

**Appendix A**

**Citizen Trade Policy Commission and Water Resources Planning Committee  
members**

Citizen Trade Policy Commission  
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Representing Organized Labor  
*Term:* 12/04/07 – 12/03/2010

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Representing ME-based Manufacturing Business  
with more than 25 employees  
*Term:* Appointed 02/17/09

*Governing Statute:* Title 10 MRSA, Chap. 1-A, §11

*Membership:* 3 senators representing at least 2 political parties, appointed by the President of the Senate;  
3 members of the House Representative representing at least 2 political parties, appointed by the Speaker of the House;  
4 members of the public, appointed by the Governor as follows:  
- Small business person;  
- Small farmer;  
- Representative on nonprofit organization that promotes fair trade policies;  
- Representative of a Maine-based corporation active in international trade.  
3 members of the public appointed by the President of the Senate as follows:  
- Healthcare professional;  
- Representative of Maine-based manufacturing business with 25 or more employees;  
- Representative of economic development organization.  
3 members of the public appointed by the Speaker of the House as follows:  
- Person active in organized labor community;  
- Member of a nonprofit human rights organization;  
- Member of a nonprofit environmental organization.  
*Ex-Officio non-voting Membership:*  
- Department of Labor;  
- Department of Environmental Protection;  
- Department of Agriculture, Food and Rural Resources, and  
- Department of Human Services.

*Term:* Except for Legislators, Commissioners and the Attorney General, members are appointed for 3-year terms. Appointed members may not serve more than 2 terms. Members continue to service until their replacements are designated.

*Duties:* Shall hold twice public hearings twice annually;  
Shall conduct an assessment every 2 years on the impacts of international trade;  
Shall submit an annual report.

*Quorum:* For purposes of holding a meeting, a quorum is 11 members. For purposes of voting, a quorum is 9 voting members.

## Water Resources Planning Committee

### Public Members

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Andrew Fisk  
Department of Environmental Protection

John Hopeck

Department of Environmental Protection

Andrews Tolman  
Maine Drinking Water Program

Nancy Beardsley  
Maine Drinking Water Program

Marcia Spencer-Famous  
Maine Land Use Regulation Commission

Steve Timpano  
Department of Inland Fisheries and Wildlife

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**Appendix B**

**Water Use Policy Background  
Previous State Efforts in Water Use Policy**

**Compiled by  
Robert G. Marvinney, State Geologist  
Maine Geological Survey  
Department of Conservation**

**September 2004  
Amended January 2010**

**Water Use Policy Background**  
**Previous State Efforts in Water Use Policy**  
**Compiled by**  
**Robert G. Marvinney, State Geologist**  
**Maine Geological Survey**  
**Department of Conservation**  
**September 2004**  
**Amended January 2010**

This compilation provides an outline of water policy efforts carried out during the past several decades. While this summary addresses highlights in water policy with some detail, it is not comprehensive, and makes no attempt to address efforts before the 1980s. Several agencies contributed to this summary including the Departments of Environmental Protection, Human Services, and Agriculture.

**Groundwater Protection Commission, 197x-1980.** Broad review of groundwater quality and quantity issues. Groundwater Quantity Subcommittee report recommendations:

- 1) Maine Geological Survey (MGS) and U.S. Geological Survey (USGS) continue to map gravel and bedrock aquifers. *Status:* gravel aquifer mapping nearing completion, bedrock information collected but no direct mapping.
- 2) Continue observation well network with USGS. *Status:* currently 23 groundwater observation wells in Maine maintained through the cooperative stream gaging program.
- 3) MGS and USGS prioritize future aquifer studies. *Status:* while there has been no prioritization per se, aquifer characteristics are reported as part of MGS's aquifer mapping, and ad hoc studies have been conducted.
- 4) Aggressive steps be taken to protect groundwater quality. *Status:* substantial rules regarding water quality protection administered by MDEP.
- 5) Maine agencies participate in USGS water use data program. *Status:* serious effort to collect better water use information for Maine was begun in 2003 at the direction of the Legislature.

**Water Transport Law, 1987**

This law and the commission described below were initiated by the Legislature in response to concerns about wholesale export of water from "water-rich" Maine.

*Legislative Finding:* The Legislature finds that the transport of water for commercial purposes in large quantities away from its natural location constitutes a substantial threat to the health, safety and welfare of persons who live in the vicinity of the water and rely on it for daily needs. If the transportation occurs, persons who relied on the presence of water when establishing residences or commercial establishments may find themselves with inadequate water supplies. In addition, the Legislature finds that the only practicable way in which to prevent the depletion of the water resources is to prohibit the transport of water in large quantities away from the vicinity of its natural location. The purpose of this prohibition is, however, not to prevent the use of such supplies for drinking and other public purposes in the vicinity of the natural location of the water.

*Provisions:* Restricted transport across municipal borders of water in containers greater than 10 gallons for commercial purposes. Water utilities (and some other uses) are specifically exempted and other water transporters can appeal for a three-year exemption.

**Water Supply Study Commission, 1987-89**

This Commission included membership from the Legislature, State Planning Office, Departments of Conservation and Human Services, the PUC, two major water districts, and a water engineering consultant.

The commission was charged with studying:

- 1) the adequacy of water supply for both commercial and noncommercial use;
- 2) impacts on the state from exportation of water;
- 3) adequacy of current regulation of the state's water supply;
- 4) a review of the appeals process regarding restrictions on water transport.

Recommendations:

- 1) State government should begin the process of developing a water resource management strategy in order to ensure adequate future supplies of water for domestic, commercial and industrial needs of the citizens of the state. *Status:* We've been discussing this ever since.
- 2) The Legislature should establish a multi-interest board to recommend the structure for Maine's future water management activities. *Status:* temporary Water Resource Management Board established to make recommendations. (see next section)
- 3) The Water Resource Management Board should analyze current state water management activities and issues of concern and make recommendations to the Legislature by January 1, 1991 regarding the appropriate State role in managing water supplies and the institutional structure necessary for efficient and effective State involvement. *Status:* Recommendations made in January 1991.
- 4) In order to begin identifying the role of state agencies in water resource issues, the Water Resource Management Board should request that copies of all applications for licenses or permits having an impact on water resources filed with other agencies of State government be sent to the Board. *Status:* Since the Board was not reauthorized, no action taken.

#### **Water Resource Management Board, 1989-90**

This temporary board was created in 1989 through legislation recommended by the Water Supply Study Commission. This Board had representation from state agencies involved in water issues (State Planning, PUC, Agriculture, Conservation, Fisheries, Economic and Community Development, Environmental Protection, Human Services) as well as water utilities, municipal governments, commercial users, hydropower producers, federal natural resources agencies, and the general public. The following summary of recommendations of this Board is organized according to the mandates in the Board's enabling legislation.

Water Use Rights: Review methods by which water rights are obtained under the existing law and recommend appropriate changes.

- 1) The Legislature should adopt a general definition of "reasonable use" that includes all socially and economically beneficial uses of water. *Status:* not adopted.
- 2) The Legislature should extend the reasonable use rule to groundwater resources. *Status:* not adopted.
- 3) The Legislature should provide additional guidance to be used in resolving conflicts among competing users. Beneficial uses of both surface and groundwater should be judged reasonable based on their impacts on the sustainability of the water source, impacts on other legitimate uses, as well as other factors. *Status:* not adopted.

Water Use Priorities: Recommend priority uses for preferential access to water supplies when supplies are inadequate to meet all demands.

Same recommendations as above.

Water Diversions: Recommend a policy regarding water diversion which addresses the implications of diversion from the State and the regions and sub-basins within the State.

- 4) Replace the Water Transport law with a permitting process for all inter-basin diversions in excess of 500,000 gallons per day. *Status:* not adopted.
- 5) An applicant for transport of water between 500,000 and 1,000,000 gallons per day should be entitled to the permit as long as it:
  - a. Furnished public notice of the diversion;
  - b. No evidence is produced to show that this diversion, in addition to current uses, could potentially exceed safe yield or otherwise be unreasonable.*Status:* not adopted.

Water Conservation: Recommend ways to improve and encourage conservation of water resources.

- 6) State agencies continue to encourage cost effective conservation measures by individuals, commercial and industrial interests. *Status:* state regulatory agencies routinely review conservation options with commercial and industrial water users. Some information on conservation practices available from some agencies.

New Permanent Structure: Recommend a permanent structure for centralized and coordinated conduct of the role of the State in water supply management.

- 7) Create a new water resources management board comprised of a citizen's board and supporting staff. Responsibilities:
  - a. Assist in the development of water management policies;
  - b. Map water basin divisions to be used in planning;
  - c. Determine and designate areas of limited local water supplies and establish priorities for undertaking water resource planning;
  - d. Develop, review, adopt and amend as necessary local water basin management plans;
  - e. Approve or deny water withdrawal permits for large diversions or any water withdrawal permits required as part of management plans;
  - f. Provide a forum for the resolution of water-related disputes;
  - g. Foster cooperation among federal, state, regional and local agencies;
  - h. Collect, develop, evaluate, manage and disseminate water resource data;
  - i. Provide assistance to other entities preparing study and action plans related to water resources.

*Status:* Board not created. Some responsibilities proposed for this Board are carried out by state agencies.

Collection of Data: Implement a strategy for coordinated collection of water supply and use data and compile that data in a readily accessible form.

- 8) Designate hydrologic management units within the state. *Status:* partially completed. MGS and USGS developed detailed digital drainage divide maps that have been used and enhanced by other agencies.
- 9) Standardize data collection among state agencies for collection and storage of water data. *Status:* partially completed. GIS serves as a common platform for collection and sharing of water data among state agencies, but there has been little effort in standardizing formats.
- 10) Water users of over 50,000 gallons per day should be required to report withdrawals. *Status:* Not adopted. (see Water Use Reporting law below)
- 11) Support the MGS/USGS water data collection project. *Status:* Water Use position at MGS cut in 1991, USGS/state water cooperative budget reduced. (see Water Use Reporting law below)
- 12) Develop a list of priority research needs and produce an annual report on water-related studies. *Status:* state agencies have considered priority research needs and report on water-related studies although not in the annual report format envisioned here and not in a coordinated fashion.

Technical Assistance: Develop technical assistance programs for municipalities, communities, or individuals adversely affected by water use decisions.

- 13) Board should coordinate water management activities among state agencies, provide technical support. *Status:* Not adopted in this form. State agencies provide considerable technical assistance to communities and individuals with regard to water problems.

Agency Coordination: Develop a strategy for coordination of all state and local agencies involved in water supply management.

- 14) Board should provide a single point of contact for water resource issues. *Status:* Not adopted.
- 15) Board should sponsor biennial exchange conference. *Status:* Not adopted in this format, but the annual Maine Water Conference accomplishes much of this recommendation.

Dispute Resolution: Recommend a process for adjudication of disputes over the right to use water and over the establishment of water levels for water supply ponds.

- 16) The state should modify responsibilities as necessary to achieve a complete and coordinated state agency approach to water-related dispute resolution. *Status:* not adopted.

#### **Aroostook Water Use Policy, 1996**

The Aroostook Soil & Water Management Board was established by the Legislature in 1987 to coordinate an Army Corps of Engineers irrigation and conservation research demonstration project in the St. John River basin. This project studied the impacts of irrigation and conservation practices. Although the Legislature did not pass the water policy reforms recommended by the Water Resource Management Board, the Legislature did recognize the Aroostook Soil & Water Management Board as a legitimate organization to serve as a conflict-resolution agency for northern Aroostook County. Through a series of meetings, the Board made a number of recommendations:

- 1) Inventory Aroostook County irrigators. *Status:* Completed.
- 2) Institute a process to address water withdrawal complaints. *Status:* largely implemented.
- 3) Work with farmers to assess irrigation needs. *Status:* in place.
- 4) Establish a direct withdrawal limit of 7Q10 and develop long-term Aquatic Base Flow (ABF) limits for withdrawals on streams where aquatic habitat is threatened. *Status:* in place for Aroostook County.
- 5) Encourage wetland use and impoundments on streams as alternatives to water withdrawal from streams. *Status:* Agricultural irrigation pond exemption and general permit process for dammed streams in place.
- 6) Financing for reservoir development. *Status:* Some funds available through Legislative bonds.
- 7) Educational program to encourage adoption of whole farm plans and to clarify the low flow plan to farmers. *Status:* in place but limited funding.

#### **Downeast Rivers Water Use Management Plan, 2000**

This effort was initiated as part of the Maine's Atlantic Salmon Conservation Plan and focuses on the important salmon rivers of eastern Maine. The plan has many elements and recommendations that are being pursued as resources permit. Those recommendations include:

- 1) Maintain USGS Gages on the Downeast Rivers, low-flow studies, monitoring strategies. *Status:* mostly in place.
- 2) Integrate Water Withdrawal Source Selection Hierarchy into State Policies. *Status:* done on an ad hoc basis.
- 3) Technical Assistance to Farmers -To ensure water resources are used as efficiently as possible, growers need technical assistance in implementing "best practices" for water management. *Status:* Guidance document to be completed by September 2004.

- 4) Cost Share Assistance- Cost share programs should be created to assist growers develop water sources that reduce current withdrawal impacts on Atlantic Salmon Habitat *Status*: New bonds passed for agricultural source development – See Agricultural Water Management Program below.

#### **Agricultural Water Management Program**

The Department of Agriculture established a new Agricultural Water Management Program in 1999 in response to the Governor's request to solve drought related losses by farmers in 1999. The Department convened a committee to develop a plan of action, the "Blueprint", which was completed in 2000. The Blueprint was updated in March 2003 as the Sustainable Water Source and Use Policy and Action Plan. The plan has a number of recommendations and actions to reduce drought related losses:

- 1) Continued funding of the successful State cost share program for sustainable water source development including engineering design and offset of permitting costs. *Status*: New Bonds passed in 2001.
- 2) Change LURC regulations for water source development to mirror DEP regulations regarding well and pond development and seasonal agricultural use. *Status*: Considerable debate during Sustainable Water Use Policy Process (see below), but without consensus.
- 3) Study ways to reduce or eliminate the requirement for federal and state (LURC) mitigation of wetland impacts for agricultural pond development. *Status*: draft recommendations developed.
- 4) Add seasonal water use for agriculture as a high priority use in Maine law. *Status*: Law passed establishing Agricultural as a priority water user in DEP water quality regulations.
- 5) Support non-regulatory solutions to water withdrawal complaints during low flow periods while maintaining traditional, longstanding riparian rights of users. Utilize the successful Aroostook Water and Soil Management Board low flow policy as a model. *Status*: No action to date.
- 6) Fund more research studies on economics of supplemental irrigation and alternative methods to increase soil water holding capacity and create water use conservation and efficiency. *Status*: Potato and Blueberry research accomplished.
- 7) Fund low flow studies to establish realistic limits on withdrawal to water bodies in regions where irrigation is likely to continue with direct withdrawals. *Status*: Low-flow study completed Downeast.
- 8) Fund increased technical assistance from the Department, Cooperative Extension, Soil and Water Conservation Districts, and USDA-Natural Resources. *Status*: Extra funding made available through NRCS in 2003 and 2004.

#### **Sustainable Water Use Policy Process, 2000-2002**

This process was initiated by several state agencies following a DEP draft proposal in 1999 for rules governing in-stream flows and water withdrawals. This effort was organized under the SPO's Land & Water Resources Council and involved state and federal agencies, water suppliers, irrigators, industrial water users, ski resorts, commercial bottlers, environmental organizations, and other interested parties. Considerable impetus for this process came from the perceived or potential conflict between Atlantic salmon habitat and water withdrawals in eastern Maine rivers. However, the process was established to consider water use policy statewide. The goal of the process was to develop a prioritized set of recommendations to establish sustainable water withdrawal policies for Maine's public water resources. The process involved several roundtable meetings with numerous participants, regular working group meetings, and subcommittee meetings.

Participants in the process agreed that solutions to water use challenges would contain many components:

- Improved storage options.
- Flow standards.

- Water conservation and efficiency of use.
- Eliminating regulatory discrepancies.
- Monitoring and research.
- Public education.
- Capacity to implement the strategy.
- Periodic assessment of effectiveness of strategies.

Subcommittees addressed storage needs, aquatic ecosystem requirements, water conservation, consumptive use, and research and monitoring. Though in the end final consensus was not reached on the recommendations, the water use reporting law which was subsequently adopted by the legislature was based largely on the work of the Sustainable Water Use Policy Process. That new law, which is further described below, also directs the DEP to undertake rulemaking to adopt water use standards.

### **Water Use Reporting Law 2002**

Title 38, Article 4-B was adopted by the Maine Legislature in 2002. An outcome of the Sustainable Water Use Policy process, the new law established the Water Use Reporting Program. The DEP submitted the first report of the Water Use Reporting Program to the legislature in January, 2004. The major provisions of the law are:

- 1) Non-consumptive use of water defined.
- 2) Reporting thresholds defined (paraphrased here). Users of 20,000 gallons or more per day on small streams need to report annually. This threshold increases on larger flowing water bodies based on the flow. Users that withdraw from lakes must report based on a sliding scale of weekly withdrawal vs. lake size. Groundwater users with 500 feet of a surface water body must report according to the same requirements for that surface water body.
- 3) Individual water reports are confidential.
- 4) Reports go to various state agencies that aggregate them by watershed for inclusion in a master database.
- 5) Non-consumptive and many other uses are exempt from reporting.
- 6) Requires DEP to develop rules for "maintaining in-stream flows and GPA water levels that are protective of aquatic life and other uses and that establish criteria for designating watersheds most at risk from cumulative water use." These will be major substantive rules, submitted to the legislature for consideration in 2005.
- 7) Requires the DEP to "encourage and cooperate with state, regional or municipal agencies, boards or organizations in the development and adoption of regional or local water use policies that protect the environment from excessive drawdown of water sources during low flow periods," as done in the Aroostook Low Flow Policy.

### **Review of Ground Water Regulations Working Group, 2005-2007.**

This stakeholder group conducted a comprehensive review of the then current regulations governing withdrawals of ground water. Among the chief work done by this group was a systematic review of water supply and demand in watersheds statewide. This effort revealed that Maine does not have a statewide crisis with regard to water use, but that there are some watersheds that should be the focus of additional investigations. The Working Group recommended:

- addressing water issues through a watershed approach;
- establishing a Water Committee to oversee water information and investigations;
- establishing a permitting process for significant wells under the Natural Resources Protection Act.

### **Water Resources Planning Committee, 2007 – to-date**

This Stakeholder Committee is charged with coordinating agency water information, conducting water investigations in watersheds where demand is a high percentage of supply, and convening planning groups in watersheds as needed.

The WRPC draws its membership from state agency groundwater professionals, water utilities, agricultural water users, the bottled water industry, other commercial water users, private well drillers, and a water advocacy organization.

The committee is charged with:

- 1) gathering and otherwise improving water resource data and using these data in an analysis of “watersheds at-risk.” Prior to establishment of the WRPC, the Maine Geological Survey conducted a preliminary analysis of “watersheds at-risk” using available data as part of a comprehensive review of groundwater withdrawal regulations. The map produced through this process identifies a number of watersheds in which cumulative withdrawals in combination with in-stream flow requirements might be a large percentage of available water resources.
- 2) convening planning groups in watersheds where additional data gathering and analysis indicate that cumulative water use, including demands for in-stream flow, approach unsustainable conditions.
- 3) making recommendations to the Legislature on options to address oversubscribed watersheds where the planning efforts of the second phase have failed.

### **Significant Ground Water Well Permit, 2007**

The Legislature established the Significant Well Permitting Program within the Natural Resources Protection Act for high-volume wells – those pumping at least 50,000 gallons per day within 500 feet of water bodies, and those pumping at least 144,000 gallons per day more than 500 feet from a water body. This includes wells previously permitted under Bulk Water Transport. The applicant must show no adverse impact on ground water, surface water, water-related natural resources, or existing uses. Permits require monitoring of water resource and water dependent resources. Permits are conditioned and withdrawals may be limited based on resource conditions.

### **124<sup>th</sup> Legislature, First Regular Session, 2009**

The Legislature debated fourteen bills dealing with ground water, most of them focused on concerns with bottled water. Several of these bills grew from two recent events: exploration for a potential bottled water source in Shapleigh; a potential long-term contract for water between the Kennebunk-Kennebunkport-Wells Water District and a commercial bottler.

### **The Potential Impact of International Trade Agreements on Ground Water Withdrawal Regulations, 2009**

The 124<sup>th</sup> Legislature passed Public Law 2009, chapter 132, which directed the Water Resources Planning Committee, of the Land and Water Resources Council, in coordination with the Office of the Attorney General and the Citizen Trade Policy Commission, to conduct an examination of the potential legal impacts of international trade agreements on the State's ability to manage its ground water resources, including, but not limited to, the potential consequences of permitting foreign companies to extract ground water. The examination was to include a review and assessment of the following subjects as they relate to or impact international trade agreement issues and the State's regulation of its ground water:

1. Property rights related to the ownership of ground water.
2. The various common law doctrines relating to the use of ground water, including the absolute dominion rule and the reasonable use rule.
3. Natural resources other than ground water.

**Appendix C**

**Citizen Trade Policy Commission  
Water Resources Planning Committee**

**International Trade Agreements and Ground Water Regulations**

**Public Hearing  
State House Room 228  
Augusta, Maine  
October 15, 2009  
Summary**

**Citizen Trade Policy Commission  
Water Resources Planning Committee  
International Trade Agreements and Ground Water Regulations  
Public Hearing  
State House Room 228  
Augusta, Maine  
October 15, 2009  
Summary**

Introduction to the hearing by Robert G. Marvinney, State Geologist.

Linda Pistner, Deputy Chief Attorney General, provided an overview of Maine's legal setting for ground water and an outline of the current regulations that govern the withdrawal of ground water.

Sarah Bigney, Commission member, outlined the major international trade agreements and potential impact to state and federal sovereignty. She provided several examples from cases in other states.

David Webster, Maine Representative from District 106, reviewed Resolve 132 that initiated this analysis of the potential impacts of international trade agreements on the state's ability to regulate ground water withdrawals.

### **Groups**

Shelly Golbiel, Chairperson, Protecting Our Water and Wildlife Resources (POWWR), a grassroots organization founded in 2007: The organization was founded by the townspeople of Shapleigh and Newfield to raise awareness of the water testing by Poland Spring, a division of Nestle Waters North America. She related her town's experience in dealing with potential ground water extraction by Poland Spring. Ms. Golbiel stated that the already-existing local and state-level water laws will not hold in court in their current state. Ms. Golbiel used the Maine shoe industry as an example of the previous statement. The state needs to take lessons from the past and think about future generations. The chair of the POWWR recommended trade and investment agreement reform as well as stricter provisions on policies.

Martin and Barbara Britten, POWWR: The Brittens specifically called for water resources to be carved out of international trade agreements and that Maine's ground water be placed in the public trust. Ms. Britten is concerned that NAFTA and GATT commodify water resources on a global scale. Ms. Britten said, "With the world water crisis and global international agreements, Maine's water is left vulnerable." Ms. Britten also noted that other states, like Vermont, New Hampshire and Massachusetts have recognized the limitation of their water resources and made efforts to protect them. She expressed concern that under NAFTA, Maine is required to give all NAFTA signers the same benefits and deals as the United States. Both of the Brittens seconded the recommendations made by Mrs. Golbiel.

Ben Chin, Maine Peoples' Alliance: The Alliance focuses on laws that benefit the population's well-being. The availability of water for drinking and recreation is of particular concern as it pertains to the well-being of the people of Maine. Mr. Chin stated that the provisions of NAFTA give foreign investors rights and liberties that could potentially "trump" state and national sovereignty. The organization has specific concerns with Chapter 11 of NAFTA. Under this Chapter, for example, the Kids Safe Law could be challenged as too burdensome to a company. With the belief that the power to make legal decisions should be made in Maine and not in international tribunals, Maine People's Alliance also supports the removal of water from international trade agreements.

Bonnie Preston, The Alliance for Democracy: The Alliance for Democracy had specific issues with Article 6 of the GATS of the World Trade Organization, namely Domestic Regulation. Local and state regulations such as “goals to ensure qualifications and standards” could be deemed too burdensome if they hindered a company's profits or services. “National measures shouldn't hinder” these profits or services in anyway. The organization is concerned that basic human needs and drinking water standards could be determined too burdensome. The United States has opposed changes to the agreements under the World Trade Organization and the organization noted that there have been no new disciplines or changes made to article 6.

Stephan Donnell and Daphne Loring, Maine Fair Trade: Maine Fair Trade is comprised of 55 member organizations. Both Donnell and Loring reiterated risks of international trade agreements, namely that they threaten state sovereignty and circumvent local policies that are meant to benefit the public, like those pertaining to the environment and public health. They also recommended that water be carved out of all international trade agreements and specifically the GATS, along with the establishment of investment disclosure, and the protection of sovereignty and local control by enforcing the hearing of conflicts in domestic courts. Ms. Loring also described the experience of Bangor's sister city in El Salvador – Carasque. PacificRim, a Canadian corporation (Canada is not a signatory to CAFTA), used a U.S. subsidiary to sue El Salvador over permits to mine gold. Mr. Donnell and Ms. Loring used this as an example of potential abuses of the international trade agreements to which Maine may be vulnerable.

Betsy Anderson, Steering Committee of Save Our Water from Wells: Ms. Anderson seconded POWWR's concern that if challenged through international trade agreements through an international tribunal, Maine would not succeed. Water is an essential element and Ms. Anderson, along with her organization, does not think it should be treated like oil or pharmaceuticals. Save Our Water also calls for the removal of water from all free trade and investment agreements, specifically the GATS. The economy depends on a clean and safe environment. Ms. Anderson hopes that the legislature will “think globally and act locally, keeping the “Maine” in Maine by refusing to be enslaved by Nestle.”

Herbert Hoffman, Ogunquit, co-chairman of Save Our Water: Mr. Hoffman called for the abolishment of absolute dominion. He believes that the role of water is too precious not to be in a public trust. Mr. Hoffman is concerned that international corporations have been given rights, constitutional and otherwise, similar to those of individual people. His concern is that this “person-status” gives companies the potential to make decisions outside of the local, state and even federal domain. He called for Maine to defend its water.

Emily Posner, from Sheepscot River represented the Defending Water for Life Campaign: This organization also recommends that water be carved out of the GATS and all trade agreements. Ms. Posner expressed her organizations' concerns r specifically with articles 11 and 20 of GATT. Article 20 allows for a country to restrict access to a resource in order to protect human life and conserve the environment. The Defending Water for Life Campaign focuses on the protection of life and health and question the overall root cause of the global shortage of water which seems to have resulted in Maine's water becoming such a desired commodity. The Campaign is also concerned about the effects of bottled water, for example the cancerous effects of plastic manufacturing, aquifer destruction, and effects on other organisms besides humans. Ms. Posner also wanted it to be clear that Maine's water has yet to be determined inexhaustible, with particular concern for the world water shortage and the impacts of climate change.

## **Economic Supporters**

Chip Ahrens, representing Poland Spring, part of the international Nestle company: Mr. Ahrens made it clear that the GATT specifically regulated the trade of *goods* (emphasis from hearing material). Groundwater, or water in its natural state, is not technically regulated under the GATT. Bottled water is, however, regulated by the GATT. Mr. Ahrens also wanted to make that distinction that any disputes over WTO agreements would be heard member nation versus member nation. The WTO also cannot rewrite laws or order any state to change their regulations. International Investment agreements (IIA) under NAFTA, according to Mr. Ahrens, are different from the WTO agreements. The United States, not individual states, can initiate cases. The United States has yet to lose a IIA challenge, although the IIA outcome do not include rewriting any regulations. "Buy American" procurement provisions, "Mad Cow" disease quarantines, and others have all been upheld. IIA only consider monetary damages. Mr. Ahrens also made it clear that nondiscriminatory regulations for public purposes enacted through due process cannot constitute an expropriation.

Chris Jackson, The Maine State Chamber of Commerce: . The Chamber represents at least five-thousand businesses. Mr. Jackson noted that water extraction is already heavily regulated in Maine. The Chamber is also concerned that the state needs more foreign investment. For every single growing local business, there are four or five that are struggling. Unemployment as increased 50% statewide to about 8.5% statewide, and bankruptcies have increased 33%. The Chamber of Commerce noted that Poland Spring employs about 800 people in-state and pays vendors and contractors. The official position of the Chamber is that water replenishes naturally and these types of businesses should be encouraged as long as they are sustainable and reasonable.

Rick Knowlton, Vice President of Aqua Maine: Aqua Maine, a division of Aqua America, an investor- owned company, has served twenty municipalities, some for over fifty years.. Mr. Knowlton expressed concerns with Mr. Waren's draft report and reviewed existing regulations. There is already a bulk water law. Mr. Knowlton referred to a legal article by attorney Scott Slater. He also stated that water is a property under the absolute dominion rule and therefore the GATT and other international trade agreements do not apply. Mr. Knowlton also referred to the Public Utilities Commission and Title 35A which restricts return on a company's investment. Aqua Maine believes, similar to the Chamber of Commerce, that the focus should be on reasonable regulations of water resources before water can be considered goods, products, or services regulated by GATT.

### **Individuals**

Denise Carpenter, Newfield planning board member, a woodlot owner and cattle farmer: Ms. Carpenter reiterated the same information as Shelly Golbiel. . All resources are interrelated. Ms. Carpenter referred to the borders being closed to Mad Cow importation and international companies owning logging in Northern Maine as examples of the effects international policies and agreements have at the state and local levels. She recommends that town-level provisions should be stricter than the state, or "life as we know it will change."

Charles Mullins, Shapleigh: Mr. Mullins does not want domestic regulations to be subject to international policy and believes "there will only be political compromise if the legislature lets it." The goal of the state should be to represent the needs of the people.

Gloria Dyer, Newfield: Ms. Dyer reiterated Hoffman's concern over the constitutional rights given to companies, the threat to state sovereignty, and lack of transparency. Investor's rights give companies power to challenge policies and agencies that interfere with economic profits (including local businesses). In the Newfield-Nestle case, Nestle acted for three years without public notice. Dyer called for laws that would protect Maine's state sovereignty. She also called for water to be removed from the GATT and placed in a public trust for future generations. She recommended that states should be represented in NAFTA and CAFTA negotiations if they are to be affected, directly or indirectly.

Rick Burns: Mr. Burns is an advocate for democracy, private property and fair trade. He noted that there are an increased number of citizens fighting multinationals. Mr. Burns came to the hearing as a supporter for the townspeople of Newfield and Shapleigh. He believes that companies are granted a privilege to use resources and should not undermine municipal ordinances. He also stated his belief that absolute dominion is a product of times past that has eroded and needs to be abolished or rebuilt. "Reasonable Use" has a much better sound than "Absolute Dominion" Mr. Burns also referenced the court case of *Lucas vs. South Carolina Coastal Council* as an example in which regulations were established and businesses had to expect that subsequent regulations would affect the way they do business. He also quoted a former Attorney General, who stated that international tribunals threatened democracy. Consider the rights based ordinance such as that passed by Shapleigh.

Eileen Hennessey: Ms. Hennessey is simply concerned for all natural resources. Everything needs water to survive. Ms. Hennessey is particularly concerned that the 2006 installment of eminent domain allows a company to come onto private land and take ground water for profit.. Water should not be a commodity. She further reiterated the recommendation for the removal of water from the GATT and the creation of a public trust for the natural resource. Ms. Hennessey also noted that foreign companies control Maine's wood and electricity.

Jim Freeman, Verona Island: Mr. Freeman raised awareness for the East-West Highway, a 1000ft swath including road, rail, a utility and water pipeline. Maine would be exporting water in pipes. Gravel would go to Europe for roads, and trees would go to Europe for wood pellets to lower carbon dioxide emissions. Both would leave Maine with no value added. This is another example of already-existing economic relationships between Maine and international companies.

Grace Bradley: Ms. Bradley emphasized her concern over the legislature's "potential overconfidence or complacency." Ms.. Bradley hopes the legislature will not lose sight of the larger picture, the broader and long-term implications the GATT for Maine. She referred to her own personal experience working with the GATS in Mexico.

**Appendix D**

**Final Report on Water Policy and International Trade Law**

*William Waren*  
*December 8, 2009*

# Forum

on democracy & trade

## Final Report on Water Policy and International Trade Law

William Waren

December 8, 2009

### *Short Summary of Report*

- **Importance of the issue.** The question is whether international trade and investment law might thwart Maine should the state adopt new groundwater policy measures. NAFTA, the WTO and subsequent trade agreements impose rules related to government regulation, taxation, purchasing and economic development policies that are regarded as non-tariff barriers to trade.
- **Trade agreements.** The World Trade Organization (WTO) agreement on trade in goods clearly covers trade in bottled water, but there are two schools of thought on whether trade in bulk water is covered. Opinions also differ about whether the WTO agreement on trade in services covers groundwater measures, although a strong argument can be made that regulation of transportation or distribution of water is covered. WTO suits may be brought by nation-states that are parties to the agreement, and WTO tribunal decisions are effectively enforced by retaliatory trade sanctions, such as authorization of punitive tariffs on U.S. exporters.
- **Investment agreements.** Chapter 11 of the North American Free Trade Agreement (NAFTA), bi-lateral investment treaties (BITS), and similar international investment agreements (IIAs) cover groundwater measures. IIAs also are the most likely source for an international lawsuit. Indeed, IIA suits seeking compensation for government water policy measures are quite common. This is because:
  - The definition of “investment” is broad;
  - The standards regarding investor rights are vague; and
  - Foreign investors can directly sue the United States for money damages, without the need for another nation-state to bring suit.
- **The need to provide for predictability in international trade and investment law.** The solution is to reform international trade and investment agreements to, in the place of vague text, substitute:
  - Specific language protecting the authority of local democratic institutions and local courts to act in the public interest; and
  - Specific language in new general exclusions in trade and investment agreement coverage of key areas of state regulatory authority, including regulation and protection of freshwater resources.



## Final Report on Water Policy and International Trade Law

### *Summary of Report*

- *Why analyze how international trade and investment agreements may impact Maine's management of groundwater resources?*

Under U.S. domestic law, Maine has authority to adopt water policy measures in order to protect the public health and the environment and to ensure sustainable supplies of water at a fair price for individual consumption and commercial use.

In pursuit of these policy goals, Maine may be asked to consider, for example, new measures to regulate groundwater extraction for export to internal and international markets.

The question is whether international trade and investment law, either already adopted or likely to be considered for adoption in the future, might thwart Maine should the state adopt such water policy measures.

It is a good question because the World Trade Organization, NAFTA, and similar international agreements are designed to limit the authority of state legislatures, agencies, and courts in the interest of maximizing the volume and value of international commerce.

NAFTA, the WTO, and subsequent trade agreements, adopted since 1994, place limits on state government.

Prior to 1994, states had little reason to monitor the course of trade negotiations closely because they focused on tariffs, quotas and similar "at the border" discrimination against foreign products, almost always the business of the federal government.

The post-1994 agreements deal not only with "at the border" discrimination, but also impose rules related to government regulation, taxation, purchasing and economic development policies that are regarded as non-tariff barriers to trade by the drafters of the agreements. Maine's policy space is now affected by international law.

- ***Bottled water is clearly covered by the WTO General Agreement on Tariffs and Trade (GATT), which regulates international trade in goods.***

Except in unusual circumstances, it is unclear how regulation of groundwater extraction would violate "most favored nation" or other obligations under the GATT (such as export restrictions under GATT article XI).

Even then, the groundwater regulation might be permissible under Article XX or some other exemption.

- ***There are two schools of thought about whether bulk water is covered by GATT.*** Nonetheless, an expansive interpretation of GATT by a future tribunal, extending coverage to regulation of trade in bulk water, cannot be ruled out.

Assuming that bulk water is covered by GATT, an argument for GATT violation involving bulk water might be made in circumstances:

- Where governments violate article XI export restriction obligations, or
  - Where governments allow one firm to export bulk water and then change the rules to restrict or stop large-scale groundwater pumping and transfers across national borders by a firm from a second country, thus violating a GATT principle of non-discrimination, such as the "most favored nation" obligation.
- ***It is unclear whether the WTO General Agreement on Trade in Services (GATS) covers groundwater regulation. An argument can be made that some forms of distribution services affecting water policy are covered by GATS, even if regulation of drinking water utilities remains beyond the scope of the agreement. In any case, the biggest concern should be the on-going WTO negotiations on GATS obligations related to "domestic regulation."***

The World Trade Organization secretariat strongly denies that the GATS covers public water services or public interest regulation of privately-supplied water services. But, there are several reasons to remain concerned:

- While no country has made a commitment on water services per se, the United States and other countries are free to do so in the future.
- The United States has made or in the future may make commitments on distribution services, transport services and other service sectors that might result in GATS litigation affecting regulation of groundwater pumping and transport.

In other words, the WTO statement can be read to only apply to drinking water services provided as a public utility, which is not relevant to the issue of whether regulation of large-scale groundwater pumping and cross-border transportation violates other GATS obligations of the United States related, for example, to transportation services (such as rail transport).

- A government might intentionally or unintentionally surrender its right to regulate water under a contract.
- The WTO statement on water services is only the view of the secretariat and is not legally binding or even certain to be persuasive with a WTO tribunal deciding an actual case.

Regardless of the current sectoral coverage of the GATS, the biggest concern should be the on-going WTO negotiations on GATS obligations related to “domestic regulation.”

The potential intrusiveness of obligations covering domestic regulations will depend on the test for when they constitute a barrier to trade. It was originally proposed that standards, requirements and procedures for domestic regulation should be “not more burdensome than necessary.” Such a necessity test could have put a range of water policy measures and a range of other regulatory measures in the State of Maine and in other jurisdictions at considerable risk of conflict with GATS obligations.

The chairman’s most recent draft of proposals (March 20, 2009) for the WTO Working Party on Domestic Regulation did not include a “necessity test.” Unfortunately, the

draft retains substantive and procedural disciplines from the prior drafts that create a spectrum of possible meanings. These meanings could be consistent with constitutional authority to regulate in the United States, but they could also be interpreted as an obligation to regulate in the least-burdensome way.

Like prior versions, the chairman's March 2009 draft recognizes the "right to regulate" in order to meet national policy objectives. To come within the GATS right to regulate, states would have to seek an endorsement of state policy from the federal government

- ***NAFTA chapter 11, bi-lateral investment treaties, and similar international investment agreements (IIAs) cover groundwater measures. Water policy measures are a frequent topic of international investment litigation.***

As state and local officials from across the country have recognized for many years, IIAs raise serious sovereignty and federalism concerns.

Also, IIAs are a more likely basis for a suit than WTO agreements.

Among other reasons, these problems arise because of:

- Broad IIA definitions of "investment;"
- Vague IIA obligations regarding "indirect expropriation."
- Vague IIA obligations regarding "minimum standard of treatment under international law."
- Broad reading of vague IIA text by some tribunals; and
- Authorization for foreign investors to sue the United States directly.

Despite the fervent support for international investment agreements by corporate lobbyists in Washington D.C., state and local officials across the country have for many years been concerned about the potential for NAFTA chapter 11 and similar IIAs to intrude on state sovereignty and inappropriately constrain state legislative, regulatory, and judicial authority.

Given the broad definition of investment in IIAs, many water policy issues are covered by the agreements.

Not surprisingly, water policy measures are a frequent topic of IIA litigation.

Most of these cases deal with challenges to governmental authority to regulate threats to health and safety resulting from pollution of groundwater or surface water (for example *Methanex v. United States* and *Metalclad v. Mexico*) or water utility privatization (for example *Azurix v. Argentina*, *Aguas del Tunari v. Bolivia*, and *Biwater v. Tanzania*). There is at least one example of a bulk water transport case being filed under NAFTA chapter 11, although that claim has been alleged to be frivolous and never went to arbitration (*Sun Belt Water v. Canada*).

So, a challenge under an international investment agreement or bilateral investment treaty to Maine's authority to regulate its water resources is possible. Such an international investment claim might be made even if Maine regulates in the public interest and without the intent to discriminate against a foreign firm.

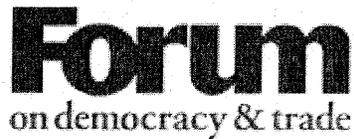
- **International trade and investment agreements should be reformed to provide greater clarity and certainty with respect to potential conflicts with state law and state water law in particular?**

The language of international trade and investment agreements is characteristically vague and subject to multiple interpretations, particularly as it relates to potential conflicts with state water law.

In the end, the lack of clarity, certainty, and predictability in international trade and investment law allows tribunals excessive discretion. While tribunals in the *Methanex* and *Glamis* investment cases used their discretion wisely and prudently declined to find that California had violated international law, other tribunals appear intent on expanding the scope of international property rights protections to limit the authority of local democratic institutions.

The solution is to reform international trade and investment agreements to, in the place of vague text, substitute:

- Specific language protecting the authority of local democratic institutions and local courts to act in the public interest; and
- Specific language in new general exclusions in trade and investment agreement coverage of key areas of state regulatory authority, including regulation and protection of freshwater resources.



## **Final Report on Water Policy and International Trade Law**

### **Preface:**

#### **What is the scope of this analysis?**

With respect to the risk of an international trade or investment law challenge to Maine's authority to adopt policies and legal measures related to groundwater, this paper provides a general analysis of how the World Trade Organization agreement on trade in goods (GATT), the WTO agreement on trade in services (GATS), and international investment agreements (NAFTA chapter 11 and similar agreements) might apply.

The first step in such an analysis is to determine whether a groundwater measure is even covered by the agreement. Much of the analysis in this paper focuses on the coverage issue because some conclusions can be reached at least in general terms without reference to the facts of a particular case and to the detailed language of the specific law, regulation, administrative decision, or domestic court opinion that is being challenged.

The next two steps in analyzing the potential risk of a successful international lawsuit are to determine whether a specific rule or "obligation" has been violated and even if there is a violation whether an exclusion, an exception, or an annex reservation (grandfathering particular existing measures) applies regardless of the violation of an obligation. It is difficult or more often even impossible to determine whether an obligation has been violated or whether an exception applies without reference to the facts of a specific case or the detailed language of the government regulation or other government measure being challenged. Nonetheless, this paper includes some limited discussion of general and hypothetical situations where an obligation is violated or an exclusion applies.

Finally, this paper provides no analysis of Maine water law. The Maine Attorney General's office is preparing such an analysis. Any hypothetical scenarios regarding future groundwater regulation are included strictly for purposes of illustrating points of international trade law, and are not intended to imply support for or opposition to any

new water law or regulation. Keep in mind that international trade and investment tribunals do not apply United States or Maine domestic law when making a decision. Although of course, domestic law may be part of the factual background of a case, and may be analyzed for its conformity to international law. But, international tribunals decide cases based on the text of the relevant international agreement and international law.<sup>1</sup> The Vienna Convention on the Law of Treaties provides that a breach of international agreements cannot be justified or excused by provisions in domestic law.<sup>2</sup>

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<sup>1</sup> For example, NAFTA chapter 11 on investment provides at article 1131 that “ A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law,” *available at* <http://www.nafta-sec-alena.org/en/view.aspx?x=343>); Article 38 of the Statute of the International Court of Justice identifies the following sources of international law: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. *Available at*, <http://www.icj-cij.org/documents>.

<sup>2</sup> *Vienna Convention on the Law of Treaties* (1969), article 27 (A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.), *available at* [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).



## Final Report on Water Policy and International Trade Law

*William Waren<sup>3</sup>*

*December 7, 2009*

- 1. Introduction: Why is it important to analyze how international trade and investment agreements may impact Maine's management of groundwater resources?** Under U.S. domestic law, Maine has authority to adopt water policy measures in order to protect the public health and the environment and to ensure sustainable supplies of water at a fair price for individual consumption and commercial use. In pursuit of these policy goals, Maine may be asked to consider, for example, new measures to regulate groundwater extraction for export to internal and international markets.

The question is whether international trade and investment law, either already adopted or likely to be considered for adoption in the future, might thwart Maine should the state adopt such water policy measures. It is a good question because the World Trade Organization, NAFTA, and similar international agreements are designed to limit the authority of state legislatures, agencies, and courts in the interest of maximizing the volume and value of international commerce.

NAFTA, the WTO and subsequent trade agreements adopted since 1994 agreements, place limits on state government. Prior to 1994, states had little reason to monitor the course of trade negotiations closely because they focused on tariffs, quotas and similar "at the border" discrimination against foreign products, almost always the business of the federal government. The post-1994 agreements deal not only with "at the border" discrimination, but also impose rules related to government regulation, taxation, purchasing and economic development policies that are regarded as non-tariff barriers to trade by the drafters of the agreements. Many state measures are now covered.

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In addition, the pre-1994 agreements had no effective enforcement mechanism. But NAFTA, the WTO agreements and other post-1994 agreements (in combination with federal implementing legislation) do. International tribunals created by these agreements have the power to enforce the obligations of the agreement against parties through retaliatory trade sanctions<sup>4</sup> or in the case of investment disputes through awards of uncapped money damages for any state or local government measure<sup>5</sup>, including any groundwater policy measure, deemed to violate international trade and investment law.

As a policy resolution adopted by the National Conference of State Legislatures states, “NCSL also believes that these [trade] agreements must be harmonized with traditional American values of constitutional federalism...[measures] are necessary to ensure that international trade agreements do not adversely impact state budgets or constrain state regulatory authority.”<sup>6</sup> Certainly, NCSL’s principle applies to state groundwater

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<sup>4</sup> WTO tribunal decisions can be effectively enforced even though under U.S. implementing legislation for the Uruguay Round agreement private parties do not enjoy a private right of action in U.S. courts to enforce WTO tribunal decisions. The effectiveness of retaliatory trade sanctions as an enforcement mechanism is illustrated by the dispute over the 2002 U.S. steel tariff. President George W. Bush on March 5, 2002 imposed temporary tariffs on imported steel of 8 to 30 percent. No tariffs were imposed on Mexican and Canadian steel imports because of the threat of retaliatory trade sanctions under NAFTA. The European Union and most other major trading partners filed a complaint with the WTO. In 2003, the WTO ruled against the U.S., authorizing \$2.2 billion in retaliatory trade sanctions potentially including higher tariffs on imports on Florida citrus, on rice, tobacco, clothing, paper, and pleasure boats produced in the South, and steel products, watches, and hand tools produced in the Midwest (Florida and Midwestern states were very much in play in the upcoming U.S. presidential elections). President Bush ultimately backed down and withdrew the steel tariffs well before the 2005 expiration date. BBC News, “Q & A: US-EU Steel Dispute, December 4, 2003, available at <http://newsvote.bbc.co.uk/2/hi/business/3391675.stm>.

<sup>5</sup> International investment tribunals can also effectively enforce their judgments in most cases by demanding payment of money damages to compensate the foreign investor. Nonetheless it must be kept in mind that even if the foreign investor is awarded damages, the NAFTA panel ruling does not automatically result in preemption of state or local law. Nor is there any right of action for private parties to enforce panel rulings in U.S. courts. 19 U.S.C. §3312(c). If U.S. state or local officials are unwilling to amend policies that are popular with the public, federal officials may simply leave the local policy in place, pay damages to the investor, and hope the issue never arises again as an IIA case. In the alternative, the federal government may seek to quietly resolve the issue. For example, federal officials acting behind the scenes might apply political or economic pressure on state officials to “voluntarily” bring state policy in line with the panel ruling. If the investor wins, the United States also has the option of suing to preempt the state law. Unlike private investors, the federal government can sue a state or locality at any time and seek the preemption of state or local measures that do not comply with an international investment agreement. In this connection, state law is in an inferior position to federal law under NAFTA chapter 11 and similar IIAs. If a dispute resolution panel finds that a federal law violates NAFTA’s investment chapter, an act of Congress is required to comply with the ruling. North American Free Trade Agreement Implementation Act, Title I, §102 (a), 19 U.S.C. §3312 (1993). In addition to that, state and local governments have repeatedly asked for assurances from Congress and several presidential administrations that if money damages are assessed against the U.S. Treasury as a result of an international investment judgment in which a state and local measure is found to be in violation of international law, the federal government would not seek to directly or indirectly recoup those costs from the state or locality. Neither the Clinton nor the Bush Administration would promise not to try to recoup the cost of an IIA money damages award from state or localities.

<sup>6</sup> NCSL policy on Free Trade and Federalism (policy resolutions under the jurisdiction of the Labor and Economic Development Committee), available at , <http://www.ncsl.org>.

regulation in Maine and across the country.

## 2. Why should Maine closely monitor the WTO General Agreement on Tariffs and Trade (GATT) as it applies to trade in water?

*Analytic framework:* As noted above, the first step in this analysis is to determine whether a groundwater measure is even covered by the GATT agreement on trade in goods.<sup>7</sup> The GATT does not clearly define the term “good.” But it is generally agreed that a “good” is “a product that can be produced, bought, and sold, and that has a physical identity.”<sup>8</sup>

The next step in analyzing the potential risk of a successful international lawsuit is to determine whether a specific rule or “obligation” has been violated. The relevant provisions here are:

- GATT article I on “most favored nation” treatment (“...any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties”<sup>9</sup>); and
- GATT article XI provides that, “No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”<sup>10</sup>

Even if there is a violation of a specific rule (obligation), the third step in the analysis is to determine whether an exclusion, an exception, or an annex reservation (grandfathering particular existing measures) applies regardless of the violation of an obligation.

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<sup>7</sup> The text of the GATT may be found at [http://www.wto.org/english/docs\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e.htm).

<sup>8</sup> Definition of good, Deardorff's Glossary of International Economics, available at <http://www-personal.umich.edu/alandear/glossary/g.html>; For published book, see Alan V. Deardorff, *Terms of Trade: Glossary of International Economics*, World Scientific Publishers, October 2006.

<sup>9</sup> Available at [http://www.wto.org/english/docs\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e.htm). GATT article III on national treatment is also just as likely to apply in a case of discrimination.

<sup>10</sup> Available at [http://www.wto.org/english/docs\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e.htm).

Particularly relevant in this case are the general exceptions at article XX (b) (life and health of humans, animals and plants) and article XX (g) (conservation of natural resources).<sup>11</sup>

*Bottled water:* Trade in bottled water is covered by the GATT.<sup>12</sup> Bottled water is produced (bottled), and it enters into the stream of commerce; it is ‘bought and sold.’ According to Howard Mann, a leading expert on trade and the environment, “It is well understood that bottled water, for example, is covered by trade law, and that restrictions on exports of bottled water are, therefore, significantly limited.”<sup>13</sup>

Given that bottled water is covered by the GATT and similar agreements on trade in goods (or products), the next question is what “disciplines” or limitations on government action are imposed. As noted above, in the case of the GATT, the “most favored nation” discipline at article I requires governments that accord “any advantage, favor, privilege or immunity” to any product destined for one country must accord that same benefit to like products destined to all countries belonging to the World Trade Organization. Similarly, article XI of the GATT bars governmental measures, other than taxes, duties, or similar charges, on the “exportation or sale for export of any covered product, absent an exemption.”

So, what exemptions in the GATT would allow application of a government measure to a

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<sup>11</sup> GATT Article XX. General Exceptions. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ... (b) necessary to protect human, animal or plant life or health; ... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; World Trade Organization, Legal Texts: GATT 1947, available at, [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_02#articleXX](http://www.wto.org/english/docs_e/legal_e/gatt47_02#articleXX).

<sup>12</sup> *For general background*, Edith Brown Weiss, *Water Transfers in International Trade Law*, in Edith Brown Weiss, Laurence Boisson de Chazournes, & Nathalie Bernasconi-Osterwalder, *Fresh Water and International Economic Law*. Oxford University Press, 2005.

<sup>13</sup> Howard Mann, “Implications of International Trade and Investment Agreements for Water and Water Services: Some Responses from Other Sources of International Law,” a paper prepared for Agua Sustentable and funded by the International Development Research Center, Ottawa, Canada, May 2006, p. 9 (on file); According to Alix Gowlland Gualtieri, “The most common form in which water can be traded occurs after its transformation or removal from a natural or bulk state. This concerns most prevalently bottled water and other drinks containing water such as soft drinks and juices. An increasingly lucrative international market in bottled water has emerged as a consequence of growing demand for the good, with Nestlé, Danone, Coca Cola and Pepsi Cola as leading corporations in the field.” Legal Implications of Trade in ‘Real’ and ‘Virtual’ Water Resources, IELRC Working Paper 2008-02, International Environmental Law Research Center, Geneva, Switzerland, p.2., available at <http://ielrc.org.content/w0802.pdf>.

covered good or product such as bottled water in spite of the disciplines imposed by article XI, article III, and/or article I? Again, articles XX(b) and XX(g), for example, allow governments to impose measures that would otherwise be prohibited if the measures are “necessary to protect human, animal, or plant life or health” or if they relate to “the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” These two exceptions in article XX, however, are available only where governmental measures “are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”

In parsing the text of articles XX (b) and (g), it becomes clear that article XX(b) is more narrow and subjective in many respects than article XX(g). For example, a WTO tribunal will decide when a measure to protect human, animal, or plant life is “necessary” under article XX (b). Does that mean the measure must be no more trade restrictive than necessary? Furthermore, under both XX (b) and XX (g), a tribunal will make the subjective judgment about when a measure is a disguised restriction on international trade.

In summary, bottled water is clearly covered by the GATT. What is unclear is how a groundwater measure would violate “most favored nation” or other obligations under the GATT (such as export restrictions under GATT article XI or a de facto violation of article III) with respect to trade in bottled water. It might well require strong evidence that groundwater regulation was intended to operate as a disguised or discriminatory restriction trade in bottled water. And even then, the groundwater regulation might be permissible under an Article XX general exemption.

*Bulk Water:* Commentators disagree about whether bulk water exports are covered by GATT and by trade in goods chapters in free trade agreements such as NAFTA. One school of thought is that bulk water is not a covered good or product. The other school of thought is that while the language of the agreements may not be specific about whether bulk water is covered, given the modern commercial practice of treating water as a commodity, the logic of the GATT agreement leads to the conclusion that bulk water is covered.

The traditional view is that bulk water, in its “natural state,” is not a good or product. For

example, with respect to trade – but not investment issues – the parties to NAFTA (Canada, Mexico, and the United States) issued a joint statement in 1993 declaring that “water in its natural state...is not a good or product, is not traded, and therefore is not and never has been subject to the terms of any trade agreement.”<sup>14</sup> With respect to the GATT, the argument is that bulk water is not a good or product to which the agreement applies.<sup>15</sup> Water in its natural state, it is argued, is not “produced.” As one commentator argues, the GATT implies that “something must be done to water to make it a product, and that mere diversion, pumping, or transfer does not suffice.”<sup>16</sup> Mere water use rights, by this view, do not confer ownership of a product.

Dissenters from this view ask how is it that water does not fit under the GATT definition of a product, when the common practice is to regard other unrefined natural resources as products and goods in international trade.<sup>17</sup> They also argue that as a matter of recent commercial practice, water is being exported as a commodity, just like crude oil, and that tribunals could find this to be a commercial reality that must be recognized. As a report of the International Environmental Law Research Centre notes, “New bulk storage and transfer technologies have now been developed to make it possible to move large volumes of water across long distances for commercial purposes, including through massive pipelines, supertankers, or giant sealed water bags.”<sup>18</sup> In other words, a distinction must be made by an international tribunal between “water in its natural state” and “bulk water.” The process of transferring or transporting bulk water in large containers like tanker trucks, rail cars, ships, or maybe even pipelines might be regarded as the equivalent of a production process, with the result that bulk water that is in the stream of commerce and that has been transported in this way is a product covered by GATT. According to Matthew Porterfield, Senior Fellow at Georgetown’s Harrison Institute, it is significant that “water is included within the tariff classification system

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<sup>14</sup> 1993 Statement by the Governments of Canada, Mexico, and the United States (on file).

<sup>15</sup> Bryant Walker Smith, “Water as a Public Good: The Status of Water Under The General Agreement on Tariff and Trade, 2009, available at : [http://works.bepress.com/bryant\\_walker\\_smith/2](http://works.bepress.com/bryant_walker_smith/2) pp.4-6

<sup>16</sup> Smith, pp.4-6.

<sup>17</sup> Smith, pp.4-6.

<sup>18</sup> Gualtieri, p.4; the author also notes on p.6, that “There is no information on the intent of the parties when negotiating the GATT relevant to the applicability of the [GATT] Agreement to bulk transfers of water, and this question has indeed never been discussed in the framework of the WTO. Indeed, the absence of an explicit exclusion of water from the GATT has been read as arguing for the applicability of the Agreement to trade in this resource. On the other hand, water might not be mentioned because trading large amounts of water between states was not envisaged until recent years.”

used by the WTO.”<sup>19</sup> And if water is a “product,” then government groundwater regulation in certain fact situations might violate GATT obligations related to nondiscrimination and export restrictions, unless article XX applies.

As Howard Mann explains,” while common sense and some history indicates trade law cannot compel the trade in freshwater resources, the matter is not without doubt, doubt created at least in part by the trade lawyers themselves. This doubt can be compounded if a first export is allowed to occur, as additional limitations or conditions on exports subsequent to a first export may become more difficult to apply due to non-discrimination requirements under trade law.”<sup>20</sup>

In summary, it is uncertain whether bulk water is covered by GATT. Nonetheless, a more expansive interpretation of GATT coverage by a future tribunal cannot be ruled out, particularly in circumstances where governments violate article XI export restriction obligations or allow one firm to export bulk water and then change the rules to restrict or stop large-scale groundwater pumping and transfers across national borders by a second foreign firm, thus violating a GATT principle of non-discrimination, such as the article I “most favored nation” obligation.

### **3. Why should Maine closely monitor water services issues raised by the General Agreement on Trade in Services (GATS)?**

*Coverage.* GATS covers measures that affect trade in services, except services supplied under “government authority.” Only some government services are excluded: specifically, those that are neither commercial nor in competition with another supplier. Some GATS trade rules cover measures in all sectors, and some cover measures in selected sectors (“commitments”).<sup>21</sup> As Global Trade Watch explains, “GATS is

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<sup>19</sup> “The General Agreement on Tariffs and Trade is the centerpiece of the WTO system. It covers trade in goods. There’s been a vigorous debate whether water in its “natural state” -- lakes, streams, aquifers -- constitutes a good or “product” and is therefore covered under the GATT. Water is included within the tariff classification system used by the WTO.”, *available at*, <http://forumdemocracy.net/article>.

<sup>20</sup> Mann, *above*, p. 10.

<sup>21</sup> The full text of the General Agreement on Trade in Services is posted on the WTO website, at [http://www.wto.org/english/docs\\_e/legal\\_e/26-gats.pdf](http://www.wto.org/english/docs_e/legal_e/26-gats.pdf). Essential to understanding the coverage of specific sectoral commitments is the classification scheme of the United Nations Statistics Division, *available at*, <http://unstats.un.org/unsd/cr/registry/regist.asp?C1=9&Lg=1>; Global Trade watch provides an excellent database on GATS sectoral commitments made by the United States, *available at*, [http://www.citizen.org/trade/forms/gats\\_sector\\_list.cfm](http://www.citizen.org/trade/forms/gats_sector_list.cfm); The Coalition for Services Industries website has posted the 2005 United States Revised Offer of sectoral commitments, *available at* [http://www.uscsi.org/pdf/US\\_revised\\_offer.pdf](http://www.uscsi.org/pdf/US_revised_offer.pdf).

structured as a “bottom up” agreement. This means that most GATS requirements only apply to service sectors [that] countries specifically agree to open up to competition by foreign corporations...a “schedule of commitments” for each WTO signatory government...lists the specific service sectors each nation has signed up to the terms of the agreement.”<sup>22</sup>

The first GATS commitments took effect in 1995. GATS builds in successive rounds of “progressive liberalization,” which are negotiations to expand the number of sectors that are covered by Market Access and National Treatment. (article XIX). GATS also authorizes negotiations to create new “disciplines” on domestic regulation. (article VI). Negotiations on these domestic regulation disciplines began in 2000 and continue up to today; domestic regulation rules will apply to those sectors where there is a commitment under market access or national treatment.

*Rules.* The most significant GATS rules are:

- National Treatment: prohibits discrimination in favor of domestic suppliers, including laws that change conditions of competition, even if they do not formally discriminate. (committed sectors, article XVII); and
- Market Access: prohibits quantitative limits on service suppliers such as monopolies, number of suppliers, volume of service (committed sectors, article XVI).

*Exceptions.* GATS article XIV excuses conflict with a trade rule if a “necessity test” is met and purpose of the measure is:

- Necessary to protect public morals;
- Necessary to protect human or animal health;
- Necessary to protect privacy or prevent fraud;
- Necessary (in the view of each country) to safeguard essential security interests.

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<sup>22</sup> Global Trade Watch, WTO General Agreement on Trade in Services (GATS) Glossary, *available at*, <http://tradewatch.org/trade/wto/gats/articles.cfm?ID=15071>.

The secretariat of the World Trade Organization strongly denies that GATS restricts public water services or public interest regulation of privately-supplied water services: "The number of Members which have so far made GATS commitments on water distribution services is zero. If such commitments were made, they would not affect the right of governments to set levels of quality, safety, price, or any other policy objectives as they see fit, and the same regulations would apply to foreign suppliers as to nationals. A foreign supplier which failed to respect the terms of its contract or any other regulation would be subject to the same sanctions under national law as a national company, including termination of the contract... It is of course inconceivable that any government would agree to surrender the right to regulate water supplies..."<sup>23</sup>

The WTO statement, itself, reveals reasons not to be entirely reassured.

First, while no country has made a commitment on water distribution services *per se*, they may choose to do so in the future.

Second, the United States has made or in the future may make commitments for distribution services, transport services and other service sectors that might result in GATS litigation *affecting* regulation of groundwater pumping and transport.<sup>24</sup> In other words, the WTO statement can be read to only apply to drinking water services provided as a public utility, and to be irrelevant to the issue of whether regulation of large-scale groundwater pumping and transportation violates other GATS obligations of the United States (rail transport of freight or distribution services related to wholesale trade).

Third, it is entirely conceivable, contrary to the WTO secretariat's expectation, that a government might intentionally or unintentionally surrender its right to regulate water

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<sup>23</sup> WTO, "GATS: Fact and Fiction: The WTO is not after your water," *available at*, [http://www.wto.org/english/tratop\\_e/serv\\_e/gats\\_factfiction8\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/gats_factfiction8_e.htm).

<sup>24</sup> For example, the United States has made a GATS sectoral commitment for rail freight transport, *available at* [http://www.citizen.org/trade/forms/gats\\_sector\\_list.cfm](http://www.citizen.org/trade/forms/gats_sector_list.cfm). The U.S. sectoral commitment for rail freight transport is to be understood in light of the services classification scheme of the United Nations Statistics Division, which at subclass 71122 includes transportation by railway of bulk liquids under class 7112 freight transportation, *available at*, <http://unstats.un.org/unsd/cr/registry/regcst.asp?C1=9&Lg=1&Co=71122>. With respect to distribution services at wholesale trade, Global Trade Watch appropriately notes that, "The WTO Secretariat explains that 'Wholesale trade services consist in selling merchandise to retailers, to industrial, commercial, institutional or other professional business users, or to other wholesalers;' and notes further that "[the United Nations]CPC 6222 covers wholesale trade in mineral water and corresponds to ISIC code 5122, which covers: 'Bottling and labelling simple (tap) water (Wholesale of food, beverages and tobacco), if performed as a part of buying and selling at wholesale, and in class 7495 (Packaging activities), if performed on a fee or contract basis.'" The United States has committed both wholesale distribution services and packaging services." *Available at*, [http://www.citizen.org/trade/forms/gats\\_results.cfm?s\\_id=91](http://www.citizen.org/trade/forms/gats_results.cfm?s_id=91).

supplies, as a result of a public-private relationship between government officials and the foreign suppliers or simply as a result of being unfamiliar with international trade law or of being “out-lawyered” by the foreign supplier.

Finally, the WTO statement on water services is only the view of the secretariat and is not legally binding or even certain to be persuasive with a WTO tribunal deciding an actual case.

Andrew Lang, a GATS scholar at Cambridge University in England, observes, “...one can attempt the difficult task of assessing the risk of claims against water sector regulation will be successful. There is no doubt that, at times, this risk has been overstated by GATS critics. But, this analysis suggests that one must approach with caution claims that the risk is nothing more than minimal.”<sup>25</sup>

At the very least, the capacity of Maine to adopt groundwater measures and manage water resources in light of potential conflicts with the GATS bears watching. In particular, GATS negotiations on domestic regulation and the future interpretations of U.S. commitments related to distribution and transportation services that might *affect* trade in water should be monitored closely.

This is despite the European Union’s decision not to seek inclusion of “water for human use” as a sector of economic activity that should come under the scope of GATS regulation of wastewater services and despite the fact that the United States has not made a commitment to subject drinking water services to GATS disciplines, up to this point.<sup>26</sup> The United States Trade Representative (USTR) has assured states that the United States has no current plans to make a commitment on water services. But, could those plans change if such a compromise could restart Doha Round negotiations in ways that would be favorable to the United States in other sectors? Moreover as noted above, “water distribution services” might be understood narrowly to cover only drinking water utilities.

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<sup>25</sup> Andrew Lang, “The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry,” *Journal of International Economic Law*. 2004 7(4), Oxford University Press, pp. 836-837, *Available at*, <http://jiel.oxfordjournals.org/cgi/reprint/7/4/801>.

<sup>26</sup> According to the European Federation of Public Service Unions, “In its recent plurilateral requests on environmental services, EC [European commission] and other demandeurs have categorically excluded “water for human use” as a result of strong civil society pressure. However water is still involved in many other areas of WTO negotiations that can be of equal threat to our demand for access to water as a basic human right. This is of concern to waste water treatment for example.” *Available at*, <http://www.cpsu.org/a/1865>.

Of even greater concern to Maine should be the on-going WTO negotiations on GATS obligations related to “domestic regulation.” The potential intrusiveness of obligations covering domestic regulations will depend on the test for when they constitute a barrier to trade. It was originally proposed that these standards, requirements and procedures should be “not more burdensome than necessary.”<sup>27</sup> Such a necessity test could have put a range of water policy measures and a range of other measures in the State of Maine and in other jurisdictions at risk of conflict with GATS obligations.<sup>28</sup>

The chairman’s most recent draft of proposals (March 20, 2009) for the WTO Working Group on Domestic Regulation<sup>29</sup> does not include a “necessity test” but “[i]n place of ensuring “necessity,” the draft states that one purpose is to ensure that regulations “do not constitute disguised restrictions on trade in services.” This purpose would inform how dispute panels interpret the disciplines. In recent disputes, the WTO has found disguised restrictions when countries have failed to consult and seek less-trade-restrictive alternatives in response to complaints that measures violate trade rules.” Avoiding “disguised barriers” if interpreted in this way could establish a standard that is similar to the necessity test.”<sup>30</sup>

Also, the draft retains 48 paragraphs of substantive and procedural disciplines from the prior drafts. ... Among the most significant proposals, several create a spectrum of

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<sup>27</sup> “The chairman’s fourth draft continues to leave out the proposal from Australia, Hong Kong and New Zealand that requires domestic regulations to be “no more burdensome than necessary to ensure the quality of a service.” This is no doubt due to resistance from the United States, Brazil and other nations who view the necessity test as incompatible with domestic regulatory authority. The strongest statement to date on this issue has been the March 2007 outline of negotiating principles by the United States Trade Representative (USTR).” Memorandum to Kay Wilkie, Chair, Intergovernmental Policy Advisory Committee (IGPAC) from: Robert Stumberg, February 12, 2008, re: WPDR chairman’s fourth draft on domestic regulation, dated 23 January 2008, p3 , *available at*, <http://www.forumdemocracy.net/downloads/Stumberg/WPDRdraftJan-08>.

<sup>28</sup> If something similar to the necessity test is agreed upon in Geneva, the Center for International Environmental Law identified several areas where water policy could be threatened, including among others: qualifications of water service providers; the use of licenses, permits, and technical regulations and standards related to pollution discharges, operating permits, and other water policy measures; the use of environmental criteria related to water services in awarding concession contracts or assessing licensing fees; and requirements for water sustainability impact assessments before issuing licenses. CIEL (document on file, Harrison Institute for Public Law, Georgetown University Law Center) p. 2.

<sup>29</sup> Working Party on Domestic Regulation (WPDR), Revised Draft, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Informal Note by the Chairman, 23 January 2008 (Room Document), available at <http://www.tradeobservatory.org/library.cfm?refID=101417>.

<sup>30</sup> Memorandum to Kay Wilkie, p.3. “Another change in the fourth draft is where it defines an obligation on governments to publish ‘detailed information’ on regulations. Mandatory details include applicable technical standards, appellate process, monitoring, public involvement, exceptions and normal time frames.”

possible meanings. These meanings *could be* consistent with constitutional authority to regulate in the United States, but they *could also be* interpreted as an obligation to regulate in the least-burdensome way. For example, under article 11:

- *A relevance test* ... could exclude criteria that are external to the quality of a service being supplied, criteria such as environmental, historical or aesthetic impacts.
- *A pre-established test* ... could affect the law of when development rights or property rights vest, meaning at what point in time regulatory changes are applicable.
- *An objectivity test* ... could exclude subjective standards such as “just and reasonable” authority that legislatures delegate to public utility commissions to regulate in the public interest.

WTO dispute panels would have to interpret this array of tests, which are neither simple nor objective. Not only are they novel, thus lacking in precedents, but one test is likely to influence interpretation of another.

“Like prior versions, the chairman’s ... draft recognizes the “right to regulate ... in order to meet national policy objectives.” However, the ... draft did not include language that referred to sub-national governments, and the previous drafts had weakened the right to regulate in order to meet “domestic” policy objectives. “To come within the GATS right to regulate, states would have to seek an endorsement of state policy from the federal government.”<sup>31</sup>

As Stumberg notes, the disciplines proposed in the chairman’s draft, “would cover U.S. commitments and offers in over 90 service sectors, many of which are regulated by states or operated by local governments ... [including distribution and transportation services,

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<sup>31</sup> Memorandum to Kay Wilkie, p.3-4.

among many others]... Many of the proposed GATS disciplines reflect best practices. Yet neither Congress nor state legislatures have imposed such disciplines on regulatory agencies, primarily owing to the complexity of regulating service industries. If proposed as domestic law, the disciplines as proposed by the chairman would be controversial. Lawyers will recognize some proposed disciplines as variations on substantive due process, one of the most contentious areas of constitutional law. Other disciplines, if adopted as domestic law, would be changes in the federal or state administrative procedure acts.”<sup>32</sup>

The outcome of negotiations within the Working Group on Domestic Regulation will be vital for Maine and all other U.S. states and localities engaged in water policy and other forms of natural resources, public health, and public utility policy.<sup>33</sup>

In summary, whether groundwater regulation and related water policies are covered by GATS is uncertain. Rebecca Bates, an Australian trade law scholar observes that, “The existence ... of continuing debate and uncertainty as to the interpretation of the agreement means that the power and impact of GATS will not be wholly known until it is applied to the water and sanitation market in a real world situation ... greater certainty may be achieved through specifically excluding water and sanitation services from the scope of the agreement. The essential nature of water and sanitation for human health and survival sets this service area apart from many others when discussing liberalization of a service area, and the existence of a human right to water means that extra care must

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<sup>32</sup> Memorandum to Kay Wilkie. p. 1-2.

<sup>33</sup> The Intergovernmental Policy Advisory Committee (IGPAC) Services Working Group (representing state and local governments in the USTR advisory process) has highlighted several of these disciplines as posing a significant risk of conflict with state regulations that neither discriminate nor limit market access. For example, the IGPAC group expressed:

- (1) “Serious concern [about disciplines that require domestic regulations to be] ‘pre-established, based on objective criteria and relevant...’ given the potential for unacceptable constraints on the scope and exercise of state/local regulatory authority, particularly related to complex and emerging industries.” IGPAC is referring to the fact that a term like “objective” has been interpreted by the WTO in ways that are inconsistent with regulatory practice in the United States, and
- (2) “Active opposition to the extremely objectionable omission of any mention of sub-federal policy objectives from [the section that states a principle of deference to legitimate national policy objectives].” Instead, the IGPAC services working group recommends the following language: “National policy objectives include objectives identified at national or sub-national levels.”

be taken before water in any form is subject to free trade obligation.”<sup>34</sup>

#### 4. Why should the Maine Commission closely monitor international investment litigation?

International Investment agreements (IIAs) place multinational corporations and other investors on an equal footing with nation-states. Investors are allowed to file claims against national governments seeking money damages in compensation for economic regulation and other government measures at the federal, state, or local level. Issues of public policy and even constitutional law are resolved under an investor/state dispute resolution system designed for arbitration of international commercial disputes.<sup>35</sup>

- *Coverage: definition of investment.* Most IIAs signed by the United States contain complex definitions of investment that cover a broad range of economic interests. These international agreements contain definitions of investment that are broader than the constitutional standards used under domestic law in the United States.

The U.S. Model Bilateral Investment Treaty, for example, includes under the definition of investment: assets having “characteristics of an investment” such as expected profits, assumption of risk, and the commitment of capital.<sup>36</sup>

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<sup>34</sup> Rebecca Bates, 31 *Sydney Law Review*, 121, 142 (2009).

<sup>35</sup> See, U.S. Department of State, Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty: Annexes, September 30, 2009, Annex B: Particular Viewpoints Of Subcommittee Members, A collective statement from Sarah Anderson, Institute for Policy Studies, Linda Andros, United Steelworkers, Marcos Orellana Cruz, Center for International Environmental Law, Elizabeth Drake, Stewart and Stewart, Kevin P. Gallagher, Boston University & Global Development and Environment Institute, Owen Herrnstadt, International Association of Machinists and Aerospace Workers, Matthew C. Porterfield, Harrison Institute for Public Law - Georgetown Law, Margrete Strand Rangnes, Sierra Club, and Martin Wagner, Earthjustice: “We recommend that the administration replace investor-state dispute settlement with a state-to-state mechanism. If the administration continues to include an investor-state dispute settlement mechanism, investors should be required to exhaust domestic remedies before filing a claim before an international tribunal. That mechanism should also provide a screen that allows the Parties to prevent frivolous claims or claims which otherwise may cause serious public harm...Investor-state claims often involve matters of vital importance to the public welfare, the environment, and national security. However, international arbitrators are not ordinarily well-versed in human rights, environmental law, or the social impact of legal rulings. Allowing private foreign investors to bring claims over such sensitive matters to international commercial arbitration tribunals is particularly disturbing when the disputes raise constitutional questions. For these reasons, we feel strongly that the Model BIT should provide only for state-to-state dispute settlement, which guarantees the crucial role of governments in determining and protecting the public interest.” Available at <http://www.state.gov/e/eeb/rls/othr/2009/131118.htm>.

<sup>36</sup> 2004 U.S. Model Bilateral Investment Treaty, article I provides: “investment” means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take

- *Rules: expropriation.* International investment agreement (IIA) expropriation obligations are, in some respects, analogous to U.S Fifth Amendment takings law.<sup>37</sup> The question is whether international expropriation law provides foreign investors with greater property rights than U.S. investors enjoy under the domestic 'takings' clause.

Tribunals set up to hear these investment cases do not agree on the scope of IIA expropriation. The rulings are all over the map. Arbitrators have room to read the vague language of IIAs broadly or narrowly.

- *Rules: minimum standard of treatment.* The “minimum standard of treatment,” which includes the right to “fair and equitable treatment,” is a vague and evolving standard that permits foreign investors to challenge government actions on the grounds that they are either procedurally or substantively unfair.

Again, these vague concepts allow international investment tribunals considerable discretion in their deliberations. Because there are no specific criteria underpinning the

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include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges. Available at, <http://www.state.gov/documents/organization/117601.pdf>.

*See also*, U.S. Department of State, Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty: Annex B, above, “ As noted in the Subcommittee report, the definition of “Investment” in Article 1 of the Model BIT is much broader than the real property rights and other specific interests in property that are protected under the U.S. Constitution.”

<sup>37</sup> *See* 2004 U.S. Model Bilateral Investment Treaty (BIT), article 6, available at, <http://www.state.gov/documents/organization/117601.pdf>. *See also*, U.S. Department of State, Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty: Annex B, above. “ ...the indirect expropriation provision in investment agreements has been interpreted to require compensation based on the impact of the government measure on the value of the investment, regardless of whether there has actually been some appropriation of an asset by the government. This interpretation of the standard for indirect expropriation cannot be justified as reflecting the general practice of states, given that the dominant practice of nations is to provide for compensation only when the government has actually acquired an asset, not when the value of an asset has been adversely affected by regulatory measures.”

concept of the "minimum standard of treatment," it is very difficult to predict when a tribunal will find that justice has been denied.<sup>38</sup>

- *Exceptions.* U.S. international investment agreements are extremely broad in coverage and provide very few general exceptions. The U.S. Model BIT provides exceptions only for essential security interests and for disclosure of confidential information. A diplomatic screen is provided to exclude most taxation measures. A diplomatic screen is also provided for prudential measures related to regulation of financial institutions, but its convoluted wording brings into question its effectiveness.<sup>39</sup>
- *Dispute settlement.* Perhaps the most important thing to know about international investment agreements is that they are not administered in national courts.<sup>40</sup> International investment agreements entered into by the United States such as NAFTA chapter 11 do an 'end-run' around the U.S. courts. It is also noteworthy that arbitrators are, often, international commercial lawyers. A lawyer who sits 'in judgment' on a tribunal can act as 'plaintiff's counsel' in another case.

Despite the fervent support for international investment agreements by corporate lobbyists in Washington D.C.<sup>41</sup>, state and local officials across the country have for many years been

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<sup>38</sup> See 2004 U.S. Model Bilateral Investment Treaty (BIT), article 5, available at , <http://www.state.gov/documents/organization/117601.pdf>.

<sup>39</sup> See 2004 U.S. Model Bilateral Investment Treaty (BIT), articles 18, 19, 20, and 21, available at , <http://www.state.gov/documents/organization/117601.pdf>.

<sup>40</sup> See 2004 U.S. Model Bilateral Investment Treaty (BIT), articles 23-29, available at , <http://www.state.gov/documents/organization/117601.pdf>.

<sup>41</sup> Business groups that want to expand investor rights include:  
**U.S. Council for International Business.** USCIB is the American affiliate of the International Chamber of Commerce (ICC), the Business and Industry Advisory Committee (BIAC) to the OECD, and the International Organisation of Employers (IOE). USCIB now supports expansion of investor-state arbitration to Brazil, India and China, and in the Korea FTA negotiations, urged U.S. negotiators to "return to the provisions of the model BIT," rather than crafting exceptions to deal with sensitive sectors such as government services. USCIB, Recommendations on Objectives for the U.S.-Korea FTA (March 24, 2006) 9, available at <http://www.uscib.org/index.asp?documentID=829> (viewed May 10, 2009).  
**National Association of Manufacturers.** NAM supports a multilateral agreement on investment under the OECD and expansion of BITs to include Russia, China, Brazil, India, the EU and Japan. NAM, 2.01 International Investment , available at <http://www.nam.org/policypositions/> (viewed May 10, 2009).  
**U.S. Chamber of Commerce.** The Chamber also supports trans-Atlantic investment negotiations through the OECD. Its goals are to limit "increasingly burdensome" investment regulations and standards on technology, environment, health and safety. U.S. Chamber of Commerce, Unleashing Our Economic Potential: A Primer on the Transatlantic Economic Council (2008), Appendix II.E, available at [http://www.uschamber.com/publications/reports/0804econ\\_potential.htm](http://www.uschamber.com/publications/reports/0804econ_potential.htm) (viewed September 7, 2008); U.S. Chamber of Commerce, Global Regulatory Cooperation Project, available at <http://www.uschamber.com/grc/default> (viewed September 7, 2008).  
**Emergency Committee for American Trade.** In principle, ECAT supports the negotiating objective of "no greater substantive

concerned about the potential for NAFTA chapter 11 and similar international investment agreements<sup>42</sup> to intrude on state sovereignty and inappropriately constrain state legislative, regulatory, and judicial authority.<sup>43</sup> Given the broad definition of investment in IIAs, these sovereignty concerns clearly apply to groundwater policy issues. Not surprisingly water policy measures are a frequent topic of international investment litigation.<sup>44</sup>

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rights” for foreign investors. However, it opposes interpretive notes or congressional action to clarify open-ended language on expropriation and the minimum standard of treatment, saying that these terms “should properly be an issue for the investor-state tribunal.” About ECAT, available at <http://www.ecattrade.com/about/> (viewed May 10, 2009); ECAT, Bulletin #15: Bipartisan TPA Act v. Kerry Amendment (2002).

<sup>42</sup> The modern model for protecting foreign investments, embodied in NAFTA chapter 11, has its origins in the 1970s when the United States concluded bi-lateral investment treaties (BITS) with several developing countries. Among the distinguishing features of BITS are: (1) broad and largely undefined provisions for protecting the property rights of foreign investors, such as “indirect expropriation,” (2) an investor-to-state dispute resolution mechanism, which provides standing for an individual foreign investor to invoke international arbitration against a nation-state, based on allegations that a governmental measure violates treaty provisions protecting foreign property rights, and (3) enforcement of international tribunal decisions with awards of money damages to foreign investors in compensation for such treaty violations. See, Matthew C. Porterfield, “International Expropriation Rules and Federalism,” *Stanford Environmental Law Journal*, Vol. 23, No. 1, January 2004, pp.36-39.

<sup>43</sup> State government groups that call for reform of international investment agreements in order to protect state sovereignty, include:

**Intergovernmental Policy Advisory Committee.** IGPAC, the state and local advisory committee to USTR, filed its most recent comments on investment under the pending Colombia FTA. IGPAC urges U.S. negotiators to codify the holding of the *Methanex* panel to limit expropriation, limit the minimum standard of treatment to procedural due process and reject substantive due process, require investors to exhaust judicial remedies, and reimburse the states (CA, MA, MS, VA) that have been “heavily taxed” in defending investor-state disputes. IGPAC, *Advisory Committee Report to the President, the Congress and the United States Trade Representative on the US-Colombia Trade Promotion Agreement*, September 15, 2006, 3 and 20-22.

**National Conference of State Legislatures.** NCSL opposes investor-state arbitration: “Trade agreement implementing language must include provisions that deny any new private right of action in U.S. courts or before international dispute resolution panels based on international trade or investment agreements.” NCSL also calls for U.S. negotiators to: (1) “carve out” state laws that might be subject to challenge, (2) use a “positive list” approach to defining the scope of covered investments, and (3) enable states to “make adjustments” to limit coverage of state policies. NCSL, *Free Trade and Federalism, 2008 - 2009 Policies for the Jurisdiction of the Labor and Economic Development Committee*, available at [http://www.ncsl.org/standcomm/sclaborecon/sclaborecon\\_Policies.htm#FreeTrade](http://www.ncsl.org/standcomm/sclaborecon/sclaborecon_Policies.htm#FreeTrade).

**Conference of Chief Justices.** CCJ is concerned that investor-state arbitration “can undermine the enforcement and finality of state court judgments.” CCJ, Resolution 26, adopted as proposed by the International Agreements Committee at the 56th Annual Meeting on July 29, 2004.

**Cities, mayors CSG.** National League of Cities, U.S. Conference of Mayors, Council of State Governments and National Conference of State Legislatures, joint letter to Ambassador Robert Zoellick (September 23, 2003).

**National Association of Attorneys General.** NAAG asked Congress to “ensure that ... foreign investors shall receive no greater rights to foreign compensation than those afforded to our citizens.” NAAG, Resolution, Spring Meeting, March 20-22, 2002, Washington, DC.

**Association of Towns and Townships.** Tom Haliki, Executive Director, NATaT, letter to U.S. Senators (April 4, 2002).

<sup>44</sup> Argentina alone has been sued in at least 8 different water cases: (1) *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina Republic* (ICSID Case No. ARB/97/3); (2) *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12); (3) *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/03/30); (4) *SAUR International v. Argentine Republic* (ICSID Case No. ARB/04/4); (5) *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17); (6) *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina Republic* (ICSID Case No. ARB/03/19) consolidated with *AWG Group plc v. Argentina* (UNCITRAL); (7) *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17); (8)

Most of these cases deal with challenges to governmental authority to regulate threats to health and safety resulting from pollution of groundwater or surface water (for example *Methanex v. United States* and *Metalclad v. Mexico*<sup>45</sup>) or water utility privatization (for example *Azurix v. Argentina*, *Aguas del Tunari v. Bolivia*, and *Biwater v. Tanzania*<sup>46</sup>). There is at least one example of bulk water transport case being filed under NAFTA chapter 11, although that claim has been alleged to be frivolous and never went to arbitration (*Sun Belt Water v. Canada*<sup>47</sup>).

So a challenge under an international investment agreement or bilateral investment treaty to Maine's authority to regulate its water resources is always possible.

Such an international investment claim might be made even if Maine adopts measures in the public interest and without the intent to discriminate against a foreign firm. For example, in *Metalclad v. Mexico*, an international tribunal found a violation of NAFTA's chapter 11 on investment when state and local governments took regulatory action to stop operation by U.S.-based Metalclad Corporation of a hazardous waste disposal facility believed to be a threat to drinking water safety and the environment. *See appendix II.*

This suggests that Maine may want to work with the U.S. Trade Representative's office and with the Maine congressional delegation to seek an official interpretation of NAFTA chapter 11 and clear language in future agreements and treaties that will codify parts of the *Methanex* and *Glamis Gold* decisions and otherwise protect bona fide government regulations, including water regulations, from any *Metalclad*-type claim that might be based on the actions of the

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*Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic* (ICSID Case No. ARB/07/26). Information on ICSID cases available at, <http://icsid.worldbank.org/ICSID/Index.jsp>.

<sup>45</sup> *Metalclad v. Mexico*, available at, <http://naftaclaims.com/Disputes/Mexico/Metalclad/Metalcladfinalaward.pdf>; Award, *Methanex v. United States*, available at, [http://naftaclaims.com/disputes\\_us\\_methanex.htm](http://naftaclaims.com/disputes_us_methanex.htm).

<sup>46</sup> *Azurix*, above. Investment Treaty News, 'Azurix Wins Claim Against Argentina,' International Institute for Sustainable Development, July 26, 2006, available at <http://www.iisd.org/investment/itm>.; Jim Schultz, "Bechtel v. Bolivia: The People Win" (Bechtel settles for only symbolic damages), Latin America Solidarity Centre, January 19, 2006, available at, <http://www.lasc.ie/news/bechtel-vs-bolivia.html>.; Award, *Biwater Gauff Ltd. v. Republic of Tanzania*, available at <http://www.worldbank.org/icsid/cases/awards.htm#awardarbo0522>; Epaminontas E. Triantafyllou, "No Remedy for an Investor's Own Mismanagement: The Award in the ICSID Case Biwater Gauff v. Tanzania," International Disputes Quarterly, White & Case, Winter 2009, available at, [http://www.whitecase.com/idq/winter\\_2009\\_4/](http://www.whitecase.com/idq/winter_2009_4/).

<sup>47</sup> Notice of Intent to Submit a Claim to Arbitration, November 27, 1998 and Notice of Claim and Demand for Arbitration, *Sun Belt Water v. Canada*, October 12, 1999, available at, <http://sunbeltwater.com/docs.shtml>.

State of Maine. Codification of the favorable decisions in *Methanex* and *Glamis Gold* is essential because there is no rule of precedent or *stare decisis* in customary international investment law.<sup>48</sup> Nor is there even an authoritative appellate body to reconcile conflicts between different tribunal rulings. Unfortunately powerful business lobbies and corporate lawyers in Washington D.C. oppose such reform measures and codification of the rules in *Methanex* and *Glamis Gold* in particular.<sup>49</sup>

In contrast to the narrow construction by U.S. courts of analogous property rights protections in the Fifth Amendment “takings” clause and the even more narrow construction of constitutional property clauses in other legal systems,<sup>50</sup> international arbitrators have room to read the vague expropriation language of international investment treaties and agreements broadly or narrowly. The arbitrators in *Methanex v. United States* interpreted NAFTA’s expropriation rule narrowly, but the tribunal in the earlier case of *Pope & Talbott* gave the same language a broad construction.<sup>51</sup> Accordingly, the construction of the expropriation

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<sup>48</sup> For example, article 1136(1) NAFTA provides that: “An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.” available at <http://www.nafta-sec-alena.org/en/view.aspx?x=343>. Moreover, case law is not supposed to be a source of customary international law. “Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.” Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987).

<sup>49</sup> Objecting to the proposal to codify the rule in *Methanex*, Linda Menghetti, from the Emergency Committee for American Trade writes, “Professor Stumberg proposes that the U.S. should “[n]arrow indirect expropriation so that it does not apply to nondiscriminatory regulations as explained in the *Methanex* award.” *Methanex* provides; in pertinent part, that “a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, *inter alia*, a foreign investor or investment is not deemed expropriatory and compensable . . . .” Professor Stumberg’s proposal would significantly narrow an investor’s rights and would be inconsistent with international law.” Additional Views Submitted on Behalf of the Emergency Committee for American Trade, Hearing on “Investment Protections in U.S. Trade and Investment Agreements,” held by the Subcommittee on Trade of the House Committee on Ways and Means on May 14, 2009, available at <http://waysandmeans.house.gov/hearings>. For objections from the international business community and bar regarding the award in *Glamis Gold v. United States*, see Report of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty, U.S. Department of State, September 30, 2009, pp. 3-4, pp.18-19; statement appended to the Report from Steven Canner, U.S. Council for International Business, Jennifer Haworth McCandless, Sidley Austin LLP, and Linda Menghetti, Emergency Committee for American Trade, pp.19-20; statement appended to the Report from Shaun Donnelly, National Association of Manufacturers, p. 20; statement appended to the Report from Sean Heather, U.S. Chamber of Commerce; statement appended to the Report from Judge Stephen Schweibel, independent arbitrator p. 34. (on file Forum on Democracy & Trade).

<sup>50</sup> While U.S. constitutional case law construes the analogous Fifth Amendment Takings Clause narrowly compared to the construction of “expropriation” by many international investment tribunals, U.S. courts do recognize “regulatory takings” when the regulation eliminates all or substantially all economic value, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 at 1019 n.8, (1992) (“It is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full”), thereby providing in the U.S.A. greater protection of property rights than is the norm in other legal systems around the world. See A.J. Van der Walt, *Constitutional Property Clauses: A Comparative Analysis*, (1999) p.17 (“the distinction between police-power regulation of property and eminent-domain expropriation of property is fundamental to all [constitutional] property clauses, because only the later is compensated as a rule. Normally, there will be no provision for compensation for deprivations or losses caused by police-power regulation of property.”).

<sup>51</sup> The NAFTA tribunal decision in *Methanex v. United States* reads the rule relatively narrowly, concluding that: “as a matter of

article of IIAs in future cases is unpredictable, particularly given that there is no rule of precedent or *stare decisis* in international investment law. Unless IIA expropriation articles are reformed by codifying the *Methanex* rule or by otherwise reflecting the international legal norm that police-power regulations are not compensable, some IIA tribunals will bestow greater rights to foreign investors than U.S. investors enjoy under one of the more ‘property-rights friendly’ constitutions in the world (and thereby radically depart from the norm under domestic law in legal systems around the world).

The obligation on parties to provide a minimum standard of treatment (MST) including “fair and equitable treatment” under international law is also vague and subject to being read broadly or narrowly.<sup>52</sup> International investment tribunals are not in agreement on the scope of MST rules. In contrast to the consistently narrow construction by modern U.S. courts of analogous “substantive due process” obligations, many international investment tribunals give a broad construction to the minimum standard of treatment obligation. On the other hand, a NAFTA tribunal in the recently decided case of *Glamis Gold v. United States* read it more narrowly.

One line of tribunal decisions, for example, has indicated that the minimum standard of treatment imposes a duty on governments to change maintain a stable and predictable legal environment.<sup>53</sup> By contrast, under U.S. substantive due process analysis and presumably

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international law, a nondiscriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects...a foreign investor or investment is not deemed expropriatory or compensatory,” unless specific commitments to refrain from regulation were made to the investor. *Methanex v. United States*, Final Award, part IV, chapter D, paragraph 7 (2005). In sharp contrast, the NAFTA panel in *Pope & Talbot*, although it ultimately rejected Pope and Talbot’s expropriation claim, said economic regulation, even when it is an exercise of the state’s traditional police powers, can be a prohibited indirect or “creeping” expropriation under customary international law if it is “substantial enough.” *Pope & Talbot v. Canada*, Interim Award by Arbitral Tribunal, In the Matter of an Arbitration Under Chapter Eleven of The North American Free Trade Agreement Between Pope & Talbot Inc. and The Government of Canada (April 10, 2001), pp. 33-34, available at <http://www.naftaclaims.com>.

<sup>52</sup> See generally Matthew C. Porterfield, *An International Common Law of Investor Rights?* 27 U. Pa. J. Int’l Econ. L. 79 (2009).

<sup>53</sup> For example, Azurix, a U.S. water services company won a multi-million dollar award against Argentina under the US-Argentina Bilateral Investment Treaty (BIT), based on the finding of the arbitral tribunal that Argentine water regulators had violated the “fair and equitable treatment” provisions of the minimum standard of treatment article in the U.S./Argentine BIT. Other examples include *Saluka Investments BV v. Czech Republic*, UNCITRAL, Permanent Court of Arbitration, Award (Mar. 17, 2006), available at <http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf>; and *Occidental Petroleum Exploration and Production Co. v. Ecuador*, para. 191 (UNCITRAL Arb.) (2004). According to the United Nations Conference on Trade and Development: “On fair and equitable treatment, several recent decisions have upheld and reinforced a broad acceptance of the FET standard in line with the often-cited *Tecmed* award in 2003. In *LG&E v. the Argentine Republic*, for example, the tribunal affirmed that the “fair and equitable standard consists of the host State’s consistent and

under due process principles embodied in other legal systems, governments are generally free to change regulatory standards in response to changed circumstances or priorities. Some tribunals have also noted that the minimum standard of treatment is continuing to “evolve,” suggesting that the scope of protection that it provides to foreign investors will continue to expand.<sup>54</sup>

This expansive reading of the MST obligation, however, was rejected by the tribunal in *Glamis Gold*. The tribunal ruled for the United States in this landmark case,<sup>55</sup> in which Glamis, a Canadian corporation, sued under NAFTA’s chapter 11, seeking \$50 million in compensation for actions taken by the U.S. Department of Interior and the State of California, imposing environmental and land use regulations on Glamis’s proposed open-pit gold mine in the Imperial Valley of California. The tribunal decision in *Glamis* may represent an important advance when it comes to preserving governmental regulatory authority in the face of property rights claims based on minimum standard of treatment obligations, depending on the outcome of future cases.<sup>56</sup> Again, the problem is that *Glamis* is not controlling precedent.

Professor Stumberg nicely summarizes the general state sovereignty problems with international investment agreements and the politically-possible IIA reforms that would

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transparent behaviour, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor.” This reading is in line with the other awards rendered in 2006 in *Azurix v. The Argentine Republic* and *Saluka v. The Czech Republic*.” UNCTAD, Latest Developments In Investor-State Dispute Settlement, IIA Monitor No. 4, United Nations, New York Geneva, 2006, p. 4 (on file).

<sup>54</sup> Award *Mondev Int’l Ltd. V. United States*, Case No. ARB(AF)/99/2, para. 116, ICSID (W. Bank) (Oct.11, 2002), available at [www.naftalaw.com](http://www.naftalaw.com).

<sup>55</sup> The United States was the ‘defendant’ in this case, even though the case concerns California state law and regulation, by virtue of the fact that the US federal government, and not California, is the signatory of the NAFTA treaty.

<sup>56</sup> Transcripts, submissions, and tribunal orders in *Glamis Gold v. United States* may be found at <http://www.state.goc/s/1/c10986.htm>. The *Glamis* tribunal rejected the plaintiff’s broad reading of MST, finding that none of the actions of the United States or the State of California violated the obligation to provide “fair and equitable treatment,” a standard that must be understood as “customary international law,” under the official interpretation of MST by the NAFTA Free Trade Commission. “Custom,” the tribunal concluded, is a question of fact that must be found in the “practice of states.” The baseline for understanding the customary international law standard for fair and equitable treatment, the tribunal said, was established in the 1926 *Neer* arbitration. The tribunal further determined that no convincing evidence based on the practice of states had been presented by Glamis Gold to show that the *Neer* standard has evolved to encompass a right to a “stable regulatory and business climate” and similar concepts. In other words, just as in 1926 a violation of the standard of “fair and equitable treatment” requires that an act by a nation-state must be: (1) “sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons,” or (2) “creation by the State of objective expectations in order to induce investments and the subsequent repudiation of those expectation.” Based on its application of the *Neer* standard, the tribunal concluded that none of the acts of the United States and the State of California about which Glamis Gold complained violated the customary international law standard.

substantially mitigate those problems,<sup>57</sup> “To date, the U.S. defense team has successfully defended against NAFTA investor-state claims. Yet behind closed doors, there is significant concern that NAFTA panels will begin to rule against the United States.<sup>58</sup> For example, Abner Mikva, a former congressman and retired federal circuit court judge, was the U.S. government’s appointed arbitrator in *Loewen v. United States*. Judge Mikva recounted a meeting with U.S. officials prior to the panel being constituted. ‘You know, judge,’ they said, ‘if we lose this case we could lose NAFTA.’ ‘Well, if you want to put pressure on me,’ Mikva replied, ‘then that does it.’<sup>59</sup> As BITS and FTAs multiply, more investors have arbitration rights. The risk grows that arbitrators will start to interpret the ambiguity of investor protections in ways that are unfavorable to the United States. ‘No greater rights’ is still the right mandate for negotiators. But the language in BITS and FTAs needs to be revised to ensure that it conforms to the conservative interpretation that the United States has used to defend against the investor claims.”

**5. Conclusion: Why is it important to reform international trade and investment agreements to provide greater clarity and certainty with respect to potential conflicts with state law and state water law in particular?**

The language of international trade and investment agreements is characteristically vague and subject to multiple interpretations, particularly as it relates to potential conflicts with state water law. The World Trade Organization (WTO) agreement on trade in goods (the GATT) clearly covers trade in bottled water, but there are at least two schools of thought on whether trade in bulk water is covered. Opinions similarly differ about whether the WTO agreement on trade in services (the GATS) covers groundwater measures, although an argument can be made that some regulations of distribution services that may affect water policy are covered. Because they define investment so broadly, international investment agreements (IIAs) cover state water measures, and are the most likely source

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<sup>57</sup> Robert Stumberg, “Reforming Investor Rights,” testimony before the U.S. House Ways and Means Committee, Subcommittee on Trade, May 14, 2009. (on file)

<sup>58</sup> There is considerable speculation about why the United States has not lost any NAFTA cases, including open discussion by arbitrators about the pressures of deciding claims against the United States. See, David Schneiderman, “Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes” ExpressO, (2009), available at: [http://works.bepress.com/david\\_schneiderman/1](http://works.bepress.com/david_schneiderman/1) (“Not so easily explained are conflicting tribunal awards drawing on virtually identical facts, invoking the same treaty text, where arbitrators seemingly change their mind from one case to the next without any explanation.”)

<sup>59</sup> Remarks of Judge Abner Mikva, Symposium: The Judiciary and Environmental Law, Panel on Trade, the Environment and Provincial/State Courts, Pace University School of Law, White Plains, New York, (December 7, 2004) (on file).

of an international lawsuit. But, the rules defining when a state water measure violates an IIA are vague, and the key rules related to indirect expropriation and minimum standard of treatment are almost impossibly vague. The results are contradictory interpretations of the rules by different international investment tribunals that are not bound by the principle of *stare decisis* or subject to review by an appellate tribunal. The uncertainty about how investment tribunals will rule is compounded by the relatively small number and the narrow scope of general exceptions in international investment agreements.

Howard Mann concludes, “ In short, there remains great uncertainty as to how trade law will or will not constrain governmental ability to prohibit or restrict exports of freshwater resources. This uncertainty is compounded by elements of international investment law which have led to rulings, in at least three cases in recent years, that the right to export products can be seen as part of the set of protected rights of foreign investors.”<sup>60</sup>

In the end, the lack of clarity, certainty, and predictability in international trade and investment law allows tribunals excessive discretion. While tribunals in the *Methanex* and *Glamis* investment cases used their discretion wisely and prudently declined to find that the democratically-elected governor and legislature of California had violated international law, other tribunals appear intent on expanding the scope of international property rights protections to limit the authority of local democratic institutions.

The solution is to reform international trade and investment agreements to, in the place of vague text, substitute:

- Specific language protecting the authority of local democratic institutions and local courts to act in the public interest; and
- Specific language in new general exclusions in trade and investment agreement coverage of key areas of state regulatory authority, including regulation and protection of freshwater resources.

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<sup>60</sup> Howard Mann, *International Economic Law: Water for Money's Sake?*, I Seminario Latino-Americano de Políticas em Recursos Hídricos, September 2004, Brasília, Brazil, pp.7-8, *available at* <http://www.howardmann.ca.pdfs/WaterandInternationaleconomiclaw.pdf>. Regarding the “right to export products”, Mann cites *Pope & Talbot v. Canada*, *S.D. Meyers v. Canada*, and *Marvin Feldman v. Mexico*, all available at [www.naftalaw.org](http://www.naftalaw.org). But, keep in mind that, the official interpretation of the “minimum standard of treatment” obligation by the parties to NAFTA bars the implied incorporation of treaty law, such as GATT article XI as part of “customary international law.”

**Appendix I:**  
**Selected Policy Options Worthy of Further Debate**

**General Water Policy Reforms for International  
Trade and Investment Agreements**

- *Maine may want to consider the pros and cons of petitioning Congress and the President to ensure that all international trade and investment agreements entered into by the United States include the following provisions:*
  - Water, including bottled water, shall not be regarded as a good or a product and shall be excluded from coverage in all international trade and investment agreements;
  - Any bona fide and non-discriminatory regulation adopted in the public interest related to or affecting the drilling for, pumping or extraction of water or related to or affecting the distribution or transportation of water, whether by pipeline, marine, land, or other transport, is excluded from coverage in all international trade and investment agreements;
  - No international trade or investment agreement shall require the privatization of drinking water or sanitation services (or services related to those sectors) or to require the payment of damages or the authorization of retaliatory trade sanctions as a result of either the regulation or the total or partial exclusion of private investors or companies from drinking water and sewerage markets (or by the de-privatization of drinking water and sanitation services).

**General Federalism Reforms for International  
Trade and Investment Agreements**

- *Maine may want to reiterate its call to Congress and the President for greater state-federal consultation on trade and federalism issues and for additional protections against federal preemption and unfunded federal mandates resulting from trade and investment disputes. For example, Congress could enact legislation to forbid U.S. federal agencies from taking any of the following actions on grounds that a state, tribal, or local government measure (or its application) is inconsistent with an international agreement or treaty or award:*
  - Initiate legal action to preempt or invalidate a sub-national law or its enforcement or application;
  - Directly or indirectly shift costs to a state or local government in response to an international tribunal decision that the United States must pay compensation to a foreign investor.

## Reform of International Services Agreements

*Maine may want to reiterate its call for Congress and the President to limit the coverage of state and local measures in international services agreements, in ways that specifically reference water policy. For example:*

- All international services agreements entered into by the United States could include provisions that:
  - Preserve the right of federal, state, and local governments to provide and regulate services in the public interest, including water and sewer services, on a non-discriminatory basis;
  - Provide that nothing in any services agreement shall bar measures rolling back service privatization or require the privatization of public services, even when such services are provided on a commercial basis and/or are already partially privatized;
  - Provide that services disciplines shall be based exclusively on a positive list of commitment, each of which is defined in detail;
  - Provide a general exclusion from the agreement for distribution and transportation of water and for drinking water and sanitation services.
- The United States by legislation or executive directive could adopt a policy that:
  - It will never accept a GATS agreement on domestic regulation that requires domestic regulations to meet a “necessity test” even if drafted in language addressing a “disguised barrier to trade,” to be “pre-established, based on objective criteria, or relevant;”
  - The section in the proposed agreement on domestic regulation providing for a principle of deference to legitimate national policy objectives shall explicitly state that national policy objectives include objectives identified at both national or sub-national levels.

## Reform of International Investment Agreements and Treaties

*Maine may want to consider the pros and cons of reiterating its call for Congress and the President to limit the coverage of state and local measures in international services agreements, in the following respects among others:*

- *Minimum standard of treatment* – Narrow the minimum standard treatment to the elements of customary international law as explained in the U.S. brief in *Glamis*, in which the State Department argued for a reading of MST confined to three elements: (1) compensation for expropriation, (2) “internal security,” and (3) “denial of justice” where domestic courts or agencies (not legislatures) treat foreign investors in a way that is “notoriously unjust” or “egregious” such as a denial of procedural due process.<sup>61</sup> Further,

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<sup>61</sup> Counter-Memorial of Respondent United States of America, in *Glamis Gold v. USA* (September 19, 2006) 221.

the expectation of a stable or unchanging legal environment is not to be understood as part of customary international law.<sup>62</sup>

- *Indirect expropriation* – Narrow indirect expropriation so that it does not apply to nondiscriminatory regulations as explained in the *Methanex* award. In other words, establish that the adoption or application by any national or sub-national government of any bona fide and non-discriminatory measure intended to serve a public purpose shall not constitute a violation of an expropriation article of an investment agreement or treaty.<sup>63</sup>
- *Protected investments* – Narrow the definition of investment to include only the kinds of property that are protected by the takings clause of the U.S. Constitution. Exclude from the definition of investment the expectation of gain or profit, the assumption of risk, and intangible property interests other than intellectual property. Acknowledge that property interests are limited by background principles of domestic property, water, and nuisance law.
- *Exhaustion of remedies* – Follow international law and require investors to exhaust domestic remedies before using investor-state arbitration. This recognizes that international investor-to-state arbitration is to be used as a last resort and should not be invoked routinely as a means of circumventing the domestic administrative and judicial processes. This also allows domestic courts and administrative bodies to resolve disputed facts and disputed points of domestic law prior to review by international arbitrators.
- *Waiver of right to file an international investment claim* – Clarify that no international investment tribunal shall find a contract provision in which a foreign investor waives its right to pursue an international investment claim to be unenforceable. *See Appendix III.*

## Measures That Might Be Taken By State And Local Governments In Maine

*The State of Maine and its subdivisions may want to consider the pros and cons of a:*

- *Waiver of right to file an international investment claim* – Require that contracts between governmental units in Maine and private investors include a waiver of any right by investors to seek compensation through international investment arbitration. *See appendix III.*

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<sup>62</sup> Counter-Memorial... at 226, 232.

<sup>63</sup> The Intergovernmental Policy Advisory Committee, which is the formal state and local government advisory body to the U.S. Trade Representative, has recommended codifying the rule in *Methanex v. United States*, "The recent ruling in the *Methanex* dispute established an important precedent for safeguarding important principles of federalism and state sovereignty of concern to this Committee. However, since such tribunal judgments are not formally precedential, IGPAC members recommend that the case's finding that 'as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted with due process and which affects... a foreign investor or investment is not deemed expropriatory and compensable....' be codified as a formal Interpretive Note in NAFTA and other existing FTAs, and that corrected language be added to this TPA and future trade agreements." "The US-Peru Trade Promotion Agreement: Report of the Intergovernmental Policy Advisory Committee," February 1, 2006, available at, [http://www.citizen.org/documents/IGPAC\\_Peru\\_Report.pdf](http://www.citizen.org/documents/IGPAC_Peru_Report.pdf).

## **Appendix II:**

# **Metalclad v. Mexico**

### **What were the facts in Metalclad?[4]**

This dispute arose over the use of a plot of land, located near the municipality of Guadalcazar, in the state of San Luis Potosi, Mexico. This plot of land was originally owned originally by a Mexican company, COTERIN. In 1990, the Mexican federal government granted COTERIN a permit to build and operate a hazardous waste landfill on the land. Thereafter, COTERIN applied to the municipality of Guadalcazar for a building permit to construct the landfill. In both 1991 and 1992, the municipality denied COTERIN such a building permit. Despite the municipality's denial, in 1993 COTERIN received three building permits to construct and operate the landfill: two from the Mexican federal government's Secretariat of the Environment, and one land use permit from the state government of San Luis Potosi. But COTERIN still had not received a municipal building permit.

In 1993 the U.S. corporation Metalclad contracted for an option to buy COTERIN and its permits[5]. Then—after receiving assurances from federal government officials as well as the Governor of San Luis Potosi[6] that all necessary permits for the landfill had been obtained—and that the federal government would secure any further support required from the state of San Luis Potosi and the municipality of Guadalcazar—Metalclad purchased COTERIN, the landfill site, and COTERIN's state and federal building permits.[7]

Shortly after Metalclad purchased COTERIN, the Governor of San Luis Potosi publicly denounced the landfill project. Nevertheless, in May 1994, upon securing an extension of the federal building permit, Metalclad began construction of the landfill.[8] Then, in October, 1994, the City of Guadalcazar ordered a halt to construction because Metalclad had not obtained proper municipal building permits. Federal officials advised Metalclad to apply for the municipal permit merely "to appease the municipality," allegedly assuring Metalclad that Guadalcazar could not deny the permit. Metalclad therefore applied again for the municipal permit. Immediately thereafter Metalclad resumed construction, and in March 1995 completed the landfill building project.

That same month, Metalclad attempted to open its new facility for operations. But angry local protestors, allegedly with the aid of state troopers, blocked the opening of the new facility. The landfill remained closed until November 1995.

In November, Metalclad entered into an agreement with two federal agencies, and the facility began to operate. The Guadalcazar city council responded in December 1995 by denying Metalclad's last petition for a municipal building permit. Allegedly, the city council acted without granting the Metalclad corporation any notice or opportunity to be heard.

Soon thereafter, Guadalcazar brought action against the federal government to challenge the

agreement the federal agencies entered into with Metalclad. Pending resolution of this suit, Guadalucazar successfully obtained a preliminary injunction barring further operations at the landfill site. While the action was pending, the same federal agencies granted Metalclad a further permit which authorized a substantial expansion of the landfill site.

Finally, in September 1997, the Governor of San Luis Potosi issued a state-level decree which established the landfill site as a protected natural area. Thus, without any reference to the lack of a municipal building permit, the state government entirely prevented the landfill from operating.

### **What is the history of the Metalclad proceedings?**

Nine months earlier, on January 2, 1997, Metalclad had already demanded arbitration under NAFTA's Chapter 11. In its claim against the Mexican federal government, Metalclad argued that the nation of Mexico was responsible under international law for the conduct of its governmental subdivisions, and that both the state of San Luis Potosi and the municipality of Guadalucazar had violated NAFTA section 1105's "minimum treatment" standard, and NAFTA section 1110's "expropriation" prohibition.

As provided for in NAFTA, Article 1120, Metalclad filed its Notice of Claim with the Additional Facility of the International Centre for Settlement of Investment Disputes (ICSID). On January 13, 1997, the Secretary-General of ICSID informed the parties that the requirements for accessing an ICSID tribunal had been fulfilled, and issued a Certificate of Registration of the Notice of Claim. On May 19, 1997 the ICSID Tribunal was constituted, and it held its first session on July 15, 1997.

After extensive review of Metalclad's claims during a period of over three years, in August 2000 the ICSID Additional Facility tribunal issued a two-part decision: (1) Mexico's conduct violated Article 1105(1) of NAFTA, which was intended to ensure the fairness, equity, and "transparency" of domestic investment rules for foreign investors, and (2) Mexico's conduct was deemed to be "a measure tantamount to expropriation" under the language of NAFTA section 1110. For these two violations, the Tribunal found that Metalclad was entitled to monetary relief in the amount of \$16.9 million from the nation of Mexico.

Following the August 2000 decision of the arbitration panel, Mexico sought domestic court review in the British Columbia Supreme Court. "Because the parties had designated the place of arbitration to be Vancouver, B.C., the International Commercial Arbitration Act allowed the Supreme Court of British Columbia to [have jurisdiction to] set aside the Tribunal's award under certain limited circumstances"—should the proceeding move to that stage.[9]

On May 2, 2001, the British Columbia Supreme Court resolved the question of whether the Metalclad tribunal had exceeded its authority under the B.C. international arbitration statute.[10] The decision came down in favor of Metalclad, as the British Columbia Supreme Court agreed with the Tribunal that the Mexican federal government owed Metalclad nearly \$16 million US dollars.[11]

- Specifically, in his British Columbia Supreme Court opinion, Judge Tysoe delivered a two-part decision which (1) agreed with the ICSID Tribunal's finding that the decree passed by the State government of San Luis Potosi was an expropriation of Metalclad's property; (2) agreed that compensation to Metalclad was thus required by the federal government of Mexico under NAFTA Chapter 11; and (3) disagreed with the Tribunal's finding that the refusal of Guadalcasar to grant a municipal building permit was a violation of NAFTA obligations of "fair and equitable treatment" under article 1105(1) on minimum treatment under international law and therefore also a violation of article 1110 on expropriation. (Judge Tysoe reached this conclusion because the violation alleged was based on the wrong section of NAFTA[12].)

Soon after the British Columbia court reached its result, the Mexican federal government announced that "Mexico's Ministry of the Economy has paid over \$16 million U.S. dollars to the United States corporation Metalclad in order to comply with a ruling by a North American Free Trade Agreement (NAFTA) arbitration panel." [13]

In sum, following the NAFTA Tribunal decision and the British Columbia Supreme Court decision, the Mexican federal government was required to pay – and did pay – the full costs of the tribunal award. [14]

### **What was the basis for the tribunal and appellate court decisions?**

**The Tribunal decision:** The Metalclad tribunal found that Mexican authorities had violated two important investor rights protected by NAFTA: article 1110 on expropriation and article 1105 on minimum treatment under international law.

- **Compensation for expropriation.** NAFTA requires member nations to compensate investors if national or subnational governments "directly or indirectly nationalize or expropriate" an investment of the other countries' investors in its territory. Expropriation includes measures "tantamount to nationalization or expropriation." [15] The Metalclad tribunal had to decide not only the scope of expropriation, but also what the open-ended references to "tantamount to expropriation" and "indirect" expropriation meant.

The Metalclad tribunal broadly read the term "tantamount to expropriation" and "indirect expropriation" in NAFTA's article on expropriation. This broad reading granted to investors a set of property rights protections that extend beyond the protections granted to property owners under the Fifth Amendment to the U.S. Constitution.

In interpreting the Fifth Amendment "takings" clause, the U.S. Supreme Court "usually has applied the regulatory takings analysis only to regulations of specific interests in property." [16] Expected or future economic benefits are not considered property under the Takings Clause. [17] By way of contrast, the Metalclad tribunal read NAFTA's expropriation article to include not merely the seizure of property or its regulation to the point that its economic value is extinguished, but also "covert or incidental interference with the use of property which has the effect of depriving the owner in whole or

significant part, of the use or reasonably-to-be-expected economic benefit of property...”[18] In its Metalclad opinion, the “tribunal made it clear...that the relevant ‘investment’ for purposes of its expropriation analysis was Metalclad’s broader interest in operating a particular type of business, not merely its interest in its real property.”[19]

- **Minimum treatment under international law.** NAFTA article 1105(1) requires member nations to provide other members' investors with treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. Article 1105 is intended to serve roughly the same purpose as “due process” norms in U.S. constitutional law, but because article 1105’s terms are largely undefined, especially when compared with the extensive U.S. case law on procedural and substantive due process, international investment tribunals exercise great discretion when they make inherently subjective judgments about when government action violates fundamental principles of procedural or substantive justice.[20]

According to the Metalclad tribunal, Mexico breached article 1105(1) because it “failed to ensure a transparent and predictable framework for Metalclad’s business planning and investment.”[21] The tribunal noted the lack of an “orderly process” in at least three circumstances:[22]

No clear rule or established practice: The tribunal concluded that Mexico did not accord Metalclad “fair and equitable treatment.” Fair and equitable treatment was understood to incorporate principles of transparency in NAFTA chapter 18, because there was no clear rule and no established practice with respect to whether Metalclad was required to obtain a municipal permit prior to constructing and operating its hazardous waste facility in San Luis Potosi.[23]

Detrimental reliance on assurances of federal officials: The tribunal similarly concluded that Mexico did not accord Metalclad “fair and equitable treatment” (as interpreted to require transparency and a predictable regulatory environment) because the company relied on representations of federal officials that a municipal permit was not required. But Guadalupe officials later refused that permit.[24] A finding that Mexico had failed to provide Metalclad with “fair and equitable treatment,” because of statements made by Mexican federal officials, would be an astonishing conclusion in a U.S. court—where businesses have an obligation to take due diligence in researching the laws and regulations that regulate their economic activities.

Notice and opportunity to be heard: The tribunal finally concluded that Mexico did not accord Metalclad “fair and equitable treatment” because the municipality of Guadalupe did not meet its obligation to conduct a transparent regulatory process, when it failed to give Metalclad adequate notice of the meeting where its construction permit application was denied and failed to provide adequate and credible reasons for denying the permit.[25]

Certainly, a U.S. court might find an authentic failure to provide notice and opportunity to be heard to be a violation of procedural due process. The question here is why the

Metalclad panel felt competent to apply Mexican law and make its own findings of fact— rather than requiring Metalclad to pursue its claims using domestic judicial remedies.

- **The appellate court decision.** Because Metalclad v. Mexico was arbitrated under ICSID Additional Facility rules, domestic courts could review the tribunal decision. Those rules allow a party to ask the domestic courts at the “seat” of the arbitration, in this case British Columbia, to set aside an award because of a violation of that jurisdiction’s international arbitration statute.[26] On this basis Mexico petitioned a British Columbia court to review the award in the Metalclad case to determine its conformity with the B.C. statute governing such arbitrations (which is based on the International Commercial Arbitration Act). The grounds for review under the B.C. statute are: improper constitution of the tribunal, actions taken beyond the jurisdiction of the tribunal, and violations of public policy.[27]

As noted above, the British Columbia Supreme Court in an opinion by Judge David Tysoe agreed with the Metalclad tribunal’s finding that the decree issued by the state government of San Luis Potosi, creating an ecological zone and barring Metalclad’s waste disposal facility from operating, was an expropriation of Metalclad’s property, but it disagreed with the tribunal’s findings that the refusal of City of Guadalcazar to grant a municipal building permit for the Metalclad facility was a denial of fair and equitable treatment under international law and an expropriation.[28]

Recall that the Metalclad tribunal interpreted the concept of “fair and equitable treatment” under article 1105(1) in light of the transparency requirements in NAFTA article 102(1), a section of the agreement not located in chapter 11 on investment, but in chapter 18 of the agreement. But, Metalclad’s right to arbitrate a claim against Mexico, Judge Tysoe reasoned, is confined to alleged breaches of obligations under section A of NAFTA chapter 11 and two articles found in chapter 15 and do not extend to the transparency obligation in chapter 18 (an obligation that might be the basis of state-to-state arbitration, but not investor-to-state arbitration). Therefore, Tysoe concluded that the Metalclad tribunal was acting beyond the scope of its authority to arbitrate under B.C. international arbitration act, because the tribunal found that the municipality of Guadalcazar—which required, but then refused to issue, a building permit—violated Mexico’s article 1105(1) obligation related to “fair and equitable treatment.” Also, the tribunal’s finding that Guadalcazar’s non-transparent permitting process amounted to an expropriation under article 1110, Tysoe concluded, was beyond the scope of its authority under the B.C. arbitration statute.

In other words, the tribunal’s finding of an article 1110 expropriation violation was also beyond the scope of the tribunal’s authority under the B.C. statute because it was based entirely on the previous finding of an article 1105(1) violation that inappropriately incorporated transparency obligations from NAFTA chapter 18.[29]

Nonetheless, Judge Tysoe let stand the Metalclad tribunal’s finding that the ecological decree of the state of San Luis Potosi was a violation of article 1110 on expropriation

because that finding was based on neither a lack of transparency nor a flawed finding of an article 1105(1) violation.[30]

### **What are the legal and policy implications of the Metalclad decisions?**

**The Tribunal decision.** State and local officials should be concerned about the Metalclad tribunal decision for at least three reasons:

- **A successful challenge to core functions of state and local government:** The Metalclad case illustrates how NAFTA's investment chapter allowed a transnational corporation to successfully bring a complaint based on state and local governments performance of core governmental functions: protecting public health and regulating land use.
- **A broad reading of NAFTA's investor protection against expropriation:** The Metalclad tribunal read article 1110 on expropriation very broadly to include "covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of the property." [31] This broad reading of article 1110 would provide foreign investors with greater rights than U.S. investors in property enjoy under the U.S. regulatory takings doctrine. This broad reading would substantially diminish state and local regulatory authority related to land use and environmental protection. As the U.S. Supreme Court explained in its recent decision in *Lingle v. Chevron* 125 S. Ct. 2074 (2005), which rejected Chevron's "takings" arguments, the touchstone of regulatory takings doctrine is "to identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain." [32]
- **A broad reading of NAFTA investor protection related to minimum treatment under international law:** The Metalclad panel's finding that transparency requirements should be read into the concept of "fair and equitable treatment" parallels the expansive reading of the text of article 1105 by other NAFTA tribunals. For example, a NAFTA tribunal in *Waste Management II* concluded that "fair and equitable treatment" is violated by government conduct "leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process." [33] No responsible U.S. court would presume to divine natural law in this way.

### **ENDNOTES**

[1] *Metalclad Corp. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000) (hereinafter *Metalclad v. Mexico*), at <http://www.worldbank.org/icsid/cases/mm-award-e.pdf>.

[2] *Metalclad Corp.* *supra* para 30

[3] Vicki Been, NAFTA's Investment Protections and the Division of Authority for Land Use and Environmental Controls, 32 *Env'tl. L. Rep.* 11001 (Sept. 2002) [hereinafter 'Vicki Been I'].

[4] Metalclad Corp., *supra*. See Vicki Been and Joel C. Beauvais, The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine, 78 *N.Y.U. L. Rev.* 30, 72 (April, 2003) [hereinafter 'Vicki Been II'].

[5] Stephen L. Kass and Jean M. McCarroll, The 'Metalclad' Decision Under NAFTA's Chapter 11, *New York Law Journal*, October 27, 2000, available at [http://www.clm.com/pubs/pub-990359\\_1.html](http://www.clm.com/pubs/pub-990359_1.html) (last visited July 10, 2003).

[6] Vicki Been I, at FN 108.

[7] [http://www.rmalc.org.mx/CIADI/reasons\\_for\\_judgment.pdf](http://www.rmalc.org.mx/CIADI/reasons_for_judgment.pdf)

[8] NAFTA Summary Reasons of Judge Tysoe on Review of Metalclad v. Mexico BCSC. [http://www.canadianliberty.bc.ca/nafta/nafta\\_summary.html](http://www.canadianliberty.bc.ca/nafta/nafta_summary.html)

[9] *Id.*

[10] Mexico Pays \$16 Million to Metalclad, Ending First NAFTA Chapter 11 Dispute (Oct. 30, 2001), <http://www.wtowatch.org/News/index.cfm?ID=2963>

[11] The payment for over \$16 million was very good news for Metalclad in an otherwise lackluster year. According to its SEC filings, Metalclad made a \$7.1 million profit in 2001, but this number was possible only because of the over \$16 million payment received from the Mexican federal government. See Metalclad Corporation (MTLC) Annual Report (SEC form 10-K), Item 7: Management's Discussion and Analysis of Financial Condition and Results of Operations (March 29, 2002), <http://biz.yahoo.com/e/020329/mtlc.html>

[12] NAFTA article 1110.

[13] See, Matthew C. Porterfield. "International Expropriation Rules and Federalism," *Stanford Environmental Law Journal*, Vol. 23, No. 1, January 2004, pp.11-12; *E. Enters v. Apfel*, 524 U.S. 498,541 (1998).

[14] *Id.* Also see, *Andrus v. Allard*, 444 U.S. 51,66 (1979) ("[L]oss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to lay a takings claim.")

[15] *Metalclad v. Mexico supra*, para. 103.

[16] Porterfield, *supra*, at p 47. See *Metalclad v. Mexico, supra*, at para 104.

[17] For example, without being totally subjective, the standard of review applied in two NAFTA chapter 11 cases *Loewen v. United States* (available at <http://www.naftaclaims.com>) and *Mondev v. United States* (available at <http://www.naftaclaims.com>), echoes the *Electronica* tribunal's understanding of a violation of minimum treatment under international law, as encompassing "a willful disregard of due process of law...which shocks or at least surprises a sense of judicial propriety." *Electronica Sicala S.P.A. (SLSI) (U.S. v. Italy)*, I.C.J. 15 at 76 (July 20). A simple "surprise to judicial propriety" would seem to be subjective and only moderately deferential, at best.

[18] *Metalclad v. Mexico supra*, para. 99.

[19] *Id.*

[20] *Metalclad v. Mexico supra*, para. 88 ("The absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit, amounts to a failure on the part of Mexico to ensure the transparency required by NAFTA.")

[21] *Metalclad v. Mexico supra*, para. 89 ("Metalclad was entitled to rely on the representations

of federal officials and to believe that it was entitled to continue its construction of the landfill. In following the advice of these officials, and filing the municipal permit application on November 15, 1994, Metalclad was merely acting prudently and in the full expectation that the permit would be granted.”)

[22] Metalclad v. Mexico *supra*, para. 91.

[23] See *United Mexican States v. Metalclad Corp.*, 2001 B.C. Sup.Ct. 664 (2001), paras. 39-49 [hereinafter Metalclad Appeal].

[24] See Metalclad Appeal, para. 50.

[25] See Metalclad Appeal, paras. 66-76.

[26] See Metalclad Appeal, paras. 57-80.

[27] See Metalclad Appeal, paras. 81-105.

[28] Metalclad v. Mexico *supra*, para. 103

[29] 125 S. Ct. 2074 (2005)

[30] Waste Management II, para. 98 (emphasis added), available at [http:// www.naftalaw.com](http://www.naftalaw.com). See, Mathew Porterfield, “Does CAFTA give greater rights to foreign investors? Roundtable Discussion Outline, March 15, 2005, p. 4 (on file Harrison Institute of Public Law, Georgetown University).

## Appendix III

**Excerpts from:**  
**“Using Contractual Waiver Clauses to Limit the  
Jurisdiction of International Tribunals in  
Investor-State Dispute Resolution”**

by

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*March 2008*

*(on file)*

In recent years, both the level of international investment and the number of investment-related treaties has increased significantly. Investment agreements typically include not only a set of substantive investor protections but also procedural provisions that permit investors to bring disputes concerning treaty protections before the International Centre for Settlement of Investment Disputes (ICSID), the leading international arbitration institution devoted to investor-State dispute settlement, and/or other international arbitral fora. ...

In response to this increasing litigation... States are looking beyond treaty texts for mechanisms to limit international arbitration. This paper analyzes the potential effectiveness of waiver provisions as indicated by key tribunal decisions. Waivers, which are clauses in various forms built directly into investor-State contracts, offer States an innovative tactic for preserving local jurisdiction, particularly over traditionally municipal matters, which, in turn allow States to exert greater control over the interpretation and execution of domestic law. The effect of waivers seems to hinge on tribunal treatment of treaty language pertaining to contract claims. ...

In the relatively few number of decisions that have addressed waiver provisions, tribunals have not rejected altogether the notion that investors can waive international arbitration, at least not in regards to contract claims. In fact, analysis reveals that treatment of the waiver issue is largely dependent upon whether contractual rights or treaty rights are at issue...

Proponents of waivers have argued—and most tribunals have accepted—the individual-rights paradigm: that one of the primary or “special” purposes of BITs [bilateral investment treaties] is to shift rights from States directly to investors. If BITs reflect States “downgrading” international dispute settlement from state-state level to state-investor level, it is arguable that logically an investor should have the ability reject that dispute settlement mechanism. Opponents contend that even if investors do enjoy individual rights disconnected from any larger State-to-State obligation, such rights cannot be waived before a dispute arises; i.e. investors cannot agree to waive rights before the rights are infringed...

Despite scholarship that seems to validate the notion of individual rights and investors' ability to agree to waivers, tribunals have not looked as favorably on the provisions that reflect and apply this understanding, namely forum selection (exclusive jurisdiction) clauses. ...

Even as some tribunals have refrained from exercising jurisdiction over contractual disputes that are disconnected from specific treaty violations, to date no tribunal has directly upheld a forum clause that waives any treaty-vested right or international arbitration of such rights. Tribunal jurisdiction over treaty-based disputes in the face of forum clauses, although vigorously contested in early disputes, has been widely accepted; however, a recent ICSID decision casts this consensus in doubt...

*The majority view: Waivers do not limit jurisdiction over treaty claims*

*Lanco v. Argentina*, the first major ICSID decision to deal with a waiver of investor rights in context of a forum selection clause held what would become an oft-cited premise: that such clauses could not inhibit tribunal jurisdiction over treaty claims. ...

Unlike *Lanco*, *Azurix v. Argentina*, a more recent ICSID decision, presented the tribunal with an express waiver clause. A U.S. company, Azurix signed a concession agreement for the distribution of potable water in Buenos Aires that required it to waive dispute resolution in any forum other than local administrative courts. ... The tribunal rejected the clause's application to treaty claims...

Together *Lanco* and *Azurix* indicate that, regardless of a tribunal's treatment of waivers over contractual disputes, it will not uphold a forum waiver clause limiting jurisdiction to domestic courts if the clause's terms conflict with treaty guarantees "as the functions of these various instruments are different." Effective waiver texts arguably should acknowledge treaty obligations and focus instead on claims arising directly out of the contractual agreements themselves.

*The minority view: impact of Aguas del Tunari v. Bolivia [sometimes referred to as Bechtel v. Bolivia]*

On the opposite side of *Lanco* and *Azurix* is *Aguas del Tunari v. Bolivia*, which represents the longest jurisdictional battle in ICSID history. It is a complex case that touches on several central issues in investor-State arbitration, including the ability of States to require investors to waive dispute resolution in international tribunals. The dispute, widely reported and followed around the world, arose out of a water concessions agreement between Bolivia and Aguas del Tunari (AdT). Because Bolivia believed that a concessionaire for a critical natural resource such as water should be subject to Bolivian law and courts, it incorporated a forum selection clause into its agreement with AdT. The text of the exclusive jurisdiction clause reads: "[The Concessionaire] recognizes the jurisdiction and competence of the authorities that make up the System of Sectoral Regulation (SIRESE) and of the courts of the Republic of Bolivia, in accordance with the SIRESE law and other applicable Bolivian laws.

Later disregarding the waiver, AdT brought claims before an ICSID tribunal, AdT arguing that the clause only “recognized” the “jurisdictional competence” of domestic courts, rather than limiting AdT to their jurisdiction. Ultimately, the tribunal essentially agreed with AdT. Bolivia pointed to the concession agreement negotiations as evidence that both parties understood the “very carefully constructed” clause to deprive AdT of a right international arbitration. Bolivia also argued that “...it was inconceivable, and equally unacceptable, that this company [the Concessionaire] could bring any dispute it had with the Bolivian government outside of Bolivia, or be subject to any law other than the law of Bolivia, consistent with [the Bolivian Constitution].” Citing both *Lanco* and *Vivendi* AdT argued that “even where an explicit and affirmative exclusive jurisdiction clause exists within a concession contract, such a clause does not affect the jurisdiction of an ICSID tribunal in respect to a claim made under a BIT.” Since AdT presented its claims as treaty-based rather than based on the concession agreement, the clause would have no effect. The tribunal agreed. ...

Despite ignoring the waiver in the AdT agreement, the tribunal stated in dicta that ICSID jurisdiction can be waived, as long as the waiver is clear and explicit: Assuming that parties agreed to a clear waiver of ICSID jurisdiction, the Tribunal is of the view that such a waiver would be effective. Given that it appears clear that the parties to an ICSID arbitration could jointly agree to a different mechanism for the resolution of their dispute other than that of ICSID, it would appear that an investor could also waive rights to invoke the jurisdiction of ICSID. However the Tribunal need not decide on the question in this case.

Unlike the tribunal in *Azurix* which went to great lengths to avoid the topic, here the tribunal addressed the question explicitly. The tribunal also implicitly rejected the argument advanced by AdT that the enormous leverage, or negotiating advantage, possessed by a State should disqualify waivers in which a State could possibly use such pressure improperly. ...

#### *Drafting principles and strategic considerations for future waiver implementation*

Analysis of these key tribunal decisions reveals drafting and strategic principles that may inform states in their efforts to craft effective waiver provisions in future contracts. The contract-treaty distinction remains central to any analysis, but it does not necessarily relate significantly to the construction of the waiver clause itself. Several textual principles, however, can be discerned from tribunal decisions, which may guide drafting towards waiver clauses that withstand tribunal scrutiny. States may also consider altering their negotiating strategies when drafting BITs in order to achieve a meaningful limitation on international arbitration and tribunal jurisdiction. Certainly, waiver clauses would stand a better chance of surviving tribunal scrutiny if the implicated BIT contained a dispute settlement provision similar to that in the Italy-Jordan BIT: “In case the investor and an entity of the [CP] have stipulated an investment agreement, the [dispute settlement] procedure foreseen in such investment agreement shall apply.” These kind of provisions, despite retaining awkward wording, are arguably uncontroversial. On the other hand, not only are treaty negotiations often heavily politicized affairs, but States have relied on waiver clause precisely in order to avoid complicated, perhaps unobtainable BIT re-negotiations. Given the difficulty of BIT

negotiations and the uneven success of waiver clauses thus far, States may look to different waiver models outside the forum selection paradigm or choose to focus exclusively on seeking alternative BITs...

*Waivers that explicitly preclude the jurisdiction of tribunals are more likely to be Effective*

The principle of specificity remains important because a tribunal will be forced to address a clause's enforceability more directly if the clause in dispute is tightly constructed; specific, explicit language aids a tribunal in determining the underlying meaning of both BIT and contractual clause. In *Lanco* the disputed waiver clause's lack of specificity represented a significant factor in the tribunal's decision. The text of the clause did not expressly select the national courts to the *exclusion of other forums*. As a result, the clause conceivably could have been interpreted as selecting *either* domestic courts *or* ICSID tribunals. In *Azurix*, the tribunal noted that "the rights under the Concession Agreement and under the BIT are not the same," and acknowledged Azurix's contention that the "generality of the waiver would exclude even the [domestic] courts," indicating that just as in *Lanco*, the waiver language was not sufficiently specific. ...

In *Aguas Del Tunari v. Bolivia*, the lack of specificity in drafting proved fatal to the waiver clause; the tribunal declined to address the clause, finding that the language was not specific enough in any event. Thus, even though the tribunal concluded that a clearly worded, precisely written waiver could theoretically be effective, it noted that the concession agreement signed by AdT was silent about international arbitration and, as a result, could be taken to imply a waiver of the right to invoke ICSID.

*Effective waivers should be limited to procedural but not substantive treaty Rights*

The *Aguas del Tunari* dicta aside, most tribunals have rejected any interpretation of waiver clauses that limit the ability of investors to seek redress for violations of fundamental treaty rights. Given that international tribunals are viewed as the proper legal forum for making such determinations, scrutiny of jurisdiction clauses has typically focused on whether or not a treaty claim is implicated. The reluctance to uphold waivers typically hinges on the tribunal's desire to protect substantive, fundamental treaty rights; the procedural rights to determine jurisdiction are important insofar as they relate. Therefore, waivers crafted with this distinction are more likely to be upheld because of their lesser degree of controversy. Even if the procedural right to tribunal adjudication is waived, substantive treaty rights could still be vindicated through state-to-state dispute settlement, or through litigation in a domestic court with jurisdiction. Further, with the expansive interpretation increasingly accorded to umbrella clauses, municipal matters are frequently being "elevated" to treaty status. Thus, a choice of forum waiver must, in a sense, be crafted to be anti-umbrella, specifying that it is the underlying facts or issues that are key, not the manner in which they are pleaded as a breach of treaty or breach of contract....

*Including waivers as material conditions of contracts may increase their viability*

One innovative waiver mechanism, which remains untested by international arbitration, is the use of an exclusive jurisdiction waiver as a material condition of the contract or concession agreement between a host State and private investor. Under this model, an investor who sought to go outside the contractually specified forum would render the agreement void. Therefore, any litigation of the agreement before international tribunals would be self-defeating...

Whether or not a forum selection clause can comprise a material condition of a contract is unclear. Furthermore, public policy concerns may cause tribunals to disregard the clause altogether and consider claims as if no condition had been set. Moreover, this line of thinking would be consistent with the idea that an arbitration clause is a contractual device that cannot achieve purposes that parties cannot purpose by contract.

#### *Incorporation of an exhaustion requirement may increase utility of waivers*

Exhaustion requirements, once a mainstay of customary international law and a component of the Calvo Doctrine, have not received the same level of use or focus as exclusive jurisdiction clauses, possibly because they do not provide the same degree of constraint on international tribunals. Traditionally, an exhaustion of domestic remedies was required in international law as a prerequisite to international dispute resolution. ISCID Article 26 leaves open the possibility of a State imposing an exhaustion requirement....

#### *Conclusion*

The cases discussed in this paper signal one of the challenges facing states stemming from the rise of BITs, namely how to contain the reach of international tribunals into municipal legal decisions by way of expansive dispute resolution and umbrella clauses. Waiver clauses represent a potential response; however, given the mercurial treatment international tribunals have accorded them, waivers remain just one of several potential, if not fully vindicated, solutions available. A full accounting of recent decisions does not indicate widespread embrace of waivers, yet certain decisions, such as *Aguas del Tunari*, give hope. With the increased attention on umbrella clauses, States must continue to grapple with and respond to the contract-treaty rights distinction that has determined jurisdictional disputes at the tribunal level over the past two decades, particularly in light of the fact that most tribunals have limited, at a minimum, waiver applicability to contractual violations.

States would be wise to approach the use of waivers with this understanding and to contemplate the suggested waiver modifications in this paper. ...States can continue to look towards other tactics, such as refreshed treaty negotiating strategies, in their attempt to limit tribunals' reach. Some might even follow Bolivia's lead and withdraw from ICSID altogether while scaling back concomitant treaty commitments. Regardless, the march of treaty-related litigation will continue apace--most likely at a faster pace, in fact, if statistics are any indication--and States must similarly continue to

respond to the challenge of retaining sovereign control in the face of expansive international arbitration.....

**Appendix E**

**THE TAKINGS CLAUSE OF THE U.S. AND MAINE CONSTITUTIONS;  
HOW THEY MIGHT IMPACT LEGISLATION MODIFYING  
GROUNDWATER OWNERSHIP**

**Prepared for the Review of International Trade Agreements  
and the Management of Groundwater Resources**

**by Assistant Attorney General Peggy Bensinger  
Office of the Attorney General  
September 11, 2009**

# THE TAKINGS CLAUSE OF THE U.S. AND MAINE CONSTITUTIONS; HOW THEY MIGHT IMPACT LEGISLATION MODIFYING GROUNDWATER OWNERSHIP

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## SUMMARY

The Takings Clause of the Fifth Amendment of the United States Constitution and Article I, § 21 of the Maine Constitution prohibit the taking of private property for public use without just compensation.<sup>1</sup> While the physical occupation of a person's property is the classic taking, the U.S. and the State Constitutions also guard against certain uncompensated regulatory interferences with a property owner's interests in his or her property.

The first question we address is whether Maine's regulation of the quantity of groundwater a property owner may withdraw and use from the property might constitute an unconstitutional taking of property under the Maine or U.S. Constitution. In their consideration of takings claims, the courts have utilized two types of analyses: first, the courts look at whether the governmental action caused a *per se* taking on its face; second, if not, the courts examine, on a case-by-case basis, the facts of a particular case to determine whether a taking has occurred. The short answer here is that such groundwater regulation would not constitute a *per se* taking, and under a fact-based *ad hoc* analysis, while it would depend on the nature of the regulation, the economic impact of the regulation, and the extent to which the regulation interfered with the property owner's investment-backed expectations, it is unlikely that a reasonable regulation of the withdrawal of groundwater would amount to an unconstitutional taking of property.

The second question under discussion by the committee is whether a taking claim could be successfully made if Maine changes from being an "absolute dominion" state to a state in which the "reasonable use" doctrine applies, or some other theory governing ownership and use of groundwater. I believe that the courts would apply the *ad hoc*, fact-based analysis and such an analysis could only be done with the context of the particular law and the particular facts in hand.

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<sup>1</sup> "... [N]or shall private property be taken for public use, without just compensation." U.S. Const., amend. V. "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." Me. Const. art. I, § 21.

## OVERVIEW OF TAKINGS LAW

### A. *Per Se* (“*In Itself*”) Takings.

The Supreme Court has identified two categories of governmental regulatory action that generally are considered *per se* takings. *Langle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005). Where the governmental regulation requires a property owner to “suffer a permanent physical invasion of her property” it must provide compensation or the requirement will be deemed to result in an unconstitutional taking of property. *Id.* A *per se* regulatory taking also will be deemed to have occurred where the government’s regulation would completely deprive a property owner of all economically beneficial use of the property. *Id.* (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)). Presumably, any regulation of a withdrawal of groundwater being contemplated by the State of Maine would not completely deprive any property owner of all economically beneficial use of the property; nor would the adoption of a “reasonable use” doctrine be likely to do so.

### B. *Ad Hoc* (or Fact Specific) Takings.

A more relevant analysis of the constitutionality of the State’s regulation of the quantities of groundwater which may be withdrawn by a property owner or of legislation proposing a shift in the ownership or use doctrine would be under what has been characterized by the U.S. Supreme Court as essentially an *ad hoc*, factual inquiry. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002). The courts have not adopted any bright line which would guide a determination of whether regulations enacted by governments at any level would cause an unconstitutional taking of private property. When there is no physical occupation of the land, no denial of all economically beneficial use of the land, and the government has merely regulated the use of property, determining whether the regulation rises to the level of a taking requires “complex factual assessments of the purposes and economic effects of government actions.” *Yee v. City of Escondido*, 503 U.S. 519, 522-23 (1992) (citing *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 123-125 (1978)). The three factors analyzed by the Courts in the *ad hoc* fact-based analysis are: 1) the economic impact of the action; 2) the extent to which the action interferes with distinct investment-backed expectations; and 3) the character of the governmental action. *Penn Central*, 438 U.S. at 124.

It is not possible to analyze whether a regulatory taking would occur without the context of the actual language of the regulation or legislation at issue, and the facts regarding their impact on a particular landowner, which would allow the necessary “careful examination and weighing of all of the relevant circumstances” (*Franklin Memorial Hospital v. Brenda Harvey*, 2009 U.S. App. LEXIS 17435 (1<sup>st</sup> Cir. August 5, 2009) (citations omitted)). However, under the three part test set forth in *Penn Central* and its interpretation by means courts, the following considerations are instructive.

1. **The economic impact on the property owner.** The mere diminution in the value of a parcel of property, even a significant diminution, has been found insufficient to demonstrate a taking. *Concrete Pipe and Products of California, Inc. v. Construction Laborers*

*Pension Trust for Southern California*, 508 U.S. 602, 645 (1993). In *Concrete Pipe*, the U.S. Supreme Court found that the 46 percent diminution of value of a shareholder equity pension plan was not a taking. *Id.* In *Wyer v. Board of Environmental Protection and State of Maine*, the Law Court found that no taking occurred as the result of denial of a permit to build a house even though the property without the permit was worth approximately \$50,000 and with a permit it would be worth \$100,000. Under *Hall v. Board of Environmental Protection*, 528 A.2d 453, 455 (Me. 1987), a property owner must prove that the application of the regulations to his or her property renders the property substantially valueless.

The fact that a property owner might not make as much profit on his investment as he would have hoped is not a basis for a taking. *See, Curtis v. Main*, 482 A.2d 1253, 1258 (Me. 1984); *Seven Islands v. Maine Land Use Regulation Commission*, 450 A.2d 475, 483 (Me. 1982). In *Seven Islands*, the landowner claimed that because the value of the land as timberland had been destroyed, the value of the land was zero. The court found that the land retained some value and that the landowner could not claim a taking of its property simply because it could not use it in the most profitable manner. *Id.* at 482-83. In the *Wyer* case, Mr. Wyer presented evidence that he paid \$10,000 for his small beach front lot in 1977 and that it would increase in value to at least \$100,000 if a permit could be obtained. With the regulatory denial of his application the property could be sold for \$50,000, and the Court found that such a reduction did not require a finding of a taking. As the Law Court pointed out in *Seven Islands*, that “the loss of future profit . . . provides a slender reed upon which to rest a taking claim.” *Seven Islands Land Company v. Maine Land Use Regulation commission*, 450 A.2d at 482, n.10.

In a challenge to a new regulatory scheme or a new groundwater ownership/use legal framework, a court would examine the value of a landowner claimant’s property in light of the law and compare it to the value of the property without the new restrictions or legal framework and make a determination whether value of the property has been so severely diminished that it has been rendered substantially valueless.

**2. Legitimate investment-backed expectations.** The U.S. Supreme Court has stated that a landowner does not have a constitutional right to a frozen set of laws and regulations governing his or her property. “It seems to us that the property owner necessarily expects the use of his property to be restricted, from time to time, by various measures newly enacted by the state in a legitimate exercise of its police power.” *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1027. Those who do business in an already regulated field, the Court has found, “cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.” *Concrete Pipe*, 508 U.S. at 645, quoting *Connolly v. Pension Benefit Guarantee Corporation*, 475 U.S. 211, 227 (1968). Likewise, a landowner is not entitled to rely on the maintenance of the same zoning of its property or regulatory status quo. *Board of Supervisors v. Omni Homes*, 481 S.E.2d 460, 465, n.3 (Va. 1997), (*cert. denied*, 522 U.S. 813 (1997)).

With regard to this prong of the three part takings test, the factors which would be considered would include whether the property owner knew of actual or potential regulations which might affect the investment potential when it purchased the property or developed it. One property owner’s claim of the legitimate expectation for his development was rejected by the Rhode Island Supreme Court in *Alegria v. Kenney*, 687 A.2d 1249, 1261 (R.I. 1997), with the

Court's determination that the landowner's expectations were not reasonable "[i]n view of the regulatory climate that existed when [the property owner] acquired the subject property."

For this part of the analysis, again the language of the law or regulation and the facts regarding an individual property owner's time of acquisition and investment in the property would be necessary.

3. **The character of the governmental action.** In the analysis of a regulatory restriction on use of property, the courts also examine the legitimacy of the exercise of the government's power. *Penn Central v. New York*, 438 U.S. at 2659-60. The Law Court has repeatedly found that the protection of the environment is a legitimate exercise of the State's police power:

We consider it indisputable that the limitation of property for the purpose of preserving from the unreasonable destruction the quality of air, soil and water for the protection of the public health is within the police power.

*In re Spring Valley Development*, 300 A.2d 736, 748 (Me. 1973).

With regard to this last part of the analysis, if the purpose of a legal or regulatory scheme adopted is to protect the environment, the courts are likely to find it is a legitimate exercise of the State's police power.

**Appendix F**

**REVIEW OF INTERNATIONAL TRADE AGREEMENTS AND THE  
MANAGEMENT OF GROUNDWATER RESOURCES  
A REVIEW OF MAINE GROUNDWATER REGULATION**

**Paul Gauvreau, AAG**

**September 11, 2009**

REVIEW OF INTERNATIONAL TRADE AGREEMENTS AND THE  
MANAGEMENT OF GROUNDWATER RESOURCES

A REVIEW OF MAINE GROUNDWATER REGULATION

Paul Gauvreau, AAG  
September 11, 2009

Introduction

- Groundwater a major source of water for domestic, municipal, commercial and agricultural uses.
  - 22% of freshwater used in U.S. comes from groundwater
  - In Maine sand and gravel aquifers occupy about 1,300 square miles and 40% of State's residents get their household water supply from groundwater wells.
  - Another 20% of the Maine population receives its water from community water suppliers which derive their water source from groundwater.
  - Maine averages 24 trillion gallons of rainwater annually.
  - Water property rights vary, depending upon the particular water source.
- A. Surface water law. Generally, Maine law provides that surface water (lakes, ponds, rivers, and streams) is governed by riparian rights, which recognize "the qualified rights of an owner of property bordering a body of water to have access to and make reasonable use of that water and enjoy the use and benefit of that water for all purposes to which it can be reasonably applied... The riparian does not own the water". *Water Law in Maine-1990, Report of Legal Framework Subcommittee, Water Resource Management Board, 1990, p.2.*
- B. Great Ponds. Surface water in "great ponds" (10 acres or more in a natural state) and tidal rivers is held in public trust by the State, pursuant to law relating back to the Massachusetts Colonial Ordinance 1641-1647. The Law Court in *Opinion of the Justices*, 118 Me. 503, 504 (1919) has stated:

Individuals owning property on the great ponds own to the low water mark; have a right of access to the pond for bathing, boating, fishing, fowling, agriculture and domestic uses; but may not, without legislative authority, draw upon the water of

the pond below its natural low water mark...In other words, they have reasonable use rights of the surface water.

- Pursuant to the public trust doctrine, the public has a right to use the great ponds. The right is not fundamental; rather it is subject to legislative restraints. *State v. Haskell*, 2008 ME 82 ¶8. The only limits on the Legislature's powers in this regard is that they must be exercised reasonably for the benefit of the people, and not be repugnant to the provisions of the Maine Constitution. *Opinion of the Justices*, 437 A.2d 597606 (Me. 1981).
- C. Groundwater It has been said that the common law of groundwater is designed "to seemingly confuse law students". (Joseph Sax, *Legal Control of Groundwater Resources* 395 (4<sup>th</sup> ed. 2006), note 11 at page 411).
- Groundwater law was developed on a state by state basis, separate from law relating to surface water. (Joseph Sax, *Id.*, note 11 at 411.
  - States recognize five common law groundwater doctrines. Within these doctrines, distinctions are made between "percolating" groundwater and underground streams. Modern groundwater law in most states also is subject to statutory provisions which either abrogates or significantly modifies common law groundwater principles. To further complicate matters, some states apply different rules to different geographic areas, leaving some aquifers highly regulated and others without significant regulation. (Tuhholske, *Vermont Law Journal*, p. 205.)

## II. Common law Groundwater doctrines

- A. Absolute dominion Rule. Commonly referred to as the English Rule, which is now the minority rule in the U.S. *Allows a landowner to intercept groundwater which otherwise would have been available to a neighboring water user, even if the effect of the use is to effectively control an aquifer without incurring legal liability.*
- For over 130 years absolute dominion rule has governed groundwater ownership in Maine.

- Absolute dominion rule is based upon premise that the owner of the surface land above groundwater owns the water, just as the rocks and soils constituting the overburden
- Adopted in *Chase v. Silverstone*, 62 Me. 175, (Me. 1873), absolute dominion provides:

One may, for the convenience of himself or the improvement of his property, dig a well or make other excavations within his own bounds, and will be subject to no claim for damages, although the effect may be to cut off and divert the water which finds its way through hidden veins which feed the well of spring of his neighbor.

- Absolute dominion stemmed from perception that groundwater was a mysterious resource, whose properties and transmission were not well understood and were not susceptible of rational regulation or allocation.
- Absolute dominion doctrine gained popularity prior to the development of principles of hydrogeology, an informed appreciation of the principles of aquifer recharge, and an understanding of the interconnectivity between surface and groundwater channels of water.
- The established watercourse exception: Most underground water percolates through various substrata and does not flow in an established watercourse. This has led to a judicial presumption that underground water is percolating; the party which asserts the existence of an established watercourse bears the burden of proof on the issue.
- Absolute dominion does not allow an owner to stop or divert the flow of an established watercourse to the prejudice of an adjoining landowner. But to constitute a watercourse, the water must flow in a specific direction, by a regular channel, having a bed with banks and sides, and generally must discharge itself into another body or stream of water. Although it is not necessary for the watercourse to flow continuously, it must have a well defined and substantial existence.

- Maddocks v. Giles, 1999 ME. 63. The Law Court declined an opportunity to jettison the common law doctrine of absolute dominion in the 1999 case of Maddocks v. Giles. In *Giles*, abutting property owners brought suit against Elbridge Giles, the operation of a gravel pit located in Lincoln County. Plaintiffs contended that Giles' excavation activities compromised an underground spring, which they believed was located under their property and yielded a substantial source of groundwater. Plaintiffs claimed that Giles was accountable for damages owing from their underground spring going dry on account of his excavation activities. At trial, each party produced the testimony of hydrogeologists, who offered different opinions on the question of whether an existing watercourse ran under the Plaintiff's property and, if so, whether Giles' excavation activities caused the watercourse to run dry. The Law Court affirmed a jury verdict on behalf of Giles, finding the trial court properly instructed the jury that a property owner could use his land as he pleased, providing that he not interfere with an existing watercourse which benefited an abutter's land. The Court declined to judicially repudiate absolute dominion rule in favor of the groundwater use rules established in the Restatement (Second) of Torts, §858(1979), (which support reasonable use rule) for three reasons:

- (1) *The Court was not convinced that the absolute dominion rule was the wrong rule for Maine.* Although modern science provides enlightenment regarding the properties of groundwater, this does not mean that the common law rule has interfered with water use or caused the development of unwise water policy. There was no evidence that the absolute dominion rule has not functioned well in Maine.
- (2) *For over a century, landowners in Maine have relied upon the absolute dominion rule. See Friendship Dev. Co., 576 S.W. 2d at 29 (citing reliance of landowners as a significant factor in upholding the common law rule).* Absent reliable information that the absolute dominion rule is counterproductive and a hindrance to achieving justice, Law Court declined to depart from established common law.
- (3) *The Court deferred to the Legislature regarding water law policy in this area.* The Legislature was best situated to study the ramifications of a policy change and can call upon experts to advise as to best water policy for Maine, and it can survey Maine's water needs. The Legislature had taken action in this area, creating the Water Resources Management Board to conduct a comprehensive study of water law in Maine (*See* 5 M.R.S.A. §6301 (Supp. 1989), repealed by 5 M.R.S.A. §6306 (Supp. 1989)). The

Board recommended that the Legislature adopt reasonable use principles. See Water Resources Management Board, Board Findings and Recommendations, #5 (Feb. 1991). The Legislature elected to leave the common law undisturbed. The Court noted that the Legislature had, in fact, modified the absolute dominion rule by creating liability when a person withdrew groundwater in excess of household use of groundwater. 38 M.R.S.A. §404 (1) & (2) (1989).

- Absolute dominion is now the minority rule in the United States. Connecticut, Indiana, Louisiana, Massachusetts, Mississippi, Rhode Island and Texas, Vermont and Maine still recognize the rule.

#### B. Reasonable Use Rule

- *Limits a landowner's use of water to those uses which bear a reasonable relationship to the use of the overburden.* Commonly referred to as "the American Rule". Rule is similar to absolute dominion, except that it prohibits waste and over site use. Similar to reasonable riparian use for surface waters, the rule requires a balancing between competing uses from the same aquifer. However, unlimited withdrawals, even to the detriment of another groundwater user, may be considered reasonable.
- Courts have authority to restrict uses which cause unreasonable harm to other users within an aquifer. Martin v. City of Linden, 667 So. 2d. 732.736 (Al. 1995). (A waste of water was unreasonable only if it caused harm and any non wasteful use of water that caused harm was nevertheless reasonable if it was made on or in connection with the use of overlying land.)
- The American Rule gained popularity with the development of the high capacity water pump, when cities bought country land or easements for use of municipal water supply, which resulted in a lowering of the water table for adjacent farms. The rule forced the cities to compensate the farmers for their damages and involved the application of tort principles, resulting in the award of damages paid by users who received the benefits of a harmful activity.

- The trend in recent years has been away from the notion that the owner's right to sub-surface waters is unqualified; rather the law has gravitated towards the premise that the use must be limited to purposes incident to the beneficial enjoyment of the land from which it is obtained, and if the diversion or sale to others away from the land impairs the supply of a spring or well on the property of another, such use is not for a 'lawful purpose' within the general rule concerning percolating waters, but constitutes an actionable wrong for which damages are recoverable. While there is some difference of opinion as to what should be regarded as reasonable use of such waters, the modern decisions generally hold that a property may not concentrate such waters and convey them off his land if the springs or wells of another are impaired." Rothrauff v Sinking Spring Water Co., 339 Pa. 129, 14 A.2d 87 (1940);
- *The reasonable use doctrine, similar to reasonable riparian use, requires balancing between competing uses from the same aquifer. However, unlimited withdrawals, even to the detriment of another groundwater user, may be reasonable. But courts may restrict uses for causing unreasonable harm to other uses within an aquifer, something never permitted under absolute dominion. Martin v. City of Linden, 667 So.2d 732, 736 (Al. 1995).*
- In 1842 New Hampshire became the first state to adopt the reasonable use rule. The rule requires competing uses from the same aquifer to refrain from causing unreasonable harm, with no party enjoying an absolute right to consume an aquifer.
- Reasonable use discourages wastewater water use and requires reasonable use of the groundwater resource. *However, the reasonable use doctrine is said to create a high degree of uncertainty, requiring case by case adjudication, which in turn provides little guidance even to senior users, and fails to provide guidance for new users.* Joseph Dellapenna, Quantitative Groundwater Law, 3 Waters & Water Rights §21.03.
- Professor Dellapenna explains that abandonment of common law reasonable rights law has often led to abandonment of reasonable use in groundwater. Most riparian rights states adopted a regulated riparian rights approach in the last half of the 20<sup>th</sup> century, forming the basis for the Riparian Model Water Code.
- 21 States have adopted or indicated a preference for reasonable use rule, four of which adopted the rule in conjunction with the Prior Appropriation Rule: Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Illinois, Ky., Md.,

Missouri, Nebraska, New Hampshire, New York, North Carolina, Oklahoma Pa, South Carolina, Tennessee, Virginia, West Virginia and Wyoming.

### C. The Correlative Use Rule

- California, followed by six other states (Hawaii, Iowa, Minnesota, New Jersey and Vermont) has adopted the correlative rights rule, which provides that *the authority to allocate water is held by the courts. The owners of overlying land and the non-owners or water transporters have correlative or co-equal rights in the reasonable, beneficial use of groundwater.* Under this doctrine, adjoining lands may be served by a single aquifer. The judicial power to allocate water rights protects the public interests and the rights of private water users.
- When an aquifer cannot accommodate all groundwater users, courts may apportion such uses in proportion to their ownership interests in the overlying surface estates. Katz v. Walkinshaw, 141 Cal. 116, 74 P. 766, 772-73 (Cal. 1903)
- *A disadvantage of the correlative rights doctrine is that litigation is necessary on a case by case basis to establish priority of use:*

Disputes between overlying landowners, concerning water for use on the land, to which they have an equal right, in cases where the supply is insufficient for all, are to be settled by giving to each a fair and just proportion. And here again we leave for future settlement the question as to the priority of rights between such owners who begin the use of the waters at different times. The parties interested in the question are not before us.

The objection that this rule of correlative rights will throw upon the court a duty impossible of performance, that of apportioning an insufficient supply of water among a large number of users, is largely conjectural. No doubt cases can be imagined where the task would be extremely difficult, but if the rule is the only just one, as we think has been shown, the difficulty in its application in extreme cases is not a sufficient reason for rejecting it and leaving property without any protection from the law

All users of an aquifer are entitled to groundwater use based upon their surface ownership rights regardless of priority of use, with preference given to on-tract uses. The correlative rights doctrine protects all users of an aquifer by empowering courts to prevent uses which are considered detrimental to common use of the water. Katz v. Walkinshaw, 141 Cal. 116, 74 P. 766, 772-73 (Cal. 1903)

#### D. Prior Appropriation Rule

- *Provides that the first landowner to beneficially use or divert water from a water source is granted priority of right. The amount of groundwater which senior appropriators may withdraw can be limited, based upon reasonableness and beneficial purposes. Some states which adopted prior appropriation rule have migrated to a regulatory permitting system.*
- Under prior appropriation, groundwater rights are obtained by putting the water to a beneficial use. New users are not allowed to interfere with existing senior rights. *But whereas Prior Appropriation is relatively easy to use with respect to surface waters (unappropriated water is visible and available for new appropriators), groundwater may not be renewable, making senior rights useless over time.* Furthermore, the interaction between surface water and groundwater uses is now better understood, and some groundwater uses may affect surface uses, creating problems for surface and groundwater appropriators.
- 12 states have adopted Prior Appropriation: Alaska, Colorado, Idaho, Utah, Kansas, Montana, Nevada, New Mexico., North Dakota., Oregon, South Dakota, and Washington.

#### E. Restatement of Torts Rule

##### §858 Liability for Use of Groundwater

- (1) A proprietor of land or his grantee who withdraws groundwater from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless:

- (a) The withdrawal of ground water unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure;
  - (b) The withdrawal of ground water exceeds the proprietor's reasonable share of the annual supply or total store of ground water; or
  - (c) The withdrawal of ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.
- (2) The determination of liability under clauses (a), (b), and (c) of Subsection (1) is governed by the principles stated in §§ 850 to 857.
- *Generally, the Restatement rule holds that a landowner who uses groundwater for a beneficial purpose is not subject to liability for interference with another's use of the resource, provided certain conditions are met. The withdrawal may not cause unreasonable harm to a neighbor by lowering the water table or reducing artesian pressure, cannot exceed a reasonable share of the total store of ground water, and cannot create a direct and substantial effect upon a watercourse or lake.*
  - 3 states have adopted or indicated a preference for the Restatement of Torts doctrine: Michigan, Ohio and Wisconsin.
  - In *Maddocks v. Giles*, the Law Court decided to retain absolute dominion for Maine, and rejected an invitation to adopt the groundwater use principles established in Restatement (Second) of Torts §858 (1977). The Court noted that the Restatement approach abandoned the common law distinction between underground water courses and percolating water. The Restatement position provides that a landowner who withdraws groundwater, whether from a watercourse or percolating water, and uses it for a beneficial purpose, is generally not subject to liability to another, unless the withdrawal unreasonably causes harm to a neighbor by lowering the water table or reducing artesian pressure. The Restatement Rule is derived from principles of reasonable use, but differs from its predecessors by balancing the equities and hardships between competing users. Maddocks v. Giles, 1999 ME 63, note 5, ¶9.

### III. Statutory Modification of Absolute Dominion Rule in Maine

- Site Location of Development Act, 38 M.R.S.A. §§ 481-490
  - Development projects involving 20 acres or more require DEP review to ensure no adverse effect on natural environment, including water quality. As part of review process, DEP will review a proposed structure to facilitate the withdrawal of groundwater and determine the effect of proposed withdrawal on the waters of the State, water-related natural resources, and existing uses including public or private wells within the anticipated zone of contribution to the withdrawal. 38 M.R.S.A. §484(3) (F).
- Natural Resources Protection Act, 38 M.R.S.A. §480-A
  - Section 480-A (c) (4) requires a DEP permit prior to operation of a significant groundwater well, defined as (1) withdrawals of 75,000 or more gallons per week, or 50,000 gallons per day, if located within 500 feet or less from a water body, or (2) withdrawals of 216,000 or more gallons a week (or 144,000 gallons per day) if located within 500 feet of a body of water. An applicant must demonstrate that the activity will not have an undue adverse affect upon the waters of the state, water-related natural resources, and existing uses including public or private wells within the anticipated zone of contribution to the withdrawal.
- Transport of Water Act, 22 M.R.S.A. §2660-A.
  - No person may transport 10 or more gallons of water across municipal boundaries in which water is naturally occurring without DHHS approval, subject to a wide array of exceptions for agricultural, construction, well drilling, agricultural, manufacturing, water utility and swimming pool operation.
  - The applicant must demonstrate that the transport of water (1) will not constitute a threat to public health, safety or welfare and (2) for a source not otherwise permitted by the Department of Environmental Protection or the Maine Land Use Regulation Commission, the water withdrawal will not have an undue adverse effect on waters of the State, as defined by Title 38, section 361-A, subsection 7; water-related natural resources; and existing uses, including, but not limited to, public or private wells, within the anticipated zone of contribution to the withdrawal. In making findings under this paragraph, the commissioner shall

consider both the direct effects of the proposed water withdrawal and its effects in combination with existing water withdrawals.

- Groundwater Reporting Program, 38 M.R.S.A. §§470 A-470-H

Establishes groundwater extraction reporting requirements for any groundwater extraction in excess of certain statutory thresholds between 20,000 – 50,000 gallons. Reports must include gallons withdrawn, anticipated water use, water source, location of withdrawal, and volume of reasonably anticipated withdrawals under maximum high-demand conditions.

- Ground Water Protection Program, 38 M.R.S.A. §401

Directs the study of groundwater and interagency coordination between state regulatory bodies. *Statute creates a cause of action arising from a withdrawal of groundwater which causes interference with the pre-existing beneficial domestic use of groundwater by another water user.* The statute does not restrict or preempt authority of a municipality pursuant to its municipal home rule authority to protect and conserve groundwater quality and quantity.

- Water for Human Consumption Act, Municipal Regulation Authorized, 22 M.R.S.A. §2642

The municipal officers of each municipality, after notice and public hearing, may adopt regulations governing the surface uses of sources of public water supply, portions thereof or land overlying ground water aquifers and their recharge areas used as sources of public water supply that are located within that municipality in order to protect the quality of such sources of public water supply and the health, safety and welfare of persons dependent upon such supplies.

- Municipal Home Rule, 30-A M.R.S.A. §3001
  - Any municipality, by the adoption, amendment or repeal of ordinances or bylaws, may exercise any power of function which the Legislature has power to confer upon it, which is not denied, either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter.
  - Municipalities have the right to exercise any power or function which is not denied them by the Legislature, either expressly or by clear implication. There is

no implicit denial of municipal police power unless the exercise of municipal ordinance would frustrate the purpose of state statute.

- Compare Swanda v. Bonney, 418 A. 2d 163,167 (Me. 1980) (municipal firearms ordinance more restrictive than state statutory criteria for issuance of concealed firearms permit, thus subject to state preemption) with Central Maine Power Co. v. Town of Lebanon, 571 A.2d 1171 (Me. 1990) (municipal ordinance regulating use of herbicides in power company transmission corridor not preempted by State Pesticide Board Act, holding that municipal ordinance only subject to preemption if Legislature either expressly prohibited local legislation, or where Legislature has evinced intent to occupy the field, and local ordinance would frustrate the purpose of the state law).