

Safeguarding Maine Water in International Trade Agreements

Testimony submitted to the Maine Citizen Trade Policy Commission

Submitted by: Craig Saddlemire

Good evening members of the Citizen Trade Policy Commission,

My name is Craig Saddlemire and I live right here in Lewiston. I know a lot of times these trade issues seem abstract and far away, but I want to try to show how these trade rules, as they relate to water, land right in our own backyard and should cause us real concern.

I'm here tonight to ask the Maine Citizens Trade Policy Commission to look into how we in Maine can protect our fresh water—and services and investments relating to water—from international trade rules.

How can we continue to regulate the extraction, distribution and use of fresh water in our state in the long term public interest without interference from global water companies using trade treaty rules?

How can we ensure that the democratic control over water in Maine is not subverted?

I don't have the answers to these questions, but I hope that this commission can take the time to find answers to these questions. I do know that the more I scratch below the surface on these issues the more alarmed I become.

Past trade agreements, like NAFTA, show the potential for trade treaties to affect bulk water exports. Many critics have pointed out that once opened, trade treaty rules make it very difficult to turn off the tap. Given Maine's large quantity of fresh water, we should be looking closely at this.

My worries go further than this. Global trade rules apply to municipal services such as water treatment, fresh water distribution, and wastewater treatment. These rules also apply to water investments, and this investment issue leads me back to a concern that lands right in our own backyard at Range Pond State Park.

A colleague of mine asked a noted international trade lawyer to summarize some of the trade treaty issues that could affect the contract the State of Maine entered into with Poland Springs to extract water from beneath the Range Pond State Park.

I'll provide that memo to the Commission.

But let me quote from it, to give you the gist. The trade lawyer, Steven Shrybman, states:

This Maine water extraction contract (quote) "is subject to the requirements of these international agreements."

“[I]f a conflict arises between the provisions of the [water] Agreement and those of international trade law, the latter would prevail.”

“It is possible to foresee disputes arising between Maine and Poland Springs in several ways.”

These statements aren't from me, they're from a respected international trade lawyer.

They raise some important questions about whether trade treaties interfere with our ability to generate more revenues in Maine to fund essential services.

In the contract, the State of Maine has granted a 30-50 year license to Nestle for water drawn from under Range Pond State Park. It charges a mere half-a-penny-per-gallon for this water. Nestle turns around and sells this water for more than we pay for gas. There's no doubt that the company can pay more, and that Maine needs more--Maine gets just 17 million dollars a year.

My question is this:

Do the investment rules contained in CAFTA chapter 10 and NAFTA chapter 11 get in the way of us re-negotiating the terms of this license?

What if Maine decided to increase its fee to a penny a gallon—thereby raising another 17-million-dollars-a-year for

the State?...Could Nestle mount a CAFTA or NAFTA investment challenge?... Could it bypass Maine law to seek more generous compensation under trade treaty investment rules?

Again, I don't have the answers to these questions, but I think they are important questions and I do hope that the commission can look into them and help provide some answers.

Finally, I have two specific requests for the commission.

First, would the Commission assess, in greater detail, the risks of international trade treaties affecting the democratic control over water in Maine?... with special emphasis on global rules on services and investments relating to water?

Secondly, would the Commission investigate how the State could minimize its exposure to these risks in its day-to-day practices? Should the State be negotiating much tighter water contract provisions? Should it, for example,

- place strict caps on water extractions,
- stipulate the State's right to reduce the volumes that are extracted,
- make explicit the fact that there is no mandatory obligation to renew water extraction contracts, and
- shorten the terms of water licenses?

All of these water issues are changing rapidly and will become more and more important as population grows and clean, fresh water becomes more scarce. It is my impression that as Maine state & local policymakers seek to craft the best policies in this context they are often not aware of the connection to trade rules. I would hope that the commission could help state & local policymakers bring an awareness of international trade into their work.

Thank you.

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April 18, 2005

Dr. Martha Spiess
7 Tidal Brook Road
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Dear Dr. Spiess:

Re: Spring Water Use Agreement and License

You have asked us to comment on the potential application of international trade law to a contract between the State of Maine and a private company to take water from the Range Pond State Park.

While poorly understood, US obligations under the *North American Free Trade Agreement* ("NAFTA") and other international trade, investment and services treaties have direct application to the actions of state and municipal governments. Moreover, under NAFTA investment rules (and those of similar treaties), a foreign investor has the right to claim damages before an international tribunal where it alleges that a government has acted in breach of those rules.

These claims may relate to government measures that are entirely lawful under US and state laws, such as those relating to the management of state natural resources, including water. In exercising its lawful authority, it is not possible for a government to contract out of, or otherwise foreclose the right of foreign investors to make such trade agreement based claims.

Allowing such rights of private enforcement is a relatively recent development, but recourse to these extraordinary dispute procedures is now becoming an increasingly common phenomenon. Over 35 claims have now been brought under NAFTA investment rules, including several against the United States. One dispute, which is now ongoing, involves a challenge to California groundwater protection measures.¹

We have reviewed a copy of the Spring Water Use Agreement and License (the "Agreement") entered into between the State of Maine and Great Spring Waters of America Inc., dated August 2, 1999. As we understand it, under this Agreement the company, which operates under the business name of Poland Springs, is authorized to take water from certain facilities and sites in the State Park. It may do so for the entire term of the Agreement, which is to continue for a period of 30 years and may be renewed for two further periods of ten years each. The Agreement establishes the fees payable by Poland Springs and deals with various matters, including the resolution of disputes arising under the Agreement.

There are two fundamental points to appreciate about this Agreement when considered in light of US obligations under NAFTA investment rules and similar investment treaties.

The first is that the Agreement is subject to the requirements of these international agreements. There is no question whatsoever that under NAFTA, the Agreement at issue would be considered a government "measure" and therefore subject to the provisions of this treaty. Moreover, we are aware of no exception or reservation that would moderate the full application of NAFTA investment rules to Maine's agreement with Poland Springs.

The second is that if a conflict arises between the provisions of the Agreement and those of international trade law, the latter would prevail. Moreover, the State has no authority to alter the rights of foreign investors under international law, either by law, regulation or contract.

To illustrate this point, consider section 10.7 of the Agreement, that requires any disputes arising under the Agreement to be resolved in accordance with the laws of Maine and in the State courts. However, it is clear that this provision would not prevent a foreign investor from making a claim relating to its investment in the water-taking enterprise before an international arbitral tribunal, even where it might otherwise have a claim under the contract, and neither the State nor the federal government would have any power to prevent it from asserting this right. Moreover, if such a claim were brought, it would be decided in accordance with international, not US law.

A recent decision by an appellate body operating under the auspices of the International Center for the Settlement of Investment Disputes, and concerning a water privatization project in Argentina, resolves any doubt about the priority of international investment law in such a case. In that case, which also involved an international water conglomerate, similar contract provisions had been negotiated, but when a dispute arose, the foreign investor ignored the local courts in favour of making a claim under an international investment treaty similar to those which bind the United States.

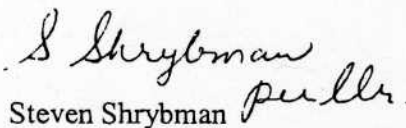
It is possible to foresee disputes arising between Maine and Poland Springs in several ways. For example, the State may decide to cancel the license because of non-performance by Poland Springs, or may regret the open-ended nature of the license it has given and seek to impose stricter limits on water takings because of competing demands upon the State's water resources or for conservation reasons. In either case, Poland Springs may have a claim for damages arising under the contract. But it may also have a claim under international investment law quite independent of its contract rights, including a claim that the State has effectively expropriated its investment.

Poland Springs may also expect that an international tribunal will be more sympathetic to such a claim than would a state court, or that its interests are better protected under international law. For either or both reasons, it may decide to proceed in an international rather than domestic forum.

It is not, of course, possible to predict the likelihood of such a claim arising, and the right to initiate such a claim would depend upon Poland Springs being able to claim the status of being a foreign investor, resident in a jurisdiction with which the US had negotiated an investment treaty. In this regard, we understand that Great Springs of America Inc. is in fact a subsidiary of Nestle Inc., and could readily qualify as an investor under NAFTA or one of several other like treaties the US has negotiated over recent years.

There is much more that might be said about the nature of the risks posed by the new generation of international trade agreements for state and local governments. We trust, however, that this broad overview will make the point that it is best for these risks to be thoroughly assessed before commitments are made that may expose governments to the onerous claims that private investors may now assert under these regimes.

Yours very truly,


Steven Shrybman

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