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Great Lakes Emerging Legal Issues Regarding the International Boundary Waters Treaty and the Great Lakes Water Quality Agreement

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INTRODUCTION

Noah Hall

MR. HALL: Welcome, everyone. Thank you for coming in on a Saturday morning to discuss a range of issues dealing with trans-boundary water management between the United States and Canada. There are actually two panels today. Although my impression is that in both substance and knowledge, the two panels have a tremendous amount of overlap. So I hope we will have a nice integrated flow from the first panel to the second.

My name is Noah Hall, and I am an environmental law professor at Wayne State University Law School in Detroit. I will moderate the first panel, then offer my own comments at the end. I will then turn it over to the second panel at 10:30. We have four speakers; each will give individual presentations, which should leave us with about twenty-six minutes for questions at the end.

Our first speaker is Dr. Murray Clamen, Secretary of the Canadian Section of the International Joint Commission (IJC). Dr. Clamen has his Ph.D. in civil engineering. He has a tremendous amount of experience in water management, both at the domestic level and with trans-boundary water management. He has done quite a bit of work with the IJC and the Great Lakes

3 See id.
over the years, and he will provide an overview of the Boundary Waters Treaty, the Great Lakes Water Quality Agreement, and some of the challenges that the IJC is facing today. With that, let us welcome Dr. Clamen.

CANADIAN SPEAKER

Murray Clamen*

MR. CLAMEN: Thank you. Good morning. I think I know most, if not all of you. I am honored to be able to speak to you about the Boundary Waters Treaty (BWT). I only wish there were more people in the room to hear it, and I am looking forward to a great discussion afterwards. This is the IJC’s centennial year, our centennial flag and special logo was designed for this. We have some materials up front, which I would encourage you to take on your way out. The bottom line I am going to reach at the end is that the BWT is a sound document. It is very flexible and adaptable, and although it is a hundred years old and some people may think it is not capable of dealing with modern times, those of us who work with it on a daily basis think otherwise.

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* Dr. Murray Clamen was educated at McGill University, graduating with a B.Eng. (Civil Honors) in 1970; and at Imperial College (University of London, England) where he received his Ph. D. in Civil Engineering (Hydraulics). His career has included broad experience in the private sector with consulting engineering and research firms in Quebec and British Columbia and a total of thirty years in the Federal Public Service, twenty-seven with the International Joint Commission (IJC), and three with Environment Canada. From 1976 to 1997, as one of the engineering advisers in the Canadian Section, he provided technical and policy advice to the Commissioners on a wide range of trans-boundary issues and participated in numerous Canada-United States studies and assessments, especially on Great Lakes issues. In April 1997 he was appointed Secretary of the Canadian Section of the IJC, responsible for overall management of the Ottawa office of the Commission, which is the position he currently holds.
9 See INTERNATIONAL JOINT COMMISSION ANNUAL REPORT FOR 2008, supra note 6, at 2
This is a blended presentation it is promoting the treaty, and the anniversary of it. This is just a slide that I threw in; a general slide to emphasize the point that most journalists in the public think, which is that water is a source of disagreement and problems between countries.\(^{10}\)

However, the facts seem to suggest otherwise, because water is actually a source of agreement between countries, which is definitely true in the case of Canada and the United States.\(^{11}\) Despite some disputes that get a lot of attention, the predominant sense is that Canada and the United States do cooperate over many things, including water.\(^{12}\) The origins of the BWT stem from two parts of the country, the Niagara region and how to use Niagara Falls and the Western region, where there were disputes between the United States and at the time Great Britain.\(^{13}\) Fortunately, there were some farseeing people, and they decided that in addition to solving those disputes, they would also put together and frame a treaty that would deal not only with them but future issues, and that is what we are dealing with today. They called it the BWT.\(^{14}\) The scope is, in fact, more than just boundary and trans-boundary waters.\(^{15}\)

The IJC has over the years dealt with land issues, some ground water issues, and air issues, so we believe it is more than just about water.\(^{16}\) It is the trans-boundary environment. The basic principle enshrined in the treaty, which was there then and still there today, is to prevent and resolve disputes.\(^{17}\) The treaty created a special commission called the IJC.\(^{18}\) Sometimes I wish they had put the word "water" or "environment" in there because every time I cross the border and use the word "joint" everybody sort of looks at me. What joint are you dealing with?

I have to go into this big explanation of what boundary waters are. The treaty is a remarkable document. I do not want to spend a lot of time because Noah will probably hit me over the head with the bell in addition to ringing


\(^{12}\) See id.


\(^{14}\) Boundary Waters Treaty, supra note 4.


\(^{17}\) DRAPER, supra note 13, at 12.

\(^{18}\) See International Joint Commission, Who We Are, supra note 15.
it. But I do for those that have not read it recently; it is not a complicated legal document. It is not like a lot of insurance policies. It is very straightforward and clear. However, even though I worked with this organization for thirty years, every time you get a specific case that causes you to interpret the treaty and look at it a little more carefully and the articles that are there, it is amazing how you can look at things in a slightly different light, especially when you have commissioners who come to the job very committed and maybe don't have all that background.

Some commissioners are not lawyers. It is amazing how you can read and reread things and see things differently. I do not know if you have experienced that in some of the documents that you work with. But here are some of the key principles that I have picked out of the treaty and that do not necessarily reflect opinions of the commissioners, but the fact that they are equal in similar and equal rights for both countries is a remarkable thing for both countries, which I do not think you could achieve today between two countries that are so different in terms of size. Maybe culturally they are not that different.

There is a precedence of use, and this is very interesting, too, because in addition to that, the Commission also has to take into account all interests, so although the word "environment" or "ecosystem" does not appear there, in recent years, as you can appreciate, especially in the last twenty or thirty years, that has become a very important issue we take into account.

The agreement also talks about structures and diversions that are built in one country or another and affects water levels, and that is a very important part of our work that leads to permits or orders of approvals as we call them and then the famous non pollution clause that is very simple but very difficult to interpret, the words "not pollute," the word "injuries," the words "health" or "property," which give lawyers a field day, and they have given commissioners fits, and they gave the Commission some interesting projects to work on over the years. So equality, as I say, is one of the key features.

Here is a little graph where I show the differences between Canada and the United States in terms of population and GDP. Here we come together.

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19 See generally McGill University, supra note 2 (last visited Sept. 18, 2009) (stating his experience in international resource studies and environmental assessments).
20 See Boundary Waters Treaty, supra note 4, at 2451.
21 See generally Michael Braun, Trade in Culture: Consumable Product or Cherished Articulation of a Nation's Soul? 22 DENY. J. INT'L L. & POL'Y 155, 161 (1993) (discussing how Canada's geographic proximity, language similarity, and history of trade with the United States leads to the desire for preservation of their culture).
23 See Boundary Waters Treaty, supra note 4, at 2450.
24 See Dr. Murray Clamen, A Case Study in the Successful Management of International
There are very few, I am not sure, maybe Dave Brooks in the audience has done some similar analysis, but there are very few arrangements between Canada and the United States where we come together as equals, equal partners to solve problems for both countries in that sense.

Bilateral, remember is not equality. Canada comes to the table with a certain number of people. The United States does, too. That is not the same thing as this. We will talk about a bi-national and bilateral relationship differently and discuss that if you like. I suspect that most people in the room know this, but just in case, the Commission is actually six commissioners, three appointed by the prime minister, three appointed by the President and needs the consent of the United States Senate.\(^{25}\)

People like me are staff, at least we support them, and we form the secretariat, but we say that the Commission is a creature of the treaty.\(^{26}\) It is not a creature of the governments.\(^{27}\) It is independent,\(^{28}\) a very important feature of the treaty at the commission that is not prevalent in too many other commissions that I have seen at international conferences where people come together and they are representatives. They are appointed by their governments. They are heads of agencies and act as such. These commissioners do not. They take an oath actually or declaration to support the treaty, and although people may suspect that they act nationally, they do not; they act in their personal professional capacity to support the treaty.\(^{29}\)

My experience is that the vast majority of Commissioners, if not all of them, have been faithful to that requirement and have done a superb job reflecting interests of their country but not demanding the Commission to follow what it wants to do separately. The real guts of the organization are not even the staff; frankly; it is our boards, task forces and subgroups that do all the work.\(^{30}\)

One of the hallmarks of the Commission's work is in the area of science, and we need sound science, and that is where we rely on members of the

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\(^{26}\) See generally id (stating that in the Boundary Waters Treaty, the United States and Canada created the International Joint Commission).

\(^{27}\) Id.


governments, the universities, the outside private sector people from time to time to give us the information that we need, to help the Commissioners who are high-level policy people from those policies and their underlying by very sound science.\textsuperscript{31} So we have three distinct roles, two of which are very important.

The third has never really been used.\textsuperscript{32} When the governments together feel that they have a problem that they cannot solve, the Boundary Waters Treaty and the IJC is one tool they can use.\textsuperscript{33} They do not have to use us. They have a tool kit over here, or they can pick up the one that is called IJC if they like and give us what is called a reference under the Boundary Waters Treaty.\textsuperscript{34}

The other aspect is, when I said if there is a project that affects levels of flows, they can sign a special agreement that is provided for, but they can also ask the IJC.\textsuperscript{35} So if the project is in Canada through the Department of Foreign Affairs, we get what is called an application to consider the project and issue an order of approval if we so desire. We usually attach conditions to that and place the board to monitor. We have been doing that now for well over a hundred years.\textsuperscript{36} We have some forty projects.\textsuperscript{37}

The third thing provided for in the treaty is arbitration.\textsuperscript{38} This has never been used, so I cannot really give you much information.\textsuperscript{39} I can speculate on it, but I know you do not want me to do it since this nice court reporter is trying to get down everything I am saying. Just to say, another hallmark of the Commission's way of working is consensus.\textsuperscript{40} I am going to reflect on that a little bit and hope if I have time at the end because that is what has made some of the commission's life very challenging now.

Consensus may have been easier a hundred years ago when we dealt with foreign affairs, whatever they were called back then and state department.

\textsuperscript{32} See generally CORA LINN, INTERNATIONAL BOUNDARY WATERS TREATY INTERNATIONAL JOINT COMMISSION AND THE KOOTENAY LAKE ORDER 8 (2007), http://www.rdck.bc.ca/publications/pdf/Environment%20Canada%20-%20IBWT%20Order.pdf (stating that binding arbitration on issues referred by governments has never been used).
\textsuperscript{33} See INTERNATIONAL JOINT COMMISSION ANNUAL REPORT FOR 2008, supra note 6, at 4.
\textsuperscript{34} Id.
\textsuperscript{36} Id. (stating that if the IJC issues orders of approval for projects, it appoints a board to monitor operation of the project).
\textsuperscript{37} See INTERNATIONAL JOINT COMMISSION ANNUAL REPORT FOR 2008, supra note 6, at 40.
\textsuperscript{38} See Boundary Waters Treaty, supra note 4, at 2456.
\textsuperscript{39} See LINN, supra note 32, at 8.
Now you have a plethora of interests. Dave Ullrich I am sure will talk to you about the Great Lakes St. Lawrence Cities Initiative.\textsuperscript{41}

So now we have to deal with cities and regions and the provinces, which are much stronger now in terms of their interpretation, their role in the environment.\textsuperscript{42} You have First Nations and aboriginal groups, and you have a much more and informed public.\textsuperscript{43} The Commission's job is to reflect all of that and figure out a path that will satisfy most, if not all, of those various interests.\textsuperscript{44} That is much more complicated in my view than a hundred years ago. That is just one example.

So here are a whole bunch of numbers I am going to quickly run through, and I cannot go any faster so we have one commission. When I say two treaties, there are actually three. There is the Boundary Waters Treaty,\textsuperscript{45} but we also deal with, in part, the Niagara River Treaty,\textsuperscript{46} which actually amended one of the clauses of the Boundary Waters Treaty, and the Columbia River Treaty\textsuperscript{47} provides for IJC involvement, three agreements really, this may shock David Brooks, but we have the Great Lakes Water Quality Agreement.\textsuperscript{48}

Somebody wrote here is an agreement, the International Air Quality Agreement,\textsuperscript{49} and somebody said an agreement was the Devil's Lake agreement\textsuperscript{50} reached in August of 2005.\textsuperscript{51}

How do you like that? David is smiling. We have three offices, one in Washington, one in Ottawa, and a third regional office in Windsor.\textsuperscript{52} I men-


\textsuperscript{42} See generally, Donald E. Blake et al., Canadian Public Opinion and Environmental Action: Evidence from British Columbia, 30 CANADIAN J. POL. SCI. 451 (1997) (measuring the Canadian public's concern about environmental issues).

\textsuperscript{43} See generally PATRICK JAMES & MARK KASOFF, CANADIAN STUDIES IN THE NEW MILLENNIUM 62 (2008) (discussing how First Nations are demanding to be included in the Canadian constitutional process).

\textsuperscript{44} See generally International Joint Commission, http://ihc.org/en/background/ijc_cmi_nature.htm#respecting (last visited Oct. 9, 2009) (stating that the International Joint Commission plays the role of authorizing uses of lakes and rivers while protecting competing interests).

\textsuperscript{45} Boundary Waters Treaty, supra note 4.


\textsuperscript{48} Great Lakes Water Quality Agreement, supra note 5.


\textsuperscript{51} Id.

\textsuperscript{52} See International Joint Commission, International Joint Commission Offices,
tioned six commissioners. I probably should have had a map. I wonder why it is not in here, but we have various watersheds that we work in, many boards. We have orders of approval that deal with applications, total number of staff, and three offices, about sixty, a hundred years since the treaty was signed.\(^{53}\) We have well over 300 board members now, and that is the border we are responsible for.\(^{54}\)

So what I want to say is, what are some of the reasons why the Commission and the treaty have worked so well, and why do we believe it is going to continue to work? Well, the nature of water, as I said, water is a source of agreement rather than disagreement, and we think that that is going to keep coming up.

The other thing is people generally think that Canada and the United States have a lot of water, and we do except for some parts of the countries. So these contextual reasons basically give rise to the fact that the Commission is likely to be more successful than it is unsuccessful.

The interesting thing is, if you look at the rivers, they do run north and south.\(^{55}\) So there is a real interest in both sides to maintain the organization. There is a clause in the treaty that says, if one country wants to terminate it, they can,\(^{56}\) but as far as I know, they have never considered doing that.\(^{57}\)

Whether you use this in other parts of the world as a model, is tricky because both countries have similar types of societies, are relatively affluent, and we have a long history of cooperation.\(^{58}\) So contextually, all those numbers I gave you provide a lot of continuity in the organization, and, of course, the treaty is there. There is the map I wanted to show, and on the far left-hand side, that is the Columbia River.\(^{59}\)

We have a number of orders of approval there. The river goes up and down and back again. The interesting one in the middle is, of course, United States water flowing north, through the Red River into Canada. That is a very sensitive region now due to flooding, and the IJC has been involved


\(^{54}\) See Clamen, supra note 24, at 5.

\(^{55}\) See id. at 6.

\(^{56}\) See generally Boundary Waters Treaty, supra note 4, at 2454 (stating that the treaty shall remain in force for five years until terminated by twelve months written notice given by either contracting party to the other).

\(^{57}\) See, e.g., id.


\(^{59}\) See Clamen, supra note 24, at 6.
there several times. In the East I am talking about Lake Ontario and the Saint Lawrence River, and they flow totally into Canadian territory, just to show you a couple of examples.

The other thing is the way in which the Commissioners develop their own rules of procedure. I already talked about consensus. Everything is Joint. All of our boards are set-up equally and are asked to work in a spirit of consensus. We build capacity by having people work in our various groups and subgroups and move across to different assignments, committed to public involvement in the way we work, and once again, the independence of commissioners is extremely important in that they do not reflect their views on government. There is remarkable agreement, and I think there were only two times in the whole history of the organization, where there was any disagreement whatsoever.

Some key questions: If people are interested in transferring this model, and they have been, we caution everybody it might not necessarily be a model for everyone, since it requires the right conditions, some of which I described. Some of the ways we sustain things is through reviewing our orders periodically and reviewing what we call our watershed initiative. I do not have time to develop this, but it basically was proposed by the Commission in 1997, when the governments asked us how we could continue to be presumably successful in the next century similar to the success experienced in the past.

One of the proposals we put forward was to view the boundary watersheds and trans-boundary watersheds as watersheds, and have them merged in terms of quality and quantity, and take a much more eco-systemic approach. What we have been developing for the past ten years in an initiative, and I have a couple copies of our third report initiative. If you read the

62 See generally Clamen, supra note 24, at 7.
63 Id.
64 See generally INTERNATIONAL JOINT COMMISSION ANNUAL REPORT FOR 2008, supra note 6, at 3 (stating that the Commissioners traditionally work by consensus).
65 Id. at 4.
67 See id. at 3.
bullets, and I would like to talk a bit about this afterwards, this is the most successful initiative in terms of getting grass roots support for what the Commission does.

Very quickly, because there are going to be a lot of good presentations and discussions on the Water Quality Agreement, we have been involved for many years. Some of the earliest studies we did were in the Great Lakes to show the seriousness of pollution. These studies led to the signing of this famous agreement in 1972, various provisions, and we consider it a standing reference as one of those assignments to us. We have various boards. We have our permanent office in Windsor. We issue reports every two years. We have done thirteen. The fourteenth will probably be coming out next month, and there is a formal review process in place. The Captain from the Coast Guard is going to talk about that, and we have already provided governments with some advice.

I think David is going to talk about the Compacts, and I would mention that, but we have done a lot of work over the last twenty or thirty years to support the kind of things that the Compact is looking at. We have done a lot of studies, and we are very supportive of that effort. So now these are what the Commission has worked on over the years and helped us be successful. We certainly consult. We try to build consensus. We feel we are a forum for public participation.

68 Great Lakes Water Quality Agreement, supra note 5.
71 See generally id.
75 Id.
We encourage engagement of local governments as well, so we are working with David's group, Great Lakes' Cities Initiative. Dave Ullrich will talk to you about that later. As I say, everything is done equally. We pride ourselves on objectivity and independence, and the key thing for me, it was the last one in there, is flexibility in terms of how the Commissioners interpret the treaty and past work of the Commissioners. We foster mutual trust and professionalism between all of our work groups, very strong scientific basis for everything, and an equal number of Americans and Canadians.

We like to think we are accountable and do not respond to political pressure. There is a big sign up here that says "stop," and if I could just extend this, these are my take-away points from a symposium that Noah and I attended in February. These are the key conclusions I thought were there. The issues we deal with, we are not the only ones that deal with them, and it will be even more important in years to come, but I think most people felt that the treaty and the IJC are flexible enough, adaptable enough to deal with emerging issues.

We think, however, the IJC has unique advantages to help Canada and the United States solve these types of problems. We have a century of experience in dealing with this, a history of success. We do think the governments are committed to working through the Commission, through the statements they made in January for the celebration of our anniversary, and through the way which they recently supported us through funding, and so on. I mentioned some of the challenges we have to deal with. I will be happy to talk to you about those later on. For researchers, we have created a special centennial web site. You can get to it and research all of the dockets. There is a summary and links to the key documents that are in there, and that is the web site address. Sorry if I ran over, but that was the best I could do. Thank you very much.

MR. HALL: We are going to save questions until the end because I think a lot of our speakers will touch on the same topics.

Our next speaker is Captain Lorne Thomas of the United States Coast Guard based here Cleveland. In this position, Captain Thomas, even though he is in Cleveland right now, brought with him a tremendous amount of experience working on water management and regulatory issues, environmental issues around the country, the Atlantic Seaboard, the Pacific Seaboard, and pretty much anything in-between which contained water. He is a

80 See INTERNATIONAL JOINT COMMISSION ANNUAL REPORT FOR 2008, supra note 6, at 3.
81 See generally Boundary Waters Treaty, International Joint Commission, supra note 7 (stating that 2009 is the 100th anniversary of the Treaty).
82 Id.
83 See generally Great Lakes Commission, supra note 78.
graduate of the United States Merchant Marine Academy, has a Master's in Environmental Policy from The George Washington University, and probably has one of the most interesting biographies of any of the speakers at this conference. I urge you to take a look at the conference program and see how a military person moves into these environmental policy and regulatory issues. With that, let us welcome Lome.

UNITED STATES SPEAKER

Captain Lorne Thomas *

MR. THOMAS: Good morning. I will start with a disclaimer, I am not an attorney, and I am also not an expert on the Water Quality Agreement. However, I think I know enough to provide you with a broad view of what is going on at the forty thousand foot level, and then speak a little bit more in detail about the review process under way, since I am involved in that.

Here is a quick outline: First, I will speak about the agreement itself, the evolution of the current agreement, the review process, and the review process findings, and also a little bit about how the Coast Guard and Congress actually implement and operationalize the Water Quality Agreement and the Boundary Waters Treaty.

I am originally from Boston, so I am going to talk fast, if I can I will slow down toward the end and if you would please try to stay with me. First and foremost, the Water Quality Agreement is not a treaty. I think it is considered a treaty in Canada or treaty status. It is not. It is an executive agree-

* Captain Lorne Thomas reported to Cleveland in July 2007 as the Prevention Division Chief position for the Ninth Coast Guard District. Captain Thomas graduated in 1981 from the United States Merchant Marine Academy and served in the United States Merchant Marine prior to entering the Coast Guard in 1983. In 1986, Captain Thomas entered the Marine Safety field and conducted merchant vessel inspections and investigated marine casualties at the Marine Inspection Office in New York and overseas. He followed that assignment a tour at Marine Safety Office San Francisco Bay where he served as the Chief of Port Safety and Waterways Management Activities as well as the Chief of the Marine Environmental Response Division. In 1994, Captain Thomas attended The George Washington University and obtained a Master's Degree in Environmental Resource Policy. He subsequently served at Coast Guard Headquarters in the Marine Safety and Environmental Protection Directorate's Office of Response from 1996 to 1999. Following this staff assignment, Captain Thomas served as the Executive Officer, Marine Safety Office Wilmington North Carolina from 1999 to 2002 followed by a tour as Commanding Officer of the Marine Safety Office in Cleveland Ohio from 2002 to 2005. In July of 2005, Captain Thomas reported to Coast Guard Headquarters in Washington, D.C. to head up the Operating and Environmental Standards Office.

84 See generally Canada, U.S. Will Renegotiate Great Lakes Water Treaty, CBC News,
We want to keep it that way. It gives us more flexibility. At least that is the United States’ perspective on that for the agreement to function effectively. It commits two countries to the second paragraph right there, “restore, maintain integrity of the waters of the Great Lakes basin ecosystem,” very important. That resonated back when it was created and also resonates now. And it provides a clear and high level vision and serves as a guide to consider action for the two countries for now and also for future revisions.

Here is a little bit of the evolution, back in the 1950s and 1960s, the Great Lakes were stressed. Eutrophication of Lake Erie was pretty far along with phosphorous, sewage, chemicals, and the Cuyahoga River catching on fire. I was ten years old in Boston and heard about that. The Water Quality Agreement was completed in 1972, the same year as the United States Federal Water Pollution Control Act. Initially the Act was looking at visible pollution, toxics to human and aquatic life, focused on phosphorous loads, especially in Lake Erie and Huron, and it was amended a couple times. In 1978, it took an ecosystem approach, which looked at the interconnection between all of the environmental components, and also has sustained itself through future revisions. 1987 brought areas of concern, particularly regarding distressed areas and our remedial action plans to focus on those areas of concern. The current agreement, like a lot of international conventions, has a set of broad articles, sets up the framework, the process, the objectives and functions of the actual agreement, and then it has seventeen supporting annexes, which provide specifics targeting actual problems, for example,
vessel source pollution, phosphorous, and sediments.\textsuperscript{94} There are seventeen annexes.\textsuperscript{95}

In 1987, the binational executive committee was created to be a working level committee with the International Joint Committee (IJC), providing that strategic oversight as kind of a guidance body, and is still very involved in the management of the agreement.\textsuperscript{96} It was a report, it is a report out every two years on general and specific objectives, and it is reviewed every six years.\textsuperscript{97} And that current review, what is going on was triggered in 2004, at the end of the third biannual review, and there is actually an excerpt from the article that directs us to conduct a review.\textsuperscript{98} There were a few other reviews conducted, I think, in the late 1980s, early 1990s and mid 1990s, but they were still very busy implementing the agreement.\textsuperscript{99} They did not want to take time to review it. So it kind of carried over. I think there were some minor things but nothing substantive, so this is the first substantial review done in a long time. Kick off that process; if you want to know what to change, I think you have to reach out to your customers.

This is a very aggressive outreach to the various stakeholders across the Great Lakes on both sides of the border. Forty-one hundred people participated in the consultation and the strong support for the agreement continued implementation.\textsuperscript{100} We had a lot of meetings. Aquatic invasive species were identified, all vectors, not just ballast water, distressed areas still stressed as being very important, non-point source runoff.\textsuperscript{101} Climate change was men-

\textsuperscript{95} See id.
tioned and also accountability, as much accountability as a non-binding agreement can bring to two countries, but they wanted to get more accountability in there.\textsuperscript{102} I think measures have a lot to do with that.

The review kicked off 2006.\textsuperscript{103} The Binational Executive Committee (BEC), which I mentioned, provided the stewardship for that, wanted an open and transparent review, and they stood up, and our agreement review committee, 350 participants from both sides of the border, abroad spectrum of participants, and they organized into several groups.\textsuperscript{104} I have that list right here. They basically took the working groups and focused them on the subject matter of the agreement, and the articles, as well as, the annexes, and there is a list of the groups charged with the intent of looking at the current agreement, and we also provided an evaluation framework, focusing on five themes.\textsuperscript{105}

They were supposed to use this for the evaluation of the respected areas: clarity, relevancy, is the existing agreement sufficient, or do we need to improve it, needs to be results oriented.\textsuperscript{106} Also the framework, the articles in the annexes, were they sufficient, were they doing their job, and the last, accountability measures are an important part. They looked through the whole agreement underneath that framework. The work was completed in 2007.\textsuperscript{107} The review committee took 600 pages of reports and synthesized that down to twenty-seven succinct pages, a comprehensive review report, put it up for public comment, and the BEC approved it in September 2007.\textsuperscript{108}

Let us go through the findings here, purposes and scope, which are still relevant and compelling. There has been a lot of focus on the chemical integrity of the Great Lakes.\textsuperscript{109} They wanted to work in the biological and physical components, as well, and need more attention, more integration into the whole agreement. It is a little bit beyond just the chemical water quality.\textsuperscript{110} There was affirmation on the ecosystem approach.\textsuperscript{111} They wanted to integrate open water, near shore tributaries, watershed ground water, and even atmospheric influences.\textsuperscript{112} They also felt the agreement needed to be more

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\textsuperscript{102} See generally id. at 1.
\textsuperscript{103} See AGREEMENT REVIEW COMMITTEE, supra note 97, at 2.
\textsuperscript{105} See AGREEMENT REVIEW COMMITTEE, supra note 97.
\textsuperscript{106} See id. at 24.
\textsuperscript{107} See id.
\textsuperscript{108} See id.
\textsuperscript{109} See generally id. at 9 (stating that the Agreement has fallen short by focusing more attention on chemical integrity and less on physical and biological integrity).
\textsuperscript{110} See id. at 45.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
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flexible and timely if there were emerging needs to be addressed. They felt it was too rigid.

I think we are going to see that change. Another big finding is the agreement should provide for effective coordination, collaboration, and other orders of Government, including non-governmental organizations. I think back when this was put together, the thought was that the federal governments were the experts on everything. Of course, that is not the case, so it has to be more inclusive, which was something clearly presented during the review. There is really no large change in the international community with respect to environmental protection. There is no real cooperation of any international conventions, a wide variety of topics, and that is something else they wanted to see put in an updated agreement.

The next step is actually transitioning from review to negotiation. Two countries jointly developed this report, and now we get a negotiation phase. Both the United States and Canada come to the table with their respective environmental agencies as well as the Department of State and Foreign Affairs and International Trade from Canada to begin negotiations.

So how do we begin development of the American and prospective Canadian positions? Of course, we create a work group, and this is the one I am involved in. This is the Water Quality Agreement work group formed on the United States aside from BEC participants.

The first meeting was December of 2008, and we have been have monthly phone calls, where we are putting together a working document to highlight what the agencies feel should actually be changed. The report is a recommendation, and we took that and are going to establish a negotiation position for the United States and the same thing is going on the Canadian side. That is kind of where we are in the process. We have a working paper of about fifteen pages, that when done, will serve as a guiding document for the more detailed work, and the update of the articles and the annexes.

113 Id. at 17.
114 Id. at 18.
115 Id. at 56.
116 See id. at 20.
117 See id. at 25.
118 See generally Clinton, supra note 11 (stating that as part of the 100th year anniversary of the Boundary Waters Treaty, Canada and the United States have decided to update the Great Lakes Water Quality Agreement).
119 Id.
120 Id.
The last slide I talked about covered implementing the Water Quality Agreement. I call it operationalizing. The Coast Guard is an operational agency. We do that through prevention, working with our Coast Guard partners, Canadian Coast Guard, Transport Canada, on a wide variety of missions and initiatives. When we are talking about prevention, one of the things we do is use navigation of Vessel Traffic System (VTS) to manage our waterways through ice-breaking, and to make sure that the ships do not collide, do not ground, do not collide with fixed objects. We have also been very fortunate in aligning our vessel inspection and prevention regulations closely to Transport Canada. There is only one country in the world we recognize as having enough commonality with our regulations; that is Canada, so much so, that we get reciprocity for their vessels. We do not really inspect their vessels, and they do not inspect ours, so it makes my job a lot easier. For the most part, we have good compliance. We have also similar regulations for the transfer of oil and hazardous substances at our marine transportation transfer facilities. If prevention fails, we have a joint Canada-United States pollution contingency plan for responding to oil spills that happen on the boundary waters. It is a good plan we have developed, and we exercise it often.

Another thing we have been doing the last couple of years with respect to aquatic species we is conducting joint examinations of every vessel coming from outside to the Great Lakes, making sure that they exchange their ballast

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122 See generally USCG: Ninth Coast Guard District, http://www.uscg.mil/d9 (last visited Oct. 22, 2009) (stating that the Coast Guard is responsible for all Coast Guard operations throughout the five Great Lakes, the Saint Lawrence Seaway and parts of the surrounding states).


125 See generally Blair, supra note 123 (discussing how the joint effort of the United States Coast Guard and Transport Canada has prevented several noncompliant vessels from entering the Great Lakes).

126 See 46 U.S.C. § 9302 (2003) (stating that the authority extended to registered pilots to serve on vessels in the United States waters on the Great Lakes will continue as long as Canada extends reciprocity to the United States).

127 Id.


water completely or switch their empty tanks with salt water to essentially mitigate the risk for invasion down the road at all levels, so ballast water exchange, probably ninety-five to ninety-seven percent for efficiency.\(^{130}\)

So that is every single vessel on the Great Lakes. We have a pretty good enforcement team right now, and we need to get our ballast water done and out there, and that is at the highest level within the administration right now, so hopefully, we will see that by the end of summer. It would probably be already out if we did not have an election. That is my little plug for ballast water. I think that is all I have, and as I mentioned, there is the Water Quality Agreement if anyone has not ever seen one. Thank you.

MR. HALL: Fantastic. Thank you. Next we are going to hear from Dave Naftzger. I have known Dave for about six, seven years now, probably longer than both of us would like, which dates back to when we were both working in the relatively early stages of discussions and negotiations regarding the Great Lakes Compact, which he is going to discuss in detail.

David is the Executive Director of the Council of Great Lakes Governors\(^{131}\) and along with the rest of the Council of Great Lakes, the Governors and staff including Pete Johnson and the others, they were really a driving force behind the Great Lakes Compact bringing all of the parties together. Dave personally was involved in every aspect of that endeavor from gathering the states and trying to find common ground to advocating for passage in the state legislatures and working with Congress to get Federal approval.

He is a fantastic policy wonk in terms of bringing people together and finding areas of common ground. He has a degree from DePauw University as well as a Masters in Economics from the Government department at the London School of Economics, and with that, let us welcome Dave.

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MR. NAFTZGER: Thank you, Noah. To start, I would like to thank the Canada-United States Law Institute for putting this conference together and inviting me to be part of it. Also, I want to recognize Jason Kral, who is here in the audience and is a student here at Case Western Reserve University School of Law. He interned with us last year, and played a big role in what I will talk about today.

The Council of Great Lakes Governors appreciates the partnership with the institute and the student internship program, which is an important part of our work. So, thank you to Jason and the Canada-United States Law Institute.

I will spend my time this morning focusing on the Great Lakes Water Resources Compact (Compact) and the Great Lakes Basin Sustainable Water Resources (Agreement), as well as, the governors and the premiers' efforts to provide protections on water supply, water use, water management, and really creating a framework for sustainable use of the Great Lakes.

As Dr. Murray and Captain Thomas have already spoken about there are other agreements that have been reached over the years illustrating that there have been many efforts over the past one hundred years to create protections for the Great Lakes.
The Great Lakes is a large resource with very complex management challenges, and as a result, at various points in time, we have been able to come together to implement certain protections. Of course, none of them are comprehensive enough in scope or in outcome, to really ensure the sustainability and the health of the Great Lakes-Saint Lawrence ecosystem.

Water supply, of course, is the basis for our region’s economic and environmental health. I know we are more or less familiar with most of the statistics, but I think they bear repeating. The Great Lakes make up twenty percent of the world’s fresh water supply, they are home to thirty-five million people, including major urban centers like Cleveland, Toronto, and Chicago. It is not too much to say that our blue water economy really does depend on the Great Lakes from agriculture, drinking water, tourism, shipping, hydropower, to all the other things we rely upon the lakes for and that they provide to us.

Of course, the basin is an ecological treasure with globally rare species and habitats as well as a world class fishery. However, despite our efforts, until the Agreement and the Compact came into place recently, there were vulnerabilities in terms of weak protections around diversions and how the water is used.

The first significant protection that was put in place was the 1909 Boundary Waters Treaty that Dr. Murray spoke of. This was a treaty between the federal governments, and in so far as water use and supply is concerned, the focus was on protection of levels and flows, and providing for a framework to prevent and resolve disputes through the IJC.

The scope of the Boundary Waters Treaty itself was limited in nature, and so it was not a comprehensive management tool to provide protections.

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137 Id.
138 See generally Great Lakes Basin Ecosystem Team, supra note 145 (discussing the different forms of wildlife within the Great Lakes Ecosystem).
140 See Boundary Waters Treaty, supra note 4 (last visited Oct. 25, 2009).
142 See generally id. at 12 (stating that the Great Lakes states and provinces signed the Great Lakes Charter in 1985, which contains individual commitments and a cooperative process for
The geographic scope was limited to apply only to the boundary waters, not tributaries and other waters that are a part of the basin.\textsuperscript{143} By only dealing with those uses that affect levels and flows, you are really only talking about very large types of projects. Obviously, there are hundreds, if not thousands, of other kinds of uses that affect the overall water supply of the lakes.

Over a period of many years each of the states and provinces developed their own water management programs.\textsuperscript{144} These are generally based on regulated riparianism, and they were developed over different periods of times with different purposes and different requirements and resulted in tremendous variation between the jurisdictions.\textsuperscript{145}

Each of the state and provincial efforts was limited and, it is going to be a continuing problem, was limited in its scope because the state and provincial programs only dealt with their own jurisdiction and could not extend any broader than that, so they were never intended to be comprehensive in nature.\textsuperscript{146} Until recently, there was fairly limited and inadequate cooperation among the states and the provinces, but this really changed significantly in 1985 with the agreement of the Great Lakes Charter.\textsuperscript{147}

This was a good faith agreement among the governors and the premiers, and it was the first of its kind for states and provinces in the region to come together and agree upon a shared framework to deal with water use; provided for a consultation process for large, new or increased diversions and uses of water inside the Great Lakes basin.\textsuperscript{148}

And it was a commitment to provide further follow-through with legislative and regulatory steps within the individual states and provinces.\textsuperscript{149} This was a historic and very important agreement, but it was limited in terms of its ultimate efficacy. It was good faith in nature, in other words, not legally binding, and for a variety of reasons, each of the states and provinces followed through on their commitments in different ways some like Minnesota going nearly all the way to implementing the terms of the Charter, and others like Indiana and Michigan taking much fewer steps until recently.\textsuperscript{150}
So the outcome was an incomplete and not comprehensive protective means for the Great Lakes. Shortly after the Charter of 1985, the United States Congress passed the Water Resources Development Act of 1986.\textsuperscript{151} This was another step in providing an important tool to manage the Great Lakes.

It was a United States federal statute and subjected new or increased diversions to an effective veto by any of the Great Lakes governors.\textsuperscript{152} This was an important legally binding mechanism that was put in place, but it, too, was limited in scope. It only dealt with diversions and did not deal with the uses of Great Lakes water inside of the basin.\textsuperscript{153} The entirety of the section dealing with the governors' authority was about a half page, so it lacked definitions like what is a diversion.\textsuperscript{154} It lacked provisions for due process, and as a result, it was very legally vulnerable and led to a lot of questions about how it really would work in practice and how effective it could be as a management tool.\textsuperscript{155}

Lastly and very significantly, it is a United States federal statute.\textsuperscript{156} It did not include the premiers in the decision making process. Over time it became increasingly evident that new protections were needed, and probably the one episode that underscored the need most significantly was the 1998 proposal by the Nova Group.\textsuperscript{157}

The Nova Group was an Ontario-based company that proposed to take water by tanker out of Lake Superior to Asia, presumably for drinking water.\textsuperscript{158} An initial permit was granted by the province to the Nova Group, and this rang alarm bells around the region, both in terms of the governors and the public at large. There were not measures in place at that time enabling the province to deny the permit, nor was there a Canadian federal law prohibiting it.

The Great Lakes Charter, a good faith agreement, did not provide a legal means to deny the permit. The Water Resources Development Act is a United States federal law and did not enable action on this Ontario permit.\textsuperscript{159} So

\textsuperscript{152} See generally Hall, supra note 141, at 14 (stating that the Act does not provide any judicial remedy to challenge a governor's decision to approve or deny a proposed diversion).
\textsuperscript{153} See id.
\textsuperscript{155} Id.
\textsuperscript{156} See generally id.
\textsuperscript{157} See generally PETER ANNIN, THE GREAT LAKES WATER WARS 194 (2006) (stating that on March 31, 1998, the Nova Group obtained a permit to export 158 million gallons of water to Asia per year for drinking water).
\textsuperscript{158} See id.
\textsuperscript{159} See Water Resources Development Act of 1986, supra note 154.
alarm bells were rung and action followed very quickly. In 2000, the United States' Congress passed amendments to the Water Resources Development Act, specifically encouraging the governors and premiers to work together to develop new protections. 160

Around that same time, the International Joint Commission (ICJ) issued a report similarly encouraging the governors and premiers to work together around new protections. Shortly thereafter, in 2001, the governors and premiers signed an annex to the Great Lakes Charter, providing a framework, and a set of principles to be included in a new set of legally binding agreements for the Great Lakes. 161

This kicked off what turned out to be about a five-year process to develop these new protections. 162 The governors and the premiers led the effort and created a work group of their senior staffs and staff from the relevant agencies and ministries. 163 They created the nucleus of the negotiating group. They also worked closely with a group of stakeholders, and this included environmental groups. 164 This included local governments. 165 This included agricultural groups 166 and many others that Noah Hall, Dave Ullrich, and others participated in as part of that process. Further, there were consultations with the federally recognized tribes, and First Nations. 167 Collectively you are now talking about a very large and somewhat awkward process to bring all these people together around a common goal in trying to agree on very specific things that would be put into law.

The outcome of this process, and it was very difficult at times, but perseverance and I think a lot of creative thinking, a willingness to compromise, brought people together in December of 2005 on a new set of agreements, and the agreements were actually two agreements. This was necessitated by the legal restrictions on the kind of agreements that could be entered into by states and provinces across the international border. 168

160 See id.
162 Id.
164 See id.
165 See id.
166 See id.
167 See id.
First is the Great Lakes-Saint Lawrence River Basin Sustainable Water Resources Agreement of 2005, and I will just call that the "Agreement" from this point forward. Not unlike the Charter, this was a good faith agreement between the governors and the premiers, and it committed the chief executives to follow through with specific actions in their domestic procedures to put these commitments into law. The agreement created a regional body to facilitate further follow through and coordination among the parties, and it relied upon state and provincial implementation in order to become effective. For the provinces, that involves the passage of provincial statute and regulation, and for the states, it involves the implementation of the interstate Compact, which was the second agreement. The Compact is a legally enforceable contract among the Great Lakes States, and in its substantive provisions, it is nearly identical to the agreement except because of the different composition of the parties to the agreement and the different legal nature, one is a good faith agreement, the other a binding interstate contract. They do look somewhat different in terms of their mechanics. In terms of the substantive provisions, they are nearly identical. They ban new or increased diversions with limited exceptions. They create a framework for jurisdictional water management programs, conservation efficiency programs, and continued collaboration around water management in the Great Lakes basin. There are also important commitments related to water conservation and efficiency.

With the conclusion of these agreements in 2005, the governors and premiers committed themselves to an aggressive action plan to implement them into law. Looking at the history of interstate compacts in the United

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170 See generally id.

171 See id.


173 See generally Great Lakes Environmental Law Center, http://www.greatlakeslaw.org/glelc (follow "Great Lakes Compact" hyperlink) (last visited Oct. 28, 2009) (stating that the Compact is a legally binding agreement between the Great Lakes states, and that there is also a non-binding companion Agreement).

174 See generally AGREEMENT, supra note 169; see generally COMPACT, supra note 172.

175 See id.

176 See id.

177 See id.

178 See id.
States, even relatively straightforward compacts among two states in some instances have taken months, even years, upwards of twenty years from the completion of the agreements to actually put through the complete ratification process.\(^{179}\)

So, it was rather daunting to start to look at what kind of a time horizon we were facing, but the governors and their staff committed themselves to work as expeditiously as possible, and we were really gratified that the process went quite quickly in relative terms.

From 2007 to 2008, each of the state legislatures ratified the Compact. Shortly thereafter, in 2008, Congressional consent was achieved.\(^{180}\) Overall the political consensus was amazing. Ninety-five percent of all state legislators and members of Congress that were asked to vote on the Compact were in favor of its protections and voted affirmatively to put it into law.\(^{181}\) And that is really incredible when you think about ninety-five percent of the entire United States Congress and ninety-five percent of all state legislators in the region. That really is a tremendous political consensus that you see very rarely on any issue, much less one as complex as this.

Now, there is further follow through that is taking place in the individual states. They are in the process of developing water management programs, following through on water conservation and efficiency commitments and developing programs in their jurisdiction.\(^{182}\) Water use information protocols are being developed to improve the information base for future decision-making, and we are in the process of starting to develop a cumulative impact assessment process.\(^{183}\) The Agreement and the Compact are not static documents. They envision change and anticipate change and create a process so that we will be looking at what is happening with the resource, what management procedures or decision making processes may need to change into

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\(^{179}\) See generally Claire Carothers, Note, United We Stand: The Interstate Compact as a Tool for Effecting Climate Change, 41 GA. L. REV. 229, 235 (2006) (stating that the text of the Compact Clause of the U.S. Constitution requires congressional approval for all interstate compacts and that this requirement is one of the greatest impediments to the formation and utilization of regional interstate compacts to impact environmental change).

\(^{180}\) See COMPACT, supra note 172; see also Council of Great Lakes Governors, supra note 131.

\(^{181}\) See id.


\(^{183}\) See id. (stating that protocols were jointly drafted in order to develop recommendations for how information will be reported to the Great Lakes-Saint Lawrence River Water use database).
the future. And we anticipate being able to do that into the future so there will be flexible tools that can be applied as circumstances change.

In closing, I think this is one of the most exciting water management agreements and processes that has taken place anywhere in the world. Recently, in a number of different venues, we have been talking, and I am not aware of any kind of collaboration like the one we have here in this region that is taking place around a shared water body. With the protections put in place with the Agreement and the Compact, we have some mechanisms to provide long-term protections. They fit into a very complicated institutional architecture, which sometimes can be frustrating, sometimes can be confusing, but it really reflects the intense interest that we have and the reliance that we have on the Great Lakes and wanting to make sure they are well managed, well protected, and we have a sustainable future, so we can take advantage of, what is arguably, our greatest competitive advantage into the future.

I have really enjoyed being involved with the process. I have really enjoyed getting to know many of you who share the same commitment I do and working together. Persevering through some of the confusions and some of the frustrations we really are reaching a point where we are looking into the future with a healthy protected Great Lakes and one that should be a strong light for our people and also for the world to look at as a good example of how we can work together. So with that, thank you very much.

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184 See id. (discussing how the Council launched the Water Resource Management Initiative, which will drive future resource management decisions and guide changes in the decision-making standard used by the States and Provinces).
MR. HALL: Okay. I am just going to give a few brief remarks, and then I want to leave plenty of time for questions. For those of you who do not know me, I am a little bit of a contrarian.

So picking up on that theme, I want to offer a slightly different perspective on United States-Canadian water management issues and transboundary issues in general than we have heard from our three previous speakers. All of them have covered what I would consider the highlights of binational cooperative policy across the entire border and specific to the Great Lakes region, and the United States and Canada certainly have quite a bit to be proud of.

The Boundary Waters Treaty was a model for the world a hundred years ago, and it is still one of the best models out there, which is a testament to its durability and how farsighted it was when it was first enacted. The Great Lakes Water Quality Agreement had some good examples of cooperation, ecosystem management, not a lot on enforcement and enforceability by citizens, but it did engage citizens quite a bit in the process and open the International Joint Committee (IJC) up quite a bit to citizen involvement, and, of course, the new Great Lakes Compact. Time will tell how effective it is in terms of protecting Great Lakes water quality and managing the ecosystem in the basin, but I think many of the key elements for success are included in the Compact, including strong enforcement provisions and opportunities for citizen involvement and citizen enforcement.

That being said, it is quite possible that we are going to look back on the past ten years, thirty or forty years from now and what this period of time is going to be known for, not these cooperative agreements but the rise of do-

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mestic litigation to address trans-boundary pollution issues between the United States and Canada. I think a quick look at the litigated disputes involving water resource protection, water pollution and air pollution gives a little bit of a different picture about the overall effectiveness of these cooperative agreements in solving environmental problems. So I am just going to go from west to east and highlight three recent examples. Actually, I will start in the middle because I think the middle one is the easiest one to discuss. In 2005, a United States District Court in Washington, D.C. ruled that the federal government could not move forward on the Northwest Area Water Supply (NAWS) project. This is a water diversion project in North Dakota that would send water from the Missouri River basin across the transcontinental watershed divide and into what eventually would be the Hudson Bay drainage basin. How that came to be, I think, shows some of, let us just say, the weaknesses or the gap in the current bi-national cooperative process. Essentially, this NAWS project is one of many projects related to the Garrison diversion and Devil's Lake and all the fights over the Missouri River and water transfers in North Dakota that have been going on since before I was born.

I am guessing most of the people in this room have had some involvement in that over the years, and despite opportunities for the IJC to become involved through either Article 9 or Article 10 of the Boundary Waters Treaty, the IJC did play some role but, ultimately, was not able to resolve the dispute. And so the province of Manitoba joined by the Canadian federal

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186 See generally Jill Schramm, U.S. Bureau Signs NAWS Record of Decision, MINOT DAILY NEWS, Jan. 17, 2009, available at http://www.houstoneng.com/projects/naws/news/1-17-09MDN.pdf (stating that NAWS will request a federal judge to lift a court injunction that has been holding up construction on the treatment portion of the water project).


189 See id.

190 See id.

191 See Boundary Waters Treaty, supra note 4, at 2452.

192 See id. at 2453

environmental agency.\textsuperscript{194} Environment Canada\textsuperscript{195} filed suit against the United States federal government in United States District Court, alleging that the United States federal government violated its own federal environmental law, the National Environmental Policy Act, by going ahead with this project without sufficient environmental review.\textsuperscript{196} This is probably the least remarkable example of domestic litigation to address transboundary problems because the Defendant, the United States Government, was sued in its own courts, the United States District Court under its own laws, the National Environmental Policy Act. The Plaintiff happened to be Canadian, but in no other respect was this litigation remarkable. This is the type of lawsuit that environmentalists in the United States bring against the federal government all the time, and maybe the only thing that was unusual about this was that the plaintiffs won, which is not easy to do in these types of lawsuits.\textsuperscript{197} The United States Federal District Court Judge, a Bush appointee nonetheless, ruled that, in fact, the United States Bureau of Reclamation had acted arbitrarily and capriciously, violating federal law in moving forward with the project without sufficient environmental review, and now that environmental review has been ongoing for a few years, and they issued a new environmental review statement.\textsuperscript{198} I suspect we are going to see another round of litigation this summer.

The next example of domestic litigation, I think, becomes a little bit more problematic and extraordinary, and it involves the same Trail Smelter that was the subject, of course, of the famous international arbitration.\textsuperscript{199} It is still held as a landmark for international adjudication between two countries for a trans-boundary pollution dispute, except now this was not involving air pollution so much as legacy contamination in the Columbia River.\textsuperscript{200} For folks not familiar with the factual setting here, it is a giant smelter in British Columbia, produces a significant amount of toxic pollutants, and from when the smelter began operating until 1995, it dumped literally tons of pollutants, toxic pollutants into the Columbia River on the United States side of the border.\textsuperscript{201} The United States Environmental Protection Agency (USEPA) initially began an enforcement proceeding and then backed off, but that, at least, cleared the way for some citizens, namely, members of a local native Ameri-
can Tribe to file suit in United States Court under United States laws against the Canadian company for the emissions from the Canadian facility that originally occurred in Canada but eventually came to be located in the United States.\textsuperscript{202} So this is now stepping beyond what we saw in the northwest area water supply, the NAWS dispute.\textsuperscript{203} This is actually bringing a Canadian party into United States courts under United States laws for harm that occurs in the United States but from actions that occur in Canada.\textsuperscript{204} It started in District Court, eventually reached the Ninth Circuit Court of Appeals, the largest Circuit Court of Appeals in the United States.\textsuperscript{205} It covers much of the western United States, and the Ninth Circuit sided with the plaintiffs against the Canadian company.\textsuperscript{206} The Canadian company screamed and yelled about how unfair it was that they, at least theoretically, based on the information before the Court had complied with all Canadian environmental laws.\textsuperscript{207} I have actually heard from some Canadian environmental lawyers that claim might be overstated, but let us just assume the Canadian company complied with all Canadian laws, all laws it had an ability to affect but now was being held liable under United States law and this was terribly unfair and violates the principle of restraint in extraterritorial application of laws that we have in both United States and Canada.\textsuperscript{208} The way the Ninth Circuit, which is usually viewed as a fairly environmentally progressive Court, the way the Ninth Circuit handled this case is they said, well, yeah, the Canadian smelters operations occurred on the north side of the border, but this was a case involving liability to clean up a contaminated area, namely the Columbia River, and the portion of the Columbia River that is contaminated is wholly within the United States.\textsuperscript{209} So the Court said that this is actually not an extraterritorial application of United States laws.\textsuperscript{210} They are merely holding a party liable for contamination under United States laws that occurred in the United States.\textsuperscript{211} A little bit of a legal fiction there, but it was enough for the

\textsuperscript{202} See generally id. at 733.
\textsuperscript{203} See id. at 727.
\textsuperscript{204} See id. at 735-36.
\textsuperscript{206} See Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066 (9th Cir. 2007), cert. denied, 128 S. Ct. 858 (2008).
\textsuperscript{207} See HALL, supra note 196, at 691.
\textsuperscript{209} See Teck Cominco Metals, Ltd., 452 F.3d at 1066.
\textsuperscript{210} Id.
\textsuperscript{211} See generally HALL, supra note 196, at 23 (discussing how the District Court called the plaintiffs’ argument that the case did not require an extraterritorial application of CERCLA because the toxic contamination occurred in the United States a “legal fiction.”).
Ninth Circuit to go on, and the Supreme Court denied review last year, and so that is now where the litigation stands.\(^\text{212}\)

And we now have a very strong perhaps discomforting precedent for holding Canadian companies liable under United States law in United States Court for injuries sustained in the United States.\(^\text{213}\) The most recent example goes even another step. Beginning last year an individual, a Canadian citizen brought a public prosecution action under Canadian law, the Canadian Fisheries Act\(^\text{214}\) in Ontario Court against a United States polluter, DTE Energy, one of the largest power companies in the Midwest, for mercury pollution from their coal-fired power plants.\(^\text{215}\) This pollution is emitted in the United States, but the mercury pollution, of course, lands in the Great Lakes, including on the Canadian side of the Great Lakes and contaminates fish.\(^\text{216}\) It makes the fish inedible, unsafe to eat, in violation of the Canadian Fisheries Act,\(^\text{217}\) and so the Canadian individual who actually happens to be a United States Attorney, he is an attorney for an environmental group in the United States called Waterkeeper.\(^\text{218}\) He is an excellent environmental attorney by the way, but he is also a Canadian citizen, and he went into Canadian Provincial Court.\(^\text{219}\) I am not very familiar with Canadian criminal law, but apparently, there is a public prosecution provision.\(^\text{220}\) He went into Canadian Court and signed a declaration of this violation of Canadian law by this United States Company, and despite DTE, the power company's protestations and again yelling loudly, the Ontario Court held that service was proper; that they did have jurisdiction, and that this prosecution can proceed.\(^\text{221}\)

Now, we do not have an outcome yet to the case. We are probably at least a year or two away from that, but just opening the door to a prosecution

\(^{212}\) See Teck Cominco Metals, Ltd., 452 F.3d at 1066.

\(^{213}\) See id.

\(^{214}\) See Fisheries Act, R.S.C., ch F-14 (1985).


\(^{217}\) See generally Fisheries Act, supra note 214.

\(^{218}\) See Michigan Energy Company Sued for Mercury Pollution in Canada, supra note 215.

\(^{219}\) See id.

\(^{220}\) See id. (stating that private prosecutions allow any Canadian citizen to independently prosecute criminal offenses in the criminal).

\(^{221}\) See generally EDWARDS V. DTE ENERGY: BACKGROUNDER, supra note 219 at 2 (discussing how Judge Donahue of the Ontario Superior Court issued an order directing the Ontario Court of Justice to summon DTE to court).
of a United States company in Canadian courts, a criminal prosecution for violation of Canadian laws for harm that occurred in Canada, I think, rounds out our circle, and so it is very clear, this is the direction things are moving.

Courts are becoming more and more liberal in allowing transboundary pollution cases to move forward. Environmental plaintiffs are becoming more aggressive in using domestic law to go after trans-boundary pollution, and defendants are becoming more and more fearful of being dragged into court, especially into a court or foreign soil and being held liable under laws they had ostensibly no ability to help shape, the idea being that a United States company, obviously, has a role in shaping United States laws but has a far more limited role in shaping Canadian laws. I am not sure how much that assumption is really true in the reality of globalized companies and globalized politics, but it is, at least, a good starting point. So here is the lesson to take from all of this. Each one of these disputes theoretically could and should best be resolved by the agreements, the cooperative policies that the United States and Canada have entered into over the years. The IJC seems like it would be an ideal mechanism to address any one of these issues, and, in fact, the IJC has certainly had Devil's Lake and the NAWS on its table more or less for thirty or forty years, although it has been unable to reach resolution.

We have a precedent obviously with the Trail Smelter of referring the old case, sixty years ago now on the eve of World War II, to an international tribunal that included a United States, Canadian, and Belgium national as an objective third-party. But we did pursue it here, and of course, the mercury pollution is the type of thing, it is the type of thing that we thought we were addressing with the United States-Canadian Air Quality Agreement. We were supposed to be addressing this type of trans-boundary air pollution, especially as it relates to deposition into shared waters.

222 See generally HALL, supra note 196, at 21.
223 See generally id.
227 See generally Great Lakes Water Quality Agreement, supra note 5 (discussing under Article V how the parties agree to meet certain standards and regulatory requirements); see generally USA, Canada to Modernize Great Lakes Water Quality Pact, ENVIRONMENT NEWS SERVICE, June 15, 2009, http://www.ens-newswire.com/ens/jun2009/2009-06-15-01.asp (last visited Oct. 31, 2009) (quoting United States Sec'y of State Hillary Clinton that the Agree-
I think it is fairly clear from the fact that these disputes have arisen, and then environmental plaintiffs are going to Court, that at least the perspective from some members of the environmental community and from individuals who live near the border and are harmed by trans-boundary pollution is that the regional agreements and treaties are simply not doing everything that needs to be done to protect the shared environment, and in the absence of other alternatives, they are going to court and finding success. This essentially leaves two options because I guess a third option, theoretically, is not to allow these type of court actions, but I think that door has already been opened, and it is going to be very hard to close it from here moving forward.

So I think that really leaves two options: One is enact new treaties and agreements to cover these gaps and solve these problems in a bilateral, cooperative way or, two, accept the trans-boundary litigation that is now part of the toolbox that environmental plaintiffs will use to address trans-boundary pollution problems, and in that things like the Uniform Treaty for Trans-boundary Pollution Plaintiffs, a draft treaty from back in 1979 this country has never adopted. That would allow, that would essentially allow trans-boundary pollution litigation and ensure equal access in courts by both parties.

So it is not so hodge-podge, and we have clear rules, and both defendants and plaintiffs know what to expect if they try to go to court to resolve these disputes. With that, I am going to open it up to questions and invite all of our panelists to come back up to the podium, and we have twenty minutes for discussion. Thank you.

DISCUSSION FOLLOWING THE REMARKS OF MURRAY CLAMEN, CAPTAIN LORNE THOMAS, DAVID NAFTZGER, AND NOAH HALL

MR. HALL: So let us just start this off, actually, I am going to turn off the power point unless we need it. Dave?

MR. ULLRICH: Murray, I got you where I want you.

MR. CLAMEN: I am right in your sights.

MR. ULLRICH: Off the record, oh, we are on the record.

MR. CLAMEN: We are on the record.

MR. ULLRICH: Murray, there has been some discussion in the review of the Water Quality Agreement and looking forward, looking into the future

228 See generally Gabrielle Wong-Parodi et al., Environmental Non-Government Organizations’ Perceptions of Geologic Sequestration, 3 ENVTL. RES. LTRS. (2008) (discussing how Environmental non-government organizations play a role in shaping public perceptions of environmental problems, their causes and potential solutions).

229 See HALL, supra note 196, at 691.
for a possible renegotiation and revision, I personally believe there is a lot of logic to making a Great Lakes-Saint Lawrence Water Quality Agreement. I am curious to know whether or not this is something, ultimately, the parties and countries have to decide this, but in your own experience with this, do you think that there is any likelihood that this could happen, and secondly, what are some of the key things that would need to be done to make it happen? I definitely appreciate the history and the political aspects on the Canadian side that make it difficult, but is this something that is possible?

MR. CLAMEN: From an ecosystem perspective, I would think it is a good thing. I think the Commissioners have discussed this many times, but from a political point of view, it might be very difficult. I think there is a sense that the treaty, the Compact, some of the other frameworks, despite what Noah said, probably provides some degree of protection. I am not sure Quebec is the furthest, I do not know, quite frankly, what Quebec thinks is the furthest downstream jurisdiction. So I have heard different schools of thought.

For example, although there is not that much enforcement within the current agreement as you know, it does demand of the jurisdictions that participate, reaching certain standards and so on. The good thing would be, I think the citizens downstream like it because then it would sort of maybe force Quebec, if they feel there are certain standards that are not being met, they would have to meet certain standards.

On the other hand, I am not sure the Quebec government really wants to participate in that kind of a framework. They feel they have their own regulations, but they are in a nice position because they can say to the Canadian Government, look, we expect you to give us water that is suitable, and if you understand what I mean, I do not really know.

I think the Quebec government is in an interesting situation. Fortunately for us, we do not have to make any formal pronouncements on those ideas, so my remarks are purely personal. The Commissioners, I think for those very reasons, have steered away from making any strong recommendations on whether Quebec should or should not be involved.

What we do in an informal way through our water quality board, which you formerly co-chaired, is invite Quebec to participate in those discussions, so they are aware of the science that is going on. That is part of our total commitment to involvement. So I hope that answers your question in some way, but probably not directly.

MR. ULLRICH: Just a little feedback, I think the Quebec government in the agreement review committee process is formally on the record against

\[230 \text{See generally Great Lakes Water Quality Agreement, supra note 5.}\]
having the Saint Lawrence included.\textsuperscript{231} I had a little project going on behind the scenes to try to change that, but I was not very successful. I was just wondering if the International Joint Commission itself might be weighing in one way or another.

MR. CLAMEN: Not currently, but if there are specific proposals coming out of the review that the Captain mentioned, then we might. But at the moment, they are focusing on the current institutional arrangements and what the current agreement says, rather than trying to expand it and, you know, as part of the 4,000 people that were for or against it.

MR. ULLRICH: Our organization did go on the record in favor of it.

MR. CLAMEN: Yes.

MR. HALL: David?

MR. BROOKS: I would like to look ahead, I am not sure how many years before, but look ahead a number of years to retirement, you are writing your memoirs. You are looking back on the period of the Compact, from Annex 2001 until the final. There was active engagement by the Environmental non-government organization (NGO) throughout this entire process.\textsuperscript{232} You are now going to write your evaluation of that process.

I do not care whether you name names or do not, I prefer if you name names, but I would like really your honest evaluation of how the NGO movement, I mean, I am thinking mainly of those that have formal offices and staff, not just citizens groups, this kind of a difference between the two and what they did well, where they failed, and what they could have done better or more usefully in that process.

MR. NAFTZGER: Great question and a difficult one to answer. I think on the positive side the environmental community came together in a way I did not ever see previously to advocate a shared agenda. The ones formally involved with the advisory committee were kind of the ones that were delivering the message directly to the negotiators, but I think that was on behalf of a much larger community of environmental interests that were involved in discussions with one another to put those ideas and concepts forward.

I think it was very difficult for the groups that were involved to manage competing agendas, and certainly, there were those groups that would have preferred a more stringent harder line, others that were more willing to compromise, and so bridging those perspectives and trying to come forward with some constructive ideas that could play into the broader negotiation process was, I am sure, a huge challenge.

\textsuperscript{231} See id.

\textsuperscript{232} See generally INTERNATIONAL JOINT COMMISSION, ANNEX 1 DIRECTIVE TO THE UPPER GREAT LAKES "PLAN OF STUDY" REVISION TEAM (2005), available at http://www.ijc.org/rel/boards/upper/Annexes1-4.pdf (outlining meeting dates with non-governmental organizations, among other actors).
In the end, though, I think there was pretty strong consensus among most of the major environmental groups on what they wanted to see the negotiations produce, and in the end, the viewpoint was that the agreements had delivered. And so support was quite strong among most of the environmental interests, and I think that was one of the absolute keys to expediting the Compact approval process in the states. Groups like the National Wildlife Federation\(^{233}\) and their partners, the Alliance for the Great Lakes,\(^{234}\) Great Lakes United,\(^{235}\) and others were very big players in the state approval process; and really helpful at getting editorials and all the other kinds of things that help create the political environment that allowed that ninety-five percent support within the legislatures and within the Congress.\(^{236}\) I think that was a very positive development.

That said, there were groups that were not willing to go along with the prevailing opinion and supporting the agreements, and this has been a problem with the Agreement and Compact process and a problem more generally. You know, what is it that the environmental community wants, and how is that being articulated and being put into the process? How are policy makers supposed to digest what we are hearing in a thoughtful way and produce good policy that is responsive?

So I think the Agreement and the Compact represented a positive precedent and one that could be built upon, but I think the ongoing challenges with hundreds of different groups saying in most cases hundreds of different things, how can we take that and create responsive policy that works in the broader context of the public opinion and all the other competing interests that decision makers have to take into account?

**MR. HALL:** Someone back here.

**MR. CLAMEN:** By the way, if, Noah, if there is any time afterwards, I would like to respond to some of the contrary views you expressed.

**MR. HALL:** Sure. How about two more questions?

**MR. CLAMEN:** I think the audience should have their thought. If there is any time, I would appreciate it.

**MS. MITCHELL:** I am going to pick-up on your question; I am interested in this, too. I am wondering, I guess addressing the question to Noah but for anyone else that might have use on this, if there are any precedents, any other transboundary regions around the world that have had to deal with the type of circumstances you have outlined, and as a side line question directly along that question, but how do you see the path forward?


\(^{236}\) See generally AGREEMENT, supra note 169; see generally COMPACT, supra note 172.
How do you address the arbitration matter that Murray identified has not been used in the Boundary Waters Treaty as having any potential to address this, and I say that both in terms of the arbitration aspect but also the political world, too.

MR. HALL: Great question. The last is the easiest to answer. As for the Boundary Water Treaty's binding arbitration provision, I think there is a reason why it has not been utilized in a hundred years, and I do not think that reason is going to change at any time in the near future.

Namely, in order to move forward with the binding arbitration, you need consent of both parties, including the consent of the United States Senate, and if you want something to not happen, make it necessary to get consent to the United States Senate in order to move forward. And putting aside the United States politics, I think the bigger reason these issues are not addressed by the two federal governments in a cooperative, diplomatic way is often that, it is the very nature of the border that Murray began his remarks with. About half the waterways flow from Canada into the United States and about half from the United States into Canada.

A recent study of air pollution in the Great Lakes region, the most heavily industrialized part of the border shows that forty-nine percent of the air pollution comes from Canada and fifty-one percent from the United States. I would have to check again, but it is close enough; really does not matter. The point is that both countries are in glass houses when it comes to trans-boundary pollution. And while the victims of trans-boundary pollution, members of the public who are most harmed would see no problem stopping trans-boundary pollution going both ways, I think it is going to be difficult for either one of the federal governments to take a hard line against trans-boundary pollution when they are also part of the problem. They are both in glass houses on this. So I think, ultimately, there is a reason why the United States relies so heavily on citizen enforcement for environmental protection which is that we have learned over thirty years that the best way to get environmental protection is with a combination of Government regulation and policies and citizen enforcement when that does not work.

As far as other parts of the world where we have seen this, I am not really familiar with anywhere, any other trans-boundary regions that have relied so

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much on domestic litigation to solve their environmental problems, but in part, that could be just that the United States relies more heavily on litigation and the role of the judiciary and citizen suits to address environmental problems than most other legal systems.

Does anybody else want to add in on that?

MR. CLAMEN: Strange as it may seem, I think I practically agree with everything you just said. My own opinion is that it is very unlikely that the dispute resolution, the arbitration will ever be used because of the senate requirement. Things are much more complicated these days in the United States, and I think I am not lawyer, but the perception I have is that the United States is very much —

MR. HALL: Litigious. That is a complement by the way.

MR. CLAMEN: Litigious. I guess if you are a lawyer, it is. If you are a member of the public, but the point is, it is, and so I think that route is open to them and used a lot more. I would just want to say, I do not want to hog the panel here, but I think the Boundary Waters Treaty is good but not perfect, and the examples you gave are examples of ones where I think the Commission has gone on the record, remember we said prevent and resolve. Prevention is better than resolving. We have gone on the record in saying the things, if the IJC and that mechanism had been used in many cases before disputes had arisen to the levels that they are or worse, we think we could have had a better chance of succeeding. The problem is, it is a mechanism. It is a tool in a tool kit.

Although the treaty is there and some of these are still in the courts, it is interesting to see how they will be resolved, but it is only one tool. People have asked, the treaty does not say it requires both governments to agree, and that is true, but the contextual and procedural ones are for better or for worse every case that we have been asked to look at, whether it is an application for a structure or both governments have given a reference to us. And there is a very good reason for that, and that is, if we were to try to respond to a request from one government that the other one does not support, just try to imagine how we would work. How would the whole basis of the Commission and the treaty function, the equality, the fact finding, the scientific nature of what we do, if one Government is not willing to even ask us the question, how could you imagine that they would be willing to allow us to come in and get the information? In theory, it is there, but in practice, it is almost in my view, an impossibility. I just wanted to make those points in response to some of the things mentioned.

MR. FELDMAN: Thank you. Two years ago the President of the United States fired the chairman of the International Joint Commission, and he did it in one line, saying that it was for consistency sake because the Commissioner was also the Commissioner of the International Boundary Commission, and he was dismissed from the International Boundary Commission because he
refused to take an order from the President about how to resolve an issue on the border.  

I would like to know whether the International Joint Commissioners ever were concerned about this kind of political interference, ideological interference with the composition of the Commission, and whether they understood the potential implications of that kind of interference.

MR. CLAMEN: I am assuming that question is being asked of me.

MR. THOMAS: Go ahead.

MR. HALL: I never thought that was important to mention until now.

MR. CLAMEN: If they were concerned they kept it to themselves. I can tell you officially they did not take a position on this, and I can tell you that there is no record in any proceeding that I am aware of how they felt personally but as far as the organization is concerned. Now, whether they should have or not, you know, that is a personal matter. So, and I understand and I think I know who you are, I think this matter is still actually before the courts.

MR. FELDMAN: This matter is in the Ninth Circuit.

MR. CLAMEN: So, I think it would even be improper for me to speculate.

MR. FELDMAN: But it is not in the Ninth Circuit in any reference to the IJC. The Ninth Circuit only references boundary commission.

MR. CLAMEN: Right. Well, I think people like me are certainly watching that process with great interest. So I appreciate you bringing it up. I am just afraid I cannot say much more about it. We can talk about it over a drink sometime if you do not have a microphone hidden in your belt.

MR. PETRAS: I have a question that goes to the whole issue of generally enforcement of water quality, and I suppose I would address it directly to Professor Hall first but everybody can chime in.

You probably recall that natural resources defense council would scour the National Pollutant Discharge Elimination System (NPDES) permits and the violations, and of course, we would have players and manufacturers all along Lake Erie who would self-report their violations, and if the EPA did

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not engage in an enforcement action, they would come in on kind of a bounty hunter way and go after it and be entitled to attorney fees, et cetera.\textsuperscript{243}

Do manufacturers, dischargers have to worry or take into consideration that they may be brought into Canadian court or face Canadian litigation on those kinds of cases?

MR. HALL: Yes. Everything I have seen from these cases says that if I were, I used to be in private practice advising manufacturers and other dischargers on environmental compliance, and if I had a large client on the shores of Lake Erie who had significant pollution discharges, whether those were in compliance with the United States Clean Water Act or not, I would be concerned with my client's liability under the Canadian Fisheries Act and Canadian laws for harm to the Great Lakes that are felt on the north side of the border. So absolutely yes.

And I think this goes to the heart of the concerns to extraterritorial use of environmental law, and if I were going one step further in advising those clients, it is how to resolve this in a way maybe short of having to comply with both countries' laws; that perhaps it is time for a new Great Lakes Water Quality Agreement that includes more enforcement and stronger standards, and perhaps in return for that, there would be some protection from domestic environmental laws, but it would be hard to give up one without getting the other.

MR. HALL: Does anybody else have any questions?

MR. CLAMEN: Just very quickly, I want to say that in one of the three reports the Commission issued on this subject of the review, we highlighted on what we call accountability, which would, I think, if there were enforcement provisions in it would hold the governments accountable for these kinds of things. So I just wanted to mention that.

MR. THOMAS: Just to follow up, that is one of the challenges that the marine issue is facing right now with the Clean Water Act being extended, not only ballast water discharges but all operational discharges, twenty-six operational discharges that come from vessels and the NPDES requirements that go on, and the citizen provisions are there, too.\textsuperscript{244}

\textsuperscript{243} See generally Compliance and Enforcement in the Pacific Northwest Area, http://yosemite.epa.gov/r10/enforce.NSF/Our+Office/Introduction+to+Enforcement (last visited Jan. 30, 2010) (discussing how industries can monitor their own emissions or discharges by reporting them to the government).

\textsuperscript{244} See Environmental Protection Agency, Vessel Discharges: Final Vessel General Permit, www.epa.gov/npdes/vessels (last visited Jan. 30, 2010) (stating that the Vessel General Permit regulates discharges from the normal operation of vessels and includes general effluent limits applicable to twenty-six specific discharge streams and inspection, narrative water-quality based effluent limits; inspection, monitoring, recordkeeping, and reporting requirements; and additional requirements).
So it is a completely different world when you talk about something that is going to move through possibly eight different states on the Great Lakes and have to comply with each one of the states, different provisions so you can imagine the challenges, and then there is also the federal requirement, which would eventually come out, and then we have international conventions that the ship is trying to meet. That is why this is a very complex matter.

It is probably in the Coast Guard position best managed at the federal level, but because of the Clean Water Act, Northwest Advocate's decision, the Clean Water Act now applies to operation discharges from vessels, and we are going through the implementation right now, and it is very, very challenging, not only for the maritime industry but also for the federal government, who is going to have to try to work around the state provisions of that, and it is a challenge.

MR. HALL: One more question before we break for the next panel.

MR. CLAMEN: I am going to need at some stage just thirty seconds when I said there was an agreement on Devil's Lake if you give me that.

MR. HALL: What was that?

MR. CLAMEN: I just need thirty seconds to clarify what I mean.

MR. HALL: Why don't you do that, and then we will take our last question.

MR. CLAMEN: Well, I used the word "agreement." I guess I should not have because it was in subsequent slides. Agreement is a much more formal thing. There really was not an agreement. There was sort of an understanding or accommodation, if you will, between both governments in August as to what role the IJC may play.

Strangely enough some people are interpreting that as a reference, but it really was not, and we have sort of operationalized it like a reference, but it is not. And that just goes to show one of the kinds of challenges we have to reach under the Boundary Waters Treaty.

When two governments seem to agree about something, if they cannot formally agree and call it a reference for political and other reasons, they could still make some progress. So we have been monitoring pathogens and parasites in the system, which is one of the key issues under Devil's Lake now for two years.

245 See generally id. (discussing the different requirements imposed by the EPA, NPDES, and the federal government).

246 See generally Council of Canadians, http://www.canadians.org (follow “Campaigns,” “Water,” and “Devil's Lake” hyperlinks) (last visited Nov. 1, 2009) (discussing how up until recently, the solution to resolving water disputes was the International Joint Commission, but the IJC's power has been eroded by unilateral action in cases such as the Devil's Lake diversion).

247 See generally Deal Struck on Devil’s Lake Diversion, supra note 50 (stating that the
We are finishing the whole sampling survey. There will be some information on our web site about all that. There will be a three-year comprehensive report. Hopefully, there will be a risk assessment framework that will be done, and I do not know if it will solve the problem. But it will provide a heck of a lot of sound science, and whether it does or does not, we are, at least, two years away. But it just goes to show you how the treaty can be used, or at least the Commission can be used in ways other than the traditional way, which is what I wanted to speak to about flexibility and adaptability. Thanks.

MR. CRANE: Just a quick comment: I first became aware of Great Lakes issues as a young reporter when a report was published on high levels of mercury in Lake Saint Clair, and I was dispatched to research it. They said this is a big problem. I said it is a great opportunity. Now we can build a thermometer factory. He had a change of heart after I printed this.

My question is this: Mention was made on the importance of good science as a basis for decision making and recommendations. I wonder at this stage do any of the entities we talked about actually have underway good research on the impact of climate change on the Great Lakes, and in particular, I am looking at the implications of different thresholds that are reached, whether it is so many parts per million in the atmosphere or changes in average global temperatures. Climate change has come up a number of times, but is there any actual work being done or anything at or near completion?

MR. NAFTZGER: Well, I think there is a lot of work ongoing in different research institutions, governmental entities and others. How well that is being coordinated and integrated into the policy making process I think is another question. In so far as it relates to water quantity, the Compact and the Agreement build in a variety of triggers that will precipitate a cumulative impact assessment. It is every time incrementally fifty million gallons of new water is being used, or every five years or at the request of any single one of the states or provinces. So that will trigger review of the Compact and the Agreement decision making standards that are being used, and changes will be made as needed.

So the Compact and the Agreement certainly anticipate and recognize specifically the issue of climate change in the body of the agreements and have some things that will be done over time. So I think those are the kind of flexible mechanisms you are going to see more of as this challenge continues to present itself.

agreement calls for an advanced filter to protect Manitoba waterways from foreign organisms).

See generally COMPACT, supra note 172.

Id.

Id.
MR. CLAMEN: I know I can speak both; I will speak primarily from the IJC, and I can because I happen to know. We are obviously very interested in climate changes as it impacts on our water management, air and other responsibilities. We have done climate change analysis in the Great Lakes on the downstream end for our Lake Ontario review of that order. I would be pleased to give you some information on that. We have run various scenarios to see what the impacts would be from water management. We are doing the same thing now from the upper lakes, primarily Lake Superior, Michigan, and Huron for the same exercise.

From the Government of Canada’s perspective, I know they have a huge number of people. I cannot honestly tell you, they have a lot of people doing research because they participate. They have the Canadian climate model. They also have adaptation groups that look at climate change adaptation. They have groups that look at mitigation. There is a lot. Whether it satisfies what you are particularly interested, I cannot tell you, and there is similar work going on in the United States. So there is an army of people and lots of money, but whether it is going to do what you want, in particular, I am not sure.

MR. THOMAS: The agreement review committee determining climate change is probably going to exacerbate any of the problems we have on the Great Lakes, but that needs to be addressed in the next revision.

So I am pretty sure we are going to see maybe something along the line that the Compact has. I am kind of speculating there, but I am sure it is going to be a big part of the revision to the next agreement.

MR. HALL: For what it is worth, I co-authored a report and then an article that tried to synthesize all of the peer-reviewed literature and government reports on the impacts of climate change in Great Lakes Water Management. The problem is, they did that about a year-and-a-half ago, and it is just getting published now, and I am worried that it is out of date, even as it is being published.

MR. CRANE: It is a question of synthetism. None of us have time to read twenty-five different reports of this size.

MR. HALL: This article is about thirty pages, but that still might be longer; that is more than bathroom reading.

MR. CRANE: I mean all in one.

MR. HALL: All in one. All right. With that, let us wrap up, thank our panelists. The next panel is going to be building on a lot of these issues and probably a lot more room for discussion about a lot of these tough points, so let us come back at 10:45 and start the next one. Thanks.