Pace International Law Review

Volume 8
Issue 1 *Winter 1996*

Article 3

January 1996

Canada's Capacity to Control the Flow: Water Export and the North American Free Trade Agreement

Scott Philip Little

CANADA'S CAPACITY TO CONTROL THE FLOW: WATER EXPORT AND THE NORTH AMERICAN FREE TRADE AGREEMENT

Scott Philip Little†

I. INTRODUCTION

Of all the debate that accompanied Canadian implementation of the North American Free Trade Agreement,[1] there was perhaps none more heated, manipulated, misinformed, yet more important, than that staged over water export.[2] Critics of NAFTA condemned the Canadian government for assenting to an agreement that apparently granted both the United States and Mexico unlimited access to Canada's fresh water resources.[3] It was argued that NAFTA opened the tap to a lucrative water market, one that would eventually run dry under free trade, and sell Canada's future short.[4] On the other side, the Canadian government staunchly denied these allegations but took few substantive measures to reassure the sceptics.[5] An analysis of both this debate, and the text of NAFTA itself, reveals that a wide spectrum of frequently juxtaposed legal opinions have formed with respect to the issue of water export and free trade.

---

† B.A. *honors*, 1991, Huron College, University of Western Ontario; L.L.B., 1995, University of Western Ontario. The author is currently articling at Gowling, Strathy & Henderson in Ottawa, Canada.

[1] North American Free Trade Agreement, Oct. 7, 1992, text released Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 612 [hereinafter NAFTA].

[2] *See* Don Gamble, *Appendix C: Workshop Summary*, *in* CANADIAN WATER EXPORTS AND FREE TRADE 4-5 (Rawson Academy of Aquatic Science, 1989).

[3] David Hunter & Paul Orbuch, Interbasin Water Transfers After NAFTA 10 (1993) (unpublished manuscript, on file with the Center for International Environmental Law).

[4] *Id.* at 1.

[5] *Divine Intervention: The Great Canadian Water Supply Proposal*, Canadian Dimension, Aug. 1994, *available in* LEXIS, Nexis Library, Canada File.

This paper shall objectively assess the threat to Canada's water resources under NAFTA. First, Part II shall examine the present demand for Canadian water and the various means through which water may be exported. Next, Part III shall make note of the shortcomings and misconceptions inherent in the argument that NAFTA robs Canada of its power to control water export. It shall then proceed to highlight those provisions of the Agreement under which the threat of unregulated water export is realistic and daunting. Finally, Part IV will make one point clear: Canada's capacity to "keep the tap closed" has not been subsumed by the text of NAFTA. At worst, the Agreement can work to progressively erode Canada's control over water export. The evolution of this issue will, as always, remain primarily a function of political will.

II. A Brief Overview: The Demand For Canadian Water and Various Water Export Schemes

Firstly, it will be useful to examine: a) the potential water crisis looming over the United States and Mexico with the corresponding pressures that will be placed on Canada's endowment of fresh water; and b) those proposals for water export which may be pursued under free trade in the future.

A. *The North American Water Crisis and Canadian Water Resources*

The process of agricultural and economic development in the American Southwest over the past one hundred years has been nothing short of incredible. Naturally dry and formerly a desert, this region enjoys a prosperity founded upon extensive irrigation schemes that have fostered both agricultural and population growth.[6] In California, vast irrigated farms which account for much of the produce enjoyed during North American winters lie where deserts used to exist.[7] The Imperial Irri-

[6] The Imperial Irrigation District is the largest irrigation district in the Western Hemisphere. It consists of a 1,500 kilometer network of canals which excrete through 50,000 kilometers of drainage tiles. The source of the water is the Colorado River which is drained by hundreds of drainage pipes and canals to irrigate nearly 14,000 square kilometers of farmland. *See* Michael Keating, To The Last Drop: Canada and the World's Water Crisis 129-31 (1986).

[7] *Id.* at 135.

gation District, a 2,000 square kilometer tract of irrigated land is responsible for the favorable farming conditions.[8] In other states such as Arizona, farmers have defied the desert climate by successfully irrigating 5,000 square kilometers of crops.[9] This has been accomplished by drawing upon diminishing groundwater resources in an unsustainable manner.[10] Huge urban centers have sprouted near these fertile lands, demanding yet more water for their industries and populations.[11]

The fresh water resources that led to the rise of the American Southwest are dwindling under the pressures of misallocation, pollution, and the demands of an ever-increasing population.[12] The mining of groundwater in Arizona left great gullies in the terrain near Phoenix.[13] In the San Joaquin Valley of California, excessive pumping of groundwater caused the ground to compact thirty feet lower than it was fifty years ago.[14] Some farmland is being abandoned as lower water tables are rendering groundwater irrigation schemes economically infeasible.[15]

Development in the American Southwest is inextricably connected to fresh, inexpensive water, the availability of which will determine the region's prosperity in the future. For this reason, the possibility of water diversion or export from Canada's abundant rivers and lakes has been discussed in the United States over the past twenty years.[16] These discussions may intensify in the future given that industrial development

---

[8] *Id.* at 136, 138.

[9] *Id.* at 137.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 140-42.

[13] *Id.* at 140.

[14] *See* Christopher B. Amandes, Comment, *Controlling Land Surface Subsidence: A Proposal for a Market-Based Regulatory Scheme*, 31 UCLA L. REV. 1208, 1246 (1984).

[15] For this reason, some writers suggest that there is not a true water crisis in the United States; rather, there is a cheap water crisis. Perhaps if water was not so inexpensive, conservation would be a more common attribute of North American water management policies. *See* RICHARD C. BOCKING, CANADIAN WATER: A COMMODITY FOR EXPORT? 5 (1986).

[16] *See* Mel Clark and Don Gamble, *Water Exports and Free Trade*, *in* CANADIAN WATER EXPORTS AND FREE TRADE 20 (A.L.C. de Mestral and D.M. Leith eds., 1989).

in both Mexico and the United States under NAFTA will create a greater demand for fresh water.[17]

The potential returns for Canada from a large-scale water market are astounding. In British Columbia,[18] the amount paid by local water export firms to the provincial government is estimated at between $9 and $18 (Canadian) per acre-foot.[19] However, the price secured for water under one export contract to California was reportedly between $2,700 and $3,400 (U.S.).[20] By creating a free trade zone among the three countries of North America, NAFTA will facilitate and may require the creation of an international water market.

B. *Potential Schemes for Water Export*

While water export can take many forms, some schemes are more economically feasible and realistic than others. However, all of the following proposals continue to be considered as undertakings that could be employed in transporting Canadian water to market.

1. *Large-Scale Water Diversion*

Technically, a water diversion is not tantamount to the export of water. Rather, it envisions the damming, flooding and altering of water courses in a manner that forces water to flow to a desired destination.[21] Perhaps the best known and most environmentally threatening of such engineering proposals is the North American Water and Power Alliance (NAWAPA). This diversion scheme was developed in 1964 by the Los Angeles based Ralph M. Parsons Company.[22] The project entails the damming of the major rivers of Alaska and British Columbia, and the diversion of this water into the Rocky Mountain

---

[17] *See* Hunter & Orbuch, *supra* note 3, at 20.

[18] It should be noted at this point that because of both British Columbia's extensive water resources and its proximity to the American Southwest, most of the debate over water export revolves around this province. As such, much of the discussion in this paper shall focus upon water export as it relates to British Columbia.

[19] An acre-foot of water has 325,851 gallons and will cover one acre of land with one foot of water. *See* Hunter & Orbuch, *supra* note 3, at 3.

[20] NAFTA AND WATER EXPORTS 56 (Canadian Environmental Law Association, 1993).

[21] FRANK E. MOSS, THE WATER CRISIS, 245 (1968).

[22] *Id.*

Trench, resulting in the creation of a 500 mile fresh water lake running the length of British Columbia.[23] From here, water would be channelled into a system of canals snaking about the continent.[24]

The by-products of the NAWAPA would be awesome while devastating. The project would generate electricity, develop a system of continental navigation, and allocate fresh water to agricultural regions most in need of irrigation.[25] In total it would contribute to the water needs of seven Canadian provinces and one territory, thirty-seven U.S. states, and three states of Mexico.[26] However, costing upwards of $200 billion,[27] the NAWAPA would result in obvious destruction to fish stalks, human settlement and vast stands of forest.[28] Despite the financial and social costs, the NAWAPA proposal may yet be revisited in the future, and it would undoubtedly be facilitated in the atmosphere of free trade.[29] This is a sobering thought in a country that diverts more water than any country on earth.[30]

2. *Water Export by Pipeline*

More easily construed as water export, pipeline proposals are a somewhat more realistic means of bringing water to a market. Although there are no significant water pipelines run-

---

[23] *Id.* at 249.

[24] *Id.* at 248-52.

[25] *Id.* at 242-54.

[26] *Id.* at 243.

[27] Hunter & Orbuch, *supra* note 3, at 4.

[28] Hunter & Orbuch, *supra* note 3, at 4.

[29] Another similar project that has been proposed for the eastern portion of Canada is the Great Recycling and Northern Development Canal Scheme [hereinafter GRAND Canal]. This proposal encompasses the construction of a dike stretching across James Bay which, in conjunction with the flow of rivers into the Bay, would eventually create a large fresh water lake. The flows of the rivers would then be reversed and water would be channelled into the Great Lakes. From there the water would be re-routed through canals that span the continent. For a detailed analysis of the GRAND Canal proposal *see* Paul Muldoon, *Scenario D: The GRAND Canal Proposal, in* CANADIAN WATER EXPORTS AND FREE TRADE 97-113 (Rawson Academy of Aquatic Science, 1989). *See also* THE GREAT RECYCLING AND NORTHERN DEVELOPMENT (GRAND) CANAL: NOTES FOR A SUBMISSION TO THE INQUIRY ON FEDERAL WATER POLICY (St. John's, Newfoundland ed., 1984).

[30] Canada has over 600 dams and 60 large interbasin water transfers. *See* J.C. DAY & FRANK QUINN, *Dams and Diversions: Learning from the Canadian Experience, in* PROCEEDINGS OF THE SYMPOSIUM ON INTERBASIN TRANSFER OF WATER: IMPACTS AND RESEARCH NEEDS FOR CANADA 45 (1987).

ning from Canada to the American Southwest,[31] a proposal that envisions a water diversion in conjunction with a pipeline has been made in the province of British Columbia.[32] The Multinational Resources Proposal is a $3.8 billion Canadian-American joint venture that would divert water from the North Thompson River into the Columbia River.[33] After having run through a series of power generating stations, the water would then enter a 400 mile pipeline leading to California.[34]

William Clancey, who orchestrates the Canadian side of the proposal, contends that the project would generate huge profits for the province of British Columbia.[35] Requiring up to one thousand workers and five million hours of labor for its completion, the project would continue to generate 100,000 hours of employment annually.[36] Clancey contends that as a further benefit to the province, the power generating facilities would create $24.2 million (Canadian) annually in revenues for the province.[37] Lamenting that the New Democratic Party government of British Columbia has been completely unreceptive to his plan, Clancey has not recently pursued the Multinational Resources proposal.[38] However, it shall be illustrated in Part III of this paper that the proposal could indeed come to fruition under NAFTA.

---

[31] There do exist some privately owned water pipelines that cross the Canadian-U.S. border in the province of British Columbia. However, these are confined to local agricultural use and predate the concept of a water market. Telephone Interview with Richard Penner, Manager, British Columbia Water Management Licensing (Feb. 28, 1995).

[32] *See* Clifford J. Villa, *California Dreaming: Water Transfers from the Pacific Northwest*, 23 ENVTL. L. 997, 1011 (1993).

[33] *Id.* at 1011.

[34] NAFTA AND WATER EXPORTS, *supra* note 20, at 65.

[35] Telephone Interview with William Clancey, President, Multinational Water & Power Inc. (Mar. 7, 1995).

[36] Telephone Interview with William Clancey, *supra* note 35.

[37] Telephone Interview with William Clancey, *supra* note 35.

[38] Telephone Interview with William Clancey, *supra* note 35. Ironically, Richard Penner, states that the British Columbia government breathed "a sigh of relief" when the Multinational Resources Proposal was abandoned; for reasons to be discussed, the realization of plans such as the Multinational Resources Proposal can only be facilitated in the trade environment created by NAFTA. Telephone Interview with Richard Penner, *supra* note 31.

3. *Supertanker Water Exports*

Bulk water exports by marine vessels are perhaps the most feasible means of transporting water to a market. The process requires little overhead on behalf of an enterprise.[39] Moreover, relative to other proposals, supertanker exports entail the least amount of environmental damage as marine vessels essentially draw fresh water from coastal streams.[40] Perhaps for this reason, four supertanker licenses presently exist in British Columbia.[41] However, the province has recently been inundated with applications for such licenses.[42] With demand for fresh water increasing in states such as California,[43] the number of applications in British Columbia for supertanker licenses will only continue to increase.

III. THE NORTH AMERICAN FREE TRADE AGREEMENT: IS THE TAP TO WATER EXPORT NOW OPEN?

With the various proposals for the large-scale diversion and export of water in mind, this paper shall first examine the reasons underlying opposition to NAFTA as it relates to Canada's water resources. Many critics of the Agreement sounded alarm in response to two apparently grim realities. First, Canada wanted to enter into a liberalized trade deal with countries facing increased demands for dwindling water supplies because they would eventually need to rely upon Canada's vast fresh water reserves. Second, both the text of the proposed Agreement and government actions appeared ambivalent toward the threat free trade posed for one of Canada's most important resources.

A. *Water Export and Chapter Three of NAFTA: National Treatment and Market Access for Goods*

As Parliament debated NAFTA in the spring of 1993, concern over the future of Canada's water resources was raised as it had been prior to the implementation of the Free Trade

---

[39] Telephone Interview with Richard Penner, *supra* note 31.
[40] Telephone Interview with Richard Penner, *supra* note 31.
[41] Telephone Interview with Richard Penner, *supra* note 31.
[42] Telephone Interview with Richard Penner, *supra* note 31.
[43] *See* NAFTA AND WATER EXPORTS *supra* note 20.

Agreement in 1988.[44] Once again, the monumental engineering schemes for water diversion appeared all the more possible in the soon to be established, liberalized trade environment of North America. Fears that Canada would lose control over its water resources seemed to be substantiated by both the text of NAFTA and government response to public concern.

1. *Chapter Three Provisions of NAFTA*

The primary objectives of NAFTA are both the elimination of barriers to trade, and the facilitation of cross border movements of goods and services between the territories of the Parties to the Agreement.[45] Goods of a Party are identified in Article 201 of the Agreement as "domestic products as these are understood in the General Agreement on Tariffs and Trade or such goods as the Parties may agree."[46] The General Agreement on Tariffs and Trade (GATT),[47] defines water in the following manner:

> Waters, including natural or artificial mineral water and aerated waters, not containing added sugar or other sweetening matter nor flavored; ice and snow.[48]

An explanatory note to the tariff item provides that water includes "ordinary natural water of all kinds (other than sea water . . .)."[49] The incorporation of this definition into NAFTA lead many to believe that the water of Canada's rivers and lakes could be construed as a trade good under the Agreement. It would be difficult to exclude any form of water, other than those already excluded, from the GATT definition of water.

Critics of the proposed Agreement argued that this inclusion restricted the legal means by which Canada could restrict

---

[44] For the most part, the principles enshrined by NAFTA are a reiteration of those in the Free Trade Agreement. As a result, much of the concern voiced over Canada's water resources and NAFTA was essentially a revisitation of those issues raised during the Canada-U.S. free trade debate. Free Trade Agreement, Dec. 22, 1987, Can.-U.S. 27 I.L.M. 281 (1988) [hereinafter FTA].

[45] NAFTA, *supra* note 1, art. 102(1)(a), 32 I.L.M. 297.

[46] NAFTA, *supra* note 1, art. 201, 32 I.L.M. 298.

[47] 55 U.N.T.S. 188.

[48] Jon Johnson, *Water Exports and Free Trade: Another Perspective*, *in* CANADIAN WATER EXPORTS AND FREE TRADE 25, 27 (1989).

[49] BARRY APPLETON, NAVIGATING NAFTA: A CONCISE USER'S GUIDE TO THE NORTH AMERICAN FREE TRADE AGREEMENT 201 (1994).

large-scale exports of water.[50] They argued that Canada had forfeited its rights to protect its water resources under Chapter Three of NAFTA concerning National Treatment and Market Access for Goods.[51] Article 301 of the Agreement requires that each Party "accord national treatment to the goods of another party in accordance with Article III of the General Agreement on Tariffs and Trade."[52] National treatment in this context requires that the interests of one Party are treated equally to the interests of another, with respect to similar goods of trade. More specifically, a NAFTA country is generally free to follow any policy, or implement any regulation that it wishes, provided that in doing so, it is not attempting to protect its own industries by discriminating against the goods of another Party.[53] Critics contended that the national treatment obligation extended to both imports and exports, and that once the tap of large scale water diversion to the south was turned on, it would be impossible for Canada to turn the tap off without curbing its own domestic use.[54]

This fear was substantiated by further provisions in Chapter Three of NAFTA relating to market access for goods. Annex 301.3 of the Agreement provides that the national treatment obligation does not apply to Canadian restrictions upon the export of logs of all species, or the export of unprocessed fish from the Maritime provinces or Quebec.[55] Repeated demands were made in Parliament[56] that a similar exclusion for bulk water exports be inserted into the Agreement, yet Annex 301.3 makes no such provision. Government neglect in the resolution of this conten-

---

[50] Clark & Gamble, *supra* note 16, at 10.

[51] *Id.* at 11.

[52] NAFTA, *supra* note 1, art. 301, 32 I.L.M. 299.

[53] NAFTA, *supra* note 1, art. 301, 32 I.L.M. 300. "National Treatment," one of the basic tenets of both NAFTA and GATT, strikes an important balance in a free trade agreement. It damages the sovereignty of a nation less than "harmonization," which obliges Parties to follow or implement the same policies. On the other hand, Parties enjoy the benefit of open foreign markets in that their trade partners may not discriminate against their goods. *See* RICHARD G. LIPSEY, DANIEL SCHWANEN, & RONALD J. WONNACOTT, THE NAFTA; WHAT'S IN, WHAT'S OUT, WHAT'S NEXT 159 (1994). For a discussion of the principle of national treatment, *see infra* part III.B.2.a.

[54] Hunter & Orbuch, *supra* note 3, at 11.

[55] NAFTA, *supra* note 1, 32 I.L.M. 305.

[56] Marlene Catterall, speech *in Debates of the House of Commons* (May 28, 1993), at 19974; *see also* the speech of Hon. Lloyd Axworthy. *Id.* at 20025.

tious issue led many to conclude that water exports were, in fact, on the Tory trade agenda.[57] To these charges Trade Minister Michael Wilson stated, "[t]here is no exemption for water in the NAFTA because it is not necessary to insert an exemption from obligations that do not exist."[58] Despite Wilson's reassurances, it appeared that Annex 301.3 created an exemption for specific exports from the national treatment obligation.[59] Many analysts accordingly believed that all other exports were therefore included under the national treatment obligations of Chapter Three and that Canada had relinquished its capacity to control the export of its water.[60]

Further provisions of NAFTA seemed to fortify the contention that water would flow unregulated from Canada to the south after the Agreement came into force. Article 314 provides that no Party may impose export taxes, such as an environmental surcharge, upon the export of any good unless a similar tax applies to the good in the domestic market.[61] Therefore, the right to impose a tax that could be prohibitive to the point where the export of water would be economically infeasible does not exist under the Agreement. Moreover, Article 309 stipulates that no Party may restrict the "exportation or sale for export of any good destined for the territory of another Party, except in accordance with Article XI of the GATT."[62] However, under Article XI Canada would have to be approaching a "critical shortage" of its water supply before it may invoke such a

---

[57] Note that regardless of whether water was on the trade agenda, it was a valuable bargaining chip for Canada. The political reality of the situation was that Canada would have lost a NAFTA benefit in return for an outright exclusion of its water in the Agreement. *See* Catterall, *supra* note 56; *see also* Michael Wilson, *Concern Over Water and NAFTA Not Based on Fact*, VICTORIA TIMES COLONIST (May 2, 1993).

[58] Wilson, *supra* note 57.

[59] *See* Hunter & Orbuch, *supra* note 3, at 11.

[60] This view was expressed on both sides of the border. *See* NAFTA AND WATER EXPORTS, *supra* note 20, at 6; Hunter & Orbuch, *supra* note 3, at 11.

[61] *See* NAFTA, *supra* note 1, 32 I.L.M. 303.

[62] NAFTA, *supra* note 1, 32 I.L.M. 303. GATT Article XI, paragraph 2(a) provides the most realistic scenario in which an export restriction upon water would become necessary and justifiable under NAFTA: "Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party." GATT, *supra* note 47, 55 U.N.T.S. 188; *reprinted in* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 818 (1969).

restriction.[63] This was obviously not considered a desirable remedy as it is founded upon a nightmare scenario that opponents of free trade aimed to prevent.

Another GATT provision, Article XX(g), is incorporated into NAFTA and permits export restrictions relating to the conservation of exhaustible natural resources such as water.[64] Under Article XX(g), Canada would be able to apply a restriction upon the exports of water but such restrictions must be made in conjunction with similar restrictions upon domestic production and consumption.[65] This proportionality requirement is made even more rigorous by the conditions in Article 315 of NAFTA.[66] First, a restriction placed upon water exports may not decrease proportional access to total supplies of Canadian water that another NAFTA Party enjoyed over the previous three years.[67] Second, in imposing a restriction, Canada may not impose a higher price for water export through the use of licenses, fees, or taxes, than the price charged domestically.[68] Therefore, both the "critical shortage" and the "exhaustible natural resource" restrictions on water exports were effectively rendered useless by Article 315.[69] Under a future domestic water crisis, Canada would be obligated to bear the proportional burden of dwindling supplies and increasing prices with those NAFTA Parties to whom it exported.

---

[63] JACKSON, *supra* note 62, at 818.

[64] Article 2101 of NAFTA states that Article XX(g) of GATT may be invoked as a general exception provided that any measures taken do not constitute an "arbitrary or unjustifiable discrimination . . . or a disguised restriction on trade between the Parties." NAFTA, *supra* note 1, art. 2101, 32 I.L.M. 699.

[65] This standard has been strictly interpreted in the past. In 1989, the U.S.-Canada Binational Panel presiding over the Salmon and Herring case established the applicable test under Article XX(g): "How genuine the conservation purpose of a measure is, must be determined by whether the government would have been prepared to adopt that measure if its own nationals had to bear the actual costs of the measure." *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, U.S.- Canada Binational Final Report, CDA 89-1807-01 (Oct. 16, 1989), *available in* LEXIS, Itrade Library, USCFTA file.

[66] NAFTA, *supra* note 1, art. 315, 32 I.L.M. 303. Note that Article 315 applies to both Article XX(g) and Article XI.2(a) of GATT. *See supra* note 64 and accompanying text for a discussion of Article XX(g).

[67] *See* NAFTA, *supra* note 1, art. 315(1)(a), 32 I.L.M. 303.

[68] *See* NAFTA, *supra* note 1, art. 315(1)(b), 32 I.L.M. 303.

[69] *See* NAFTA, *supra* note 1, art. 315, 32 I.L.M. 303.

2. *Government Half-Measures*

The Conservative government made one consistent reply to the critics of the proposed Agreement on free trade: there was no need to make an exclusion for water in NAFTA because appropriate measures had already been taken to protect Canada's water.[70] In response to concerns voiced over the FTA, the Conservatives had already implemented the Federal Water Policy in 1987.[71] The Federal Water Policy was touted by the Conservatives as the instrument that would prevent the export of water should the need arise.[72] This contention is tenuous at best. The provisions of NAFTA will take primacy over any domestic legislation or policy of the Parties to the Agreement.[73] Moreover, the Conservative government had not, as the Policy provided, taken any measures to "strengthen federal legislation" with respect to water exports.[74] Bill C-156, entitled the Canadian Water Preservation Act, was introduced to "prohibit outright large-scale freshwater exports and strictly regulate small-scale water sales such as those by tanker."[75] However, when Parliament adjourned in 1988, this bill died on the order paper and was not debated any further.[76]

---

[70] *See generally*, Charles Langlois, *Debates of the House of Commons* (May 28, 1993).

[71] *See* Hunter & Orbuch, *supra* note 3, at 14. The Policy stated that the federal government would take all possible measures within the limits of its constitutional authority to prohibit the export of Canadian water by interbasin diversions and strengthen federal legislation to the extent necessary to fully implement the policy. FEDERAL WATER POLICY, (Environment Canada, 1987).

[72] *See, e.g.*, the speech of Mr. Charles Langlois in *Debates of the House of Commons* (May 28, 1993) at 20008.

[73] *See* APPLETON, *supra* note 49, at 202.

[74] *See generally*, FEDERAL WATER POLICY, *supra* note 71.

[75] *See* the tabling of Bill C-156 by Minister of the Environment, Mr. Tom McMillan in *Debates of the House of Commons* (Aug. 28, 1988) at 18818.

[76] Many critics argued that, had the Canadian Water Resources Act been passed, it would have had no force under the FTA or NAFTA and would not have effectively prohibited water exports. *See* Clark & Gamble, *supra* note 16, at 17. However, while the proposed law was not passed it would have given Canada more control over its water resources. An act prohibiting the large-scale export of water or regulating small-scale water sales would be consistent with Chapter Three of NAFTA in most respects. For reasons to be discussed in the next section of this paper, only those few contracts for water export that existed prior to the passing of such a law would be subject to the stringent proportional sharing obligations of NAFTA.

The North American Free Trade Implementation Act of 1993,[77] which made NAFTA part of Canadian domestic law, is an example of further governmental half-measures. Section 7(2) of this legislation provides that water "packaged as a beverage or in tanks," but not "natural, surface and ground water," is included under the national treatment obligations of NAFTA.[78] However, while this provision illustrates the position of Canadian domestic law, one Party's unilateral decision upon the terms of NAFTA will have no effect upon the interpretation of the Agreement.[79] With no specific exclusion for water in the actual text of NAFTA, many charged that half-measures such as section 7(2) of the Implementation Act were made so that large-scale interbasin transfers of water could be facilitated in the forthcoming environment of liberalized trade.[80]

3. *Truths About Water Export and Chapter Three of NAFTA*

Fears over Canadian water are both understandable and justifiable. The juxtaposition of the commitments made in the Federal Water Policy of 1987 and the failure of the Canadian government to reassure the public of its control over its country's water resources under NAFTA, indicates a less than sincere effort in setting the water export issue straight. However, many of the fears and allegations raised over water export and Chapter Three of NAFTA are both unfounded and circumventable. Indeed, the amount of misinformation that has circulated over the issue has made the problem seem more daunting and insurmountable for Canada than is the case. Misconceptions revolve around the type of bulk water export that will be subject

---

[77] R.S.C. 1993, c.44 [hereinafter Implementation Act].

[78] *See* APPLETON, *supra* note 49, at 202.

[79] Article 31(2)(b) of the Vienna Convention on the Law of Treaties provides that "any instrument which was made by one or more parties in connection with the conclusion of the treaty" may be used "for the purpose of interpretation." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969). However, an instrument like the Implementation Act, must also be "accepted by the other parties as an instrument related to the treaty" to have any effect. If the export of waters excluded by the Implementation Act was at issue in a dispute between Canada and another Party, Article 7(2) would obviously not have been "accepted by the other parties" and it would have no effect on the interpretation of NAFTA. *See* Implementation Act, *supra* note 77.

[80] *See generally*, Hunter & Orbuch, *supra* note 3.

to the terms of NAFTA and Canada's capacity to regulate such export.

a. Forms of Water Export That Will Be Subject to Chapter Three Obligations

First and foremost, the massive water diversion proposals, such as NAWAPA, do not subject Canadian water to the Market Access and National Treatment for Goods obligations of NAFTA.[81] Under such proposals water cannot be construed as a good for trade. One need only examine the understandings that have been struck between the Parties to NAFTA with respect to this issue. On December 2, 1993, the governments of Canada, the United States and Mexico made a joint and public statement that NAFTA creates no rights to the natural water resources of any Party to the Agreement. More specifically,

> [u]nless 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. And nothing in the NAFTA would oblige any NAFTA Party to either exploit its water for commercial use, or to begin exporting water in any form. Water in its natural state in lakes, rivers, reservoirs, aquifers, waterbasins and the like is not a good or product, is not traded, and therefore is not and never has been subject to the terms of any trade agreement.[82]

This declaration is by no means legally binding upon the Parties to NAFTA; at best, it can be considered as "soft law"[83] that may affect a Party's conduct. However, it illustrates that for the provisions of Chapter Three to apply, water will likely have

---

[81] *See generally,* Hunter & Orbuch, *supra* note 3.

[82] Office of the Prime Minister, Release, *Prime Minister Announces NAFTA improvements; Canada To Proceed With Agreement*, (Dec. 2, 1993). *See also* Letter of United State Trade Representative Mickey Kantor *in* APPLETON, *supra* note 49, at 202 (providing that "when water is traded as a good, all provisions of the Agreements governing trade in goods apply.").

[83] While soft law or lex ferenda is not directly enforceable in domestic courts or international tribunals, its application may eventually lead to the formation of new international law. For example, Article 31(2)(a) of the Vienna Convention on the Law of Treaties provides that "any agreement relating to the treaty which was made between all the parties" may be used for the purpose of interpretation of the treaty. Vienna Convention of the Law of Treaties, *supra* note 79, art. 31(2)(a), 1155 U.N.T.S. 331. *See* INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA 78 (Hugh M. Kindred, et. al. eds., 5th ed. 1993).

to be taken out of its natural state and processed for trade. Only when it is exploited in this manner will it become a good pursuant to NAFTA.

The actual text of NAFTA substantiates this point of view. It has already been mentioned that Article 201 of NAFTA defines the "goods of a Party" as "domestic products as these are understood in the General Agreement on Tariffs and Trade."[84] Therefore, for an item to be a "good" under NAFTA, it must be a "product" under GATT.[85] While GATT does not define the meaning of a "product," the Oxford English Dictionary defines it as "a thing produced."[86] Therefore, "ordinary natural waters of all kinds" under the GATT tariff heading, must be "produced" in some way to be considered a "good."[87] It would be difficult to contend that the creation of a large reservoir or the diversion of a river (where water remains in its natural state) is tantamount to the production of water. Water would have to be taken from its natural element and gathered in tanks, a pipeline or a vessel for it to become a "product" under GATT and a "good" under NAFTA.

For this reason, should the Canadian government make the unfortunate decision to proceed with one of the massive plans of watershed altering diversion in the future, it could still close the tap and not violate Chapter Three of NAFTA.[88] This water would not be considered a "good" and therefore a tax, prohibition, or other restriction placed upon its diversion would not violate Articles 309, 314 or 315 of NAFTA. Only when water is produced in a way contrary to NAFTA will the onerous obligations of Chapter Three apply to water export.

---

[84] NAFTA, *supra* note 1, 32 I.L.M. 298.

[85] *See* Johnson, *supra* note 48, at 28.

[86] THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2367 (4th ed. 1993).

[87] *See* Johnson, *supra* note 48, at 28.

[88] Given the incredible breadth of these projects and the environmental destruction that their assemblance would entail, one may question whether the Canadian government would ever hold the conservation of our water resources as a priority in the future. Moreover, it is unlikely that any one government would be able to take unilateral measures in a multinational arrangement such as the NAWAPA. *See, e.g.*, Hunter & Orbuch, *supra* note 3, at 3.

b. Canada's Capacity to Regulate the Export of Water

Many opponents of NAFTA noted that Canada made exceptions to the national treatment obligation for certain exports in Annex 301.3 of the Agreement.[89] With this provision in mind, these opponents claimed that as a general rule, the national treatment obligation of Article 301 must apply to both imports and exports.[90] However, this contention is erroneous given that Article 301 is to be interpreted "in accordance with Article III of the General Agreement on Tariffs and Trade."[91] It is generally accepted that the national treatment obligation of Article III does not apply to exports.[92] Therefore, this interpretation of GATT can be extended to Article 301 of NAFTA.[93] Other provisions of Chapter Three relating specifically to export taxes and export restrictions also suggest that exports are to be treated with standards different than that of national treatment.[94]

Certain conclusions can be drawn at this point. First, because the national treatment obligation does not apply to exports in the same manner that it applies to imports, Canada is not legally bound to make water available in its natural state, or as a "good" to other NAFTA countries. Under the national treatment obligation of Chapter Three, Canada possesses complete control over its water resources up to the moment it grants another NAFTA country a licence for the exportation of Canadian water.[95] Because water in its natural state cannot be construed as a "good" for the purposes of Chapter Three, and because it cannot become a "good" until an exporter is granted a license to produce it into a "good," stringent licensing requirements will serve to effectively regulate water export. Thus, Canada can regulate its water resources before they become

---

89 Hunter & Orbuch, *supra* note 3, at 11.

90 Clark & Gamble, *supra* note 16.

91 Hunter & Orbuch, *supra* note 3, at 10; Article 301(1) sets out the GATT national treatment obligation. *See* NAFTA *supra* note 1, 32 I.L.M. 299.

92 Under Article III of GATT, "exported products can be taxed or regulated in a manner different from those products that remain in the domestic market." JACKSON, *supra* note 62, at 499.

93 *See* APPLETON, *supra* note 49, at 203.

94 NAFTA, *supra* note 1, arts. 314, 315, 32 I.L.M. 303.

95 It will be illustrated later in this paper that the provinces are generally responsible for the granting of export licenses. In this section "Canada" is used for greater simplicity.

"goods" and as such it has not sacrificed any sovereignty over its water until it chooses to do so.

Second, no exporter can avail itself of the proportional sharing requirements of Articles 314 and 315, unless it has already been granted a license to export Canadian water. Again, this situation can only flow from a Canadian decision allowing for export. Moreover, the number of presently existing water export licenses in Canada is negligible and those that do exist are not large-scale projects.[96] Therefore, in the event of an export restriction on Canadian water, it would not be burdensome to meet the proportional sharing requirement of Article 315, since the proportion of total Canadian water available as a "good" the United States currently enjoys is essentially zero. Unless Canada's lakes and rivers have practically run dry, it would not be difficult to maintain this small proportion under an export restriction.

In the final analysis, Canada has not lost control over its water resources as a result of the Chapter Three provisions of NAFTA. The great engineering proposals for the interbasin transfer of water do not make a "good" out of water and would not bring the obligations of Chapter Three of NAFTA into effect. Moreover, contrary to what many critics of the Agreement submit, Canada may regulate its water resources before they become "goods" and thereby avoid the onerous restrictions placed upon the export measures included in Chapter Three. Only when licenses for the export of water are granted will such restrictions come into effect.

While this analysis presupposes both wise management and a desire to conserve Canadian water resources on its government's behalf, the analysis illustrates that Canada's water is not threatened by free trade in the manner that many contend. While it is hoped that these particular misconceptions have been clarified, the following section shall illustrate that another part of NAFTA poses more of a threat to Canada's sovereignty over water export.

---

[96] For example, in British Columbia where there is the greatest potential and demand for water export, only four licenses currently exist. All of these allow for the export of water to the United States through the use of supertankers. Hunter & Orbuch, *supra* note 3.

B. *Water Export and Chapter Eleven of NAFTA: Investment*

It is surprising that the provisions in NAFTA regarding investment were not condemned by critics of the Agreement. Herein lie the true problems that free trade poses for Canada with respect to its control over water resources.

1. *Foreign Investment in a Free Trade Zone*

An essential component of any free trade agreement is the establishment of a domestic environment that fosters growth in foreign investment. Canada's well-being which is dependent upon foreign investment, reached $490 billion (Canadian) in 1991.[97] The United States is the largest foreign investor in Canada, representing about 65% of foreign direct investment.[98] U.S. policy has consistently favored both the establishment "of international legal protection for foreign investment and . . . the elimination of obstacles to the entry of such investment."[99] Not surprisingly, the Chapter Eleven investment provisions of NAFTA are structured to meet these goals.[100]

2. *Legal Protection Accorded to Investment under NAFTA and Its Potential Impact Upon Water Export*

a. National Treatment: Article 1102

Similar to Chapter Three of NAFTA, Chapter Eleven imposes national treatment obligations upon the Parties to the Agreement. However, the provisions of Chapter Eleven are far more onerous and threatening to Canada when the issue of water export is considered. Even before water is traded as a "good," Article 1102 requires Canada to extend treatment no less favorable to investors and investments of another Party than that which is accorded to similar Canadian interests.[101] At a provincial or state level this treatment must be the same

---

[97] *See*, MINISTER OF INDUSTRY, SCIENCE AND TECHNOLOGY, *Canada's International Investment Position*, *in* INVESTMENT CANADA (1991).

[98] *Id.*

[99] Steven C. Nelson, *The Investment Provisions of the Free Trade Agreement: A United States Perspective in* UNITED STATES/CANADA FREE TRADE AGREEMENT: THE ECONOMIC AND LEGAL IMPLICATIONS 45-52 (1988).

[100] Indeed, one of the prime objectives of the investment provisions was to liberalize the restrictive Mexican investment regime for the benefit of Canadian and American foreign investors. *Id.*

[101] NAFTA, *supra* note 1, art. 1102(3), 32 I.L.M. 639.

as that treatment accorded to investors and investments of nationals of that province or state.[102]

The National Treatment Obligation draws no distinction between exports and imports. It imposes strict obligations upon literally all aspects of foreign investment by extending itself to "the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[103] Article 1139 defines the term "investment" in such a broad manner that it could cover even the most tenuous of interests held by foreign investors.[104] In general, it works to protect any proprietary right held by an investor of a NAFTA Party in Canada.[105]

The broad legal rights and protections afforded to investors translate into the greatest threat to Canada's water resources.

---

[102] NAFTA, *supra* note 1, art. 1102(3), 32 I.L.M. 639.

[103] NAFTA, *supra* note 1, arts. 1102(3), 1102(2), 32 I.L.M. 639.

[104] For example, the Article 1139 definition of investment includes:

(a) an enterprise; . . .

(d) a loan to an enterprise;

(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; . . .

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purpose; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory . . . .

NAFTA, *supra* note 1, art. 1139, 32 I.L.M. 647.

Article 1139 also provides that the benefits of the chapter are available to investors of non-Parties whose particular investments are incorporated into a NAFTA country and who wish to expand into another NAFTA country. As a result, NAFTA creates an attractive investment environment in Canada for all countries dependent upon foreign investment. *See* EXTERNAL AFFAIRS AND INTERNATIONAL TRADE CANADA, NAFTA: WHAT'S IT ALL ABOUT? 61 (1993).

[105] These NAFTA provisions are buttressed by the Organization for Economic Cooperation and Development [hereinafter OECD] recognition of national treatment as a fundamental condition for the creation of foreign investment. *See* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, NATIONAL TREATMENT FOR FOREIGN-CONTROLLED ENTERPRISES 54 (1993). The OECD, which is composed of 24 developed countries, including Canada and the U.S., accounting for three quarters of world trade, stated in its Declaration on International Investment and Multinational Enterprises that, "[m]ember countries should . . . accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another Member country . . . treatment under their laws, regulations and administrative practices, consistent with international law and no less favourable than that accorded in like situations to domestic enterprises." OECD Declaration on International Investment and Multinational Enterprises, June 21, 1976, *reprinted in* 15 I.L.M. 967-68.

First and foremost, Canada's right[106] to choose whether to allow the exportation of water to another NAFTA Party, is subsumed by the national treatment obligations in Article 1102. As the obligation applies to "the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments,"[107] investors from all NAFTA countries must be treated equally. Therefore, future American investors, wishing to establish an enterprise in British Columbia that will carry out supertanker exports of water to California, must be extended the same treatment granted to the four present holders of supertanker export licenses in the province. More specifically, Canada must allow the further export of water, regardless of how it wishes to manage the resource.[108] In a more ominous scenario, if a massive water diversion scheme was undertaken in Canada, the national treatment obligation would erode government control over similar future engineering proposals.[109]

---

[106] The Canadian provinces are generally responsible for granting water export licenses. Section 92(10) of the British North America Act confers upon the provinces jurisdiction over "local works and undertakings." British North America Act, 1867, 30 & 31 Vict. c. 3, § 92(10) (U.K.). Section 92(13) creates provincial jurisdiction over "property and civil rights" and therefore the power to regulate land use and most forms of business activity. *Id.* at § 92(13). The provinces may also make laws respecting non-renewable natural resources under section 92A, a category into which some forms of water may fall. *Id.* at § 92A. However, note also that under section 92(10)(a), an undertaking such as a pipeline, that extends beyond the limits of a province, falls under the jurisdiction of the federal government. *Id.* at § 92(1)(a). Moreover, Parliament could assert federal jurisdiction upon other interjurisdictional water issues such as large-scale water diversions. By contrast, the United States Congress has virtually unlimited power to legislate over water resource matters. *See* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA, 713-733 (3rd ed. 1992); *see also* BARRY BARTON, *Interregional Cooperation on Resource Management: Cooperative Management of Interprovincial Water Resources*, *in* MANAGING NATURAL RESOURCES IN A FEDERAL STATE 234-56 (J. Owen Saunders, ed. 1985).

[107] NAFTA, *supra* note 1, 32 I.L.M. 639.

[108] Note that since 1991, there has been a moratorium in British Columbia upon the issuance of new licenses for supertanker exports and the removal of water from streams. O.I.C. 1991/331, B.C. Gaz. 1991. The Order in Council imposing the moratorium has been extended four times and is designed to prevent further exporting until the passing of new water export legislation in British Columbia. Telephone Interview with Lyn Krywoken, Manager of Water Section and Policy, British Columbia, Ministry of the Environment (Feb. 28, 1995).

[109] Thus, the premise that Canada may decide whether or not to turn on the tap for water export, is severely limited by the investment provisions in Chapter 11 of NAFTA. *See generally*, NAFTA, *supra* note 1, ch. 11, 32 I.L.M. 639.

b. Compensation for the Expropriation of An Investment: Article 1110

The breadth of the definition of "investment" in Chapter Eleven is buttressed by provisions regarding expropriation and compensation of investments.[110] To date, no NAFTA Party has made a claim of expropriation under Article 1110.[111] However, the pivotal issue in a future claim will be the meaning extended to the term "expropriation." Although no definition has been provided in Article 1139 of the Chapter, the stipulation that Article 1110 will come into effect in the case of either expropriation, or "a measure tantamount to . . . expropriation," will undoubtedly extend protection to present and potential investors under a wide variety of scenarios.[112]

For example, once the decision to grant a water export license has been made, Article 1106(1)(a) provides that "[n]o Party may impose or enforce . . . in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment . . . to export a given level or percentage of goods or services . . . ."[113] Under this Article, an American investor, with interests in an enterprise that exports water from Canada, may take recourse against the government if a performance requirement limiting water export is attached to the license. Action could well take the form of a claim of expro-

---

[110] *See* NAFTA, *supra* note 1, ch. 11, 32 I.L.M. 639. Article 1110 provides:

1. 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"), except:

(a) for a public purpose;

(b) on a non-discriminatory basis;

(c) in accordance with due process of law and Article 1105(1); and

(d) on payment of compensation in accordance with paragraphs 2 through 6.

Id.

[111] *See* R.J. Hofley, *NAFTA's Investment Dispute Regime Awaits Test*, NAFTA WATCH 7 (Sept. 15, 1994).

[112] For example, the Canadian government's cancellation of the privatization of Toronto's International Airport and its proposal for the generic packaging of cigarette packages have both been construed by U.S. investors as government actions "tantamount" to expropriation. These events may become the first investment disputes under NAFTA. It is worth noting that Article 1605 of the Free Trade Agreement [hereinafter FTA] contained provisions similar to those of Article 1110 and no disputes arose. Canada-United States Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281 (1988). *See* Hofley, *supra* note 110, at 7.

[113] NAFTA, *supra* note 1, art. 1106, 32 I.L.M. 641.

priation requiring compensation under Article 1110.[114] In this manner, control over the amount of water that leaves the country is taken away from the government and placed into the hands of private interests. This fact is even more daunting given that the California community of Goletta was prepared to pay British Columbia exporters up to $2000 (U.S.) per acre foot of delivered Canadian water.[115] As the door to water export has already been opened, water will flow in increasingly large volumes, to the point where it secures the most lucrative returns for investors.

Article 1114 will permit Canada to take environmental measures to protect its water resources under Chapter Eleven.[116] Under Article 1114 a Party may adopt, maintain or enforce an environmental measure to ensure that investment activity is undertaken in an environmentally sound manner.[117] However, such a measure must be consistent with the other provisions of Chapter Eleven. This right is also limited by Article 1110 which works to grant investors compensation for acts of expropriation or acts "tantamount to . . . expropriation."[118] It is difficult to conceive of the situation in which an environmental measure would not give rise to a claim for compensation. If an investor has not yet availed itself of the Article 1110 protection, then an environmental measure, limiting the manner or amount of a water export, would undoubtedly have some effect upon the economic well-being of an investment. As a result, it may be construed by an Investor-State tribunal as an "act tantamount to . . . expropriation" obliging Canada to pay compensation.[119]

---

[114] Under Articles 1116 and 1117, action could also be taken on the basis that Canada has breached a Chapter Eleven obligation. NAFTA, *supra* note 1, art. 1116, 1117, 32 I.L.M. 642. *See infra* notes 120-26 and accompanying text.

[115] NAFTA AND WATER EXPORTS, *supra* note 20, at 48.

[116] NAFTA, *supra* note 1, art. 1114, 32 I.L.M. 642.

[117] NAFTA, *supra* note 1, art. 1114, 32 I.L.M. 642.

[118] NAFTA, *supra* note 1, art. 1110, 32 I.L.M. 641.

[119] The present moratorium on the issuance of water export licenses in British Columbia could be challenged on the basis that such an action was an "act tantamount to . . . expropriation." However, to date, no investor has taken this measure. Ross Curtis, Manager of Trade Policy for the British Columbia government, holds that immense legal fees would make such an action economically infeasible for an investor. Moreover, he contends that if the government was held liable for compensation, it would quickly pass legislation to make the moratorium a law in the province. This would entail even further legal costs on the behalf of investors.

c. The Investor-State Dispute Settlement Procedure: Articles 1116 and 1117

Finally, dispute settlement mechanisms under Chapter Eleven are unique in that an investor of a NAFTA Party may submit a claim to arbitration if it believes it has incurred some form of loss or damage due to the actions of another NAFTA Party.[120] This process is different from the more formal State-to-State dispute settlement process of Chapter Twenty of the Agreement.[121] Under Chapter Twenty, if an investor of a Party feels that its host state has breached a Chapter Eleven obligation, perhaps by acting in a discriminatory manner, or by not granting compensation in the event of expropriation, the investor may bring a claim regarding the breach of these obligations.[122] Therefore, while under most circumstances, only national governments may appear before a dispute settlement panel,[123] investors of a Party are accorded special privileges under Chapter Eleven of NAFTA.

Moreover, an investor of a Party, who holds an interest in the enterprise of another Party, may bring a similar claim on behalf of that enterprise against the other Party.[124] A concrete example of this possibility is provided by the example of the engineering scheme of Multinational Resources, noted in Part II of this paper. The North Thompson River Diversion proposal of Multinational Resources is the joint project of Multinational Water and Power Inc. and KVA Resources, an American company that would act as the project developer.[125] In the event that the government of British Columbia prevents the proposal, or strictly regulates the granting of an export license, KVA Re-

---

Telephone Interview with Ross Curtis, Manager of Trade Policy, British Columbia, (Mar. 20, 1995). Note that under Articles 1116 and 1117, action could also be taken on the basis that Canada has breached a Chapter Eleven obligation. *See*, NAFTA, *supra* note 1, art. 1116, 1117, 32 I.L.M. 642.

120 *See* NAFTA, *supra* note 1, ch. 11, 32 I.L.M. 642-47.

121 *See* NAFTA, *supra* note 1, ch. 20, 32 I.L.M. 693.

122 *See* NAFTA, *supra* note 1, ch. 11, 32 I.L.M. 642-47.

123 *See* NAFTA, *supra* note 1, ch. 20, 32 I.L.M. 693. *See also*, APPLETON, *supra* note 49, at 145-55.

124 NAFTA, *supra* note 1, art. 1117, 32 I.L.M. 643. This Article essentially provides that an American investor in a Canadian corporation can bring an action against the Canadian government, on behalf of the corporation, for the breach of a Chapter Eleven obligation. *Id.*

125 NAFTA AND WATER EXPORTS, *supra* note 20, at 48.

sources could bring a claim of expropriation against Canada on behalf of Multinational Resources. Therefore, the wide protection afforded to investors in this instance will have an impact upon a traditionally domestic situation.[126]

When control over the management of water is at issue, Canada must take measures to avoid this type of adverse consequence. The following section of this paper suggests the possible legal means by which the viability of Canada's water resources may be preserved, and examines the feasibility of such means under Chapter Eleven of NAFTA.

3. *Recommendations for Reconciling the Investment Provisions of Chapter Eleven with Canadian Control over Water Export*

While Canada is well-endowed with water resources at present, a time may arrive when water scarcity, in important areas such as Canada's prairie basin, will require the placing of limits upon water usage for its own benefit. Reconciling this need with existing or future NAFTA obligations, such as those embodied in Chapter Eleven of the Agreement, will be an integral part of meeting this challenge.

a. Federal Legislation Banning the Export of Water

A law similar to that envisioned by Bill C-156,[127] which would ban the export of water, seems the obvious means by which to preserve Canada's water resources. However, the law must contain certain components in order to be consistent with Canada's NAFTA obligations. First, it must affect exporters from all NAFTA Parties equally so that the national treatment obligations of Article 1102 are not violated. Second, such a law must purport to regulate water in its natural state and place restrictions upon its general use. The law should not be drafted such that it restricts the granting of a license for water export. Rather, it must have an environmental objective, and aim to regulate the general use and conservation of water. In this manner, it will distance itself from the prohibition upon per-

---

[126] For a more detailed analysis of Article 1117 *see* APPLETON, *supra* note 49, at 150.

[127] Canadian Water Preservation Act, Bill C-156, House of Commons of Canada (Aug. 25, 1988); *see Debates of the House of Commons*, *supra* note 72.

formance requirements in relation to the "establishment" or "acquisition" of an investment.[128]

There are, however, a number of obvious flaws inherent in this recommendation. Legislation banning the export of water would take away the right of all investors to establish an enterprise based upon water export and as such, would be an unpopular domestic measure. It is difficult to conceive of the government placing an outright prohibition upon such a lucrative investment. Moreover, while the law would treat all investors in enterprises carrying out water export equally, it may still violate the national treatment principle. For example, in times of water shortage, there may exist Canadian enterprises responsible for the transfer of water from British Columbia to the prairie provinces. While these enterprises may not technically be exporters of water, they may be construed as being "in like circumstances" to international water exporters.[129] As such, if they are not equally affected by the legislation, a claim could be made that Canada has not respected its national treatment obligations.

Moreover, as unrelated as a law banning water export may be to the "establishment" or "acquisition" of an investment, it would technically deny investors of their "interest in an enterprise."[130] Thus, a claim could be made under Article 1110 that the law is a "measure tantamount to . . . expropriation" of an investment, triggering the requirement for the payment of compensation.[131] This claim will hinge upon the interpretation of Article 1110 by an Investor-State arbitration, but the inclusion of the "measure tantamount to . . . expropriation" concept in Article 1110 suggests that investors are to be granted generous protection under Chapter Eleven.[132] Claims of investors may be buttressed by the fact that the law is an environmental mea-

---

[128] For example, the Article 1106(1)(a) prohibition upon the establishment of export levels only applies to water in the form of a "good." NAFTA, *supra* note 1, art. 1106, 32 I.L.M. 640. As it has already been noted, water in its natural state is not a "good."

[129] NAFTA, *supra* note 1, art., 1102, 32 I.L.M. 639.

[130] NAFTA, *supra* note 1, art. 1139, 32 I.L.M. 647.

[131] NAFTA, *supra* note 1, art. 1110, 32 I.L.M. 641.

[132] NAFTA, *supra* note 1, ch. 11, 32 I.L.M. 641.

sure inconsistent with Canada's NAFTA obligations as they relate to investment.[133]

Finally, in prohibiting the export of water, Canada would have to confront new problems posed by those export licenses that are already in existence. As water is presently being traded as a "good" under these licenses, an export restriction would be subject to the proportional sharing obligation under Article 315 of NAFTA.[134] Accordingly, the proportion of total water exports that had been made to another Party, relative to the total supply of water in Canada, would have to be maintained regardless of the law. Thus, in a scenario where water scarcity is coupled with a large number of existing export licenses, an export prohibition would not work to effectively protect our water resources. This point stands as yet another illustration of why federal legislation banning the export of water would likely create more problems than it solves.

b. Canada's Right to Screen Specific Investments

The legal protection provided for investors and investments under Chapter Eleven of NAFTA is not absolute. Under Annex I of the Agreement, the Schedule of Canada permits discrimination against the investors or investments of another Party in certain agreed upon sectors of the economy.[135] This right has been afforded to Canada so that it may protect certain domestic industries that are integral to Canada's economy and that may be threatened by the national treatment obligation of Chapter Eleven of NAFTA. For example, in the Energy Sector of the economy, persons holding oil and gas production licenses or shares in such licenses "must be Canadian citizens ordinarily resident in Canada, permanent residents or corporations incorporated in Canada."[136] In the Fisheries Sector, foreign fishing vessels may not enter Canada's Exclusive Economic Zone "except under authority of a license or under treaty."[137] Moreover, the Minister of Fisheries and Oceans "has discretionary author-

---

[133] NAFTA, *supra* note 1, art. 1114, 32 I.L.M. 642.

[134] Note that under Articles 309 and 315, legislation would have to be drafted in the name of either Article XI.2(a) or Article XX(g) of GATT. NAFTA, *supra* note 1, arts. 309, 315, 32 I.L.M. 303.

[135] NAFTA, *supra* note 1, Annex I, 32 I.L.M. 706.

[136] NAFTA, *supra* note 1, Annex I, 32 I.L.M. 712.

[137] NAFTA, *supra* note 1, Annex I, 32 I.L.M. 714.

ity with respect to the issuance of licenses."[138] Both of these provisions from Annex I work to discriminate against other NAFTA Parties.

While none of the provisions of Annex I relate specifically to water, a general exception, touching all sectors of the economy and relating to investment, would prove to be an effective tool in limiting the rights of investors under Chapter Eleven. This exception would permit Canada to screen all direct investments as provided for by the Investment Canada Act.[139] Under this Act, Canada retains the right to screen all direct investments by investors of United States or Mexico above a threshold initially set at $5 million (Canadian).[140] This amount will be recalculated annually for such investments.[141] In the review process, an applicant for an investment must demonstrate the net benefit to Canada of the proposed acquisition.[142] Most importantly, Canada may impose requirements "in connection with the establishment, acquisition, expansion, conduct or operation of an investment of an investor of another Party. . . ."[143] Therefore, the onerous prohibition against performance requirements in Article 1106 is lifted and strict conditions may be attached to the entry of investments above a certain threshold.[144] Given that any substantial water export scheme would likely be comprised of assets much greater than this threshold,[145] Annex I grants Canada substantial control over its water resources.

While the inclusion of the Investment Canada Act in Annex I leaves Canada considerable room for reservation, the exercise of this power will be left to the political will of the day. Whereas, the engineering proposals discussed earlier in this paper may eventually bring large financial returns to Canada,

---

138 NAFTA, *supra* note 1, Annex I, 32 I.L.M. 714.

139 R.S.C. 1985, ch. 28, (1st supp.).

140 NAFTA, *supra* note 1, Annex I, 32 I.L.M. 706.

141 R.S.C. 1985, ch. 28, (1st supp.), amended by ch. 44, § 178, 1993 S.C.

142 NAFTA, *supra* note 1, 32 I.L.M. 706 (Annex I, para. 4 of the description element of Canada's reservations with respect to investment).

143 NAFTA, *supra* note 1, 32 I.L.M. 706 (Annex I, para. 11 of the description element of Canada's reservations with respect to investment).

144 In addition to strict conditions of entry, Canada also retains "the important right to refuse entry altogether." *See* LIPSEY, SCHWANEN & WONNACOTT, *supra* note 53, at 75.

145 For example, the Multinational Resources Proposal is a $3.8 billion (Canadian) venture. *See* NAFTA AND WATER EXPORTS, *supra* note 20, at 64.

they will be accompanied by environmental destruction. In the arena of free trade, one must presume that Canada will strive to be as unrestrictive to investment as possible.[146] Accordingly, the provisions of Annex I will not likely be used to refuse outright entry to an applicant desiring to invest in water export. At best, performance requirements will be imposed on water exporters.

c. Provincial Capacity to Control the Export of Water

A more politically realistic goal is the extension of control over the issuance of water export licenses to the provinces. Management and allocation of water has its direct impact upon those individuals or local communities dependent upon a particular water source. As such, a more regional approach to the designation of water for export is clearly the most appropriate manner in which to deal with the issue.[147] Provincial governments which are more accountable to public concern over water resources, and more sensitive to local reliance upon water, are most likely to formulate a responsible water export policy in the face of NAFTA.

Article 1108 of NAFTA is extremely important in this respect. Under its terms "[e]ach Party may set out in its Schedule to Annex I, within two years after the entry into force of this Agreement, any existing non-conforming measures maintained by a state or a province."[148] Moreover, Article 1102, which involves national treatment for investors and investments of a Party, and Article 1106, which prohibits performance requirements for investors and investments of a Party, do not apply to

---

[146] Note that the OECD Committee on International Investment and Multinational Enterprises on a Standstill on National Treatment Measures made a declaration of understanding in 1988 stating "that Member countries avoid the introduction of new measures or practices which constitute exceptions to the present National Treatment instrument." *See* OECD Declaration and Decisions on International Investment and Multinational Enterprises *supra* note 105, at 24. As a member of the OECD, Canada's foreign investment policies will likely become more liberalized than restrictive.

[147] For this reason, Canada's system of federalism designates most legislative jurisdiction over natural resources to the provinces. For a detailed analysis of the many issues related to federal and provincial jurisdiction over natural resources *see* MANAGING RESOURCES IN A FEDERAL STATE (Owen J. Saunders ed., 1985).

[148] NAFTA, *supra* note 1, art. 1108(2), 32 I.L.M. 641.

such "existing non-conforming measures."[149] Essentially, Article 1108 works to preserve provincial autonomy over those matters within provincial jurisdiction that are threatened by the investment provisions of NAFTA.[150] Water resource management, especially in those provinces that are under pressure to increase water exports, is a prime example of such a matter.[151]

While Article 1108 extends substantial control to the provinces in various matters, it may only be applicable to the extent that a provincial measure relates to investment. In the context of water resources, this requirement places a severe limitation upon provincial control of water export. Ross Curtis believes that the issuance of water export licenses cannot be construed as relating directly to the matter of investment.[152] He further contends that because a license for export is more attached to the production of a "good," it would be unjustifiable to construe legislation regarding a water export license as an exception to the investment provisions of NAFTA.[153] Moreover, it is unlikely that the federal government would assent to the inclusion of such a restrictive law in Annex I of NAFTA. Accordingly, an

---

149 NAFTA, *supra* note 1, art. 1108(1)(a)(ii), 32 I.L.M. 640.

150 Note that if the investment provisions of Chapter Eleven were incorporated into Annex I of the Agreement, all Parties, including Canada, would have to adhere to them, regardless of restrictive provincial legislation. Article 105 of NAFTA provides: "The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement including their observance, *except as otherwise provided in this Agreement*, by state, provincial and local governments." NAFTA, *supra* note 1, art. 105, 32 I.L.M. 298. (emphasis added).

151 British Columbia is undoubtedly the province most in need of a water export policy. Inundated with lucrative offers from the American Southwest, and endowed with freshwater resources, this province has no firm legislation or policy relating to water export. Licenses for water removal from rivers in the province fall under the governance of the Water Act, R.S.B.C. 1979, ch.429. However, appurtenance requirements on water removal, which may be imposed under section 10(e) of the Water Act, are not consistent with Article 1106 of NAFTA. Note that in the context of the Water Act, "appurtenancy" refers to the extent that water must be used in relation with, or for the benefit of, the land upon which it is found. Because strict appurtenancy requirements would stymie the goals of water exporters, their inconsistency with the provisions of NAFTA is obvious. This issue must be dealt with soon because the two year period terminates on January 1, 1996. At the time this paper was prepared, the New Democratic Party government in British Columbia was preparing a comprehensive Bill relating to water export that will soon be tabled in the provincial legislature. Telephone interview with Ross Curtis, British Columbia Manager of Trade Policy (Feb. 28, 1995).

152 Telephone Interview with Ross Curtis, *supra* note 119.

153 Telephone Interview with Ross Curtis, *supra* note 119.

upcoming bill on water export in British Columbia will not purport to fall under the Article 1108 reservations.[154]

This legislation may nevertheless be unassailable under NAFTA, limiting the "establishment, acquisition, expansion . . . [or] operation" of investment by placing conditions upon the issuance of licenses for export.[155] Such legislation may be construed as a prohibited performance requirement under Article 1106 or, a "measure tantamount to . . . expropriation" of an investment under Article 1110.[156] If the matter was heard by a dispute panel, it could be argued that the legislation is both consistent and justified under Chapter Nine of NAFTA as a Standards-Related Measure.[157] If it is ruled as a valid measure,[158] a panel would have no choice but to invoke Article 1112(1) which provides, "[i]n the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency."[159] In this manner, a provincial water export law could be justified despite Canada's onerous obligations in Chapter Eleven.[160] Such legislation appears

---

[154] However, as it has already been noted, the umbrella of protection has been opened very generously for investors and their investments under NAFTA. This point is substantiated by legal opinions circulating over the pending dispute on the generic packaging of cigarettes; in this instance product trademarks are being construed as "investments" by U.S. tobacco manufacturers. Ottawa Claims Plain Packs Deter Smokers, FINANCIAL POST, May 20, 1995, *available in* WESTLAW, ALLNEWS Library. Similarily, it should be possible under Article 1108 to extend provincial reservations against the protection for investment just as broadly. While a license for water export enables one to produce a "good," it is also a form of "intangible property" making it an investment for the purposes of Article 1139. This author submits that if a water export license could be construed as an investment, a provincial law regulating the granting of such a license, would be justified as an Article 1108 exception.

[155] NAFTA, *supra* note 1, art. 1106(1), 32 I.L.M. 640.

[156] NAFTA, *supra* note 1, art. 1110(1), 32 I.L.M. 641.

[157] Article 915 defines "standards" as "[r]ules, guidelines or characteristics for goods or related processes and production methods . . .." NAFTA, *supra* note 1, art. 915, 32 I.L.M. 392. Note that Chapter Nine appears to give leeway to the provinces for the establishment of such a standard. Article 902 does not hold Canada to as high a standard in ensuring provincial compliance with NAFTA as does Article 105. NAFTA, *supra* note 1, art. 902, 32 I.L.M. 386.

[158] Under Article 904, it would have to be proven that the law is made in the pursuance of a legitimate objective, does not discriminate against the goods of another Party, and does not create an unnecessary obstacle to trade. NAFTA, *supra* note 1, art. 904, 32 I.L.M. 387.

[159] NAFTA, *supra* note 1, art. 1112(1), 32 I.L.M. 643.

[160] Clearly, the issue of water export opens up a complex interplay between the National Treatment and Market Access for Goods provisions of Chapter Three, the

to be the most effective means with which Canadian control over water resources may be maintained in the face of NAFTA's investment provisions.[161]

IV. CONCLUSION

The apparent threat to Canada's water resources posed first by the FTA and now by NAFTA, provoked many charges that Canada's lakes and rivers would eventually run dry under free trade. Undoubtedly, such a threat is conceivable. The important agricultural regions and massive urban centers of the North American Southwest are willing to pay a high price for pure and plentiful water while Canada, a country comprised of less than one tenth of North America's population, is extremely well-endowed with fresh water resources. Because of this situation, extensive engineering schemes for massive diversions or

---

Investment provisions of Chapter Eleven, and the Standards-Related Measures provisions of Chapter Nine. Other parts of NAFTA that are beyond the scope of this paper, such as the Nullification and Impairment provisions of Annex 2004 may also enter into the debate over water export. The evolution of this issue under the Agreement will depend upon how eager the federal or provincial governments are to export water, the manner in which licenses for water export are regulated, and whether an investor or a NAFTA Party brings an action against Canada in reaction to Canadian policy or legislation.

[161] While the contents of such a law are well beyond the scope of this paper, many changes must be made to existing provincial legislation. For example, the British Columbia Water Act is not an effective tool for water resources management because it only sets out the process by which the government is to allocate water in the province. New legislation must focus on the ecological impact of water export and create mechanisms that will protect water resources. In this respect, the following measures would be appropriate: 1) water pricing that creates incentives to avoid waste and use water efficiently; 2) designating certain rivers, lakes or watersheds as environmentally sensitive or integral to the well-being of an ecosystem, Aboriginal groups, communities, or local industries; 3) ensuring public consultation and participation in the granting of a license for water export; and 4) placing strict appurtenance requirements upon all licenses granting the removal of water from rivers in an attempt to confine the use of the water to the parcel of land upon which it is found. Ross Curtis has indicated that this final measure will be a predominant characteristic of the upcoming legislation of British Columbia. Telephone Interview with Ross Curtis, *supra* note 119. For a more detailed examination of what may be expected of a future water policy see PROVINCE OF BRITISH COLUMBIA, STEWARDSHIP OF THE WATER OF BRITISH COLUMBIA: A REVIEW OF BRITISH COLUMBIA'S WATER MANAGEMENT POLICY AND LEGISLATION (1993). *See also*, P.H. Pearse, F. Bertrand & J.W. MacLean, *Water Management for the Future, Currents of Change*, *in* FINAL REPORT OF THE INQUIRY ON FEDERAL WATER POLICY 95-110 (Environment Canada 1985).

exports of water, which will be facilitated under free trade, are frequently proposed.

Despite these realities, many of NAFTA's criticisms, and its impact on Canadian water were simply not founded in law. Massive projects such as the NAWAPA will not find their fruition in the provisions of Chapter Three of the Agreement. This is evident from both the Parties' intention and the fact that natural water cannot be considered as a "good" under NAFTA. Moreover, the national treatment obligation in this same Chapter does not legally bind Canada to make water available as a "good" to other NAFTA Parties. National treatment need only be extended to the imported goods of another Party. Only when government makes the decision to allow for the export of water does NAFTA provide that restrictions upon export be accompanied by corresponding restrictions on water use in the domestic domain. Given that water exports from Canada are presently negligible, the tap of Chapter Three that allegedly opened the flow of water from north to south simply does not exist. Canada remains in control of its water in this regard.

If there is a true threat to Canada's water, it is posed by the provisions of Chapter Eleven of NAFTA, which were left surprisingly uncondemned by critics of the Agreement. The extension of national treatment to the investors of all NAFTA countries will place all NAFTA investors on an equal playing field. Other provisions of the Chapter, such as the prohibition on performance requirements, and the broad legal remedies available to investors, will work to open the door to investment in Canada. As such, any individual from another NAFTA country holding an interest in an enterprise established for the export or diversion of water, will enjoy all of the benefits and protection of Chapter Eleven of NAFTA. In this regard, Canada's control over the management of its water resources has been compromised.

Measures that can be taken to rectify this situation are limited but not futile. Federal legislation banning the export of water by investors of all NAFTA Parties would only prevent future exports of water. Moreover, this is not a politically realistic measure given both Canada's obligations to foster foreign investment and the potential returns of such an investment. The right Canada holds to screen and potentially deny investment

under Annex I of NAFTA is also a valuable tool. However, in the context of water export, the exercise of this right shall remain subject to the political will of the day. Lastly, the Chapter Eleven reservations made for provincial measures affecting investment could be used in the formulation of responsible legislation on water export. If a provincial law is not made upon the basis of Chapter Eleven it could still be justified on a number of fronts.

In sum, all potential solutions are based upon the premise that the Canadian government is willing to make prudent decisions regarding water export. In this sense, perhaps the greatest threat to Canada's water is a lack of political will. Fresh water will certainly become an increasingly valuable commodity in the future, but it should also be considered as the most important[162] of Canada's dwindling ecological resources. The volume of water leaving Canada in the years to come will be indicative of our government's position in this debate. For in the final analysis, the Canadian government's action or inaction, not the provisions of NAFTA, shall determine how much of Canada's water will flow to the highest bidder.

---

[162] Taking nothing away from the importance of other natural resources, the implications for many Canadian industries would be grave if Canada's fresh water resources went the unfortunate way of the Atlantic cod stocks. Hopefully William Blake's oft-cited "Proverb of Hell," "You never know what is enough unless you know what is more than enough," will not be the standard employed by the Canadian Government if it chooses to open the tap to water export. WILLIAM BLAKE, PROVERBS OF HELL (1790).