

## CANADA'S FRESH WATER AND NAFTA: CLEARING THE MUDDIED WATERS

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### ABSTRACT

*Over the past half century Canada became a signatory to a number of complex and integrated international agreements. Canada's obligations under these agreements have often been ill-defined and vague. This is particularly evident in regards to Canada's freshwater resources. This article will examine Canada's international trade obligations, liabilities and responsibilities under the North American Free Trade Agreement (NAFTA). It will argue that Canada's piecemeal approach to fresh water is insufficient to safeguard its sovereignty over this indispensable resource.*

*The article begins by providing a comprehensive and global perspective on trade in water by illustrating the prominent position that water is beginning to assume in the discourse of international relations. After situating the issue of trade in water in the global context, the North American perspective is examined. The author evaluates the applicable NAFTA provisions, corresponding tribunal case law, and competing treaty interpretations that potentially threaten Canadian sovereignty over its fresh water resources. The author then outlines and critiques the actions and policies the Canadian Government has implemented to protect its domestic water supply. Finally, a number of policy options are presented that may help ensure Canada's sovereignty over its fresh water resources.*

*The author's ultimate conclusion is that only through amendments to NAFTA can Canada once again become author of its own future.*

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## INTRODUCTION

In an interconnected world increasingly governed by the trinity of trade, commerce and corporations, a country's sovereignty over its natural resources cannot be assumed. Nowhere is this more apparent than in the case of Canada's fresh water resources. Over the past half century Canada became a signatory to a number of complex and integrated international agreements. Canada's obligations under these agreements have often been ill-defined and vague.

This article will examine Canada's international trade obligations, liabilities and responsibilities under the *North American Free Trade Agreement (NAFTA)*.<sup>1</sup> It will argue that Canada's piecemeal approach to fresh water is insufficient to safeguard its sovereignty over this indispensable resource. This article is in four parts. Part one illustrates the prominent position that water is beginning to assume in the discourse of international relations. Part two outlines the applicable *NAFTA* provisions that threaten Canada's sovereignty over its water supply. Part three offers an examination and critique of the actions and policies the Canadian Government has implemented to protect its water. Part four proposes a number of policy options that will help ensure Canada's sovereignty over its fresh water resources.

## I. THE FUNDAMENTAL IMPORTANCE OF WATER

### 1. Supply and Distribution

Is the world's water supply capable of quenching the thirst of a growing population, reliant on a readily available and inexpensive water source? Although less than five percent of the world's water supply is clean and fresh enough for human consumption, experts indicate that there is enough water in the world to meet the current and future needs of humankind.<sup>2</sup> Geographic abundance, however, does not translate to equitable or efficient allocation and management. Seven percent of the

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<sup>1</sup> 17 December 1992, 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

<sup>2</sup> Jamie W. Boyd, "Canada's Position Regarding an Emerging International Fresh Water Market with Respect to the North American Free Trade Agreement" (1999) 5 *NAFTA L. & Bus. Rev. Am.* 325 at 326, 328 [Boyd].

world's current population does not have access to an adequate supply of water to ensure survival.<sup>3</sup> An equally appalling statistic puts the number of annual water-related deaths at between two and five million. Although when water is measured on an aggregate scale it cannot be said to be running out, water is certainly "running out in places where it's needed most."<sup>4</sup>

If present water use and distribution patterns continue, the world's water problems will compound exponentially. In 1997, then World Bank Vice President Ismael Serageldin predicted that, "the wars of the next century will be over water."<sup>5</sup> By 2015, the U.S. Government estimates that more than 3 billion people will face water shortages for drinking and sanitation.<sup>6</sup> Furthermore, 1.8 billion people, including citizens of geopolitical hotspots such as Pakistan, South Africa, and parts of China and India, will suffer from "absolute water scarcity."<sup>7</sup> The problem of access to a safe and secure water supply is particularly problematic in the water-scarce Middle East. Jordan and Israel presently rely on shared non-renewable water supplies to satisfy twenty percent of domestic demand. Similarly, Saudi Arabia is rapidly depleting non-renewable subterranean aquifers to satisfy much of its water needs. This brief survey of global water distributions and shortages illustrates the point that water is on the brink of becoming a major item in international political and economic affairs.

## 2. The Economics of Water

Basic economic theory dictates that scarcity and value are interrelated concepts. As the availability of a good decreases, its relative value in-

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<sup>3</sup> Christopher S. Maravilla, "The Canadian Bulk Water Moratorium and Its Implications for NAFTA" (2001) 10 *Currents* 29 at 29 [Maravilla].

<sup>4</sup> Marq de Villiers, "Three Rivers" in Bernadette McDonald & Douglas Jehl, ed., *Whose Water is It? The Unquenchable Thirst of a Water-Hungry World* (Washington: National Geographic Society, 1999) 41 at 45 [Three Rivers].

<sup>5</sup> Cynthia Baumann, "Water Wars: Canada's Upstream Battle to Ban Bulk Water Exports" (2001) 10 *Minn. J. Global Trade* 109 at 109 [Baumann].

<sup>6</sup> Douglas Jehl, "Introduction" in Bernadette McDonald & Douglas Jehl, *supra* note 4, ix at xiii [Jehl].

<sup>7</sup> Maravilla, *supra* note 3 at 30.

creases. When underlying economic principles are applied to water, the calculus illustrates a disturbing trend.

Corporate interests and international business conglomerates have already seen glimpses of the profit potential of trade in water. The American biotech corporation Monsanto recently declared its intentions to enter the lucrative business of water supply in stating, “there are markets in which there are predictable sustainability challenges and therefore opportunities to create business value.”<sup>8</sup> Ricardo Petrella, a trade analyst and water market watcher, has claimed that a “global high command” for water has been building for the last decade.<sup>9</sup> Perhaps most illustrative of the impending big business interest in water is World Bank’s definitive statement: “one way or another, water will soon be moved around the world as oil is now.”<sup>10</sup>

The commodification of water has already taken hold. Hong Kong purchases water from its neighbouring territories. A host of Caribbean islands import fresh water to quench the insatiable thirst of growing tourist industries. South Africa compliments its domestic supply by importing from the water-abundant nation of Lesotho. Malaysia and Singapore are signatories to a water contract, agreed to in 1961 and scheduled to conclude in 2061, where Malaysia supplies its smaller, wealthier neighbour with untreated drinking water.<sup>11</sup> In total, no less than thirty countries already import at least one third of their water resources.

In addition to the traditional methods of water commodification through bottled water sales and diversion projects, companies are beginning to investigate more innovative means of trade. Bulk freshwater transfers are presently slated to begin through the vehicle of converted oil tankers. On March 25, 2004, Israel and Turkey penned a twenty-year contract for the sale of 50 million cubic meters of water per year.<sup>12</sup> Under the Agreement, water will be extracted from Turkey’s Manavgat River

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<sup>8</sup> Maude Barlow, “The World’s Water: A Human Right or Corporate Good?” in Bernadette McDonald & Douglas Jehl, *supra* note 4, 25 at 29 [Barlow].

<sup>9</sup> *Ibid.* at 38.

<sup>10</sup> *Ibid.* at 38.

<sup>11</sup> Brian Anderson, “Selling Great Lakes Water to a Thirsty World: Legal, Policy & Trade Considerations” (1999) *Buff. Env’tl. L.J.* 215 at 242 [Anderson].

<sup>12</sup> Dr. Isabel Al Assar, “Future Trading of Water as a Commodity” (Paper presented to the Third International Symposium, University of Dundee, June 14, 2000) Paper updated January 2005.

and transported via converted oil tankers to Israel. Jonathan Peled, an Israeli Foreign Ministry spokesperson, has said, “this landmark agreement transforms water into an internationally accepted ‘commodity.’”<sup>13</sup> This agreement between Turkey and Israel relocates the fresh water debate from intellectual and academic realms into the real world of politics, profit and economics.

### 3. Locating Canada’s Water Issue

In the North American context, the politics of water operates in a particularly unique and challenging context. Water experts estimate that Canada holds between nine and twenty percent of the global share of fresh water resources.<sup>14</sup> The exact percentage is dependent on whether Canada’s inaccessible fresh water supplies – the water ‘locked away’ in glaciers and the far North – is included in the equation. Even if the more conservative figure of nine percent is adopted, the undeniable conclusion is that Canada enjoys an abundant supply of this increasingly valuable resource. The value of Canada’s fresh water supply becomes even more astounding when computed on a per capita basis. The combination of low population density and staggering supply places Canada in the position as a gatekeeper of the world’s water supply.

The United States, in contrast, has only one tenth of Canada’s water and nearly ten times its population.<sup>15</sup> Furthermore, America has become reliant on unsustainable means to meet its current water demands – a trend witnessed throughout the western world. Water is currently being pumped from subterranean aquifers at alarming rates. The Olgatha underground aquifer, which covers one third of the United States, “is being depleted at a rate eight times faster than it is replenished.”<sup>16</sup> The large-scale diversion projects and the irrigation techniques of the American Southwest exemplify the U.S.’s water predicament. Arizona, once a dry and barren wasteland, has defied environmental constraints by irrigating 5,000 square kilometres of desert for crop production. The Imperial Irrigation District, a 2,000 square kilometre strip of irrigated farmland in

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<sup>13</sup> *Ibid.*

<sup>14</sup> Baumann, *supra* note 5 at 112; Boyd, *supra* note 2 at 328.

<sup>15</sup> Anderson, *supra* note 11 at 218.

<sup>16</sup> Maravilla, *supra* note 3 at 30.

California, has similarly relied on vast diversion projects and wholesale groundwater extractions to create favourable farming conditions.<sup>17</sup> The American southwest has built its prosperity on the assumed constant of an inexpensive and readily available source of water. The future prosperity and growth of the region will depend on the continued existence of a cheap water supply. As the twin factors of increased demand and decreased supply begin to take hold, the United States will inevitably look to its northern neighbour to help supplement its water supplies.

#### 4. Normative Dynamics

Should the basic tenets of supply and demand dictate the allocation of the world's water? Professor Joseph Sax argues that water is more than just a common natural resource. He characterizes water as a "heritage resource", grouping it not with resources such as oil, gas and forestry, but rather bestowing water with its own special status.<sup>18</sup> Professor Sax notes that a community's attachment to this "unique life- and economy-sustaining" resource is more aligned with an attachment to architecture, art or other cultural iconography than the other category of natural resources.<sup>19</sup>

Most Canadians appear to subscribe to the notion that the true value of water cannot be measured in simple monetary terms. When the government of British Columbia crafted plans to allow for the export of water to the United States via converted tankers, the public reacted with visceral distaste.<sup>20</sup> The proposed exportation and commodification of water spurred a heated and contentious debate that led the B.C. government to place a moratorium on fresh water exports. When the water debate reached the floor of the House of Commons, veteran MP Bill Blaikie proclaimed, "water is as Canadian as hockey, as the Mounties, as the beaver."<sup>21</sup> After a similar venture was proposed by an Ontario company,

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<sup>17</sup> Scott Philip Little, "Canada's Capacity to Control the Flow: Water Export and the North American Free Trade Agreement" (1999) 8 *Pace Int'l L. Rev.* 127 at 128, 129 [Little].

<sup>18</sup> Anderson, *supra* note 11 at 216.

<sup>19</sup> Anderson, *supra* note 11 at 216.

<sup>20</sup> Maravilla, *supra* note 3 at 31.

<sup>21</sup> Anderson, *supra* note 11 at 216.

and an equally harsh public reaction, the Canadian government implemented a federal moratorium on bulk water transfers.<sup>22</sup> In defending the moratorium, then Canadian Foreign Affairs Minister Lloyd Axworthy bluntly declared, “[water] is not just a commodity.”<sup>23</sup>

The issue of water export is thus immersed in a host of normative, ethical, financial, political and economic claims. Although Canada will eventually have to face these claims, a threshold question must first be answered: given international commitments, is Canada restricted in how it manages, controls and distributes its water? A partial answer to this quandary lies in the *North American Free Trade Agreement*.

## II. THE NORTH AMERICAN FREE TRADE AGREEMENT

### 1. An Overview

*NAFTA* creates a comprehensive and complex trade regime that binds the Canadian government to a host of trilateral obligations. Trade experts have identified Chapter 3 (Trade in Goods) and Chapter 11 (Investment) as potentially constraining Canada’s discretion over its water policy. Although some commentaries suggest that Chapter 12 (Cross Border Trade in Services) may also potentially hinder Canada’s ability to make policy, the majority of academic literature and governmental analysis on the subject identifies Chapters 3 and 11 as the chief impediments to Canada’s ability to exert sovereign control over its water resources. The following analysis will therefore focus on Chapters 3 and 11.

### 2. Chapter 3: Trade in Goods

#### *i. Article 300: Scope and Coverage*

##### *a. Threshold Issue*

The threshold issue in the debate over fresh water exports is whether *NAFTA* applies to water. Article 300 states that Chapter 3 of *NAFTA*

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<sup>22</sup> Maravilla, *supra* note 3 at 29.

<sup>23</sup> Anderson, *supra* note 11 at 217.

only applies to “trade in goods of a Party.”<sup>24</sup> Therefore, the provisions in Chapter 3 of the *NAFTA* only apply to water if it first qualifies as a “good.”

Article 201 of *NAFTA* defines “goods of a Party” as “domestic products as these are understood in the *General Agreement on Tariffs and Trade (GATT)* or such goods as the Parties may agree, and includes originating goods of that Party.”<sup>25</sup> The *GATT* defines water, by reference to the *International Convention on the Harmonized Commodity Description and Coding System*, as “including natural or artificial mineral water and aerated waters, not containing added sugar or other sweetening matter nor flavoured; ice and snow.”<sup>26</sup> An explanatory note to the tariff schedule further provides that water includes “ordinary natural water of all kinds (other than sea water).”<sup>27</sup>

On its face, the *GATT* tariff schedule appears to characterize water as a good and thus incorporates it into *NAFTA* by operation of Articles 201 and 300. The Canadian government and a host of academic commentators have challenged this interpretation. The assertion that water is not a “good,” and therefore not applicable to *NAFTA* obligations, is one of the government’s chief assumptions underlying its water policy.<sup>28</sup>

## ii. *Is Water a Good?*

The Canadian government and other subscribers to the view that water is not a “good” enlist the following arguments in support of their position.

First, proponents of the view that water does not qualify as a “good” focus on the definition of “good” in *NAFTA*’s Chapter 2. Article 201 defines the “goods of a Party” as “domestic products as [...] understood under the *General Agreement on Tariffs and Trade*.” The argument follows that for an item to be a “good” under *NAFTA*, it must be a

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<sup>24</sup> *NAFTA*, *supra* note 1.

<sup>25</sup> 30 October 1947, 58 U.N.T.S. 187 (entered into force 1 January 1948) [*GATT 1947*].

<sup>26</sup> June 14, 1983, 1503 U.N.T.S. 3, 4 (entered into force 1 January 1988).

<sup>27</sup> Boyd, *supra* note 2 at 134.

<sup>28</sup> Canada, Department of Environment, *The Management of Water: Frequently Asked Questions*, Question # 5, online: < [http://www.ec.gc.ca/water/en/manage/removal/e\\_FAQ.htm#5](http://www.ec.gc.ca/water/en/manage/removal/e_FAQ.htm#5) > [FAQ].



“product” under the *GATT*. The term “product” is not defined under the *GATT*, however the *Oxford English Dictionary* defines “product” as “a thing produced.”<sup>29</sup> An interpretation that emphasises the *GATT* “product” requirement mandates that before a resource qualifies as a “good,” it must first undergo a process that somehow transforms the resource into an item of commerce.<sup>30</sup> Proponents of this view assert that since water in its natural state is an unexploited resource, like oil and gas in the ground, it is not a “product” and therefore not subject to the provisions of Chapter 3. The counter argument to this interpretation of Article 201 is a simple reliance on the unambiguous wording of the *GATT*'s tariff schedule which states, “ordinary water of all kinds (other than sea water)” qualifies as a “good.”<sup>31</sup>

Second, the Canadian government insists that the inclusion of water as a tariff heading under the *GATT* is not determinative. In a 1999 policy paper released by the Department of Foreign Affairs and International Trade, the Canadian government argues that the *GATT* tariff schedule “does not tell us if and when water is a good; it only tells us that when water is classified as a good, it falls under a particular tariff heading.”<sup>32</sup> The government insists that to imbue the schedule with substantive interpretive content is to adopt a “mistaken view” of the tariff schedule. Furthermore, the government explains that the tariff schedule is merely an “organizational structure”, utilized for the purposes of administrative classification and ease of reference and it is silent on the issue of whether water is a “good.”<sup>33</sup>

Third, a 1993 Joint Statement, released by the Canadian government, is put forth as proof that water remains outside the rubric of Chapter 3:

The governments of Canada, Mexico and the United States, in order to correct false interpretations, have agreed to state the following jointly and publicly as Parties to the North American Free Trade Agreement (NAFTA):

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<sup>29</sup> 2d ed, s.v. “product”.

<sup>30</sup> Maravilla, *supra* note 3 at 33.

<sup>31</sup> Boyd, *supra* note 2 at 134.

<sup>32</sup> Canada, Public Works Canada, Law and Government Division, *Bulk Water Removals, Water Exports and the NAFTA*, David Johansen (PRB 00-41E), 20 February 2001 (Updated 31 January 2002), online: < <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/prb0041-e.htm> > [Johansen].

<sup>33</sup> *Ibid.*

The NAFTA creates no rights to the natural water resources of any Party to the Agreement.

Unless water, in any form, has entered into commerce and become a good or product, it is not covered by the provisions of any trade agreement, including the NAFTA [...]. Water in its natural state in lakes, rivers, reservoirs, aquifers, water basins and the like is not a good or product, is not traded, and therefore is not and has never been subject to the terms of any trade agreement.<sup>34</sup>

The blunt wording and authoritative tone of the Joint Statement lends credibility to the Canadian government's position. A number of political and legal realities, however, detract from this stance. A common critique of the government's reliance on the Joint Statement is that it is not legally binding upon the *NAFTA* parties.<sup>35</sup> At best, the Joint Statement can be characterized as "soft law" and utilized only as a tool of treaty interpretation.<sup>36</sup> Furthermore, even reliance on the Joint Statement for the purposes of treaty interpretation may be problematic given subsequent U.S. declarations. A United States announcement released the same day as the above Joint Statement, lacks the definitive wording and unwavering tone of the Canadian release:

[T]he Governments of the United States, Canada, and Mexico are today releasing a joint statement of future work on dumping and antidumping duties and subsidies and countervailing duties, and a joint statement on natural water resources and the NAFTA. *None of these statements change the NAFTA in any way.*<sup>37</sup>

This less than compelling American release coupled with the fact that "it has long been recognized in international practice that governments may agree on joint statements of policy or intention that do not establish legal obligations," severely curtails the Canadian position that

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<sup>34</sup> Governments of Canada, Mexico and the United States, Joint Statement (1 December 1993) cited to: Johansen, *supra* note 33.

<sup>35</sup> West Coast Environmental Law, Legal Opinion commissioned by the Council of Canadians re: Water Export Controls and Canadian Environmental Trade Obligations, 17 August 1999 [WCEL].

<sup>36</sup> Little, *supra* note 17 at 140.

<sup>37</sup> WCEL, *supra* note 35.[emphasis added].

its unilaterally released and unsigned 1993 joint statement disqualifies water from Chapter 3.<sup>38</sup>

Fourth, proponents rely on Canadian domestic legislation to buttress their claim that water is not a *NAFTA* “good.” Section 7(2) of the *North American Free Trade Implementation Act* states that only water “packaged as a beverage or in tanks, but not natural, surface and ground water” falls within the scope of *NAFTA*.<sup>39</sup> The flaws in this argument are twofold. First, there is no analogous caveat to the definition of “good” in the actual text of *NAFTA*. Since inherent authority to override the provisions of an international agreement is not embedded in domestic legislation, s. 7(2) is not binding on the *NAFTA* parties. Second, and perhaps more significant, is the fact that the Canadian government felt the need to include a restrictive definition of water in domestic legislation yet failed to effect parallel safeguards in the actual provisions of *NAFTA*. Given the close temporal proximity between the drafting of the implementation legislation and the actual drafting of *NAFTA*, the logical inference is that the Canadian negotiating delegation made a conscious decision, or simply lacked sufficient leverage, to expressly exclude water from *NAFTA*.

The arguments that water is excluded from the ambit of Chapter 3 are, on the whole, unconvincing. Reliance on a highly sophistic treaty interpretation of the *GATT* tariff schedule, a legally unenforceable joint statement and domestic legislation are an insufficient basis to conclude that water is not a “good.”

In addition to the countervailing arguments cited above, American jurisprudence and international case law adopt the position that water is a “good.” In *Sporhase v Nebraska*, the Supreme Court of the United States held that water is an article of commerce under U.S. law.<sup>40</sup> The case concerned a Nebraska law limiting the rights of neighbouring states to apply for water use permits. Nebraska argued that state ownership of a resource entitled it to discriminate against out-of-state investors and, alternatively, given that water is essential for human survival it deserves special status apart from other natural resources.<sup>41</sup> The Court

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<sup>38</sup> Jerome Hinkle, “Troubled Waters: Policy and Action in the Great Lakes” (2003) 20 T.M. Cooley L. Review 281 at 302 [Hinkle].

<sup>39</sup> S.C. 1993, c. 44.

<sup>40</sup> 458 U.S. 941 (1982).

<sup>41</sup> Maravilla, *supra* note 3 at 33.

struck down the law as unconstitutional and concluded that water was an article of commerce, largely because of the nature of, and trade in, commodities almost wholly comprised of water.

International law also holds that water is a “good.” In *Commission v. Italy*, the European Court of Justice held that the term “good” encompasses anything capable of monetary evaluation that is placed within the flow of commerce.<sup>42</sup> Similarly, in *Dunbalk Water Supply*, the Court gave an equally wide interpretation of “goods.”<sup>43</sup> It held that the term not only includes materials produced, but also materials supplied in, the provision of services.<sup>44</sup> The wide latitude given to the definition of a “good” at international law appears elastic enough to include Canada’s fresh water supplies.

## *ii. Article 301: National Treatment*

### *a. Scope of Article 301*

Article 301 of *NAFTA* states that each Party must “accord national treatment to the goods of another party.” The national treatment provisions of *NAFTA* mandate that Canada must not extend to the United States and Mexico treatment “less favourable” than the “most favourable treatment” extended to similar domestic goods and services.

The scope and reach of Article 301 is somewhat ambiguous. Trade experts and *NAFTA* commentators have argued the national treatment provisions do not apply to exports.<sup>45</sup> If this reading were correct, foreign producers and consumers would be precluded from claiming an equal right to, or stake in, Canadian water resources. The argument that Article 301 is limited to imports is grounded in the wording of the provision which states, “each Party shall accord national treatment *to the goods of another party*.” The limiting phrase “goods of another party” suggests that the provision only applies to imports.

However, Annex 301.3 seemingly reincorporates exports into the framework of Article 301. Annex 301.3, an attachment to Chapter 3, specifically exempts export control measures on logs and unprocessed

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<sup>42</sup> Case 7/68, [1968] E.C.R. 42 (European Court of Justice).

<sup>43</sup> Case 45/87, [1988] E.C.R. 4929 (European Court of Justice).

<sup>44</sup> WCEL, *supra* note 35.

<sup>45</sup> Little, *supra* note 17 at 135.

fish from the provisions of Article 301. To read Article 301 as excluding exports would render Annex 301.3 superfluous.<sup>46</sup> Although this endeavour is essentially one of statutory interpretation, assuming a coherency in drafting, it appears that Article 301, by reference to Annex 301.3, includes exports.

*b. Substantive Obligations of Article 301*

Article 301 mandates that once Canada allows domestic producers to engage in economic activity relating to water, at minimum, the same rights must extend to foreign business interests. It is important to note that Article 301 does not dictate any substantive obligations in the absence of commercial activity. Therefore, Canada retains sovereign control over its water resources until the moment it allows water to enter the cycle of commerce. However, if Canada allows water to be removed from its natural source, in furtherance of economic or financial ends, it will be obligated to extend to foreign interests the same commercial privileges and rights of access as it would to Canadian companies. The Council for Canadians summarizes this reasoning by stating that once water enters the cycle of commerce, “trading water cannot be limited to Canadian companies.”<sup>47</sup>

*iii. Article 309: Import and Export Restrictions*

The import and export restriction provisions of *NAFTA* are the teeth of Chapter 3. Article 309 states:

no Party may adopt or maintain any prohibition or restriction on the importation of any good of another Party or on the exportation or sale for export of any good destined for the territory of another Party, except in accordance with Article XI of GATT.<sup>48</sup>

Article 309 prohibits the “restriction” of exports or imports unless such measures are permissible under Article XI of the *GATT*.<sup>49</sup> That article

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<sup>46</sup> WCEL, *supra* note 35.

<sup>47</sup> Johansen, *supra* note 32.

<sup>48</sup> NAFTA, *supra* note 1.

<sup>49</sup> Note: Article XI also includes a minor exception to allow for trade restrictions in instances of “domestic shortages of essential products.” Academics generally

can be distinguished from Article 309 by the fact it allows signatories to maintain export “duties, taxes or other charge.” Read in isolation, Article 309, by operation of *GATT* Article XI, seems to allow for a country to place a “duty, tax or other charge” on exports. On this reading, Canada need only enlist such sufficiently high tariffs to stem the flow of water exports.<sup>50</sup>

However, Article 314 of *NAFTA* specifically prohibits such measures. Article 314 expands the ambit of Article 309 by mandating that “no Party may adopt or maintain any duty, tax or other charge on the export of any good” *unless* the same restriction is placed on products “destined for domestic consumption.” When Article 309 is read in conjunction with Article 314, it dictates that before Canada can restrict water exports to the United States through the implementation of a sufficiently high “duty, tax or other charge”, it must impose similar measures on water destined for domestic consumption. In addition to breaching Article 314, a proposed “duty, tax or other charge” would most likely breach Canada’s overarching *NAFTA* commitment, outlined in Article 302, to reduce and eliminate tariffs. A political incentive and potential trade war also renders the duty approach a non-possibility. Article XI of the *GATT* offers little relief from Article 309 and provides negligible policy space for government to restrict water exports.

#### *iv. Article 315: Other Export Measures*

Article 315 tempers the harshness of Article 309 by permitting trade restrictions, provided they are implemented “in relation to” a conservation measure. Article 315 accomplishes this by incorporating *GATT* conservation provisions Article XI: 2(a) and Article XX (g), (i) or (j). These conservation exemptions, however, are not absolute. Attached to Article 315 is a “proportionality” caveat which states that parties may only adopt conservation based trade restrictions if:

the restriction does not reduce the *proportion* of the total export shipments of the specific good made available to that other Party

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accept that the “domestic shortages” saving provision of Article XI provides little manoeuvrability for restrictive trade measures. To rely on Article XI, Canada would have to experience a “critical shortage” before implementing a restriction on water exports.

<sup>50</sup> WCEL, *supra* note 35.

*relative to* the total supply of that good of the Party maintaining the restriction as compared to the proportion prevailing in the most recent 36-month period for which data are available prior to the imposition of the measure, or in such other representative period on which the Parties may agree.<sup>51</sup>

Before examining Article 315 further, it is pertinent to briefly examine the language and judicial interpretations of the *GATT* conservation provisions.

#### *v. GATT Conservation Provisions*

Article XX (g) is the most utilized of the *GATT* conservation measures. Article XX (g) allows a signatory country to implement an export restriction, provided it is “primarily aimed at” the conservation of an exhaustible natural resource. The language of Article XX (g) appears to allow Canada to restrict water exports by drafting sufficiently sensitive, conservation focused legislation. Judicial interpretation of Article XX (g), however, has been less than deferential toward government mandated ‘conservation’ measures. WTO Appellate Body jurisprudence has liberally interpreted the substantive provision of Article XX (g), and critiqued conservation measures under the provision’s introductory clause (the chapeau). The chapeau demands that all conservation based trade restrictions must be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”<sup>52</sup> The WTO case of the *Shrimp Turtle I* illustrates this trend.<sup>53</sup>

In the *Shrimp Turtle I*, a U.S. law imposed to protect sea turtles was deemed a valid measure under XX (g) but was held to violate the chapeau of the Article. The law met the substantive “relating to” test of XX (g), in that it was “narrowly focused” on the objective of protecting sea turtles and did not cast a “disproportionately wide” net in accomplishing the desired policy objective.<sup>54</sup> The application of the law, however, vio-

<sup>51</sup> NAFTA, *supra* note 1 [emphasis added].

<sup>52</sup> GATT 1947, *supra* note 25.

<sup>53</sup> (1998) WTO Doc. WT/DS58/AB/R (Appellate Body Report).

<sup>54</sup> Robert J. Girouird, “Water Export Restrictions: A Case Study of WTO Dispute Settlement Strategies and Outcomes” (2003) 15 *Geo.Int’l Env’tl. L. Rev* 247 at 266 [Girouird].

lated the *chapeau* in that it mandated environmental compliance identical to U.S. practices, applied restrictions inconsistently and did not engage in “concerted and cooperative efforts” to address protection.<sup>55</sup>

This brief case summary of the *Shrimp Turtle* is not intended to exhaustively survey the *GATT* jurisprudence on Article XX (g), rather it is included to illustrate the restrictive nature of the potentially valuable conservation exemptions of the *GATT*. Given the strict judicial interpretation of the conservation measures and the WTO Appellate Body’s apparent distaste for all measures limiting trade, it is unlikely that a Canadian law restricting water exports would qualify as a genuine conservation measure.

### 6. Proportionality under Article 315

Even if a Canadian law restricting water exports could qualify under the rubric of Article XX (g), it would be a pyrrhic victory given the “proportionality” requirement in Article 315. Article 315 states that once Canada begins to export water it cannot restrict exports *unless* it initiates a proportionate domestic restriction. Critics of Article 315 decry that if Canada begins to export water, *NAFTA* signatories are “entitled to a proportionate share of Canadian water resources in perpetuity.”<sup>56</sup> The Council of Canadians argues that “proportionality means that as long as there is a drop of water left we can never end water exports regardless of the environmental effects in Canada or the needs of Canadians.”<sup>57</sup> This statement, although perhaps hyperbolic, demonstrates the highly contentious and emotionally charged nature of the water debate and captures the profound implications of the Article 315 restriction. If Canada begins to trade in water, the proportionality requirement of Article 315 will make it difficult, if not impossible, to turn off the proverbial tap.

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<sup>55</sup> *Ibid* at 267.

<sup>56</sup> WCEL, *supra* note 35.

<sup>57</sup> Johansen, *supra* note 32.



### 3. CHAPTER 11: INVESTOR RIGHTS

#### *i. Overview*

Chapter 11 is arguably the most controversial part of *NAFTA*. The investor rights provisions imbue corporations with a wide range of rights including national treatment (1102), protection from expropriation (1110) and, perhaps most notably, the right to bring a claim against a sovereign country in an international tribunal (1116). Some critics argue that although Article 1116's compulsory "model of adjudication" may be desirable in a strictly commercial context, it is not appropriate in adjudicating broad public policy decisions.<sup>58</sup> This extraordinary divestment of power to corporations greatly complicates Canada's ability to exercise domestic water policy.

Before delving into the provisions of Chapter 11, it is worth highlighting some of the distinctive characteristics of the investor rights section. First, unlike the *NAFTA* provisions governing trade in goods, Chapter 11 applies regardless of whether water is characterized as a "good." Notwithstanding vindication of the Canadian governments position that water is exempt from Chapter 3, the investor rights provisions of *NAFTA* apply regardless.<sup>59</sup> Furthermore, there is no equivalent section pertaining to investor rights in the *GATT*. Although subsequent bilateral trade agreements have adopted similar investment rights provisions, *NAFTA* was the first agreement to usher in this new era of corporate rights.<sup>60</sup> Finally, the *GATT* conservation measures of Article XX do not apply to Chapter 11. In other words, the investor rights provisions of *NAFTA* apply irrespective of their effect on environmental or conservation initiatives.<sup>61</sup>

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<sup>58</sup> Jon Beauvais, "Regulatory Expropriations under NAFTA: Emerging Principles and LingerinG Doubts" (2002) 10 N.Y.U. Envtl. L. J. 245 at 262 [Beauvais].

<sup>59</sup> Hinkle, *supra* note 38 at 321.

<sup>60</sup> Ann Capling and Kim Richard Nossal, "The Rise and Fall of Chapter 11: Investor State Dispute Mechanisms in the North American Free Trade Agreement and the Australia – United States Free Trade Agreement" (Paper presented to the Oceanic Conference on International Studies, July 2004)[unpublished].

<sup>61</sup> WCEL, *supra* note 35.

*ii. Article 1102: National Treatment*

The national treatment provision in Chapter 11 states that a Party “shall accord to investors of another Party treatment no less favourable than it accords, *in like circumstances*, to its own investors.”<sup>62</sup> The reach of Article 1102 hinges on the interpretation of the term “in like circumstances.”

A straightforward reading of Article 1102 mandates that a blanket prohibition on water export must equally apply to both Canadian and American investors. On this interpretation, a hypothetical Canadian measure equally denying export licences to domestic and foreign investors would not likely engage Article 1102. However, a potentially more contentious issue arises where the phrase “in like circumstances” is interpreted to equate a Canadian investor seeking to provide water services to municipalities in British Columbia with an American investor seeking to provide Canadian water to a city in California.<sup>63</sup> The potential consequences of such an expansive interpretation of the phrase “in like circumstances” are alarming. This interpretation would essentially give American investors uninhibited access to Canada’s vast water resources. Although a paucity of tribunal jurisprudence on the matter renders a definitive interpretation of this provision impossible, it would be imprudent for Canada to allow the fate of its water to hinge on a panel interpretation.<sup>64</sup>

*iii. Article 1110: Expropriation and Compensation*

Article 1110 mandates that no government shall engage in actions involving expropriation, or measures tantamount to expropriation:

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”).<sup>65</sup>

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<sup>62</sup> NAFTA, *supra* note 1 [emphasis added].

<sup>63</sup> Little, *supra* note 17 at 150.

<sup>64</sup> WCEL, *supra* note 35.

<sup>65</sup> NAFTA, *supra* note 1.

Under Article 1110, a corporation whose business interests have been adversely affected is entitled, as of right, to bring a claim against government. An international tribunal may award damages directly to a corporation if governmental action amounts to measures tantamount to expropriation.

Although “expropriation” is not defined under *NAFTA*, judicial treatment of Article 1110 has enunciated a broad scope of what constitutes expropriation.<sup>66</sup> The government of Canada contends that a regulatory measure designed to conserve water resources will not constitute expropriation.<sup>67</sup> However, at least one *NAFTA* panel decision challenges this view. In the case of *Pope and Talbot*, a panel found that even non-discriminatory regulations may amount to “measures tantamount to expropriation.”<sup>68</sup> This view coincides with Mr. Justice Tysoe’s interpretation of Article 1110 in the case of *Mexico v. Metaclad Corp.*<sup>69</sup> Commenting on the expansive scope of *NAFTA*’s expropriation provisions, Tysoe, J. stated that government action as innocuous as municipal rezoning may offend Article 1110. Article 1110 has proven a valuable weapon in a corporation’s legal arsenal as witnessed by the fact that the majority of Chapter 11 claims have been brought under this provision. The expropriation provisions are particularly troubling in the context of existing water use and export licences.

#### *iv. The Sun Belt Case*

On October 12, 1999 pursuant to Article 1116 of *NAFTA*, Sun Belt Water, Inc. of California filed a Notice of Claim and Demand for Arbitration.<sup>70</sup> Sun Belt alleged that the Canadian federal government and the British Columbia provincial government breached *NAFTA* Articles 1102, 1105 and 1110. The dispute arose out of a 1986 contract between Sun Belt and a British Columbia company to jointly engage in bulk water

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<sup>66</sup> Little, *supra* note 17 at 147.

<sup>67</sup> Johansen, *supra* note 32.

<sup>68</sup> Karen Campbell and Yasmin Nizami, “Security or Scarcity? NAFTA, GATT and Canada’s Freshwater” (2001) West Coast Environmental Law Publication 1at 6 [Campbell & Nizami].

<sup>69</sup> [2001] B.C.J. No. 950.

<sup>70</sup> 12 October 1999, (*Sun Belt Water, Inc. v. Her Majesty the Queen in the Right Canada*), John F. Carten, Canadian filing agent for Sun Belt Water, Inc. [Arbitration].

exports. The proposal involved extracting water from the internal waters of British Columbia and transporting it via tanker to the California city of Goleta. The contract was terminated shortly after the agreement was reached when the provincial government, in response to public outcry and national media attention, placed a moratorium on bulk water removals.<sup>71</sup> Sun Belt is seeking damages in excess of \$10 billion, claiming the B.C. government expropriated future profits.<sup>72</sup>

Although the Sun Belt claim has not yet proceeded to arbitration, the case serves as a poignant reminder of how present government action may preclude future conservation pathways. The extent of current water use and riparian right permits in the hands of foreign investors is unknown. However, as demonstrated by the Sun Belt case, given the potentially lucrative rewards of litigation, foreign investors could file claims asserting that a governmental denial of the ability to exercise riparian rights and water use licences for commercial permits amounts to expropriation.<sup>73</sup>

### III. CANADA'S PRESENT WATER POLICY

#### 1. Introduction

On February 10, 1999, Hon. Lloyd Axworthy, then Minister of Foreign Affairs, and Hon. Christie Stewart, then Minister of the Environment, announced a three-part strategy to safeguard Canada's water supply.<sup>74</sup> The plan came in the wake of political fallout after an Ontario Company announced it was going to begin exporting bulk water. The federal government's strategy includes three key elements:

1. Amending the *International Boundary Waters Treaty Act* [IBWTA];<sup>75</sup>
2. A Canada wide accord prohibiting bulk water transfers; and

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<sup>71</sup> Anderson, *supra* note 11 at 221.

<sup>72</sup> Arbitration, *supra* note 70.

<sup>73</sup> WCEL, *supra* note 35.

<sup>74</sup> Johansen, *supra* note 32.

<sup>75</sup> R.S.C. 1985, c. I-17 as amended.

3. A joint reference to the International Joint Commission (IJC) regarding water related issues, including trade, in the Great Lakes region.<sup>76</sup>

In addition to the water protection strategy, the government also reaffirmed its long-standing policy that “water is not covered by the *NAFTA* or any other trade agreement.”<sup>77</sup>

*i. Amending the International Boundary Waters Treaty Act (IBWTA)*

The first part of the government’s three-pronged water strategy involved amending the *IBWTA* to prohibit bulk water removals from the Great Lakes basin. The government chose to legislate a bulk water *removal* ban, as opposed to a bulk water *export* ban, because a prohibition on water removal “is more comprehensive, environmentally sound [...] and is more consistent with Canada’s international trade obligations.”<sup>78</sup> During the second reading of the amending Legislation, MP Bill Blaikie questioned the logic of a ban on bulk water removal:

The very language of removal tells the story. The [government] refuse[s] to use the word export because if they talked about water exports [...] they would have a test case with respect to NAFTA because NAFTA deals with exports.<sup>79</sup>

Critics of the government’s decision to alter the *IBWTA* denounce the limited geographic scope of the amendments as inadequate to protect all of Canada’s water, indicating that the amendments only apply to a limited number of watersheds. Areas covered under the prohibition include the Great Lakes, part of the St. Lawrence River, the St. Croix and Upper St. John Rivers, and the Lake of the Woods. Although the federal government’s exclusive constitutional jurisdiction over international treaties and boundary waters account for the relative ease in which the prohibition was enacted, the same constitutional jurisdiction also accounts for the limited application of the prohibitions. Given provincial jurisdiction

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<sup>76</sup> Johansen, *supra* note 32.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

over most natural resources under s. 92(13) and s. 92A of the *Constitution Act, 1867*, it is beyond the federal government's constitutional competency to legislate similar prohibitions on lakes, rivers and watersheds that are solely within the geographic confines of a province.<sup>80</sup>

### ii. *Canada Wide Accord on Bulk Water*

The purpose of the Canada-wide Accord was to ensure that all provinces adopted measures to prohibit bulk water removal over waters in their constitutional jurisdiction. The merits of the proposed Accord were debated by the Canadian Council of Ministers of the Environment. The Accord never materialized, however, as Quebec and the three prairie provinces failed to endorse its mandate. Nonetheless, all provinces presently have in place some form of bulk water prohibition. Provincial measures range from legislative prohibitions, such as British Columbia's *Water Protection Act*, to softer prohibitions in the form of official policy and regulations.<sup>81</sup> Although provincial measures adhere to the overarching philosophy of water protection, the level of protection afforded, and the means chosen to achieve the desired goals, vary greatly.<sup>82</sup>

During Parliamentary debates on the water accord, MP Charles Caccia, an outspoken critic of the government's water policies, stated "the proposed accord will lead to a patchwork of provincial initiatives, thus making Canada vulnerable to trade challenges."<sup>83</sup> This critique is as relevant today as it was when the comments were made. At present, Canada lacks a comprehensive, clear and uniform policy on water exports.

### iii. *Reference to the International Joint Commission*

The third element of Canada's strategy to safeguard its water resources was a joint Canadian-American reference to the International Joint Commission (IJC). The IJC is an independent bi-national organization created under the *Boundary Waters Treaty*.<sup>84</sup> Its stated purpose is

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<sup>80</sup> R.S.C. 1985, App. II, No. 5.

<sup>81</sup> RSBC 1996, Chapter 484.

<sup>82</sup> Anderson, *supra* note 11 at 234.

<sup>83</sup> Johansen, *supra* note 32.

<sup>84</sup> *Treaty relating to Boundary Waters and Questions arising with Canada*, 11 January 1909, U.K.T.S. 1910 No. 23.

to “help prevent and resolve disputes relating to the use and quality of boundary waters and to advise Canada and the United States on related questions.”<sup>85</sup> The IJC was charged with studying the potential effects of bulk water removals or exports from the Great Lakes region.<sup>86</sup> On February 22, 2000, the IJC released its final report, entitled *Protection of the Waters of the Great Lakes*.<sup>87</sup> The recommendations of the IJC included:

- Signatories “should not permit any new proposal for the removal of water from the Great Lakes Basin to proceed unless the proponent can demonstrate that the removal would not endanger the integrity of the ecosystem of the Great Lakes Basin.”
- In assessing a proposal, signatories should give “full consideration” to “potential cumulative impacts of the proposed removal.”
- A proposal must ensure “no net loss” to the watershed from which the water was taken.
- A proposal must guarantee the water “be returned in a condition that protects the quality of and prevents the introduction of alien invasive species into the waters of the Great Lakes.”<sup>88</sup>

Environment Canada argues that, given the adverse environmental effects created by bulk water removals, application of the IJC recommendations effectively precludes bulk water transfer.<sup>89</sup>

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<sup>85</sup> International Joint Commission website, online: <[http://www.ijc.org/en/background/biogr\\_commiss.htm](http://www.ijc.org/en/background/biogr_commiss.htm)>.

<sup>86</sup> Tara Boldt -Van Rooy, “Bottling Up Your Natural Resources: The Fight Over Bottled Water Extraction In The United States” (2003) 18 J. Land Use & Env'tl. L. 267 at 290.

<sup>87</sup> International Joint Commission, *Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States*, March 2000. International Joint Commission, online: <<http://www.ijc.org/php/publications/html/finalreport.html>> [IJC Report].

<sup>88</sup> *Ibid.*

<sup>89</sup> FAQ, *supra* note 30 at Question #3.

Regarding Canada's *NAFTA* obligations, the IJC's conclusions were largely supportive of the measures and policies adopted by the Canadian government.<sup>90</sup> The IJC stated that "the *NAFTA* and the *GATT* agreements do not constrain or affect the sovereign right of a government to decide whether or not it will allow natural resources within its jurisdiction to be exploited and, if a natural resource is allowed to be exploited, the pace and manner of such exploitation."<sup>91</sup> In reaching its conclusions, the Committee appeared to rely on a December 1993 Joint Statement (discussed above) and a November 24, 1999 letter from the U.S. Deputy Trade Representative to the IJC stating: "[i]n our view, the implementation [of recommendations not to authorize or permit bulk water transfers] would not run afoul of the obligations imposed by international trade agreements."<sup>92</sup>

The findings of the IJC have not been universally accepted. The same day the IJC released its report Jamie Dunn, water campaigner for the Council of Canadians, expressed his "deep disappointment that in its final report [...] the International Joint Commission squandered an historic opportunity to speak for the Canada and the United States."<sup>93</sup>

Two aspects of the IJC report require comment. First, the IJC is an advisory body established to inform the American and Canadian governments on Great Lakes issues. The report is simply one agency's opinion. Although its opinion may be utilized as a source of treaty interpretation, it is not legally binding. Second, the IJC states that Canada's international obligations do not prevent it from taking measures to safeguard water resources as long as there is no discrimination against foreign investors. This leads to the conclusion that once bulk water removal – or activity analogous to bulk water removal – is permitted, *NAFTA*'s substantive obligations apply.

#### *iv. Summary of the Government Response*

Perhaps the most prescient statement in the IJC's final report was the recommendation that Canada and the United States should limit liability under the *NAFTA* by "clearly articulating their water-management poli-

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<sup>90</sup> Johansen, *supra* note 33.

<sup>91</sup> IJC Report, *supra* note 87.

<sup>92</sup> Johansen, *supra* note 33.

<sup>93</sup> Johansen, *supra* note 33.



cies in a fully transparent manner, by acting in a manner that is entirely consistent with their stated policy, and by limiting the time for which authorizations are valid.”<sup>94</sup> Canada has failed to heed this advice.

Although the amendments to the *IBWTA* are an improvement, the limited geographic application of the *Act* is problematic. Accepting that constitutional sensitivities preclude unilateral federal action on internal waters, nonetheless, the federal government’s failed Canada-wide accord and the existing provincial patchwork of policy are insufficient to guard against exposure to *NAFTA* liability. The government cannot delegate to the provinces the paramount responsibility of protecting domestic water resources. Similarly, although the IJC report offers Canada positive reinforcement, the government cannot rely on the report as gospel. The methodology of the report is flawed in that it relies on a number of soft sources that are not legally binding. Although the Canadian government’s three-pronged plan has accomplished some positive change, more work needs to be done to safeguard Canada’s water resources. A comprehensive and clearly articulated strategy should be implemented.

## IV. PROPOSED POLICY ALTERNATIVES

### 1. The Need for Action

Beginning with the *Canada-United States Free Trade Agreement*, North America has aggressively pursued an agenda of economic integration.<sup>95</sup> Recent events indicate that Canada, the United States and Mexico are preparing to enter a more interdependent relationship. In a March 23, 2005 joint statement, all three *NAFTA* signatories announced the formation of a new “Security and Prosperity Partnership of North America.”<sup>96</sup> The object of this partnership is to achieve the “mutually dependent and complementary” goals of economic growth and enhanced security. Two of the chief policy aims of the partnership are to “promote sectoral col-

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<sup>94</sup> IJC Report, *supra* note 87.

<sup>95</sup> 2 January 1988, C.T.S. 1989/3 (entry into force 1 January 1989).

<sup>96</sup> Governments of Canada, Mexico and the United States, Joint Statement (23 March 2005), online: <<http://usinfo.state.gov/usinfo/Archive/2005/Mar/23-215428.html>>.

laboration in energy, transportation, financial services, technology” and to “reduce the costs of trade through the efficient movement of goods and people.”<sup>97</sup>

With this renewed commitment to increased regional reliance, Canada’s water resources will certainly become more of an issue. This realization has already begun to take hold in Canadian political circles. At the 2005 Liberal Biennial Policy Convention, the Ontario contingent put forth a motion stating that, “whereas legal experts have indicated that water is considered a tradable good under *NAFTA* [...] the Party should encourage the Government to do anything in its constitutional jurisdiction to prevent all forms of water export.”<sup>98</sup> Although the motion was not incorporated into official Liberal Party policy, it demonstrates that internal political opposition to Canada’s longstanding policy of denying water is a *NAFTA* “good” has arrived on the national political agenda. Given growing domestic political pressure and increased international economic integration, it is essential that Canada adopt a clear national water strategy.

## 2. Legislation

The most obvious means to ensure absolute sovereignty over Canada’s water resources is to legislate a prohibition on water exports. Such a prohibition would not infringe provincial jurisdictional or constitutional sensitivities, given the federal government’s exclusive jurisdiction over international trade. Furthermore, federal legislation would combat the problematic patchwork of policy and the sliding scale of water protection that presently exists across the country. Definitive federal legislation would also adhere to the IJC recommendation of clearly articulating an unambiguous national standard.

Some key players in the water debate support the legislative approach. The Council of Canadians has continually called on the federal government to implement a national water act that “outline[s] the protections needed environmentally [and] really puts limits on the use

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<sup>97</sup> *Ibid.*

<sup>98</sup> “Policy Proposal” (Ontario, Liberal Party Biennial Policy Conference Handbook, 3 March 2005).

and abuse of our water from industry.”<sup>99</sup> The West Coast Environmental Law Association (WCEL) similarly concludes, “the best federal approach for preventing bulk water removals from Canada is the enactment of federal legislation designed specifically for the purpose [of preventing exports].”<sup>100</sup>

Although the ease with which the federal government could implement a prohibition on water exports is attractive, there are a number of problems associated with this approach. First, as stated in a legal opinion drafted by the WCEL, “no matter how carefully designed, Canadian measures to prevent bulk water exports or diversion projects would still be vulnerable to trade challenges and/or investor-state claims.”<sup>101</sup> The national treatment provisions of Article 301 and 1102 negate the possibility of prohibiting exports without implementing similar domestic measures. As the above discussion on Article 1102 notes, the phrase “in like circumstances” may require extending any prohibition on water exports to include transfers between provinces or even regions within a province. The political and economic feasibility of such a domestic constraint is highly questionable.

Proposals to circumvent *NAFTA* liability almost universally suggest crafting legislation with an environmental objective, aimed not at trade but rather couched in terms of regulating the general use and conservation of water. This was the approach taken by the federal government in amending the *IBWTA*. When extended to provincial Canadian watercourses, however, this suggestion is inherently self-defeating. The federal government must ground any water prohibition in its exclusive constitutional jurisdiction over international trade. The irony is that by crafting legislation prohibiting exports under the federal government’s s. 91 international trade powers, it contravenes *NAFTA* Article 309 (import and export restrictions) and potentially the national treatment provisions of Article 302 and 1102. By crafting environmentally based legislation prohibiting bulk water a removal, however, the federal government encroaches on provincial authority over natural resources. The proposed Canada wide accord was the federal government’s solution to this quandary. The obvious shortfall of any proposal similar to the Canada wide

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<sup>99</sup> Interview with Maude Barlow (January 25, 2005), online: Mother Jones website <[http://www.motherjones.com/news/qa/2005/01/maude\\_barlow.html](http://www.motherjones.com/news/qa/2005/01/maude_barlow.html)>.

<sup>100</sup> WCEL, *supra* note 35.

<sup>101</sup> *Ibid.*

accord is its voluntary nature and the wide latitude the provinces will almost certainly demand in crafting and implementing the policy.

Second, any suggestion of water export legislation is contradictory to the long-standing government position that water does not qualify as a *NAFTA* “good.” At a February 1999 press conference following the announcement of the government’s water policy, Hon. Lloyd Axworthy was asked why the government did not simply legislate a ban on exports. He replied, “[O]nce you start doing that then you make water into a tradable commodity and it gets subject to all the trade rules going back to *GATT* of 1947 [...] We’re saying there’s a much more effective way of doing it and that is to treat it in its natural state.”<sup>102</sup> The government’s blanket refusal to consider water as a “good” essentially precludes a host of policy alternatives. This threshold denial of *NAFTA*’s application to water forecloses the possibility of export legislation.

Third, some critics suggest that, even if non-discriminatory legislation could be crafted, it would be nonsensical for the government to place an outright ban on such a potentially lucrative investment. The sentiment that Canada is failing to harness the economic power of its water resources is captured by Former Newfoundland Premier Roger Grimes who felt that by banning water exports from Gisborne Lake, “we’re just letting it spill into the ocean.”<sup>103</sup> A legislated prohibition on water export would thwart provincial aspirations to utilize water resources as a revenue stream.

Even though federal legislation prohibiting water exports will most likely infringe *NAFTA* Articles 309 (export restrictions), 315 (proportionality) and potentially the national treatment provisions 301 and 1102, many environmental organizations advocate immediate action.<sup>104</sup> The question of when (or if) to legislate is essentially a policy decision that the federal government will have to make after analyzing the costs associated with pre-emptive unilateral action. Irrespective of when legislation is contemplated, one thing is clear: sooner or later the government must negotiate with its *NAFTA* partners.

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<sup>102</sup> Johansen, *supra* note 32.

<sup>103</sup> Campbell & Nizami, *supra* note 68 at 12.

<sup>104</sup> WCEL, *supra* note 35.

### 3. International Avenues

The most effective means to secure control of Canada's water resources is to create sufficient space for policy options within the *NAFTA* framework. *NAFTA* contains a number of mechanisms for amendments, exclusions and adoptions. Reliance on these measures is the most appropriate way to ensure sovereign dominion over Canada's water.

The most obvious way to avoid *NAFTA* liability is to avoid *NAFTA*. Under Article 2205, Canada is permitted to withdraw from *NAFTA* with six months notice. Although withdrawal is perhaps an economically unfeasible solution (87% of Canada's trade, and 62% of Canada's wealth is dependent of the U.S.), it does illustrate a fine point: Canada's water resources are ultimately within its control.<sup>105</sup> The real question is the amount of political capital Canada is prepared to expend in reasserting that control.

A less drastic option is to negotiate a broad *NAFTA*-wide exemption for water export controls. Article 2102 provides an almost unlimited scope to amend *NAFTA*. Under Article 2102, a Party may effect any "modification or addition" given such measures are agreed on by all the parties. Governments have used this provision to insulate national security from trade obligations. The advantage of Article 2102 is its reach. All other *NAFTA*-amending mechanisms lack the wholesale coverage that Article 2102 engages. The omnibus nature of Article 2102, however, is a double-edged sword. Given the breadth and scope of such a powerful exclusionary provision, the Article is reserved for only the most essential economic spheres; trade in water may not qualify. Similarly, the inherent contradiction of excluding goods from a liberal trade agreement – particularly a good that was not excluded upon the negotiation of *NAFTA* – runs contrary to the spirit of *NAFTA*. Negotiating a general exception may prove an insurmountable barrier given Canada's political and economic clout.

A less invasive means of shielding water from *NAFTA* liability is to negotiate water conservation agreements with the other *NAFTA* signatories and have them added as attachments. Article 104.2 specifically envisions such action by allowing parties to attach bilateral or trilateral environmental agreements to Annex 104. Presently Annex 104 includes

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<sup>105</sup> Canada, Department of Foreign Affairs and International Trade, Trade Statistics (3 March 2005) DFAIT, online: <<http://www.dfait-maeci.gc.ca/eet/menu-en.asp>>.

two bilateral agreements: A Canada-U.S. Agreement on Transboundary Movement of Hazardous Waste and a Mexico-U.S. Agreement on Protection and Improvement of the Environment in the Border Area. An Annex 104 conservation or environmental agreement prohibiting the removal and export of water would take precedence over countervailing *NAFTA* provisions.

Another alternative is to petition the *NAFTA* Commission to issue an interpretive statement under Article 1131.2. Such a statement could stipulate that the definition of “investment”, presently outlined in Article 1139, does not include water permits, licences or other related activities.<sup>106</sup> This statement may take a similar form as the December 1993 Joint Statement. Such an interpretive statement, however, would only extend to Chapter 11, thus leaving open Chapter 3 liability.

The Canadian government could also circumvent the investor provisions of *NAFTA* by jointly amending Annex 1138.2. This provision allows for Parties, on mutual agreement, to prevent a corporation from seeking a remedy for a particular activity. This measure essentially estoppes corporations from bringing a Chapter 11 claim. Canada could lobby the other *NAFTA* signatories to include an explicit exclusion for legislation prohibiting bulk water removals or exports.<sup>107</sup>

The above recommendations would be of varying effectiveness. Amending Article 2201 or adding a conservation treaty to Annex 104 are likely the most effective measures for Canada to pursue. Amendments to Articles 1131.2 or 1138.2 do not enjoy the scope of the above measures, however they do grant immunity against Chapter 11 claims. All proposed amendments, however, share one essential trait: they are premised on an assumption that Canada is willing, or able, to engage in the necessary negotiation and compromise involved in amending an international agreement.

## CONCLUSION

The likelihood of a global water shortage is quickly becoming a reality. As this most precious of resources dwindles, water will become a chief consideration in national security and economic policy. Canada is in the

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<sup>106</sup> WCEL, *supra* note 35.

<sup>107</sup> WCEL, *supra* note 35.

enviable position of holding one fifth of the world fresh water supplies. Although Canada's ownership of its vast freshwater resources is certain, its ability to manage and control its water resources is not as definite.

A host of *NAFTA* provisions threaten to impeach Canada's sovereignty over its water resources. Chapter 3's national treatment provision (Article 301), prohibition on export controls (Article 309) and proportionality requirement (Article 315) collectively restrict government action. The investor rights provisions of Chapter 11 allow for corporations to bring claims for breach of national treatment provisions (Article 1102) and, perhaps more invasively, claim that a government action is "tantamount to expropriation" (Article 1110).

The Canadian government's response to trade concerns has been insufficient to adequately safeguard its water resources. Trapped between Constitutional constraints and international trade obligations, the federal government has failed to establish a clear and comprehensive national water policy. The government's three-pronged strategy, although effective in safeguarding boundary waters, is limited in scope. By allowing the provinces to determine water protection priority and measures, the government has allowed for the development of a patchwork of provincial policies of varying effectiveness.

As North American integration proceeds at a remarkable pace, it is paramount that Canada "clearly articulate a water management policy in a fully transparent manner."<sup>108</sup> Given that federal legislation will almost certainly violate Canada's international obligations, the most desirable route is through political negotiation and compromise. Only through amendments to *NAFTA* can Canada once again become author of its own future.

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<sup>108</sup> IJC Report, *supra* note 87.