international law principles are better adapted to the actual problems faced by stressed resources and provide the necessary general standards for conservation. International environmental law is evolving from the simple negative rule that no state should harm another to the affirmative duty of environmentally sustainable development.⁴⁷ Environmentally sustainable development, vague as it is, posits that governments must act as resource stewards for present and future generations.⁴⁸ Of all the ethical principles put forth in recent years, the emerging global consensus that we must replace the Greco-Judeo-Christian tradition that humankind is a despot over nature⁴⁹

45. See generally James Salzman, *Valuing Ecosystems Services*, 24 *ECOLOGY L.Q.* 887 (1997) (providing a general description of valuation of ecosystem services).

46. See AGREEMENT, *supra* note 1.

47. See EDITH BROWN WEISS ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 325–28 (2d ed. 2007).

48. See DAN TARLOCK, *ECOSYSTEMS*, CHAPTER 24 *OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* (2007).

49. JOHN PASSMORE, *MAN'S RESPONSIBILITY FOR NATURE* 28–40 (1974) (remaining the leading exponent of this position). Many people now read the first book of Genesis as supporting environmentally sustainable development through the duty to manage the Garden of Eden without exploit it thoughtlessly for human benefit. *Id.* at 29. The great geographer Gilbert White has written:

People around the world in the 1990s are perceiving the earth as more than a globe to be surveyed, or developed for the public good in the short term, or to be protected from threats to its well-being both human and natural. It is all of these to some degree, but has additional dimensions. People in many cultures accept its scientific description as a matter of belief. They recognize a commitment to care for it in perpetuity. They accept reluctantly the obligation to come to terms with problems posed by growth in numbers and appetites. This is not simply an analysis of economic and social consequences of political policies toward environmental matters. The roots are a growing solemn sense of the individual as part of one human family for whom the earth is its spiritual home.

with the principle that we are stewards of the earth⁵⁰ has had the most impact. At a minimum, stewardship requires that some high pre-existing baseline condition be maintained over time.

Stewardship includes two important principles: the principle of inter-generational equity articulated by Professor Edith Brown Weiss⁵¹ and the principle of precaution. Inter-generational equity permits resource exploitation subject to the constraint that we leave the resource in no worse condition than when we found it.⁵² The dedication of major ecosystems as the common heritage of humankind managed with appropriate precaution is a practical application of the ethic of inter-generational equity and the fundamental norm of environmentally sustainable development.

A. The Common Heritage of Humankind

One of the most intractable problems of international environmental law is the imposition of duties on states for the environmentally sustainable management of internal natural resources whose importance extends beyond national borders. Resources such as wetlands or aquatic ecosystems are not true unowned commons that traditionally encompass the high seas and the upper atmosphere.⁵³ Ecosystem mismanagement also does not fit the paradigm of transboundary pollution as there is often no discrete victim.⁵⁴ As a matter of international law, most ecosystems are simply the internal territory of a country and decisions regarding use of these ecosystems are wholly within the nation's discretion as a sovereign.⁵⁵ The Law of the Sea produced a new

Gilbert White, *Reflections on Changing Perceptions of the Earth*, 19 ANN. REV. ENERGY & ENV'T 1 (1994).

50. See generally ROBIN ATTFIELD, *THE ETHICS OF ENVIRONMENTAL CONCERN* (2d ed. 1991) (providing a forceful exposition of this provocative thesis).

51. EDITH BROWN WEISS, IN *FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY* 17-46 (Richard Faulk ed., 1989).

52. *Id.* at 42.

53. *Developments in the Law-International Environmental Law*, 104 HARV. L. REV. 1484, 1534-36 (1991) (distinguishing among three categories of global commons: (1) areas within a single country such as a rain forest that have global impacts, (2) unallocated commons, and (3) true commons for which the assignment of sovereign rights is impossible).

54. OSCAR SCHACTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 366 (1991) ("The activities within a particular country or under its jurisdiction would not result in international environmental harm unless those activities actually had physical effects in another country or in areas beyond the jurisdiction of any State.").

55. See TARLOCK, *supra* note 48.

category of a possible *erga omnes* duties,⁵⁶ protection of the common heritage of humankind,⁵⁷ although the concept remains contested, vague, and seldom explicitly recognized. However, its application in international environmental law could promote domestic ecosystem protection.

The concept of common heritage commons originated in Article 136 of United Nations Law of the Sea,⁵⁸ which entered into force in 1994.⁵⁹ Article 136 declares that deep-sea beds are “the common heritage of mankind.”⁶⁰ At the insistence of non-littoral nations, the concept was applied only to deep-sea bed mining rights and only to resources outside the territorial jurisdiction of any nation.⁶¹ However, it has evolved, at least in theory, to include resources both within and outside of national territory.⁶² The most important application beyond the high seas, which have long been recognized as outside the ownership of individual nations, is Antarctica.

The Antarctic is not a true global commons, but it is the only continent whose territory has not been divided among nation states, although various nations still assert ownership claims.⁶³ Because permanent settlement is unfeasible, the post World War II protection regime agreed upon by the interested nations is moving toward the recognition that the continent should be conserved as a global heritage environmental resource. In 1961, the Antarctic

56. See Dan Tarlock, *Five Views of the Great Lakes and Why They Might Matter*, 15 MINN. J. INT'L L. 21, 29–32 (2006).

57. See Malgosia A. Fitzmaurice, *International Protection of the Environment*, 293 RECUEIL DES COURS 10, 150–61 (2001).

58. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

59. WEISS ET AL., *supra* note 47, at 659 n.27; see Christopher C. Joyne, *Legal Implications of the Concept of the Common Heritage of Mankind*, 35 INT'L & COMP. L.Q. 190 (1986). There are more distant antecedents. By the 19th century, it was widely recognized that laws of war did permit a nation to plunder works of art that were part of the national heritage. Wojciech W. Kowalski, *Restitution of Works of Art Pursuant to Private and Public International Law*, 288 RECUEIL DES COURS 10, 60 (2001) (arguing that judgments requiring the return of seized art and statements during the early Nineteenth Century constitute “the birth of the concept of the common heritage of mankind”).

60. United Nations Convention on the Law of the Sea, *supra* note 58, art. 136.

61. See DIVISION OF OCEAN AFFAIRS AND THE LAW OF THE SEA, OFFICE OF LEGAL AFFAIRS, UNITED NATIONS, *THE LAW OF THE SEA: CONCEPT OF THE COMMON HERITAGE OF MANKIND—LEGISLATIVE HISTORY OF ARTICLES 133–50 AND 311(A) OF THE UNITED NATIONS CONVENTION OF THE LAW OF THE SEA* 109–23 (1996) (collecting the comments of all countries, especially developing and non-littoral countries, who insisted on limiting the common heritage concept to areas beyond the territorial jurisdiction of states).

62. See *id.*

63. See LAKSHMAN D. GURUSWAMY ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER: A PROBLEM ORIENTED COURSEBOOK* 379 (2d ed. 1999) (providing a map of the frozen claims).

Treaty froze the territorial claims of the various states.⁶⁴ In the 1980s, attempts to develop a mining regime failed, and the parties to the Antarctic regime have gradually come to recognize that the Antarctic should be devoted to research and carefully controlled tourism.⁶⁵ The 1991 Madrid Protocol on the Antarctic Environment expressly imposes a number of stringent assessment and protection duties on any activity that threatens to damage the continent's ecosystems.⁶⁶ In short, Antarctica is now a common heritage resource.⁶⁷ The Antarctic regime demonstrates the benefits of recognition of the international character of a natural resource not exclusively within the territory of any one state.

The idea of extraterritorial duties toward areas of global concern can also be extrapolated from Principle 21 of the Stockholm Declaration,⁶⁸ and its affirmation in Principle 2 of the 1992 Rio Declaration on Environment and Development,⁶⁹ and the Rio Plus 10 2002 Johannesburg Summit.⁷⁰ Principle 21 qualifies the sovereign right of states to develop their resources by recognizing the responsibility not to "cause damage to the environment of other states or of areas beyond the limits of national jurisdiction."⁷¹ The thrust of Principle 21 is to reaffirm the holding of the Trail Smelter Arbitration⁷² that the foundation of the state duty not to cause pollution in the territory of another state. However, Principle 21 also modestly extends state responsibility to recognized global commons.⁷³ Principle 21 does not yet apply to international (let alone internal) resources where there is no conventional damage from trans-boundary pollution. Thus, Principle 21 and its subsequent reaffirmations are not only a precedent for the recognition of a

64. Antarctic Treaty art. 4, Dec. 1, 1959, 19 I.L.M. 860.

65. GURUSWAMY, *supra* note 63 at 406–09.

66. Protocol on Environmental Protection to the Antarctic Treaty, § 3, Oct. 4, 1991, 30 I.L.M. 1461. See generally Francesco Francioni, *The Madrid Protocol on the Protection of the Antarctic Environment*, 28 TEX. INT'L L.J. 47 (1993) (analyzing the Madrid Protocol).

67. See Deborah H. Overholt, *Environmental Protection in the Antarctic: Past, Present, and Future*, 28 CAN. Y.B. INT'L L. 227, 256–60 (1990).

68. Declaration of the United Nations Conference on the Human Environment, June 16, 1972, 11 I.L.M. 1420.

69. United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 876.

70. JOHANNESBURG DECLARATION ON SUSTAINABLE DEVELOPMENT § 8 (2002), http://www.joburg.org.za/clean_city/johannesburgdeclaration.pdf.

71. Declaration of the United Nations Conference on the Human Environment, *supra* note 68.

72. Trail Smelter (U.S. v. Canada), 3 R. Int'l Arb. Awards 1938, (Trail Smelter Arb. Trib. 1941).

73. Declaration of the United Nations Conference on the Human Environment, *supra* note 68.

new *erga omnes* duty. However, Principle 21 does illustrate that the concept of state responsibility for environmental degradation is evolving and expanding.

The international community still resists the extension of the common heritage principle beyond traditionally recognized “unowned” common resources.⁷⁴ For example, the Preamble to the 1992 Convention on Biological Diversity states only that biological diversity is a “common concern of humankind,”⁷⁵ which represents a rejection of stronger characterizations of the international dimensions of domestic biodiversity that might constrain national discretion. Nonetheless, the idea of heritage or ecosystems of common concern continues to evolve through state practice.

The net effect of the protection decisions taken by the Canadian and U.S. governmental actors is a recognition that the Lakes are a world heritage resource, or at the very least a constrained natural resource. The core idea of both categories is that the Lakes are a non-renewable, functioning system that should be maintained in as close to its “natural” condition as possible for the benefit of present and future generations.⁷⁶

There are other important domestic precedents. For example, in the Tasmanian Dam Case, the Australian High Court accepted the World Heritage Convention as a restraint on its internal resource use.⁷⁷ Australia’s weak federal constitution does not give the Commonwealth government the power to regulate the environment.⁷⁸ After the state of Tasmania passed legislation authorizing a dam in a World Heritage temperate rain forest, the federal government passed legislation prohibiting the dam.⁷⁹ In a 4–3 decision, the High Court held that the Commonwealth government’s adherence to the Convention allowed it to invoke the Foreign Affairs clause of the federal constitution as a legitimate basis for the otherwise unconstitutional legislation.⁸⁰ Brazil’s 1988 adoption of constitutional protection of her rain forests⁸¹ (ineffective as it is) is another important precedent.

74. Brazil Marshals Defenses to Fight Amazon Internationalization (ENS Brasilia, April 11, 2005), <http://www.ens-newswire.com/ens/apr2005/2005-04-11-04.asp>. In 2005, the Brazilian Senate Foreign Relations and National Defense Commission held a public hearing on the threats posed by the efforts of “the international community” to classify the Amazon rain forest as “collective public goods.” *Id.* The Fleet Admiral announced that the military has prepared a strategy of resistance should the region be invaded by a “superior power.” *Id.*

75. Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 822 (emphasis added).

76. INTERNATIONAL JOINT COMMISSION, *supra* note 9, at 5.

77. Commonwealth of Tasmania v. Australia (1983) 158 C.L.R. 1.

78. See GERRY BATES, ENVIRONMENTAL LAW IN AUSTRALIA 76–77 (4th ed. 1995).

79. *Id.* at 80.

80. Commonwealth of Tasmania, 158 C.L.R. at 295.

81. Constituição Federal [Constitution] art. 225 ¶ 4 (Brazil).

The proposed management regime constitutes a modest but important “soft law” precedent for the principle that states have a duty to manage their internal resources for the benefit of present as well as future generations. This duty is currently neither a peremptory *jus cogens* norm,⁸² nor a customary rule. Biodiversity conservation, despite the existence of the 1992 Convention on the Conservation of Biodiversity,⁸³ has not yet emerged as a general practice accepted by states as legally obligatory.⁸⁴ In fact, state practice remains the subordination of biodiversity conservation to exploitation to promote economic development.⁸⁵ This said, both *jus cogens* and customary rules of international law are not static. The history of the evolution of the concept of *jus cogens* and its application to the laws of war and human rights illustrate that the general norms are the result of centuries of painful, cruel, and bloody experience of nation states.⁸⁶ A similar learning curve, now driven by the mounting evidence of the serious impacts of global climate change, is occurring with respect to environmental degradation at a much faster rate than occurred in the past. As Professor Edith Brown Weiss has written, although the “recognition of a moral obligation does not in itself create legal obligations and rights [I]t is a stage in the evolution of the public conscience.”⁸⁷

82. *Jus cogens* is a rare species of the general or peremptory norm of international law that constrains state behavior, including the power to enter into treaties that contravene the norm. WEISS ET AL., *supra* note 47, at 137–38. Unlike most international law obligations, *erga omnes* obligations are owed by a state to the international community at large. *Id.* The standard for the recognition of a *jus cogens* norm is high; it must be a general norm which has generally, but not unanimously, been accepted by the nations that make up the international community. Vienna Convention on the Law of Treaties art. 53, May 22, 1969. The norms that exist are generally human rights norms, such as the prohibition of slavery and genocide, as well as the protection of foreign investment. The International Court of Justice recognized *erga omnes* obligations as a source of international law. See *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, 1970 I.C.J. 3 (Feb. 5).

83. See Convention on Biological Diversity, *supra* note 75.

84. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(2) (1987). See Thomas Meron, *International Law in the Age of Human Rights*, 301 RECUEIL DES COURS 9, 373–90 (2003) (discussing the sources of custom).

85. MILLENIUM ECOSYSTEM ASSESSMENT, ECOSYSTEMS AND HUMAN WELL-BEING: CURRENT STATE AND TRENDS 1–20 (2005) (documenting the continued degradation of a number of crucial ecosystem functions and services throughout the world).

86. See generally LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS (1988) (providing an exhaustive development of this thesis).

87. WEISS, *supra* note 51, at 103.

B. Precaution

The proposed management regime for the Lakes is equally an example of the application of the precautionary principle. The principle can be stated in strong and weak versions,⁸⁸ but the core idea is that the state has the power to limit activities that pose a risk of future harm, although the desired scientific evidence about the likelihood and magnitude is uncertain and inconclusive. The United States has, in general, opposed the precautionary principle. The United States sees this principle as a European import with the dangerous potential to undermine the risk assessment, which is the scientific foundation of U.S. environmental laws.⁸⁹ Hard questions, such as the scientific threshold necessary to trigger the principle, will have to await an actual application,⁹⁰ but the scien-

88. The precautionary principle posits that a high degree of certainty about the adverse impacts of an activity is not a necessary prerequisite to limit or regulate it and is one of the foundations of international environmental law. DANIEL BODANSKY, REMARKS, PANEL ON NEW DEVELOPMENTS IN INTERNATIONAL ENVIRONMENTAL LAW, AMERICAN SOCIETY OF INTERNATIONAL LAW, PROCEEDINGS 85TH ANNUAL MEETING, 413, 414 (1991) [on file with author]. The principle was endorsed in the 1992 Rio Declaration on Environment and Development. Rio Declaration on Environment and Development, *supra* note 69, at 879. The precautionary principle remains much contested. See, e.g., Frank B. Cross, *Paradoxical Perils of the Precautionary Principle*, 53 WASH. & LEE L. REV. 851, 851-925 (1996) (arguing that it is incoherent and unfair); Christopher D. Stone, *Is There a Precautionary Principle?*, 31 ENVTL. L. REP. 10790, 10792 (2001). Crucial issues, such as who bears the burden of proof and how feedback loops should operate, remain unresolved, but properly used, the precautionary principle is an essential principle of modern ecosystem management.

89. See Jutta Brunée, *The United States and International Environmental Law: Living with an Elephant*, 15 EUR. J. INT'L L. 617, 628-30 (2004) (placing United States opposition in the broader context of the fear of general principles of customary law); Jonathan Weiner, *Whose Precaution After All?: A Comment on the Comparison and Evolution of Risk Regulatory Systems*, 13 DUKE J. COMP. & INT'L L. 207, 207-62 (2003) (providing the best articulation of this position).

90. See Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS293/R (Sept. 29, 2006) (providing one of the fullest considerations of the principle). The Panel decision rejected the EU's formulation, which would have allowed any doubt, regardless of the scientific foundation, to justify a regulatory action, in this case a ban on GMOs. *Id.* As of November 2006, the Panel report has been circulated but not formally adopted. See KEY FACTS: SUMMARY OF THE DISPUTE TO DATE (2007), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds292_e.htm. The following summarizes the Panel's discussion of the status of the precautionary principle:

The EC argued that certain GMOs present potential threats to human health and the environment. It submitted that the existence of a potential threat justified the assessment of risks on a case-by-case basis and special measures of protection based on the precautionary principle. Citing several international instruments incorporating the precautionary principle, the EC asserted that the precautionary principle was now a fully fledged and general principle of international law.

tific basis for its incorporation into the management regime for the Lakes is in place.

The Lakes are a fragile, stressed ecosystem. Although the Lakes contain vast amounts of water, the current volumes are needed to perform vital ecological and human services.⁹¹ Thus, changes in the system, including large and small withdrawals, must be viewed skeptically. Three examples illustrate the fragility of the system. First, it takes over one hundred years to flush pollutants through the system from Lake Superior to the Saint Lawrence.⁹² Second, the levels needed to sustain navigation and the grandfathered Chicago diversion are high, and a small drop in surface levels could impact these services.⁹³ Third, although regional global climate change scenarios are not consistent, many models suggest lowered levels and thus re-enforce the need for precaution to maintain the Lakes in their natural fluctuating cycles.⁹⁴

CIEL's *amicus curiae* brief further argued that scientific uncertainty is an essential component of the precautionary principle. In fact, it was the recognition that science does not have all the answers in certain circumstances that led to the acknowledgment that uncertainty could not be used to postpone measures that respond to serious and complex health and environmental problems, and to the development of the precautionary principle. CIEL also noted that while the precautionary principle may be worded differently in various instruments—not an uncommon characteristic in international customary law—the notion of inconclusive scientific evidence is at the core of each statement.

With respect to the precautionary principle, the Panel found that if the 'precautionary principle' was a general principle of law, it should be taken into account. Noting that the EC had not explained exactly what it meant by the term 'general principle of international law,' the panel found that the term could be understood as encompassing either rules of customary law or the general principles of law recognized by States or both, and that it would consider whether the precautionary principle fit within either of these categories. In doing so, the Panel relied primarily on the Appellate Body's handling of this question in its report in EC-Hormones. In that case, the Appellate Body, noting that it was unclear whether the precautionary principle has been widely accepted by Members as a principle of general or customary international law, refrained from taking position on the status. In line with that approach, the EC-Biotech Panel also refrained from expressing a view on the issue.

NATHALIE BERNASCONI-OSTERWALDER & MARIA JULIA OLIVA, EC-BIOTECH: OVERVIEW AND ANALYSIS OF THE PANEL'S INTERIM REPORT 47-48 (2006), http://www.ciel.org/Publications/EC_Biotech_Mar06.pdf.

91. INTERNATIONAL JOINT COMMISSION, *supra* note 9, at 15-16.

92. NATIONAL RESEARCH COUNCIL & ROYAL SOCIETY OF CANADA, THE GREAT LAKES WATER QUALITY AGREEMENT: AN EVOLVING INSTRUMENT FOR ECOSYSTEM MANAGEMENT 2 (1985).

93. INTERNATIONAL JOINT COMMISSION, *supra* note 9, at 15-18.

94. See US NATIONAL ASSESSMENT OF THE POTENTIAL CONSEQUENCES OF CLIMATE VARIABILITY AND CHANGE, REGIONAL PAPER: GREAT LAKES (2003), <http://>

Maintenance of the status quo is perhaps the best way for the region to adapt to the risks of climate change. In addition, the proposed management approach also is an extension of the decades long efforts of the two countries to improve the quality of the Lakes. Canada and the United States have adopted an ecosystem approach to guide pollution control strategies.⁹⁵ In sum, any displacement of the status quo should be carefully questioned. As the 2000 International Joint Commission (IJC) reference on diversions concluded, (1) “[i]f all interests in the Basin are considered, there is never a ‘surplus’ of water in the Great Lakes system; every drop of water has several potential uses, and trade-offs must be made when, through human intervention, waters are removed from the system” and (2) “[a]ny water taken from the system has to be replaced in order to restore the system’s lost resilience The precautionary approach dictates that removals should not be authorized unless it can be shown, with confidence, that they will not adversely affect the integrity of the Great Lakes Basin ecosystem.”⁹⁶ The risks of lower permanent levels as a result of global climate change only strengthen the case for precaution.

There is, however, a need to cabin a precautionary principle so that it does not preclude all consumptive uses or block necessary future changes to the regime. Proponents of the precautionary principle have argued that opponents of precaution should bear the burden of rebutting the exercise of the principle, but this burden is too extreme. Such a rule would become a *per se* prohibition on any alteration of the status quo. Thus, there is a real possibility that the precautionary principle could choke off a wide range of legitimate considerations such as risk-risk trade-offs. It is more sensible to place the burden of justification on the government body that invokes the principle. This allocation would insure that alternative methods of minimizing uncertainty, such as compensation, have been adequately explored and that the principle is applied to the most serious and largely irreversible risks. In addition, the idea that once the principle is invoked to minimize risk, the decision is permanent should be excised from discussions of the principle. The decision needs to be linked to the concept of adaptive man-

www.usgcrp.gov/usgcrp/nacc/education/greatlakes/greatlakes-edu-3.htm (stating that nine out of ten models predict some lowering of lake levels).

95. See NATIONAL RESEARCH COUNCIL & ROYAL SOCIETY OF CANADA, *supra* note 92 (1985). See generally PERSPECTIVES ON ECOSYSTEM MANAGEMENT OF THE GREAT LAKES: A READER (L.K. Caldwell ed. 1988) (providing a comprehensive compendium of articles on ecosystem management in the Great Lakes).

96. INTERNATIONAL JOINT COMMISSION, *supra* note 9, at 36.

agement.⁹⁷ The existence of monitoring and adaptive feedback mechanisms should be a major factor in validating the decision to limit an activity when the adverse impacts are uncertain. This reasoning is especially true for ecosystem management given the dynamic nature of ecosystems.⁹⁸

III. THE ADVANTAGES OF INTERNATIONAL JOINT COMMISSION INVOLVEMENT

The second advantage of focusing on the international character of the Lakes is that it can increase the influence of the IJC. For almost a century, the Commission has played an important role in the management of the Great Lakes. The IJC was created by the 1909 Boundary Waters Treaty⁹⁹ and is perhaps the most powerful and influential bi-national organization in the world because of its combination of adjudicatory and investigatory powers. At Canada's insistence, the IJC was given limited adjudicatory powers over diversions or obstructions that affect the natural level of the lakes.¹⁰⁰ Article IX of the Boundary Waters Treaty gives the IJC the power to investigate issues referred to it by the two governments.¹⁰¹ This investigatory power is the major source of the IJC's influence and is now its most important function, as adjudication is no longer requested by the two governments.¹⁰² In fact, the IJC had its wings

97. See NATIONAL RESEARCH COUNCIL, *THE MISSOURI RIVER ECOSYSTEM: EXPLORING THE PROSPECTS FOR RECOVERY* 107-12 (2002) (discussing the concept of adaptive management).

98. John M. Blair, Scott L. Collins & Alan K. Knapp, *Ecosystems as Functional Units in Nature*, 14 NAT. RESOURCES & ENV'T 150, 152 (2000).

99. Boundary Waters Treaty, *supra* note 14, art. VII.

100. *Id.* art. III; see L.M. BLOOMFIELD & G.F. FITZGERALD, *BOUNDARY WATER PROBLEMS OF CANADA AND THE U.S.* (1958) (providing a more detailed history of the background of the Treaty); A.D.P. HEENEY, *ALONG THE COMMON FRONTIER: THE INTERNATIONAL JOINT COMMISSION* (1967); David LeMarquand, *The International Joint Commission and Changing Canada-United States Boundary Relations*, 33 NAT. RESOURCES J. 59, 62-67 (1993) (providing a brief history of the background of the Treaty).

101. Boundary Waters Treaty, *supra* note 14, art. IX. In theory either country could submit a reference, but the IJC's consistent practice has been to act only when both countries agree to refer an issue to it. Noah Hall, *Bilateral Breakdown: U.S.-Canada Pollution Disputes*, 21 NATURAL RESOURCES & ENV'T'L 18, 19 (2006).

102. Hall, *supra* note 101, at 19. The Trail Smelter dispute was originally referred to the IJC, but the United States rejected the recommended award and the dispute was eventually resolved by a special arbitral tribunal. *Trail Smelter Arbitration (U.S. v. Can.)*, 35 Am. J. Int'l L. 684 (Ad Hoc Int'l Arb. Trib. 1941). In discussing a U. S. CERCLA action against the present owners of the smelter, Professor Michael Robinson-Dorn noted that "[t]he Boundary Waters Treaty contains no provision preempting the application of domestic law." Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail for CERCLA*,

clipped when it asserted the power to determine its jurisdiction absent a request to adjudicate or a reference from the two countries.¹⁰³ The practice is now clear: the IJC must await a joint reference before it acts. Reference reports have often laid the foundation for Canada-United States cooperation initiatives on major issues or at least provided broad, relatively neutral analyses of issues that are superior to studies subject to the immediate pressures of national politics.

Within the confines of bi-national political constraints, the IJC's principal strengths are its independent and broad comparative approach to water management derived from its international character and non-parochial perspectives.¹⁰⁴ For example, the IJC's 2000 report, *Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States*,¹⁰⁵ is an example of the positive role that the Commission played during the Clinton administration in helping to shape the policy debate about the future of the Great Lakes around environmental issues. The Report marshaled available scientific evidence to underscore the need for a strong anti-diversion regime. First, it classified the Lakes as a "nonrenewable resource."¹⁰⁶ Initially, this conclusion is surprising, as nonrenewable resources are usually deep aquifers mined in arid areas and mineral deposits rather than rain fed water bodies.¹⁰⁷ However, the Report noted that less than one percent of the total

14 N.Y.U. ENVTL. L.J. 233, 305 (2006); see also *Pakootas v. Teck Cominco Metals Ltd.*, 452 F.3d 1066, 1082 (9th Cir. 2006) (holding that the presumption against the extraterritorial application of CERCLA does not apply to hazardous substance releases which come to rest and cause harm in the United States). However, NGOs continue to argue that the IJC has jurisdiction outside of the reference procedure. The 2006 Submission to the Commission of Environmental Cooperation, created by the NAFTA Environmental Side Agreement, a group of United States NGOs, asserts that Canada and the United States have failed to enforce the Boundary Waters Treaty by failing to refer the alleged cross-border pollution from Devil's Lake, North Dakota to the IJC. Secretariat of the Commission for Environmental Cooperation, *Determination in Accordance with Article 14(1) of the North American Agreement for Environmental Cooperation*, SEM-06-002 (June 8, 2006), http://www.cec.org/files/pdf/sem/06-2-DET14_1__en.pdf. The submission was dismissed because of considerable uncertainty about whether the Treaty was a law or regulation in either Canada or the United States. *Id.*

103. LeMarquand, *supra* note 100, at 75–76.

104. *Id.* at 77–78 (stating that IJC strengths include independence, impartiality, ability to accurately synthesize relevant facts, the willingness to incorporate international and environmental perspectives into its decisions, and ability to facilitate inter-governmental consensus).

105. See INTERNATIONAL JOINT COMMISSION, *supra* note 9.

106. *Id.* at 5.

107. WILLIAM A. ALLEY, THOMAS E. REILLY & O. LEHN FRANKE, SUSTAINABILITY OF GROUND-WATER RESOURCES 3–4 (1999) (“[G]round water is not a nonrenewable resource, such as a mineral or petroleum deposit, nor is it completely renewable in the same manner and timeframe as solar energy The term ground-water mining typically refers to a prolonged and progressive decrease in the amount of water stored in a ground-water system, as may occur . . . in heavily pumped aquifers in arid and semiarid regions.”).

volume is renewed annually by precipitation,¹⁰⁸ that the levels remain relatively constant “with a normal fluctuation ranging from 30 to 60 cm (12–24 in.) in a single year,”¹⁰⁹ and the levels are “highly sensitive to climatic variability.”¹¹⁰ Second, the Report’s section on climate change synthesized the various projected, albeit inconsistent, climate change scenarios and boldly opined that “[c]limate change suggests that some lowering of water levels is likely to occur [T]he Commission believes that considerable caution should be exercised with respect to any factors potentially reducing water levels and outflows.”¹¹¹

Third, the Report firmly placed management issues in the context of international law. Not only did it discuss the Boundary Waters Treaty and the need for precaution, but it also ventured an opinion on the applicability of the General Agreement on Tariffs and Trade (GATT)¹¹² and the North American Free Trade Agreement (NAFTA)¹¹³ to any restrictions on diversions. Since the late 1990s, environmental NGOs, especially Canadian nationalist greens, have raised the argument that either the Dormant Commerce Clause of United States Constitution¹¹⁴ or international trade law will preempt state and provincial control of diversions. The basic argument is that any regime that allows some diversions will “commodify” the Lakes, opening them up to the challenge that an environmental regime which severely limits diversions is simply a disguised discriminatory trade practice.¹¹⁵ This fear has also broken out in the United States, causing some states to act like mythical Balkan republics in Viennese operettas, making heroic but ineffective gestures. For example, in 2005, the Governor of Michigan ordered state officials to block a proposal by Nestle to withdraw spring water for bottled water sales unless Nestle could prove that the bottles would be sold exclusively within the Basin.¹¹⁶

108. INTERNATIONAL JOINT COMMISSION, *supra* note 9, at 5.

109. *Id.*

110. *Id.* at 6.

111. *Id.* at 21–22.

112. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A–11, 55 UN T.S. 194.

113. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

114. See ANNIN, *supra* note 10 at 218–23; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (holding groundwater is an article of commerce and thus the Commerce Clause invalidates a flat state prohibition on the interstate export of water).

115. See SUNGJOON CHO, *FREE MARKETS AND SOCIAL REGULATION: A REFORM AGENDA OF THE GLOBAL TRADING SYSTEM* 45–50 (2003).

116. Peter Luke, *Great Lakes States Circle the Wagons on Fresh Water*, GRAND RAPIDS PRESS, July 10, 2005, at B3. This incredible anti-commodity argument was made in litigation

Thus, I could not buy a bottle of water in a supermarket a mile west of my home because I would have crossed into the Mississippi watershed.

The Report identified the key legal issue as whether water in its natural state is a product or good for purpose of trade law and concluded that raw water that has not yet entered the stream of commerce is not a product or good.¹¹⁷ This conclusion was purely advisory, but the Report helped strengthen the resolve of the eight Basin states and two Canadian provinces to proceed with a management regime that made it difficult if not impossible to divert water outside of the basin in the face of possible U.S. Constitutional and international trade law objections. The question of whether water in its natural state is a product or good under GATT or NAFTA is an open and complex one, but subsequent analyses have confirmed the IJC's analysis.¹¹⁸

The Commission on Environmental Cooperation (CEC) provides another example of the benefits of an international body with the courage to raise broader issues in the face of the constraints of domestic politics. The CEC was created by a 1992 environmental side agreement to NAFTA.¹¹⁹ Articles 14 and 15 of the Agreement create a citizens submission process.¹²⁰ Any citizen of one of the

challenging Perrier's planned diversion of spring waters in Michigan. *Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc.*, No. 01-14563, slip op. (Mecosta County Cir. Ct. 2003), *aff'd on other grounds*, 709 N.W.2d 174 (2005), *leave granted* 722 N.W.2d 422 (2006). The reasonable use rule of groundwater limits use to overlying land and the opponents of the plan argued that when groundwater is used to produce commodities, the commodities can only be consumed on the overlying land. *Id.* The trial court rejected the argument. *Id.*

117. INTERNATIONAL JOINT COMMISSION, *supra* note 9, at 26–27.

118. After a careful analysis of the issue, a leading international environmental law lawyer, Professor Edith Brown Weiss, concluded:

it is essential to consider that water is different from other natural resources. It is a unique resource Thus, it would be prudent to adopt an approach of “anticipatory caution,” to strike the appropriate balance between the need to conserve water resources and the need to ensure a level playing field in trading relationships. Anticipatory caution means that in the face of uncertainty about the future, a country should be able to exercise its sovereign authority to maintain its fresh water resources without having to convince the trade community of the legitimacy of its actions.

Edith Brown Weiss, *Water Transfers and International Trade Law*, in *FRESH WATER AND INTERNATIONAL ECONOMIC LAW* 61, 83 (Edith Brown Weiss et al. eds., 2005).

119. John H. Knox & David L. Markell, *The Innovative North American Commission for Environmental Cooperation*, in *GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION* 276 (David L. Markell & John H. Knox eds., 2003).

120. COMMISSION ON ENVIRONMENTAL COOPERATION OF NORTH AMERICA, *BRINGING FACTS TO LIGHT: A GUIDE TO ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION* 1 (2002), available at http://www.cec.org/files/pdf/SEM/BringingFacts-Jun02_en.pdf.

three NAFTA countries can allege that the country has failed to effectively enforce an existing environmental law. If the Commission accepts a submission, it may decide to prepare a Factual Record.¹²¹ However, a vote of two of the three environmental ministers that make up the CEC Council is required both to prepare and to release a record.¹²² Factual records can only spotlight non-enforcement; they can neither reach conclusions of fact or law nor recommend a remedy.¹²³ The hope is that the “facts” disclosed in the record will shame the government into enforcement and remedial actions. There are many problems with the CEC process,¹²⁴ but it has disclosed important domestic enforcement failures and put some of them in an international context. The CEC’s Factual Record in the Tarahumara Submission investigated allegations that Mexico failed to effectively enforce various laws designed to prevent illegal logging in indigenous communities in the northern state of Chihuahua.¹²⁵ Over the objections of both Mexico and the United States, the Factual Record included a United Nations Commission on Human Rights report, which detailed how the survival of indigenous communities was threatened by Mexico’s inability to enforce and dispense justice, including the prevention of illegal logging.¹²⁶

The very strength of an international body is also often its weakness because of the ease with which it may be silenced. An international body may have a separate legal personality as a matter of international law, but ultimately it can only be as effective and forward-looking as the nations that staff and fund it allow it to be. This dilemma is a real problem of Canada-U.S. bodies; the smaller the client base, the more vulnerable the body is to the vicissitudes of domestic politics. The IJC is very much a creature of the two governments but has been able to broaden the policy dialogue on the Boundary Waters Treaty because Canada sees the international nature of the Commission as a useful counter to the

121. *Id.*

122. *Id.* at 41–42.

123. *Id.* at 1 (“A factual record outlines, in as objective a manner as possible, the history of the issue, the obligations of the Party under the law in question, the actions of the Party in fulfilling those obligations, and the facts relevant to the assertions made in the submission . . .”).

124. *See infra* text accompanying notes 130–135.

125. COMMISSION FOR ENVIRONMENTAL COOPERATION OF NORTH AMERICA, FINAL FACTUAL RECORD TARAHUMARA SUBMISSION SEM-00-006 38–39 (2005), http://www.cec.org/files/pdf/sem/TarahumaraFR_en.pdf.

126. *Id.*

asymmetric power relationship with the United States.¹²⁷ The bottom line is that both countries only resort to the IJC when it is useful and bypass it when political considerations have so dictated. Its role has been described as “a kind of residual claimant on the issues, a place for the federal governments to turn after a conflict has been reduced to a technical issue or where the IJC’s study role can serve as a step toward achieving [a] political result.”¹²⁸

Efforts to limit the modest fact finding mission of the CEC Submissions Unit illustrate the risks when a small group of clients join a race to the bottom.¹²⁹ As previously stated, unlike the IJC, the CEC does not enjoy the credibility and legitimacy that the ICJ has built up over almost 100 years. The CEC Submissions Unit may request permission from the CEC Council, made up of the three NAFTA country environmental ministers, to prepare a Factual Record.¹³⁰ This important but weak experiment in an alterative enforcement mechanism has triggered opposition in all three countries, even though they are free to ignore the entire process. Canada and the United States were supposed to be the counterweight to Mexico’s anticipated objection to being the primary object of scrutiny, given its poor environmental record.¹³¹ This assumption occurred to a large extent as the bulk of the submissions and factual records come from Mexico.¹³² However, as submissions begin to expose the weaknesses of environmental enforcement in Canada, and to a lesser extent in the United States, the three nations have begun to act in concert to curb the Commission’s power. For example, the Commission has tried to use the Factual Record process to focus on cases of non- or under-enforcement of envi-

127. See Brunée, *supra* note 89, at 617.

128. David J. Allee, *Subnational Governance and the International Joint Commission: Local Management of United States and Canadian Boundary Waters*, 33 NAT. RESOURCES J. 133, 133 (1993).

129. The author wishes to disclose that since 1998 he has been a Special Legal Advisor to the Submissions Unit. All matters discussed in this Essay are a matter of public record and any opinions about the CEC are his alone and do not reflect the views of the CEC staff or the parties to the environmental side agreement.

130. North American Agreement on Environmental Cooperation art. 15, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480.

131. See generally David L. Markell, *The CEC Citizen Submissions Process: On or Off Course?*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 276 (David L. Markell & John H. Knox eds., 2003) (tracing the fears of underenforcement in Mexico and the role of U.S. NGOs in pushing for a tri-lateral oversight body).

132. As of February 2007, the CEC reports that it has closed forty-seven files, with twenty-three of the submissions coming from Mexican NGOs. Current Status of Filed Submissions, <http://www.cec.org/citizen/status/index.cfm?varlan=English> (last visited Feb. 8, 2007). Eight of the twelve active submission files are from Mexican NGOs. *Id.*

ronmental laws that represent a pattern and practice.¹³³ However, the three nations have increasingly limited records to an account of the specific instances of non-enforcement, rendering the original purpose of the process¹³⁴ impotent by trivializing it.

IV. THE BENEFITS OF INTERNATIONAL LAW ON DOMESTIC LAW

The possible benefits of international law on domestic law include the least of the three claimed benefits of “internationalizing” the Lakes. In addition, international law could strengthen U.S. domestic regulation regimes and provide an additional basis to reject trade law and Dormant Commerce Clause challenges. Two possible examples are described below.

A. *The Proposed Compact and International Law*

The Boundary Waters Treaty is incorporated into the Proposed Compact. Section 8.2 provides in part, “[n]othing in this Compact is intended to infringe nor shall be construed to infringe upon the treaty power of the United States of America, nor shall any term hereof be construed to alter or amend any treaty or term thereof that has been or may hereafter be executed by the United States” and “[n]othing in this Compact is intended to affect nor shall be construed to affect the application of the Boundary Waters Treaty of 1909 whose requirements with respect to boundary waters continue to apply in addition to the requirements of this Compact.”¹³⁵ A similar provision appears in the proposed Agreement.¹³⁶

Thus, remote as the possibility is, Canada could thus challenge a diversion decision approved by the Great Lakes governors as a violation of the Treaty. The diversion would have to lower the level of

133. See, e.g., COMMISSION FOR ENVIRONMENTAL COOPERATION OF NORTH AMERICA, FINAL FACTUAL RECORD FOR SUBMISSION SEM-99-002 (2003), http://www.cec.org/files/pdf/sem/MigratoryBirds-FFR_EN.pdf. U.S. NGOs alleged that the federal government systematically refused to protect migratory birds by regulating logging and other habitat destruction practices. *Id.* Council Resolution 01-10 limited the factual record to two documented cases of the destruction of nests as the result of logging. WEISS ET AL., *supra* note 47, at 230. See generally Markell, *supra* note 131 (providing a comprehensive collection of papers assessing the efforts of CEC to promote environmental protection in the three NAFTA countries).

134. See Teseming Yang, *The Effectiveness of the NAFTA Environmental Side Agreement's Citizen Submission Process: A Case Study of Metales y Derivados*, 76 U. COLO. L. REV. 443, 458-76 (2005).

135. *Id.*, § 8.2.

136. See AGREEMENT, *supra* note 1, art. 701.

boundary water in Canada, and thus the burden of proof would be high.¹³⁷

During the process of negotiating the proposed Agreement and Compact, the states ignored the Boundary Waters Treaty. However, the U.S. Department of State appears to have insisted on the inclusion of Section 8.2. Article VI of the U.S. Constitution makes treaties, along with federal law, the supreme law of the land.¹³⁸ If the Compact is ratified by Congress, as the Constitution requires,¹³⁹ and signed by the President, it becomes federal law.¹⁴⁰ Under federal law, treaties and federal statutes, including ratified compacts, are of equal dignity and the most recently enacted controls in case of conflicts.¹⁴¹ However, the Draft Compact abrogates this rule and makes the Boundary Waters Treaty superior to the Compact.¹⁴²

B. Trade Law Challenges

A formal international law agreement between Canada and the United States might also make it more difficult to challenge an anti-diversion regime as illegal under the GATT or NAFTA.¹⁴³ Canadian nationalist greens have argued that a ban on diversions might be illegal under the GATT.¹⁴⁴ This argument makes the doubtful assumption that water in its natural state is a product under GATT or NAFTA. Were "raw" water to be classified as a product,¹⁴⁵ one of the issues that would arise in a state-to-state World Trade Organization (WTO) challenge is the relevance of multi-lateral environmental agreements that use trade bans as an

137. Boundary Waters Treaty, *supra* note 14, at 2450. Articles II and III of the Boundary Waters Treaty require either proof of injury or a lowered lake level. *Id.* at 2449–50.

138. U.S. CONST. art. VI.

139. U.S. CONST. art. II, § 2. Congressional ratification of water resources compacts is the universal norm, but the Supreme Court has suggested that Congressional ratification is only necessary where a compact increases the political power of states at the expense of the federal government. *Virginia v. Tennessee*, 148 U.S. 503, 518 (1893). The proposed Compact clearly meets this standard. It gives states the power to manage waters that the federal government could manage under the Commerce Clause, and it allows states to make decisions that are constitutionally suspect under the dormant commerce power because the definition of water in Section 1.2 subjects navigable surface waters under federal control to state regulation.

140. States may not invoke state constitutional defenses to compliance. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951); *see also Texas v. New Mexico*, 462 U.S. 554, 564 (1983) (stating that interpretation is a federal question).

141. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 115 (1987).

142. COMPACT, *supra* note 2, § 8.2(3).

143. *See generally* MAUDE BARLOW & TONY CLARKE, *BLUE GOLD: THE FIGHT TO STOP THE CORPORATE THEFT OF THE WORLD'S WATER* (2002).

144. *See ANNIN, supra* note 10 at 218–23.

145. *See Weiss, supra* note 118, at 76–85.

enforcement tool. WTO jurisprudence is currently unclear and contradictory. The decision of the Appellate Body in the Shrimp-Turtle dispute¹⁴⁶ found that such agreements were relevant and should be considered in evaluating trade restrictions. However, the 2006 Panel Report in the EC-Biotech case (Argentina v. European Commission) came to a different but distinguishable conclusion.¹⁴⁷ The interim Panel refused, without explanation, to accept the EC's reliance on the Conventions on Biological Diversity and Biosafety for its "risk not disproved" formulation of the precautionary principle.¹⁴⁸ However, the two cases are sufficiently distinguishable to support the argument that relevant multi or bi-lateral treaties can provide the basis for the WTO to conclude that a measure is not illegal under the GATT.

The international nature of the protection regime might also provide another argument that the anti-export ban does not violate the Dormant Commerce Clause. In 1982, the U.S. Supreme Court held that groundwater was an exploitable article of commerce and invalidated a Nebraska statute that prohibited the use of water on a farm that straddled Colorado and Nebraska.¹⁴⁹ The specter of judicial invalidation of a regional export ban under the Dormant Commerce Clause has been a persistent fear of proponents of the regime.¹⁵⁰ If the Proposed Compact is ratified, it should clear up any doubts that Congress has validly exercised its power to waive the Dormant Commerce Clause.¹⁵¹ However, the argument persists that courts retain the power to scrutinize congressionally approved compact waivers under the Dormant Commerce Clause.¹⁵² A large-scale anti-international ecosystem conservation regime that is supported by both a domestic inter-state region and by Canada provides a strong argument for a court to conclude that this is not the type of discriminatory legislation that requires judicial policing.

146. United States-Import Prohibition of Certain Shrimp and Shrimp Products, Nov. 6, 1998, 38 I.L.M. 121.

147. Panel Report, *supra* note 90. In November 2006, the EU announced that it would not appeal the Panel decision. EU ACCEPTS TRADE RULING ON GMOs, www.euractiv.com/en/trade/eu-accepts-trade-ruling-gmos/article-159918.

148. Panel Report, *supra* note 90.

149. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 954 (1982).

150. See HENRY J. HENDERSON, TOWARD SUSTAINABLE GOVERNANCE OF THE WATERS OF THE GREAT LAKES BASIN 17-19 (2001), <http://www.policysolutionsltd.com/wateressay2.pdf>.

151. See *Intake Water Co. v. Yellowstone River Compact Comm'n*, 590 F. Supp. 293, 295-96 (D. Mont. 1983), *aff'd*, 769 F.2d 568 (9th Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986); see also Frank J. Trelease, *Interstate Use of Water*—"Sporhase v. El Paso, Pike & Vermejo", 22 LAND & WATER L. REV. 315, 339 (1987).

152. Douglas L. Grant, *State Regulation of Interstate Water Export*, in 4 WATERS AND WATER RIGHTS § 48.03(c)(6) (Robert E. Beck ed., 1991).

CONCLUSION

The suggestion that international environmental law has a role to play in the future management of the Great Lakes may strike many as fanciful for at least two reasons. First, the states and provinces have constructed a strong and effective anti-diversion regime within a loose bi-national regime. Second, the weaknesses of international environmental law, such as the difficulty of enforcing norms and the tendency to seek the lowest common denominator standards, make a strong national or bi-national regime an attractive alternative. However, the Great Lakes states and provinces need to be sensitive to the international environmental law dimension of the regime. International law can both re-enforce domestic and bi-national protection efforts and remind the basin states, provinces, and nations of the broader context of the proposed diversion control regime. The proposed Great Lakes protection regime may be a rare case of having one's cake and eating it too: the littoral states and provinces will be able to control the destiny of the region at the same time that they give a valuable gift to the planet. Viewing the Lakes as a common heritage of humankind is a valuable precedent for other stressed aquatic ecosystems such as Lake Baikal in Russia, a minimally restored Aral Sea in Central Asia, the Colorado Delta in Mexico, and many others.