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## Canada's Position regarding an Emerging International Fresh Water Market with Respect to the North American Free Trade Agreement

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# **Canada's Position Regarding an Emerging International Fresh Water Market With Respect to the North American Free Trade Agreement**

*Jamie W. Boyd\**

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## I. Introduction.

By the year 2100, the earth's human population will double to more than ten billion people and as a result the global demand for non-regenerative fresh water will grow immensely.<sup>1</sup> The resulting "competition for supplies of fresh water will be a serious problem"<sup>2</sup> of tremendous importance. Though water covers 70 percent of the earth's surface, only 2.5 percent is fresh water,<sup>3</sup> rendering it an extremely limited resource. The scarcity of water, coupled with its unequal distribution on earth, equates to an innumerable number of persons having inadequate access to fresh water.<sup>4</sup> Many states throughout the world are faced with the staggering challenge of providing an adequate supply of fresh water to their nationals. In these situations, sovereign states must look beyond their borders to gain access to fresh water. Consequently, by necessity, international water markets emerge.

Controlling the flow of and distributing water from places of abundance to arid regions has been a challenge to human beings since ancient times, and has precipitated the development of centrally located communities.<sup>5</sup> North America is no stranger to this phenomenon. The foundations for a North American international water market began in the nineteenth century through the actions of the early settlers with relation to fresh water resources.<sup>6</sup> From the actions of the early settlers, two major doctrines evolved with respect to surface water: the riparian doctrine<sup>7</sup> and the appropriation doctrine.<sup>8</sup>

1. See H.L.F. Saeijs & M.J. van Berkel, *The Global Water Crisis: The Major Issue of the Twenty-first Century, a Growing and Explosive Problem*, in *THE SCARCITY OF WATER: EMERGING LEGAL AND POLICY RESPONSES*, 11-12 (Edward H.P. Brans et al., 1997).  
Note: there have been countless studies on the future of natural resources and fresh water in particular. This paper does not begin to enter into this debate on what the future will hold. The basic premise underlying this paper is that while the earth's population continues to increase, the supply of fresh water will invariably become notably limited. For a more detailed and thorough analysis on the earth's future climatic change, see the Report of the Intergovernmental Panel on Climate Change, *Climate Change: The IPCC Scientific Assessment* (1990).
2. Shirley Conover, *World's Water Fight is Just Starting*, *TORONTO GLOBE & MAIL*, May 23, 1998, at D7.
3. See Saeijs & van Berkel, *supra* note 1, at 3.
4. See *id.* at 6-7.
5. See KARL A. WITTFOGEL, *ORIENTAL DESPOTISM: A COMPARATIVE STUDY OF TOTAL POWER* 8 (1957); Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AM. J. INT'L L. 384, 385 (1996).
6. See Steven E. Clyde, *Adapting to the Changing Demand for Water Use Through Continued Refinement of the Prior Appropriation Doctrine: An Alternative Approach to Wholesale Reallocation*, 29 NAT. RESOURCES J. 435, 435 (1989); TERRY L. ANDERSON & PAMELA SNYDER, *WATER MARKETS: PRIMING THE INVISIBLE PUMP* 43 (1997).
7. "[R]iparian rights are a matter of land ownership; they are one of the incidents, or 'sticks of the bundle,' that accompany the ownership of riparian lands. Second, there is equality among riparian owners." KENNETH R. WRIGHT, *WATER RIGHTS OF THE FIFTY STATES AND TERRITORIES* 8 (1990). For one of the earliest recorded judicial decisions, see *Tyler v. Wilkinson*, 4 Mason 397 (1827) (riparian owners have a reasonable right to use the water and no one gains a greater right through prior use).
8. "The appropriation doctrine rests on two basic principles: priority and beneficial use. The priority principle (first in time, first in right) is a rule for matching demand with supply. When the flow of a stream is insufficient to meet demands, use is regulated by priority in time. . . . The principle of beneficial use is, first, a rejection of the riparian doctrine. One has no water right by land ownership alone. Rather, a water right is acquired by putting water to a beneficial use." WRIGHT, *supra* note 7, at 9-10.

Essentially, a riparian right is a right to use part of the flow of a watercourse that arises by virtue of ownership of land bordering fresh water streams and lakes.<sup>9</sup> Further, the law of prior appropriation is in essence "an exclusive property rights model regime which assumes that all available resources should be used to the point of exhaustion but that each user shows in advance the extent of their right so that the risk of interference with other users will be minimized."<sup>10</sup>

The eastern portion of the United States generally adhered to the riparian doctrine, while the developing western states observed the prior appropriations doctrine.<sup>11</sup> Through the median of these two doctrinal approaches to water rights, a domestic water market emerged wherein individual actors established an efficient set of institutions allowing for the most advantageous use of water.<sup>12</sup> But due to various reasons including the rapid settlement and expansion of the West, fresh water resources were not adequately managed.<sup>13</sup> As a result, coupled with an ever-increasing population, as well as extensive agricultural and economic development, the American Southwest's water resources are dwindling at an alarming rate.<sup>14</sup>

Over the ensuing decades, fresh water will invariably become an increasingly scarce ecological resource meriting comprehensive protection by the governments of the North American continent.<sup>15</sup> Specifically, Canada, which has an abundant supply of the continent's fresh water resources,<sup>16</sup> should adequately prepare for the future in light of the recently enacted North American Free Trade Agreement (NAFTA)<sup>17</sup> and other international agreements. By taking proactive steps to ensure sovereignty over its fresh water natural resources, Canada can position itself as a world leader in an emerging international water market. Unfortunately, under the current state of international agreements, Canada does not have absolute control over the exportation of its fresh water. So it seems paramount that Canada should act sooner rather than later in implementing policies and laws that effectively provide Canadians with absolute control over the amount of fresh water it wishes to export. In handling its national fresh water policy, Canada should first establish a general policy regarding its stance on the possibility of exporting fresh water, and second, promulgate multilateral treaties that trump certain provisions in NAFTA that hinder Canada's control over its fresh water resources.

This paper will explore the current fresh water legal and political situation in North America with a focus on Canada-U.S. relations. Next, an examination of various interna-

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9. See NATIONAL WATER COMMISSION, A SUMMARY DIGEST OF STATE WATER LAWS, 32 (Richard L. Dewsnap & Dallin W. Jensen eds. 1973).
  10. A. Dan Tarlock, *Current Trends in United States Water Law and Policy: Private Property Rights, Public Interest Limitations and the Creation of Markets*, in THE SCARCITY OF WATER: EMERGING LEGAL AND POLICY RESPONSES, 187 (Edward H.P. Brans et al., 1997).
  11. See WRIGHT, *supra* note 7, at 19-30. For an excellent comparison between the two doctrines, see *id.* at 114-16.
  12. See generally *id.*; see also WITTFOGEL, *supra* note 5.
  13. See MICHAEL KEATING, TO THE LAST DROP: CANADA AND THE WORLD'S WATER CRISIS 129-42 (1986).
  14. See *id.*
  15. See ANDERSON & SNYDER, *supra* note 6, at 7-8.
  16. See generally KEATING, *supra* note 13.
  17. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 [hereinafter NAFTA].
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tional agreements, along with international and domestic laws affecting the exportation of Canada's fresh water will take place. Examples from Ontario and British Columbia will then be explored to provide illustrations of the current state of the law on this issue. Further, a conclusion will be drawn as to the current state of the water situation in North America followed by a recommendation as to what Canada can do to protect itself from losing control of its fresh water resources. Finally, this paper will probe the possibilities of an emerging Canadian-based North American International Water Market.

## II. Current Water Situation in North America.

Arguably, there is enough fresh water in this world to meet the current and future needs of human beings.<sup>18</sup> Water resources, however, are remarkably unevenly distributed, and therefore, a redistribution of water is needed to provide all global inhabitants with an adequate quantity of fresh water.<sup>19</sup> North America is indicative of this phenomenon and as a result, numerous water diversion proposals have been considered in recent decades.

Canada has an abundance of fresh water, with about nine percent of the entire world's renewable water resources.<sup>20</sup> Therefore, Canada is seen as the answer to many water scarcity problems in North America. Along with rapid population growth and a realization that the North American continent has fresh water allocation difficulties, engineers have considered various projects intended on transferring water from abundant sources to arid regions. Due to Canada's abundant supply of fresh water, the United States naturally began looking to Canada for remedies concerning its own fresh water reserves. During the 1960s, top engineers contemplated a major water transfer proposal from Canada to the southwestern United States.<sup>21</sup> Ralph M. Parsons Company advanced the concept of a massive water transfer project known as the North American Water and Power Alliance (NAWAPA).<sup>22</sup> The blueprint of this project entailed damming virtually all

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18. See Benvenisti, *supra* note 5, at 384; GEOFFREY E. PETTS, *IMPOUNDED RIVERS: PERSPECTIVES FOR ECOLOGICAL MANAGEMENT* 1 (1984); PETER GLEICK, *An Introduction to Global Fresh Water Issues, in WATER IN CRISIS* 3-4 (Peter H. Gleick ed., 1993).

19. See Benvenisti, *supra* note 5, at 384. See generally Peter H. Gleick, *Water and Conflict*, OCCASIONAL PAPER SERIES OF THE PROJECT ON ENVIRONMENTAL CHANGE AND ACUTE CONFLICT, Sept. 1992, at No. 1 (water scarcity and uneven distribution has led to heated conflict between nations over the years).

20. See Commission on Sustainable Development Canadian Country Profile, *Protection of the Quality and Supply of Freshwater Resources: Application of Integrated Approaches to the Development, Management and Use of Water Resources*, Agenda 21 Ch. 18 (visited Mar. 3, 1999) <<http://www.dfait-maeci.gc.ca/english/foreignp/environ/age3-18e.htm>>.

This commission was established in furtherance of Agenda 21, *Report of the United Nations Conference on Environment and Development*, U.N. Doc A/conf.151/26.

21. See FRANK E. MOSS, *THE WATER CRISIS* 243-45 (1967).

22. See *id.* The project entailed damming nearly all of the major rivers in both Alaska and British Columbia, and diverting the water into the Rocky Mountain Trench, which is a five hundred mile, natural depression along British Columbia's border. This project would provide Idaho with 2.3 million acre-feet of water, Texas with 11.7 million, California with 13.9 million, and Mexico with 20 million. See David Hunter & Paul Orbuch, *Interbasin Water Transfers after NAFTA: Is Water a Commodity or Ecological Resource?* (visited Mar. 4, 1999) <<http://www.turnercom.com/jdk/canal8.html>>.

of the major rivers in British Columbia and Alaska.<sup>23</sup> Though this project had the potential to furnish much needed water to numerous provinces and states in Canada, the United States, and Mexico, the exorbitant cost of an estimated 200 billion dollars (U.S.), coupled with the massive alteration to the environment and ecosystems halted the water transfer project from ever being implemented.<sup>24</sup>

In the 1950s, Thomas Kierans conceived the Great Replenishment and Northern Development Canal<sup>25</sup> (Grand Canal), which is an eastern version of NAWAPA. This project proposed a large dyke across the northern end of James Bay that would channel the dammed water to Lake Diefenbaker in Saskatchewan, where it would be siphoned to provide the transfer of water to various North American destinations.<sup>26</sup> Though this project has never been implemented, various hydroelectric projects by the province of Quebec appear to make the Grand Canal reasonably feasible in the future.<sup>27</sup>

Currently, North America has no transboundary large-scale water diversion projects in place, however, there are a limited number of smaller north-south pipeline water transfer projects that do exist.<sup>28</sup> Further, there have been certain medium-scale projects proposed that would transfer fresh water from British Columbia's rivers to California<sup>29</sup> by way of a 400-mile pipeline.<sup>30</sup> To date no such project has been implemented.

Smaller scale water exportation from Canada appears to be the most feasible means to transfer water under the current law affecting water markets in North America.<sup>31</sup> The image of Canada selling its fresh water to foreigners appalls many Canadians. But as noted in a commentary on this issue, "Canada already sells its water resources to foreigners, and not just in obvious but trivial forms such as beer, soft drinks and bottled water," but in other forms such as hydroelectric exports, which involve massive disruptions in natural watercourses.<sup>32</sup>

23. See *id.* (unpublished manuscript on file with the Centre for International Environmental Law); a portion of this article can also be found on the Internet. See *id.*

24. See *id.* at 4.

25. See MOSS, *supra* note 21, at 247-48.

26. See *id.* The cost of this project was estimated to be \$100 billion in 1985.

27. See SEAN MCCUTCHEON, *ELECTRIC RIVERS: THE STORY OF THE JAMES BAY PROJECT* (1991).

28. For example, since August 28, 1987, Point Roberts, Washington, has received and paid for fresh water from the Greater Vancouver Water District (province of British Columbia, Canada). See Water Protection Act [RSBC 1996] Ch. 484, § 1(1); Scott Philip Little, *Canada's Capacity to Control the Flow: Water Export and the North American Free Trade Agreement*, 8 PACE INT'L L. REV. 127, 132, n.3 (1996) (citing a Telephone interview with Richard Penner, Manager, British Columbia Water Management Licensing (Feb. 28, 1995)) (privately owned pipelines that carry water across the Canada-U.S. border do exist in limited number for the use in the local agricultural industries).

29. See Clifford J. Villa, *California Dreaming: Water Transfers from the Pacific Northwest*, 23 EVNTL. L. 997, 1010 (1993).

30. See CANADIAN ENVIRONMENTAL LAW ASSOCIATION, *NAFTA AND WATER EXPORTS* 65 (1993).

31. See generally Section III of this paper.

32. *Will Foreigners Drink Canada Dry?*, TORONTO GLOBE & MAIL, May 23, 1998, at D6. Further, this is easily evidenced by the readily available supply of bottled Canadian water on the grocery store shelves at various countries throughout the world. See Lawrence Herman, *Ottawa Can Turn Off Tap On Water Exports at Any Time: NAFTA, WTO Do Not Limit Our Sovereignty*, THE FIN. POST, May 30, 1998, at 26.

This paper deals with the concept of an international water market involving large-quantity transfers of fresh water. The notion of extracting fresh water from its natural sources for sale on the international market is relatively new and considerably frightening to many Canadians. Conversely, the economic potential of such an operation is astounding. One needs only to look at the oil-rich countries of the Middle East to fathom the lucre involved in Canada's exportation of its fresh water resources to a thirsty world. Fresh water has the possibility of becoming the oil of the twenty-first century,<sup>33</sup> and Canada has the capacity to be one of the world's main suppliers.

As it stands currently, however, Canada has worked itself into a virtual stalemate with regard to its national fresh water policy. Accordingly, Canada is essentially prevented from placing any restrictions on the exportation of its fresh water, while at the same time, it is also accurate that Canada is under no obligation to export any of its fresh water.

It is up to the Canadian Government to decide where it wants to position itself in the newly emerging international fresh water marketplace. The binding provisions of NAFTA do not hinder the economic prospects involved in exporting Canadian fresh water, however, they do thwart Canada's ability to control, monitor, maintain, and enforce the quantity of its exported fresh water. Plainly, it would be imprudent for Canada to enter into the realm of fresh water international trade without adequately protecting its interests to the full extent. This paper will suggest possible courses of action that the Canadian Government should accomplish. These proposals will allow the Canadian Government to regain control over one of its most precious natural resources, as well as establish itself to explore the possibility of exporting fresh water on the international market.

### III. Current Laws Affecting the Fresh Water Situation in North America.

It is important to note that this paper is concerned only with inland territorial, non-navigable, fresh water resources, and not transboundary or shared fresh water resources.<sup>34</sup> There are currently several hundred international agreements, laws, and treaties involving transboundary watercourses.<sup>35</sup> For instance, the International Law Commission has drafted certain articles on the Law of the Non-Navigational Uses of International Watercourses that provide for some general principles of international laws

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33. Exemplifying the importance and value of fresh water, the World Bank Vice President for environmental affairs, Ismail Serageldin, was quoted in the summer of 1995 as saying "[t]he wars of the next century will be over water." John Vidal, *Ready to Fight to the Last Drop*, GUARDIAN WKLY., Aug. 20, 1995, at 13.
  34. See generally Treaty relating to boundary waters between the United States and Canada, Jan. 11, 1909, U.S.-U.K., 36 Stat. 2448 [hereinafter Boundary Waters Treaty] for an example of a treaty dealing with shared watercourses. As well, there are many other international treaties, agreements, organizations, and cases that deal with internationally shared water resources.
  35. See *Legal Aspects of Hydro-Electric Development of Rivers and Lakes of Common Interest: Report of the U.N. Commission for Europe*, at 95-152, U.N. Doc. E/ECE136 (1952); FAO, LEGISLATIVE STUDY 50, TREATIES CONCERNING THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES — EUROPE (Stefano Burchi ed. 1993); *United Nations, Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes than Navigation*, U.N. Doc. ST/LEG/SER.B/12 (1964); Stephen Schwebel, *The Law of Non-Navigational Uses of International Watercourses*, [1982] 2 Y.B. Int'l L. Comm'n 65 U.N. Doc. A/CN.4/348.
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that deal with shared watercourses,<sup>36</sup> but because we are primarily dealing with internal, territorial water sources none of these principles apply.

Because Canadians and Americans share numerous fresh water resources, however, one cannot simply ignore the importance of international transboundary agreements. The Boundary Waters Treaty of 1909 is the leading authority when it comes to dealing with general and specific disputes between Canada and the United States.<sup>37</sup> For instance, the Boundary Waters Treaty of 1909 instituted various obligations between the two countries regarding the Great Lakes.<sup>38</sup> Specifically, this treaty created a six-member (three persons from each country) International Joint Committee (IJC) to manage issues regarding the transboundary waters.<sup>39</sup> The IJC, its jurisdiction, and function will be explored further in Section IV. A. of this paper.

The United States and Canadian bilateral trade relationship is the strongest in the world,<sup>40</sup> and in furthering this relationship, the two countries began negotiations to consider the possibility of a free trade area between them.<sup>41</sup> As a result of the negotiations, the Canada-U.S. Free Trade Agreement (FTA) was enacted.<sup>42</sup> To further their agendas, the two countries joined with Mexico in 1994 and enacted the North American Free Trade Agreement to create the most comprehensive free trade pact among regional countries.<sup>43</sup>

The objective behind the FTA and the North American Free Trade Agreement was to create a North American free trade bloc through the elimination of barriers to trade so that goods and services could flow freely throughout the continent,<sup>44</sup> making it the largest free trade area on the planet.<sup>45</sup> With the lofty goal of promoting economic growth through

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36. "Draft Articles on the Law of Non-Navigational Use of International Watercourses" as adopted on second reading by the International Law Commission at its forty-sixth session; see *Report of the International Law Commission on the work of its forty-sixth session*, U.N. GAOR, 49th Sess., Supp. No. 10, at 195-197, U.N. Doc. A/49/10; GLEICK, *supra* note 19, at 21 (equitable utilization, prevention of significant harm to other states, obligation to notify and inform, obligation to share data, cooperative management of international rivers, obligation to resolve disputes peacefully).
  37. Boundary Waters Treaty, *supra* note 34.
  38. See *id.*
  39. See *id.* arts. VII-VIII. Certain other agreements have been entered into between the two countries. For instance, the Great Lakes Water Quality Agreements of 1972 and 1978 deal with mainly environmental matters between the two nations. Great Lakes Water Quality Agreement, Apr. 15, 1972, U.S.-Can., T.I.A.S. No. 7312; Great Lakes Water Quality Agreement, Nov. 22, 1978, U.S.-Can., T.I.A.S. No. 9257.
  40. S. REP. NO. 509, at 2402 (1988).
  41. See *id.* at 2399.
  42. See Canada-U.S. Free Trade Agreement (FTA), Dec. 10, 1987 (entered into force January 1, 1989) (implemented in Canada by the Canada-United States Free Trade Agreement Implementation Act, S.C. ch. 65 (1988), and in the United States by the United States-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100 - 449, 102 Stat. 1851 (1988)).
  43. See H.R. REP. NO. 103-361, at 2558 (1993).
  44. NAFTA, *supra* note 17, art. 102 (1) (a), 32 I.L.M. at 297.
  45. Promoting economic growth, reducing barriers to the flow of goods and investment among the United States, Mexico, and Canada, and promoting economic growth were primary goals behind NAFTA. See *id.* pmbl. Specifically, NAFTA combines over 360 million people with an output of over \$6 trillion annually. See U.S. Department of State Dispatch, North American Free Trade Agreement 110-112 (Tentative Draft Feb. 17, 1992); Farah Khakee, *The North American Free Trade Agreement: The Need to Protect Transboundary Water Resources*, 16 FORDHAM INT'L L.J. 848, 869 (1993).
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expanded trade and investment by reducing the barriers to the flow of goods and investment among the three signatory countries,<sup>46</sup> it appears that the important debate over water exportation was inadequately deliberated.<sup>47</sup> Negotiations between the signatory countries did take place to explore the possibility of explicitly excluding water from the scope of NAFTA, however, no such exception was adopted.<sup>48</sup> As a result, Canada now finds itself in a very precarious position with regards to one of its most significant natural resources – water. “[U]nder NAFTA, if we permit it, we cannot limit it; if we forbid it, we cannot prevent the United States and Mexico from selling it,”<sup>49</sup> are the frightening words concerning fresh water exports spoken by Maude Barlow, chairperson for the Council of Canadians.<sup>50</sup>

#### A. CHAPTER 3 OF NAFTA.

Chapter 3 of NAFTA raises great concern in regards to fresh water resources as it establishes obligations respecting the trade in goods.<sup>51</sup> NAFTA treats fresh water as a “good,” which is defined in Article 201 as “domestic products as these are understood in the General Agreement on Tariffs and Trade<sup>52</sup> (GATT) or such goods as the Parties may agree.”<sup>53</sup> Accordingly, water is defined in GATT as, “[w]aters, including natural or artificial mineral water and aerated waters, not containing added sugar or other sweetening matter nor flavored . . . ; ice and snow.”<sup>54</sup> Moreover, an explanatory note adds “ordinary water of all kinds (other than sea water)”<sup>55</sup> to expand the definition of water in NAFTA.

Article 301 of NAFTA provides that each party to the agreement is to “accord national treatment to the goods of another party in accordance with Article III of the General Agreement on Tariffs and Trade.”<sup>56</sup> The underlying theme of “national treatment” is that each party, province, or state must accord no less favorable treatment to goods and services of other parties than the most favorable treatment accorded to any similar, directly competitive or substitutable goods and services.<sup>57</sup> Therefore, based on the national treat-

46. See NAFTA, *supra* note 17, pmbl., 32 I.L.M. at 605.

47. See DON GAMBLE, APPENDIX C: WORKSHOP SUMMARY, IN CANADIAN WATER EXPORTS AND FREE TRADE 4-5 (1989).

48. See *It's British Columbia's Water*, ECONOMIST, June 17, 1995, at 49.

49. Ron Fast, *Water license fees*, TORONTO GLOBE & MAIL, May 22, 1998, at A18.

50. The Council of Canadians is an organization committed to safeguarding Canadian social programs, promoting economic justice, renewing Canadian democracy, asserting Canadian sovereignty, advancing alternatives to corporate-style free trade, and preserving the environment. Their mission is to challenge the corporate agenda and promote development that addresses social as well as economic and environmental goals. Their website is *The Council of Canadians* (visited Dec. 14, 1998) <<http://www.canadians.org>>.

51. See Maude Barlow, *Water Exports: Canada is getting in over its head*, TORONTO GLOBE & MAIL, May 19, 1998, at A19.

52. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187 [hereinafter GATT].

53. NAFTA, *supra* note 17, art. 201, 32 I.L.M. at 298.

54. NAFTA Tariff Phasing Subhead, 22.01.90; see also JON JOHNSON, WATER EXPORTS AND FREE TRADE: ANOTHER PERSPECTIVE IN CANADIAN WATER EXPORTS AND FREE TRADE 27 (1989).

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

56. NAFTA, *supra* note 17, art. 301, 32 I.L.M. at 299.

57. See *id.* Article 102 makes national treatment one of the underlying objectives of NAFTA, while article 301 specifically bestows this national treatment to the goods of another party.

ment notion, imported fresh water from Canada may not be discriminated against. "Private American and Mexican companies would have the same right to invest in the commercial use of Canadian waters as Canadians. If Canadian companies were to export our water, American transnationals could help themselves to as much as they liked."<sup>58</sup>

The national treatment obligation is the instrument in NAFTA that is most damaging to Canadian control over water exports. National treatment is the commitment by a country to treat enterprises operating on its territory, but controlled by the nationals of another country, no less favorably than domestic enterprises in like situations.<sup>59</sup> Accordingly, foreign owned corporate conglomerates involved in exporting Canadian fresh water would have access to Canadian fresh water resources equal to that of the domestic water corporations. Without adequate legal protection, Canadian water is therefore subject to egregious exploitation. This is an important determinant that Canadian federal and provincial Governments should not overlook while promulgating future laws and policies regarding fresh water.

In complementing the free trade zone objective, NAFTA aims to prohibit restrictions placed on imports and exports.<sup>60</sup> Specifically, except as otherwise provided in NAFTA, Article 309 says, "no Party shall adopt or maintain any prohibition or restriction ... on the exportation or sale for export of any good destined for the territory of another Party."<sup>61</sup> Recalling that water is not specifically exempted from NAFTA,<sup>62</sup> that the term "good" is not explicitly defined in NAFTA,<sup>63</sup> and that water is included in most GATT tariff provisions,<sup>64</sup> it seems that water is a "good" that must be exported and imported without restriction.<sup>65</sup> Consequently, fresh water must be considered a "good" under NAFTA, subjecting it to the national treatment obligation.

To protect some of its natural resources from the national treatment obligation in NAFTA, the Canadian Government acted proactively in making some specific reservations.<sup>66</sup> Essentially, this protection applied to exportation of all species of logs as well as the exportation of unprocessed fish.<sup>67</sup> Though members of the Canadian Parliament vehemently debated and insisted that fresh water exports should be included as a reservation to the national treatment standard of NAFTA,<sup>68</sup> no such inclusion ensued.<sup>69</sup> By failing to exclude fresh

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58. Barlow, *supra* note 51, at A19.

59. See *supra* text accompanying note 57; see also *Accord, Organization for Economic Cooperation and Development Declaration on International Investment and Multinational Enterprises*, June 21, 1976, reprinted in 15 I.L.M. 967. Currently about 33 countries adhere to the Organization for Economic Cooperation and Development (OECD) national treatment obligation. It has become a well-established principle among the OECD member countries. See *OECD: Organization for Economic Co-operation and Development* (visited Dec. 7, 1998) <<http://www.oecd.org>>.

60. See NAFTA, *supra* note 17, art. 309, 32 I.L.M. at 303.

61. See *id.*

62. See generally *id.*

63. See generally *id.*; see *supra* notes 51-55 and accompanying text.

64. See generally GATT, *supra* note 52, 55 U.N.T.S. at 187.

65. See NAFTA, *supra* note 17, art. 309, 32 I.L.M. at 303.

66. See *id.* annex 301.3.

67. See *id.*

68. See Marlene Catterall, Speech in Debates of the House of Commons (May 28, 1993), at 19974; see also Speech of Hon. Lloyd Axworthy, *id.* at 20025.

69. See generally NAFTA, *supra* note 17.

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water from the national treatment obligation, it appears as though Canada is bound to give national treatment to its fresh water resources.

Further, under NAFTA, Canada is precluded from applying an environmental levy on any water exports to the point of financial unfeasibility, because any such export tax must be applied similarly to the Canadian domestic market.<sup>70</sup> Article 301 of NAFTA does allow a party to limit the "exportation or sale for export of any good destined for the territory of another Party;"<sup>71</sup> however, such restriction is conditioned upon the "good" being exported having reached a critical scarcity in the exporting country.<sup>72</sup> This scenario is an exception to the national treatment requirement that Canada would obviously never want to have to implement,<sup>73</sup> and one that is highly unlikely to occur due to the vast amount of available fresh water as well as environmental awareness measures.

Another exception to the national treatment obligation that attaches to fresh water as a result of NAFTA is found in Article 2101.<sup>74</sup> Article 2101 calls upon an invocation of Article XX(g) of GATT when the export restriction is based on the want to conserve an exhaustible natural resource.<sup>75</sup> At first, this exception looks favorable to Canada. The pertinent test relating to Article XX (g) of GATT, however, is "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."<sup>76</sup> So, once Canada has begun exporting fresh water, the only way it could restrict further exportation based upon Article 2101 of NAFTA would be to apply similar restrictions on domestic consumption.<sup>77</sup> Such a restriction on Canadian domestic water use would clearly not be in Canada's best interests, and accordingly, it would be unwise for the Canadian Government to rely on Article 2101 as a means to control its fresh water exports.

Article 315 of NAFTA acts to further restrict any hope Canada has in curtailing water exports once they have begun.<sup>78</sup> First, any restriction put on a good (water) may not reduce proportional access to the total supplies of that good that have been enjoyed by the importing party over the preceding three years.<sup>79</sup> Second, Canada is essentially pre-

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70. *See id.*

71. *Id.* Also included is "except in accordance with Article XI of the GATT." *See infra* note 72.

72. *See* GATT, *supra* note 52, art. XI, para. 2(a), 55 U.N.T.S. at 226. "[E]xport prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party."

73. Clearly, Canada would never want its fresh water resources to ever reach the critical scarcity stage. Further, Canada's reliance on this exception to the national treatment obligation with respect to fresh water would be a blatant disregard for environmental conscientiousness, not to mention an unconscionable governmental mismanagement. Plainly, the Canadian Government must act to ensure that they never have to rely on the implementation of this exception to NAFTA's national treatment obligation with respect to fresh water.

74. *See* NAFTA, *supra* note 17, art. 2101, 32 I.L.M. at 699.

75. *See* GATT, *supra* note 52, art. XX (g), 55 U.N.T.S. at 262.

76. 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.

77. *See* Little, *supra* note 28, at 137.

78. *See id.*

79. *See* NAFTA, *supra* note 17, art. 315 (1) (a), 32 I.L.M. at 303.

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cluded from placing a licensing fee or tax on the good because any such price for the exported water after the tax cannot be higher than the price charged domestically.<sup>80</sup>

Interestingly, in order for water or any other item to be considered a "good" within NAFTA, it must also be considered a "product" under GATT.<sup>81</sup> But the term "product" is not defined in GATT,<sup>82</sup> and therefore its meaning as commonly understood, is that of "something produced."<sup>83</sup> What this does to the exportation of water with respect to the national treatment requirement of NAFTA is interesting because an argument could be made that certain exportation proposals do not render the fresh water "products." Again, it would be imprudent for the Canadian Government to rely on such an uncertain legal argument, and therefore proper preparation is imperative before Canada embarks into the international water trade market.

Contentiously, the massive fresh water diversion projects that have been proposed do nothing to alter, or in any way produce, the water from its natural element. The projects merely redirect the flow of the watercourse. Should the Canadian Government make the decision to advance with one of the massive plans of watershed altering like NAWAPA or the Grand Canal, arguably, Canada could stop exporting the water at any time without violating Chapter 3 of NAFTA.<sup>84</sup>

Antithetically, if fresh water is removed from its natural state, it is likely that it would be considered a "product" under GATT, therefore rendering it a "good" under NAFTA. Fulfilling this process involves gathering or siphoning the fresh water into tankers, pipes, or anything else that would remove the water from its natural state. So it appears that save for the massive diversion projects proposed, any exportation of fresh water would be subject to Chapter 3 national treatment obligations of NAFTA. This realization is not comforting for Canadians because the large inter-basin transfer projects are probably the least likely to occur due to the massive environmental and ecological implications involved. The preference would likely be a smaller scale, controlled exporting process wherein the Canadian Government has complete control.

#### B. CHAPTER 11 OF NAFTA.

Two goals behind the Chapter 11 investment provisions of NAFTA were to provide for the protection of, and the removal of obstacles in acquiring foreign investments.<sup>85</sup> As was the case in Chapter 3 of NAFTA, Chapter 11 compels national treatment obligations with regard to foreign investments.<sup>86</sup> Countries afford national treatment obligations "the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."<sup>87</sup> The term "investment" is defined broadly in NAFTA,<sup>88</sup> and any foreign interest involved in a water exportation enterprise would

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80. See *id.* art. 315 (1)(b).

81. See JON JOHNSON, *supra* note 54, at 28.

82. See generally GATT, *supra* note 52, 55 U.N.T.S. at 187.

83. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1810 (1981).

84. See Little, *supra* note 28, at 141.

85. See NAFTA, *supra* note 17, ch. 11, 32 I.L.M. at 642-47.

86. See *id.* art. 1102.

87. *Id.*

88. See *id.* art. 1139.

clearly be included under the auspices of the term "investment."<sup>89</sup> Essentially, Chapter 11 operates to safeguard any interest held by a NAFTA country in the sovereign state of another NAFTA signatory.

Since national treatment obligations apply to foreign investments, the situation in British Columbia<sup>90</sup> could lead to the United States and Mexico's irreversible access to Canadian fresh water.<sup>91</sup> As well, any massive water diversion project that could escape Chapter 3 NAFTA national treatment obligations,<sup>92</sup> would likely be subject to the national treatment investment obligations of Chapter 11. Therefore, Canada could lose control over future water export projects, however large or small.<sup>93</sup>

If Canada carries through with any plans to export water and subsequently decides to restrict or forbid any further exportation, Article 1106 (1)(a) of NAFTA would apply requiring the Canadian Government to compensate the foreign investor.<sup>94</sup> Such action would likely be classified as an "expropriation of foreign owned property," and therefore, Article 1106 would be called to provide compensation for the expropriation by the Canadian Government.<sup>95</sup> This has staggering ramifications due to the fact that some existing water export licenses in British Columbia are worth substantial amounts of money.<sup>96</sup> Further, if the Canadian Government decides to officially ban the exportation of fresh water, "by that act it names water as a commercial tradable commodity, triggering NAFTA" Chapter 11 privileges.<sup>97</sup>

Chapter 11 of NAFTA does furnish some environmental protections allowing the restriction on the exportation of fresh water.<sup>98</sup> For example, Canada could institute a measure to protect its fresh water that would require any investment activity involved in the exportation of water to be performed in an environmentally sound manner.<sup>99</sup> Such

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89. For instance, any Canadian enterprise with a foreign (NAFTA signatory country) interest, any loan to such enterprise, any property interest, or other foreign capital interest would suffice. See *id.* So, if there is an enterprise in Canada that involves the exportation of fresh water, and a NAFTA signatory country holds some sort of capital interest in it, then Chapter 11 applies.

90. See *infra* Section IV. B. of this paper. Currently there exists some American-owned water export licenses in British Columbia, Canada.

91. Note: No such export licenses have been acted on yet and the British Columbia Government has placed a temporary moratorium on fresh water exports. See *infra* Section IV. B. of this paper for a more thorough analysis of the situation in British Columbia.

92. See Section III. A. of this paper.

93. See NAFTA, *supra* note 17, ch. 11, 32 I.L.M. at 639.

94. *Id.* art. 1106 (1)(a). In pertinent part, article 1106 reads, "[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 . . ." *Id.*

95. *Id.* art. 1110. "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 nondiscriminatory 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.*

96. See Section IV. B. of this paper for an analysis of the extent of, and money involved in, the export licenses. See also *infra* note 105.

97. Barlow, *supra* note 51, at A19.

98. See NAFTA, *supra* note 17, art. 1114, 32 I.L.M. at 642.

99. See *id.*

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action by the Canadian Government, however, would likely be considered an "[act] tantamount to . . . expropriation" compelling compensation under Article 1110.<sup>100</sup> Further, Articles 1116 and 1117 allow for an investor, as opposed to the nation state, to submit a claim to a NAFTA dispute settlement panel.<sup>101</sup> The significance of this is important. Normally, national governments can only bring claims against another NAFTA signatory country to a dispute settlement panel,<sup>102</sup> but Chapter 11 affords a private entity the right to bring an action before the panel. The probability of a private entity bringing an action before a NAFTA dispute panel is much more likely than a signatory country doing so.<sup>103</sup> The increased exposure to a hearing that Chapter 11 provides to privately held foreign water exporting interests is unfavorable to Canada, as it increases vulnerability to suit.

Overall, Chapter 11 is very consequential because if Canada introduces a law that bans the export of Canadian fresh water, it triggers Chapter 11 protections allowing private enterprises to sue the Canadian Government for future lost profits.<sup>104</sup> Since the expected profitability in exporting water is extremely high,<sup>105</sup> along with the fact that some water export licenses currently do exist in Canada,<sup>106</sup> the lost future profits that the Canadian Government could be sued for are tremendous.

### C. ANNEX I OF NAFTA.

Annex I of NAFTA provides for the discrimination against foreign held investment interests in agreed upon economic sectors.<sup>107</sup> In effect, Annex I provides for a direct exception to the national treatment obligation of Chapter 11.<sup>108</sup> Examples of economic sectors that are afforded discrimination in NAFTA are the Energy Sector,<sup>109</sup> and the Fisheries Sector.<sup>110</sup> Unfortunately, fresh water is not included in Annex I, so this section of NAFTA does not afford Canada any direct protection from the national treatment requirement.<sup>111</sup>

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100. *Id.* art. 1110.

101. *See id.* ch. 11. Normally national governments are the only parties allowed to appear before any NAFTA dispute settlement panel. *See id.* ch. 20.

102. *See id.*

103. The process involved in a Chapter 20 dispute panel proceeding is comparatively more difficult and intricate than a Chapter 11 private party action. *See id.* chs. 11, 20.

104. Conover, *supra* note 2, at D7.

105. "In British Columbia, the amount paid by local water export firms to the provincial government is estimated at between \$9 and \$18 (Canadian) per acre-foot. However, the price secured for water under one export contract to California was reportedly between \$2,700 and \$3,400 (U.S.)." *See Little, supra* note 28, at 130 (citations omitted).

"If [British Columbia] were to supply Mexico and American markets, annual revenues would probably be in the hundreds of millions or perhaps billion of dollars." John Carten, *Why B.C. Should Export Fresh Water*, *TORONTO GLOBE & MAIL*, June 23, 1998, at A19.

106. *See* Section IV of this paper; *see infra* note 167.

107. *See* NAFTA, *supra* note 17, Annex I, 32 I.L.M. at 706.

108. *See generally id.*

109. *Id.* at 712 (owners of licenses to produce oil or gas are subject to the restriction that the license holder must be "Canadian citizens ordinarily resident in Canada, permanent residents or corporations incorporated in Canada.").

110. *Id.* at 714 ("Minister of Fisheries and Oceans has discretionary authority with respect to the issuance of licenses" granting foreigners permission to fish in Canada's exclusive economic zone.).

111. *Id.* at 706.

Optimistically, there does exist a general exception to Chapter 11's national treatment obligation in Annex I in which fresh water could be included.<sup>112</sup> The general exception provides Canada the ability to screen specific investments in accordance with the Investment Canada Act.<sup>113</sup> Under this Act, Canada can prescribe requirements "in connection with the establishment, acquisition, expansion, conduct or operation of an investment of an investor of another Party...",<sup>114</sup> so long as the investment is greater than a prescribed amount.<sup>115</sup>

Annex I clearly provides Canada with the best protection against the national treatment requirement in respect to its natural water resources because the cost involved in a fresh water export operation will likely fall within the threshold required by the Investment Canada Act.<sup>116</sup> It is certain that any large-scale water transfer project would be valued beyond the requisite amount, however, some smaller-scale fresh water exportation projects could fall below the necessary amount.<sup>117</sup> Though Annex I does shield Canada from the national treatment obligations respecting some fresh water exportations, such protection is not impenetrable and therefore, the threat to Canadian fresh water is still very real. This exception, however, to the national treatment obligation should distill the fears of those who believe Canada's fresh water resources are currently up for grabs because of the NAFTA agreement.

Notably though, a restriction or ban placed on fresh water exports conflicts with NAFTA's concept of a more liberalized free trade arena.<sup>118</sup> Echoing this sentiment, a committee of the Organization for Economic Cooperation and Development made a declaration stating "Member countries [should] avoid the introduction of new measures or practices which constitute exceptions to the present National Treatment instrument."<sup>119</sup> If Canada were to implement legislation banning the exportation of fresh water resources, it would be acting in spite of the underlying philosophy of free trade. Any such action could result in retaliatory economic sanctions from another NAFTA signatory country, and therefore, Canada should intensely contemplate their course of action used to protect Canadian fresh water resources.

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112. *Id.*

113. R.S.C. 1985, ch. 28 (1st Supp.).

114. See NAFTA, *supra* note 17, Annex I., 32 I.L.M. at 706.

115. *Id.* (Approximately \$5 Million (CAD)). This amount is to be recalculated annually to take into consideration changing economic conditions in accordance with R.S.C. 1985, ch. 28 (1st Supp.), amended by ch. 44, § 178, 1993 S.C.

116. See *id.*

117. It is certainly conceivable that small-scale siphoning projects, or certain water export licenses (for example, ones similar to those in Ontario and British Columbia) could amount to capital expenditures amounting to less than the required amount.

118. See NAFTA, *supra* note 17, pmbl., 32 I.L.M. at 602.

119. Organization for Economic Cooperation and Development 1988, *Committee on International Investment and Multinational Enterprises on a Standstill on National Treatment Measures or Practices Which Constitute Exceptions to the Present National Treatment Instrument*, reprinted in part in ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, NATIONAL TREATMENT FOR FOREIGN-CONTROLLED ENTERPRISES 24 (1993). The national treatment obligation implemented by the Organization for Economic Cooperation and Development is virtually identical in form and meaning to that of NAFTA's.

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It is unequivocal that Canada should have included fresh water as an excludable resource sector in Annex I to escape national treatment obligations. But Annex I does provide Canada with significant protection and limited control. Yet, having only limited control of a natural resource is a position that a country does not likely want to be in. Therefore, Canada should act now to regain full control over its fresh water before it is too late.

#### D. CANADIAN JURISDICTIONAL SITUATION OVER FRESH WATER RESOURCES.

Section 91 of the Constitution Act gives the Canadian Federal Government jurisdiction over interprovincial and international lakes and rivers.<sup>120</sup> It would be in the best interests of the Canadian Government to take a unified approach in its fresh water exportation laws. An examination of the Federal Constitution reveals that the possibility is there; however, it is subject to interpretation as to who can enact laws. The Canadian Federal Government has the authority to enter into international agreements; however, their implementation must not conflict with the division of powers between provincial and federal governments found in the Canadian Constitution.<sup>121</sup> Lakes, rivers, or other fresh water resources that lie exclusively within a provincial boundary could still be subject to control by the federal government, therefore taking the possibility of exporting fresh water out of the hands of the provincial governments.<sup>122</sup> Further, the federal government could declare that the notion of exploiting natural water resources should be ceased for the "general advantage of Canada."<sup>123</sup> Finally, the federal government could control international and interprovincial commerce in bulk water under the trade and commerce power of the constitution.<sup>124</sup>

In matters respecting the environment and trade, both the federal and provincial governments can create legislation.<sup>125</sup> Provincial governments are limited to the extent that if the provincial environmental law were in fact a disguised barrier to international trade, then it would be unconstitutional.<sup>126</sup> Such provincial laws, however, have a good likelihood of surviving a constitutional attack if they relate only to a local environmental regulation because of the threat of federal jurisdiction over environmental standards becoming excessively enlarged.<sup>127</sup> So if a province were to enact legislation to limit or cease the exportation of water, it would likely be constitutional.<sup>128</sup>

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120. Constitution Act, 1867 (U.K.), 30 & 31 Vict., ch. 3 [hereinafter Constitution Act].

121. See A.G. Can v. A.G. Ont., [1937] A.C. 326, 352 1 W.W.R. 299, 1 D.L.R. 673 (P.C.) (the Labour Conventions case); MacDonald v. Vapor Canada Ltd., [1977] 2 S.C.R. 134, at 167-72, 66 D.L.R. (3d) 1, 22 C.P.R. (2d) 1, 7 N.R. 477; STEPHEN J. RANDALL & HERMAN W. KONRAD, NAFTA IN TRANSITION 286 (1995).

122. Constitution Act § 91(2). This is the trade and commerce power of the constitution.

123. *Id.* § 92.

124. *Id.* § 92(a).

125. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 317 (2d ed. 1985).

126. RANDALL & KONRAD, *supra* note 121, at 288.

127. *Id.*

128. The province of British Columbia has enacted such legislation prohibiting bulk water export and diversion projects between major watersheds. R.S.B.C. 1996, ch.484, §§ 4-7. To date, this legislation has not been challenged for its constitutionality.

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Provinces are generally responsible for regulating land use and most forms of business activity.<sup>129</sup> As well, provinces are furnished jurisdiction over "local works and undertakings."<sup>130</sup> In enacting legislation, provinces must be sure to conform with Article 904 of NAFTA, which requires that the law be made in pursuance of a legitimate objective, that it doesn't discriminate against the goods of another party, and that it does not create an unnecessary obstacle to trade.<sup>131</sup>

Thus, the jurisdiction over fresh water legislation is mixed between the provincial and federal governments of Canada.<sup>132</sup> Unanimity of water policy is paramount to the protection against international trade implications under NAFTA, and therefore it is imperative that the federal and provincial governments act together as a cohesive unit to establish an effective approach to regain control over fresh water resources.

#### E. CANADIAN FEDERAL LAWS CONCERNING THE EXPORTATION OF FRESH WATER.

In the past, the Canadian Federal Government has tried to implement legislation that would effectively prevent the exportation of bulk fresh water. A first attempt was in 1987 arising from concerns over the exportation of fresh water in respect to the FTA. The Canadian Government implemented a Federal Water Policy<sup>133</sup> that was, in part, aimed at preventing the bulk exportation of Canadian fresh water should the need arise.<sup>134</sup> This attempt however, was legally ineffective because it was just a policy and therefore had no legal consequences upon a violation of any administrative obligations. A second and more definitive undertaking involved the introduction of a bill to the House of Commons that would prohibit the large-scale, and limit the small-scale, export of Canadian fresh water.<sup>135</sup> This bill, however, was tabled for later reconsideration because of an ensuing federal election<sup>136</sup> and was never reconsidered.<sup>137</sup> This was quite unfortu-

129. Constitution Act § 92(13) (provincial jurisdiction over "property and civil rights").

130. *Id.* § 92(10).

131. NAFTA, *supra* note 17, art. 904, 32 I.L.M. at 643. GATT panels have interpreted the word "necessary" to mean the least trade-restrictive means to achieve environmental protection goals. See *United States – Restrictions on Imports of Tuna*, Report of the GATT Panel (Sept. 3, 1991) DS21/R, 30 I.L.M. 1594; *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, Report of the GATT Panel (Nov. 7, 1990) BISD, 37th Supp. 200, DS10/R, 30 I.L.M. 1122 (1991); and *United States – Section 337 of the Tariff Act of 1930*, Report of the GATT Panel (Nov. 7, 1989) BISD 36th Supp. 345; RANDALL & KONRAD, *supra* note 121, at 283.

132. For a thorough analysis of the interrelations and jurisdictional issues between the federal and provincial governments, see *MANAGING RESOURCES IN A FEDERAL STATE* (Owen J. Saunders ed., 1985).

133. Federal Water Policy, (Environment Canada, 1987) <[http://www.doc.ca/water/en/info/pubs/Fedpol/e\\_fedpole.pdf](http://www.doc.ca/water/en/info/pubs/Fedpol/e_fedpole.pdf)>. "The underlying philosophy of the policy is that Canadians must start viewing water both as a key to environmental health and as a scarce commodity having real value that must be managed accordingly." *Id.* at 2.

134. See, e.g., speech of Charles Langlois in Debates of the House of Commons (May 28, 1993), at 20008.

135. Bill C-156, Canada Water Preservation Act, 2nd Sess., 33d Parl., 1986-87-88 (1st Reading, August 25, 1988).

136. Tabling of Bill C-156 by Minister of the Environment, Tom McMillan in Debates of the House of Commons (Aug. 28, 1988), at 18818.

137. Some critics of this potential Bill would have been ineffective in preventing the exportation of bulk water in light of the FTA and NAFTA. MEL CLARK & DON GAMBLE, *WATER EXPORTS AND FREE TRADE IN CANADIAN WATER EXPORTS AND FREE TRADE* 17 (A.L.C. de Mestral & D.M. Leith eds., 1989).

nate due to the fact that water exports would likely have been given much more consideration in NAFTA deliberations had such a federal law been in existence. In fact, by failing to enact federal fresh water protection laws prior to NAFTA, and by not explicitly excluding water from its scope, Canada appears to have categorically violated one of the goals of its Federal Water Policy.<sup>138</sup> Canada's political inaction with regard to fresh water has in turn placed them in a dubious position regarding sovereignty over one of its most significant natural resources.

Another attempt made by the Canadian Federal Governmental to foreclose the possibility of exporting bulk fresh water was the North American Free Trade Implementation Act of 1993.<sup>139</sup> This act limits the national treatment of water exports with respect to "natural, surface and ground water," while providing for the national treatment obligation only to water "packaged as a beverage or in tanks."<sup>140</sup> This legislation appears to protect only against the large-scale inter-basin transfer of water, while leaving the possibility of exporting fresh water in supertankers open. Further, Canada's NAFTA Implementation Act is an "instrument which was made by one [party] in connection with the conclusion of the [NAFTA]"<sup>141</sup> agreement, and therefore must be "accepted by the other parties as an instrument related to the treaty"<sup>142</sup> for it to be given force. Due to the fact that the United States and Mexico would likely not accept this Canadian legislation as part of NAFTA (because they are ostensibly interested in acquiring Canadian fresh water), such legislation will likely have little to no effect on a dispute panels' interpretation of NAFTA.<sup>143</sup>

As a result of Canadian fears over losing control of their natural fresh water resources due to the soon to be implemented NAFTA, Prime Minister Chretien instituted a trilateral declaration to clarify the fresh water issue.<sup>144</sup> The declaration stated, "[w]ater 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 never has been subject to the terms of any trade agreement."<sup>145</sup> This declaration ineffectively deals with the water issue because it speaks nothing of *what will happen when water is traded as a good or product*. It only eliminates the idea of NAFTA *immediately* opening up Canadian fresh water to the United States and Mexico upon its initiation.

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138. In the Federal Water Policy, it states that the Canadian Federal Government will: "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 this policy; and develop with concerned provincial governments a mutually acceptable referral system to ensure that provincial licensing of small-scale transfers of water (local arrangements between communities, or containerized transfers) between jurisdictions take into account federal interests respecting navigation, fisheries, environmental protection, Indian Treaties and trade considerations." Canadian Federal Water Policy, 19 (Environment Canada 1987) <[http://www.doc.ca/water/en/info/pubs/fedpol/e\\_fedpole.pdf](http://www.doc.ca/water/en/info/pubs/fedpol/e_fedpole.pdf)>.

139. R.S.C. 1993, ch. 44.

140. *Id.* § 7(2).

141. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31(2)(b), 1155 U.N.T.S. 331.

142. *Id.*

143. *See id.*; *see also* letter of United States Trade Representative Mickey Kantor *reprinted in part in* APPLETON, *supra* note 55, at 202 ("[W]hen water is traded as a good, all provisions of the Agreements governing trade in goods apply").

144. BNA INT'L TRADE DAILY, Dec. 3, 1993.

145. *Id.*

Currently, there appears to be ineffective federal legislation to protect against the exportation of Canadian fresh water in light of NAFTA. As will be explained further in Section V of this paper, Canada needs to take proactive steps to adequately deal with all aspects and possibilities related to the exportation of bulk fresh water.

#### IV. Recent Provincial Water Export Illustrations.

Over the past few years Canada has come close to exporting its fresh water to the point of triggering NAFTA's national treatment obligations; however, before any such exportation was accomplished, various governmental entities stepped in to interrupt the process. Very recently, water export companies were issued licenses from provincial governments to withdraw fresh water from various lakes in the provinces of Ontario, Newfoundland, and British Columbia.<sup>146</sup> Resulting from the fear that future water exporters would drink Canada dry because of its NAFTA obligations, all licenses were temporarily revoked by provincial governments. The following sections provide examples of recent events in the Canadian fresh water exportation industry.

##### A. ONTARIO/NEWFOUNDLAND.

On October 31, 1998, the Ontario Environment Ministry granted a water export permit to Nova Group, an Ontario company, for removal of 600 million liters of water per year from Lake Superior for five years.<sup>147</sup> Nova Group planned on selling the water in Asia and transporting it by way of large ocean-going supertankers.<sup>148</sup> Clearly, it is apparent that the Ontario Government did not thoroughly consider the ramifications of such an issuance of a water export license. First, the license has international trade implications under NAFTA. Second, since Lake Superior is one of the Great Lakes, it is therefore controlled by the Canada-U.S. Boundary Waters Treaty of 1909.<sup>149</sup> This unilateral act by the provincial government of Ontario appears to impinge treaty obligations.<sup>150</sup>

The federal government was caught off guard by the Ontario water export permit and took immediate action to suspend it.<sup>151</sup> The Ontario Environment Minister, Norman Sterling, wrote to Foreign Affairs Minister, Lloyd Axworthy, "[t]he permit issued by my ministry was simply a permit to take water, not to export it . . . The primary responsibility for laws governing export remain clearly in the federal domain, and I anticipate you will be taking the appropriate action to address concerns about this situation."<sup>152</sup> Mr. Axworthy responded by submitting a request to the International Joint Commission,

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146. See sections IV. A., B. of this paper.

147. Martin Mittelstaedt, *Permit to Export Lakes Water Draws U.S. Fire*, TORONTO GLOBE & MAIL, May 1, 1998, at A6.

148. *Id.*

149. See Boundary Waters Treaty, *supra* note 34.

150. The IJC has the authority to regulate diversion of water channels. *Id.* art. II, 36 Stat., at 2449.

Further, it is not hard to imagine that if the United States witnessed Canada siphoning water from the shared Great Lakes, in retaliation, they might entertain large-scale water transfer projects of their own that would supply water to the arid southwest.

151. Heather Scoffield, *Ottawa Seeks to Halt Water Exports*, TORONTO GLOBE & MAIL, May 5, 1998, at A1.

152. *Id.*

which has the primary authority to manage issues respecting the Great Lakes,<sup>153</sup> to look into the water export issue.<sup>154</sup> The recommendation, which was due out in late 1998,<sup>155</sup> although not legally binding,<sup>156</sup> will surely conclude that neither country should export any water from the Great Lakes without first gaining the permission of the other country. In anticipation of the IJC's recommendation, the two countries have asked the International Joint Commission to further examine the water export issue, as well to offer guidance in establishing an international watershed board to govern future matters of similar concern.<sup>157</sup> Further, it is hopeful that the IJC will call for Canada and the United States to promulgate a bilateral treaty or clarification involving the policy, implications, and obligations of the parties respecting any water exportation from the Great Lakes.

Nova Group's water export license was formally canceled by the provincial government of Ontario on July 7, 1998, based on a new provincial water transfer policy.<sup>158</sup> The Ontario Provincial Government enacted a surface waters transfers policy, which generally opposes any proposals to divert water and stresses the need to preserve water quantity to sustain ecosystem integrity.<sup>159</sup> Further, the newly enacted policy requires broad consultation and permit application reviews to consider the cumulative effects of existing and proposed fresh water takings.<sup>160</sup> This, however, is not enough. More needs to be done both provincially and federally regarding this issue. The Canadian water policy, which generally disapproves exporting water,<sup>161</sup> does not go far enough to stop provinces from exporting. For example, a few days after the federal government said it would look into terminating the Nova Group water export permit, the Newfoundland Provincial Government accepted an application from the McCurdy Group of Companies to export its fresh water.<sup>162</sup> This water export license involves about eighty-seven times the amount of fresh water proposed in the Nova Group License.<sup>163</sup> Mr. Sean Kelly, a spokesman for Newfoundland's Department of Environment and Labour, says that once final provincial approval is achieved, nothing stands in the way of its implementation.<sup>164</sup> Further, Mr.

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153. *Boundary Waters Treaty*, *supra* note 34, art. VIII, 36 Stat., at 2451-52.

154. Department of Foreign Affairs and International Trade, *Canada Asks the United States to Agree to a Joint Referral of the Water Export Issue to the International Joint Commission* (May 6, 1998) available on government of Canada website (visited Oct. 9, 1998) <[http://www.dfait-maeci.gc.ca/english/news/press\\_releases/98\\_press/98\\_109e.htm](http://www.dfait-maeci.gc.ca/english/news/press_releases/98_press/98_109e.htm)>.

155. *See id.*

156. *See* *Boundary Waters Treaty*, *supra* note 34. Since what is being asked for is merely a recommendation, the conclusions of the IJC will not be binding on the two countries.

157. *IJC to Further Examine Watershed Approach* (November 23, 1998) available on Internet at <<http://www.ijc.org/news/h2oshed1198.html>>, and a portion of the letter is available at <<http://www.ijc.org/comm/refl198.html>>.

158. *Fight to Export Water Heats Up*, *TORONTO GLOBE & MAIL*, Aug. 29, 1998, at A4.

159. *See generally id.*

160. *Id.*

161. *See* *Federal Water Policy* (Environment Canada, 1987) <[http://www.doc.ca/water/en/info/pubs/Fedpol/e\\_fedpole.pdf](http://www.doc.ca/water/en/info/pubs/Fedpol/e_fedpole.pdf)>.

162. Heather Scoffield, *Newfoundland Company Enters Water Debate*, *TORONTO GLOBE & MAIL*, May 14, 1998, at A4. The application still needs to go through an environmental assessment from the province.

163. *Id.*

164. *Id.*

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Kelly is quoted in saying, "[w]e're not worried about it at all. We're treating water as any other resource."<sup>165</sup> The expressions of Mr. Kelly are indicative of how unilateral actions taken by provincial governments could work to harm the whole of the country. The impetus of his desires would have extreme ramifications within NAFTA, and would more than likely subject Canada to the national treatment obligations of NAFTA. Situations such as this exemplify the urgency and efficiency with which the Canadian Federal Government should act.

Clearly, the Ontario and Newfoundland examples show that the provincial government and the federal government are not working together. The provincial governments appear to be looking at the positive economic aspects involved in exporting fresh water without looking at the international trade implications that could result. It is evident that the federal government must get together with the provincial governments to develop a unified water export policy along with effective laws. So Canada's first objective in securing sovereign control of its fresh water resources should begin internally amongst the federal and provincial governments in order to be able to effectively deal on an international level with the other NAFTA signatories.

#### B. BRITISH COLUMBIA.

British Columbia is Canada's most lucrative outpost in the fresh water export business. A study has shown that over 400 million acre-feet of fresh water from this province's coastal streams and rivers drains directly into the Pacific Ocean.<sup>166</sup> As such, in the past, the province has entertained the concept of exporting its water internationally. As a result, British Columbia is another Canadian province that has issued water export licenses and subsequently revoked them.<sup>167</sup> An example of a water export company that fell victim to the export license termination and subsequently sued in a British Columbia provincial court is described below.

In April of 1989, British Columbia granted Snowcap Waters, Ltd. a water export license to extract water from Tzela Creek for the purposes of marine bulk export to California and elsewhere.<sup>168</sup> Snowcap formed a joint venture with a U.S. corporation called Sun Belt and began securing buyers for the fresh water in the United States.<sup>169</sup> In December 1990, Sun Belt entered into contractual relations with the Goleta Water District in California to legitimize the exportation venture. On March 14, 1991, Goleta selected Sun Belt as the future supplier of fresh water.<sup>170</sup>

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165. *Id.*

166. Heather Scoffield, *Water, Water Everywhere: Not a Drop to Sell?*, TORONTO GLOBE & MAIL, May 11, 1998, at A1. To illustrate this point further, the California market would require only .002% of that amount. *Id.*

167. Water Protection Act, R.S.B.C. 1996, ch. 484, § 10(1) [hereinafter Water Protection Act]; license no. 64737 for 200 acre-feet a year from Alpine Creek near Toba Inlet; license no. 64738 for 200 acre-feet a year from Racine Creek near Toba Inlet; license no. 69510 for 200 acre-feet a year from Tzela Creek near Toba Inlet; license no. 70663 for 5837 acre-feet a year from Whalen Lake on Princess Royal Island; license no. 101289 for 40 million gallons a year from Salmon Glacier near Stewart.

168. *Snowcap Waters Ltd. v. British Columbia* [1997] 34 B.C.L.R. (3d) 139, 141.

169. *Id.* at 142.

170. *Id.* at 142, 143.

On March 18, 1991, the Lieutenant Governor in Council of British Columbia issued an order that established a moratorium upon the issuance of new fresh water export licenses.<sup>171</sup> Subsequently on June 21, 1991, the provincial government enacted the Water Protection Act<sup>172</sup> that effectively prohibited the export of fresh "water from British Columbia in containers of sufficient size or capacity to economically serve [an exporter's] intended business markets."<sup>173</sup> Snowcap and Sun Belt sued the province of British Columbia seeking damages for negligent misrepresentation, intentional interference with contractual relations, and breach of contract alleging that they were deprived of the opportunity to export fresh water from British Columbia.<sup>174</sup>

"The purpose of the [Water Protection Act] is to foster sustainable use of British Columbia's water resources in continuation of the objectives of conserving and protecting the environment."<sup>175</sup> The Act expressly prohibits large-scale transfers between major watersheds,<sup>176</sup> the removal of water in containers greater than twenty liters,<sup>177</sup> and any future issuance of a water removal license.<sup>178</sup>

Currently, British Columbia's Water Protection Act has sufficed to cease all new fresh water exportation from the province. What's more, it has yet to be challenged for its constitutionality or its implications respecting NAFTA. It is likely that this provincial legislation would survive a constitutional attack,<sup>179</sup> however, it is less certain that the legislation would survive an attack based on a NAFTA Article 904 violation.<sup>180</sup> The test would be whether such measure taken created an unnecessary obstacle to trade.<sup>181</sup> If ever before a NAFTA dispute panel, British Columbia would likely be successful in arguing that such means were the least trade-restricted means available to achieve provincial environmental protection goals to survive an Article 904 action.

Because this legislation would likely be considered an act tantamount to expropriation of foreign owned property, however, a private entity could bring a NAFTA Chapter 11 action against the government legislation.<sup>182</sup> It is likely that such an action would be successful due to the fact that the export license being rendered null is an ostensible expropriation of property. Accordingly, Article 1110 of NAFTA would be triggered and compel compensation to the foreign entity.<sup>183</sup> Further, since national treatment obliga-

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171. O.I.C. 1991/331, B.C. Gaz. 1991.

172. Water Protection Act, ch. 484, § 10(1).

173. *Snowcap Waters*, [1997] 34 B.C.L.R. (3d) at 143.

174. *Id.* at 141.

175. Water Protection Act § 2.

176. Water Protection Act § 6.

177. Water Protection Act § 5.

178. Water Protection Act § 7.

179. See generally Constitution Act (as referred to in footnote 120).

180. Very interestingly, within a few days prior to completion of this paper, Sun Belt Water, Inc. filed notice of its intent to submit a claim to a NAFTA dispute panel against Canada under Chapter 11 of NAFTA. They are claiming that the British Columbia Government expropriated their property and should therefore reimburse them. It will be extremely interesting to observe this dispute in the ensuing months. *U.S. Lawsuit on Canadian Fresh Water Exports Pours More Cold Water on NAFTA, Says Council of Canadians* (Dec. 8, 1998) available on Internet at <<http://www.canadians.org/release55.html>>.

181. See NAFTA, *supra* note 17, art. 904 and accompanying text.

182. See NAFTA, *supra* note 17, arts. 1106(1)(a), 1110 and accompanying text.

183. See NAFTA, *supra* note 17, arts. 1106(1)(a), 1110, 1114 and accompanying text.

tions are afforded to foreign investments under Chapter 11 of NAFTA, this legislation appears to be subject to a violation of such obligations. Notwithstanding, this legislation could likely overcome a national treatment violation claim as long as the British Columbia Government could prove that such means were the least trade-restricted available to achieve its provincial environmental protection goals.<sup>184</sup>

Overall, the British Columbia Water Protection Act is a sound piece of legislation that minimizes both constitutional and international trade challenges. But British Columbia is only one province in a large country, and as such, if another province such as Newfoundland, which does not have similar water protection legislation, were to begin exporting fresh water on the international market,<sup>185</sup> nothing is to stop British Columbia from repealing its water protection legislation in order to reap any economic benefits that the other province would be realizing. In reality, it only takes the actions of one province to create NAFTA's national treatment obligations with respect to water. The instability of this situation is depicted in the attitude and words of the Newfoundland spokesman for its Department of Environment and Labour,<sup>186</sup> which came immediately after the general denouncement of water exports by the federal government. If such a case as in Newfoundland, or any other province, were carried through to fruition, all of Canada would lose control of one of its vital natural resources as it would be lost to foreigners through the national treatment obligation.

The slope is an extraordinarily slippery one and is deserving of instant attention by the federal government. It would appear to be untenable for the Canadian Government to leave it up to the independently-oriented provincial legislatures to control water exportation decisions that effect the entire country. Due to the implications of NAFTA, the Canadian Federal Government must unite its provinces on a stable platform at once before it can begin to entertain selling its water in an international market. What is more, the federal government should act contiguously so as to protect the control that it now possesses over its fresh water resources in hopes of gaining complete control in the near future.

## V. Recommendations Regarding What Canada Should Do.

As it stands currently, Canada has not lost complete control over its fresh water resources in light of NAFTA; nevertheless, Canada does lack effective authority to act in its own best interest respecting fresh water policy. Canada ought to act promptly and effectively to ensure its sovereign right to control its endowment of fresh water resources, just as it has acted in the past to protect other natural resources. Clearly it was a mistake not to include fresh water as an explicit exception to the national treatment obligation in NAFTA, but Canada must now do its best to regain sovereignty over its fresh water. Once Canada has full control over its water resources, it can proceed in whatever manner it wishes. Unfortunately at this point, Canada has few viable options.

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184. See NAFTA, *supra* note 17, art. 904.

185. This could very likely be a contemporary reality. See Section IV. A. of this paper with regard to Newfoundland.

186. See *supra* notes 161-164 and accompanying text.

Currently under NAFTA, Canada is inherently estopped from placing restrictions on fresh water exports. Fortunately, Canada is presently not exporting any of its water,<sup>187</sup> and is under no obligation to do so. Accordingly, Canada must choose to act, react, or do nothing. Presumably, a proactive position ought to serve its interests best because by acting affirmatively Canada can attempt to position itself where it wants to be instead of scrambling at a later date to ineffectively rectify something that could have been achieved at an earlier time.

In light of NAFTA and jurisdictional issues, Canada appears to be faced with a limited number of options in regaining full control over its fresh water resources. Further, it is important for the Canadian Government to work without delay in taking action so as to avoid potentially negative consequences arising from unilateral provincial actions. Underlying all of this, Canada's preeminent concern should be how it wishes to position itself in the world market place with respect to fresh water. That is, does it want to be a participant, a potential participant, or merely an observer unable to enter because of political constraints? In effectuating their goals, the federal Canadian Government essentially has the option of acting either unilaterally, or in conjunction with the other NAFTA signatory countries.

Unilateral action by the Canadian Government, though potentially effective in gaining full control over fresh water resources, is extremely precarious with respect to international trade ramifications. For instance, if the Canadian Government were to pass legislation resembling Bill C-156,<sup>188</sup> it would undoubtedly violate NAFTA provisions and subject Canada to retaliatory measures and various other trade ramifications. If the Canadian Government were to take a different approach in implementing legislation to curtail the exportation of bulk water, it could potentially justify its actions in light of NAFTA.

For example, Canada could implement a federal comprehensive water management and conservation policy that could justify a fresh water export ban under NAFTA on environmental grounds, and therefore not be subject to legal repercussions.<sup>189</sup> In attempting such legislation, it is essential that the federal government base its motives on the environmental, social, and cultural importance of sustaining its national water resources. Further, the federal legislation should in no way be rooted in economic or export issues. But due to the current copious supply of fresh water in Canada, any such legislation would likely fail justification, and would therefore be considered a violation of NAFTA,<sup>190</sup> subjecting Canada to potentially harmful and extensive legal backlash.

Further, Canada could attempt to bring all of its provinces to a general consensus as to their position respecting the exportation of water. For instance they could have a meet-

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187. Note: Canada does export some of its fresh water in bottled water and soft drinks, as well, there are some export licenses that exist; however, the exportation that does exist now is not enough to invoke any NAFTA obligations.

188. See Canada Water Preservation Act (as referred to in footnote 135).

189. See NAFTA, *supra* note 17, art. 2101, 32 I.L.M. at 699; and see GATT, *supra* note 52, art. XX (g), 55 U.N.T.S. at 262. Though, if this were successful, it is likely that the United States would implement non-legal retaliatory measures that could be extremely harmful to the Canadian economy.

190. See *supra* notes 74-76 and accompanying text.



ing to establish uniform provincial laws respecting fresh water protection.<sup>191</sup> As described above, however, this is a very slippery slope. Unilateral provincial actions could cause serious consequences to the country as a whole. This course of action is not recommended.

Ultimately, if Canada firmly believes in gaining full control over its fresh water resources no matter what the consequences, it could conceivably do so. Instituting federal legislation that permanently bans the exportation of fresh water completely, or subjects it to certain restrictions, is a viable option assuming it would be approved by the House of Commons and the Senate. If this course of action were taken, however, the Canadian Government would have to be willing to ride out the resulting trade violation consequences. Such action by the Canadian Government would be directly contrary to the trade liberalization theme underlying NAFTA, and would subject Canada to many legal penalties as well as much acrimony and backlash from other countries. The widespread implications on the Canadian economy would undoubtedly be detrimental. The Canadian Federal Government should seriously consider all potential economic, political, and social consequences in deciding its proper course of action. A complete ban on fresh water exports does not appear to be a rational or politically prudent measure in light of current international trade methodology, and the potential economic gains achievable in an international water market.

Contrasting this course of action, Canada could choose to act in conjunction with the United States and Mexico. This option prognosticates Canada gaining full control of its fresh water resources while evading all international and NAFTA trade violations. This accomplishment would involve international negotiations and agreements leading to mutual understandings and obligations. Basically, Canada needs to enact a trilateral treaty with all of the NAFTA signatory countries affording it sovereign and comprehensive control over its fresh water resources.

Such a treaty could be very extensive and cover a myriad of issues regarding Canada's ability to export fresh water subject to certain agreed upon limitations. Conversely, a treaty could be quite simplistic and only consist of the signatory countries agreeing to add fresh water as an explicit exemption in Annex I. The coming to fruition of such a treaty is uncertain, yet consequential for all countries involved. Clearly, Canada wants to be able to manage and control its fresh water resources without being limited by international trade agreements. The United States and Mexico on the other hand, definitely would like access to Canada's cheap fresh water resources and would benefit from such a treaty. As it stands currently, however, the United States and Mexico hold a significant interest in Canadian water by way of the national treatment obligations in NAFTA.

This issue is very engaging as Canada has what the United States and Mexico want, but Canada will likely not furnish any of it to the other countries unless it is assured control over its management. Perhaps it will take forward-looking policy makers to agree to

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191. For example, if the provincial governments all enacted legislation substantially similar to that of British Columbia's Water Protection Act, such an agreement could elude NAFTA infractions. However, each province would need to sufficiently establish that the legislation is the least restrictive method available to them to protect an environmental interest. Conceivably this could work, however, the volatility of an arrangement subject to being scuttled by any one entity involved is high. Such a venture would not be the most prudent for a government to embark on when more applicable methods exist.

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promulgate such a treaty today. The situation, however, dictates that an agreement be made in the ensuing years. The signatory country's needs and desires will grow intensely with every year as populations continue to expand along with the continued mismanagement of domestic water programs. So, fundamentally it would be insightful for Canada to instigate trilateral negotiations in furtherance of establishing a treaty or agreement.

Buttressing the possibility of enacting a treaty without delay is the recent actions taken by Canada and the United States in submitting a question to the IJC regarding water exports and requesting the establishment of an international watershed board.<sup>192</sup> The institution of such a board could provide an instrumental stepping-stone to solving the North American fresh water quandary.

Overall, Canada's most tactful option ought to be the pursuance of a trilateral treaty furnishing it exclusive control over its fresh water endowment. Making rash policies and legislation attempting to regain control of water would be imprudent in light of NAFTA and its accompanying obligations. Most importantly however, Canada must ensure that it does nothing in the future that will trigger the NAFTA national treatment obligations in fresh water. If Canada chooses to do nothing, it will only lose the opportunity cost of its involvement in an international water market industry.

By being proactive in initiating treaty negotiations, Canada arranges itself in the best possible position to gain control over its fresh water resources. Also, Canada opens itself up to the possibility of being a major participant in an emerging and potentially extraordinarily lucrative international market place.

## VI. Future Canadian Based International Fresh Water Market.

"The saving grace for future wars over water would be if the universal natural resource *water* were to assume its proper place as an economically valued and traded commodity."<sup>193</sup> This statement personifies the potential need and viability of an international water market.

Though operating mainly in the Middle East at only a globally insignificant level, international fresh water markets do currently exist today due to inadequate water allocations.<sup>194</sup> With rapidly expanding modern technology, along with current large-scale ocean-going tankers, North America's viability in such a worldly market is potentially remarkable. Albeit the concept of an international water market is relatively modern, it is not hard to conjecture the potential need, viability, and prosperity of such a proposition. The participants in international water markets can be categorized into exporting countries that have a sufficient supply of fresh water, and importing countries that lack suffi-

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192. See ICJ to Further Examine Watershed Approach, *supra* note 157 and accompanying text.

193. I. Serageldin, Environment Vice-President of the World Bank, cited in *Water, Flowing Uphill*, ECONOMIST, Aug. 12, 1995, at 38.

194. See P.J.I.M. de Waart, *Securing Access to Safe Drinking Water Through Trade and International Migration*, in THE SCARCITY OF WATER: EMERGING LEGAL AND POLICY RESPONSES 106 (Edward H.P. Brans et al. eds., 1997) citing M. Thobani, *Tradable Property Rights to Water*, in WORLD BANK PAPER (1995); M. Rosegrant & H. Binswanger, *Market in Tradable Water Rights: Potential for Efficiency Gains in Developing-Country Irrigation*, in WORLD DEVELOPMENT 11, 22 (1994).

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cient fresh water resources.<sup>195</sup> Due to its wealth of fresh water natural resources, Canada clearly classifies as an exporting country, and as such, should position itself so as to be able to reap the potential economic benefits that will arise in the near future. Effective governing dictates that Canada ought to act sooner as opposed to later in gaining full control over its fresh water resource management. Thus, as mentioned previously, Canada should act in conjunction with the United States and Mexico in forming an agreement that lifts NAFTA's constraints over its fresh water resources.

Customary and codified international law respecting an international water market industry is virtually nonexistent. Certain international laws do, however, further the agenda of an international water market. For instance, at the United Nations Water Conference in 1977 it was declared that "[a]ll peoples, whatever their state of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs . . . ."<sup>196</sup> Also, the international community recognizes an obligation that States come to the aid of deprived individuals,<sup>197</sup> however, it appears international human rights law does not affirmatively require sovereign states to aid others in grave need of potable water.<sup>198</sup> Although it is not required of a State to aid another in need of providing its inhabitants with adequate fresh water, it appears to be a generally considered international norm to assist others who are deprived. From that spawns the need to transfer fresh water across sovereign borders, which is the foundation of an international water market. Therefore, just as the oil rich countries of the world export their natural resource on an international market, so too should those who possess an abundant national endowment of fresh water.

The seeds of an international water market grew from a theoretical concoction devised by economists in the 1960s resulting from their criticism of an ill-managed, poorly allocated, fresh water situation in the United States.<sup>199</sup> The basic concept underlying this theory is that general market principals work to govern the allocation and valuation of water in a manner superior to that of governmental administrators.<sup>200</sup>

From a Canadian perspective, the federal government currently exports its unrenewable natural resources like oil, natural gas, coal, and other minerals – "It's time Canadian fresh water was offered as a major export to a world that has a pressing need for clean drinking water."<sup>201</sup> Granted, while these are most likely the conjectures of a recognized minority of Canadians, their argument deserves valid consideration. The economic

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195. Esther J. de Haan, *Balancing Free Trade in Water and the Protection of Water Resource in GATT*, in *THE SCARCITY OF WATER: EMERGING LEGAL AND POLICY RESPONSES* 246 (Edward H.P. Brans et al. eds., 1997).

196. REPORT OF THE UNITED NATIONS WATER CONFERENCE, U.N. Doc. E/CONF.70/29, U.N. Sales No. E.77.II.A.12 (1977), at 66.

197. International Covenant on Economic, Social and Cultural Rights (ICESCR), arts. 11(1) & 12(2b). According to art. 11(2), the state parties to the ICESCR recognize the fundamental right of everyone to be free from hunger. Being free from hunger implicitly states being free from thirst.

198. Stephen McCaffrey, *Water Scarcity: Institutional and Legal Responses*, in *THE SCARCITY OF WATER: EMERGING LEGAL AND POLICY RESPONSES* 55 (Edward H.P. Brans et al. eds., 1997).

199. National Water Commission, *WATER POLICIES FOR THE FUTURE* 260-261 (1973).

200. Tarlock, *supra* note 10, at 190.

201. Carten, *supra* note 105, at A19.

potential involved in exporting fresh water is truly remarkable, as is evidenced by the water export contracts in British Columbia and Ontario alone. For example, Jack Lindsey, the CEO of Sun Belt, estimated his company would have achieved one billion dollars (U.S.) over a five-year period under his water export license from British Columbia.<sup>202</sup>

An example of one lake in British Columbia that could be used in water export is Link Lake.<sup>203</sup> This lake receives an annual rainfall of 5.4 million acre-feet and all of it drains directly into the Pacific Ocean over a waterfall.<sup>204</sup> It has been estimated that in twenty years the population increase in California will result in a shortfall of four million acre-feet of water annually.<sup>205</sup> This means that the fresh water from one of the many lakes in British Columbia that normally flow directly into the Pacific Ocean could be harnessed to satisfy the Californian fresh water shortfall.<sup>206</sup>

The next step is to determine the best process Canada should choose in entering the world of international water trade. The idea of massive water transfer projects like NAWAPA and the Grand Canal are unpleasant to imagine and will likely never be brought to fruition due to the extreme ecological/environmental alterations involved. But the gathering of fresh water from rivers and lakes whose runoff would invariably spill directly into the ocean is a much less daunting concept. Exporting water by supertankers to the United States and the rest of the world is likely Canada's most viable economic, environmental, and social alternative. Such implementation would conceivably place Canada in a position similar to that held by the Arab states in the world oil market. Indeed, super tanker water markets are in existence today in the Middle East,<sup>207</sup> and could therefore act as a viable template for Canada to learn from. So the potential for a functional Canadian-based international water market is real and warrants due deliberation.

To achieve this status, Canada must first gain exclusive control over its fresh water resources. That means that they must get around the NAFTA national treatment obligations through such methods as described above. Once control of fresh water is established, Canada can adequately form its fresh water policy to serve its best interests.

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202. Scoffield, *supra* note 162, at A1.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. Henk Donkers, *Fresh Water as a Source of International Conflicts: The Water Conflicts Between Israel, Jordan and the Palestinians*, in *THE SCARCITY OF WATER: EMERGING LEGAL AND POLICY RESPONSES* 148-49 (Edward H.P. Brans et al. eds., 1997).

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## VII. Conclusion.

There is no dispute over the fact that fresh water is inequitably distributed throughout the earth. Couple this with the gross mismanagement of fresh water resources and global overpopulation, and one can see the plausibility of the need for an international fresh water market. Along with many other parts of the world, the United States is indicative of a nation with poorly distributed fresh water resources and would likely be an active importer of water. Canada on the other hand, holds a vast amount of the world's fresh water holdings, and as such, it occupies an exceptional position in an emerging fresh water market. But currently, certain provisions in NAFTA work to strip Canadian control over its fresh water exporting decisions.

It is evident that the Canadian Government must act soon to protect against unilateral provincial action that could cause serious international trade repercussions. NAFTA is the main body of international law governing Canada's water exportation issue. Chapter 3 of NAFTA provides for the national treatment obligation to be attached to all but a limited number of explicitly stated goods that do not include water. Unfortunately for Canada, water likely qualifies as a good under NAFTA, and therefore, once it is imported into the United States or Mexico, it cannot be discriminated against. This rule is subject to very few exceptions, and it is questionable whether Canada will be able to utilize any such methods to limit or stop future exports once they have begun. Chapter 11 of NAFTA is likewise detrimental to Canadian control over its fresh water situation as it affords national treatment obligations to foreign owned capital interests, as well as requiring compensation for the expropriation of property. Favorably, Chapter 11 entitles Canada to screen foreign investments valued at greater than approximately five million dollars (CAD). This provision, however, still fails to provide Canada with the adequate control needed to enter an international water market.

The Canadian jurisdictional structure is such that the provincial governments can enact laws that would limit or cease the future exportation of fresh water. Such laws have the ability to escape the violation of certain detrimental provisions of NAFTA; however, pertinent Chapter 11 obligations will still act to harm Canada's control over its water resources. Further, it would not be sensible for the federal government to rely solely on the provinces to act in the country's best interests in enacting fresh water legislation. Such a situation would be tainted by unilateral provincial self-regard and could result in an unreliable political situation. Recent examples of provincial action in granting water export licenses exemplify the volatility that would exist in such a situation.

Ultimately, the Canadian Government finds itself in an unstable predicament regarding its fresh water management. Though Canada is currently under no obligation to export its fresh water, once it does, NAFTA provisions will be implicated and, as a result, Canadians will have limited authority in restricting future exports. To counteract this disturbing possibility, Canada should act at once to rectify its position and gain back control of its valued natural resource. One option would be for the federal government to establish a law based purely on environmental and social grounds that would eliminate the possibility of future water exports. Such a law would be difficult to justify under NAFTA and would presumably be considered an unfounded restriction on free trade. Further, such action may not be economically prudent, as it would eliminate Canada from the

possibility of entering into a lucrative emerging international water market. A more insightful decision would be for Canada to enter into a trilateral agreement with the NAFTA signatory countries that would give it full control over future exportation decisions regarding its fresh water. Such an agreement is conceivable as the United States and Mexico currently want, and in the future will undoubtedly need, access to Canadian fresh water for their subsistence. Further, as it stands, Canada is unlikely to export any of its water without such an agreement, as doing so would limit their control over future restrictions on exports. Thus, Canada's most logical course of action would be to instigate trade agreement talks that would effectively trump the provisions of NAFTA, which work to strip Canadian control over its future fresh water exports.

Once Canada gains sufficient control over its fresh water resources, it could then determine the extent to which it wishes to commit itself to an emerging international water market. The potential economic gains attainable in such a market are extraordinary. As well, Canada is fortunate enough to be endowed with a plentiful reserve of fresh water and, therefore has the ability to enter into such a market. Overall, Canada currently has control of its fresh water decisions, however, due to NAFTA, authority could be lost in the near future. Therefore, Canada would be wise in taking proactive measures to regain full control over its fresh water management decisions. Once that is accomplished, Canada could embrace the idea of entering into an emerging international fresh water market.

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# Yearbook of International Financial and Economic Law 1997

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The second volume of this yearbook provides articles, comments, and analyses of developments throughout the previous year. A special focus section highlights the importance of arbitration and other forms of alternative dispute resolution in the financial field.

Authors of major articles in this edition include Ernesto Aguirre of the International Monetary Fund, Dr. Paolo Clarotti of the European Commission, Dr. Michael Gruson of Shearman and Sterling, Konstantin Lubchenko of the Bank of Russia, and Geoffrey P. Miller of NYU School of Law.

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This volume should appeal to anyone with an interest in international financial and economic law throughout the world, a subject to which this volume as with its predecessor makes a significant contribution.

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by José Manuel Calderón, Professor of Tax Law, University of La Coruña, Spain; Visiting Scholar, International Tax Program, Harvard Law School, Cambridge, USA

Is there a safe harbour for multinational enterprises operating in a global economy? This book assesses whether Advance Pricing Agreements (APAs) constitute a suitable solution to the major problems and controversies in the area of transfer pricing. The 1980s brought increased confrontation between taxpayers and tax administrators and between jurisdictions implementing and enforcing diverging transfer pricing legislation. The author analyses the legal characteristics of APAs; practical problems regarding their implementation; and the benefits, drawbacks, and alternatives confronted by the parties to such agreements. This study is in large measure based on the U.S. procedures on APAs which make up the most advanced regulation in this field. In addition, the work describes the worldwide practice on APAs, the OECD guidelines, and the APA procedures of other jurisdictions which basically follow U.S. legislation. Its informativeness and extent of coverage make this work essential reading for practitioners, in-house counsel, and academics active in the area of international taxation.

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## NAFTA and the Energy Charter Treaty Compliance with, Implementation and Effectiveness of International Investment Agreements

by Miriam Kene Omalu, Centre for Energy, Petroleum and Mineral Law and Policy, Dundee, UK

Dr Miriam Kene Omalu gained qualification as a barrister and solicitor in Nigeria. She went on to attain a PhD from the Centre for Energy, Petroleum, and Mineral Law and Policy (CEPMLP), University of Dundee, Scotland in 1997. She worked as a post-doctoral research fellow and currently works for Shell International Limited in London. Her areas of research and expertise include international petroleum law, international economic law, international business law, and mining law. Miriam Kene Omalu is a Chevening Scholar.

The North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT) are the first major multilateral treaties to impose obligations on governments concerning the protection and treatment of foreign investments. These obligations are enforceable by private companies. *NAFTA and the ECT* examines the effectiveness of the investment rules of these treaties and analyses the mechanisms adopted to enhance compliance, and to facilitate the implementation and enforcement of the relevant rules and regulations. Coverage of this work includes: a conceptual analysis of the precise meaning and theoretical foundation of compliance, implementation, and effectiveness; an examination of issues of direct effect and direct international responsibility in terms of the practical question of the treaties' impact on the domestic regimes of states; an exploration of the issues of transparency and monitoring to achieve enhanced compliance; and a close look at a number of key links in the field - between the investment rules and the workings of national legal and governmental systems, between national and international law, between different disciplines involved (international law, international relations, international politics, and economics), and between transparency and compliance monitoring. *NAFTA and the ECT* also offers several helpful features, including results from a questionnaire-based survey circulated to the main players in the realm of foreign investment which offer unique insights on the prevalent perception of the industry towards NAFTA and the ECT; and original suggested provisions and frameworks which would enhance the effectiveness of the investment rules. The thought-provoking issues probed and conclusions reached and the interdisciplinary and comparative approach taken make *NAFTA and the ECT* a compelling new resource for academics, policymakers, and others interested in the effectiveness of international investment agreements and the tools employed in their implementation and enforcement.

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# NAFTA Law and Business

by *Ralph H. Folsom, W. Davis Folsom*

The North American Free Trade Agreement (NAFTA) is more than just another trade treaty. It represents a major shift in political, economic, and business relations between the United States, Canada, and Mexico. This looseleaf service is designed for law, business, and government professionals located both inside and outside the NAFTA region who seek to understand the operational realities of the North American Free Trade Area. NAFTA Law and Business provides a continuously updated review of the legal and business ramifications of NAFTA. Leading law and business practitioners provide perspectives on legal, financial, management, marketing and strategic planning developments. In addition to analysis of contemporary events, an historical background provides readers with an understanding of how features of the Agreement are evolving.

The multi-disciplinary approach provided by the editors gives readers a comprehensive coverage of all aspects of NAFTA. The service is designed to be user-friendly with all topics supported by case studies, illustrative examples and practical strategies.

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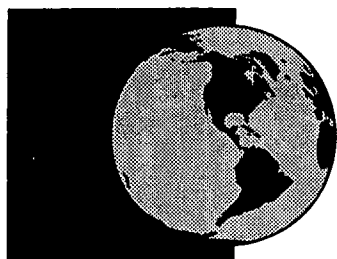
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# Southern Methodist University School of Law's Law Institute of the Americas

*(formerly SMU Centre for NAFTA and Latin American Legal Studies\*)*

Established in 1952, the Law Institute of the Americas at Southern Methodist University School of Law was originally designed to promote good will and to improve relations among the peoples of the Americas through the study of comparative laws, institutions and governments respecting the American Republics and to train lawyers in handling legal matters pertaining to the nations of the Western Hemisphere. Today, in reviving this institution, the Law Institute of the Americas comprises meaningful academic research, teaching and programs pertaining to the "NAFTA Process" and Western Hemispheric integration efforts; to Latin and Central American law and judicial reform, particularly focusing on Argentina, Brazil, Chile, Guatemala, Mexico, Peru and Venezuela; and, to a more limited extent, to Canadian legal issues, particularly as they interrelate to the NAFTA. The Law Institute of the Americas also is concerned with increasing (regional and hemispheric) legal and economic interconnections between the "NAFTA Process" and European and Asia-Pacific integration activities.

The officers of the Institute are as follows: the Honorable Roberto MacLean, President; Professor Joseph J. Norton, Executive Director; Professor George A. Martinez, Associate Executive Director; Professor Rosa Lara (of the UNAM Law Research Institute), Acting Assistant Director; Professor C. Paul Rogers, III, Acting Chair; the Honorable Raul Granillo O'Campo (Minister of Justice of Argentina), Honorary Chair; the Honorable John S. McKenniery (Executive Director of the NAFTA Labor Commission), Honorary Chair; and Professor Julio C. Cueto-Rua of Argentina, Honorary President of the Institute. The Institute also is supported by a distinguished group of Professorial Fellows, Senior Research Scholars, Professional Fellows, and Student Research Fellows. Corporate sponsorship of the Institute is provided by H.D. Vest Financial Services.

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\* From 1952 through the early 1970s, the name was the Law Institute of the Americas; in 1993, it was reactivated as the Centre for NAFTA and Latin American Legal Studies; and in 1998, it returned to its original name. For further detailed information on the Law Institute of the Americas, please refer to the Winter 1998 issue of the NAFTA Review, pages 5 through 36; this information is substantially current except for the new name change referred to above.