

Clarifying the Water

Canadian Water, Canada's Trade Obligations and B.C. Water Policy

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Few legal interpretations have been as hot political issues or obscured in as much rhetoric. The question of whether Canadian trade obligations with the United States and more recently Mexico give the U.S. and Mexico access to Canadian water resources strikes a sensitive chord amongst Canadians. The spectre of a thirsty American or Mexican populace being given a right to drain Canada of its most plentiful resource has assured this issue remains current. Unfortunately, despite all the attention, the political nature of the issue has kept the water muddy.

Debates over whether water is "in" or "out" of the North American Free Trade Agreement ("NAFTA") and the Canada - United States Free Trade Agreement ("CUSFTA"), and debates over whether the Americans can "force the tap open" really depend on interpretation of relatively technical and sometimes obscure provisions. This article attempts to give a simple review of what the issues are.

The first issue is whether or not the two trade deals apply to water. The answer is that it depends. The trade deals apply to goods. "Goods" in the trade deals mean the same thing as goods or "products" under the General Agreement on Tariffs and Trade ("GATT").¹ Although GATT has been usually applied to goods which are commercially traded there is no clear answer as to when something becomes a good. The issue of whether water is a good for the purposes of the trade agreements has been muddied by references to whether all forms of water or only bottled water are covered in GATT's commodity coding system. However, the commodity coding system is generally seen by trade experts as being only a standard basis for negotiating tariff reductions on different goods, not as a basis for defining what is or is not a product or good.²

It is clear that water in its natural state, in aquifers, lakes and rivers is not a good since it has not entered commerce. This was reiterated in the December 1993 "clarification" of NAFTA signed by Canada, Mexico and the United States which Prime Minister Chretien insisted on in December as a condition of implementing NAFTA.³

The clarification, however, did little if anything to resolve the more important issue of when water does become a good under NAFTA or CUSFTA. The issue that remains unresolved is whether or not water is a good once it is dammed or diverted into

pipelines, canals or distribution systems. While the December 1993 clarification stated that water in its natural state in reservoirs was not a good, there is no reference as to whether water in a human-made reservoirs or water which has been diverted is a good. It is unresolved whether water becomes a good if it is diverted for domestic, municipal or industrial use; if it only becomes a good only if prices are charged for it; or if it only becomes a good once sold on a commercial basis.

The December 1993 clarification of NAFTA also failed to provide any clarification of what rights Americans have to Canadian water that is a good. For water that is a good under NAFTA and CUSFTA any restrictions on export, including export quotas, export licences, and minimum export prices, must comply with GATT Article XX(g).⁴ Moreover, NAFTA generally prohibits the use of export taxes (unless equal taxes are applied domestically).⁵

While GATT Article XX(g) allows export restrictions relating to the conservation of exhaustible natural resources, these measures are only allowable if they are "made effective in conjunction with restrictions on domestic production or consumption"⁶ GATT panels have stated that these provisions require at least some domestic restrictions on production or consumption.⁷

Since diversions of water in British Columbia and other provinces require licenses under provincial legislation it seems that Canada has some restrictions on domestic production of water as a product. However, the existence of some domestic regulation of water diversions does not mean that a water export ban will necessarily be acceptable under GATT and CUSFTA.

CUSFTA and GATT trade panels have said that restrictions on export must be restrictions which Canada would be willing to impose on its own nationals for conservation purposes⁸ and the export restriction must be primarily aimed at rendering the domestic restrictions effective.⁹ Also, even if Canadian water export restrictions are permissible as being in relation to conservation of natural resources, they will only be allowed under CUSFTA and NAFTA if the resulting percentage reduction in the amount of water available to Americans is equal to the percentage drop in the Canadian supply of the water commodity (i.e. water which has become a good because of its diversion or sale).¹⁰ In other words, once the tap is open it cannot be closed.

All of this suggests that:

- If Canada does not want to be locked into exporting bulk water to the United States the federal government should re-introduce legislation banning large scale diversions or shipping of water to other countries, and tightly regulating smaller shipments. Once commercial exports begin water is clearly a product, and, at best, Canada will only be able to reduce export in conjunction with equal percentage reductions in Canada.
- Restrictions on water exports may fail unless they are applied in the context of strong domestic restrictions on water diversions and use. Strong domestic restrictions will be an indication that the export restrictions are in relation to

conservation and that they are needed to make the domestic restrictions effective in conserving water. Thus, the provinces should review water legislation to ensure that it would support a federal ban.

These prescriptions for action underline the need for reform of provincial water regulation. Under the current British Columbia *Water Act* applications for water licences are based on availability of water, impact on other licensees, and instream fisheries and habitat requirements. Licenses define the purpose for which the water is to be used (thus a license for irrigation of a B.C. farm would not allow the B.C. farmer to sell to the United States).

The government of British Columbia has proposed that amendments to the *Water Act* be introduced which enshrine existing criteria plus as well as requiring compliance with approved water management plans and use of best available conservation technology. The government has also proposed use of water pricing as an incentive for conservation.

Other additional amendments include:

- a ban large scale diversions and tight regulation of smaller scale diversions;
- a ban on development of diversions for purposes of export;
- providing explicit protection for instream use -- i.e. enshrining the principle that water diversions should not reduce flow or quality of water to a level that interferes with instream uses such as fish habitat, recreation and maintenance of water tables.

All of these measures, even in the absence of federal legislation, could largely eliminate the practical effects of Canada having granted other nations rights to Canadian water under CUSFTA or NAFTA.

British Columbia's Minister of Environment, Moe Sihota, has stated that "water export is a major concern to the people of British Columbia. The [December clarification] provides little comfort for the province." Sihota has also called for the federal government to ban exports. West Coast Environmental Law Association supports this proposal, but the British Columbia government must also take what action it can to avoid being tied into water exports in the future. The above amendments to the *Water Act* are important if we want to effectively ban the export of our water.

Endnotes

[1.](#) "Goods of a Party" are defined as being the same as "domestic goods" under GATT; however, the provisions relevant to water export do not use the phrase "goods of a Party".

[2.](#) Conversations with Owen Saunders, Canadian Institute of Resources Law and Ross Curtis, B.C. Government Trade Advisory unit. See also "GATT Concessions under the

Harmonized Commodity Description and Coding System" Decision of 12 July 1983 (L/5470/Rev. 1) which describes the intent behind creation of the system.

[3.](#) *Statement by the Governments of Canada, the United States and Mexico*, December 2, 1993.

[4.](#) NAFTA Article 309(1), (2) and CUSFTA Article 407 generally prohibits export restrictions and minimum export prices. It should also be noted that several commentators have said that CUSFTA promises of "national treatment" give Americans access to Canadian water. This interpretation of "national treatment" provisions seems unlikely. First, under GATT and NAFTA "national treatment" means countries are to give the same treatment to foreign goods and services in Canada; it does not mean that they are to give other nations equal access to Canadian goods and services. This interpretation is likely to be extended to CUSFTA. Secondly, CUSFTA only promises national treatment "to the extent provided in this agreement".

[5.](#) See NAFTA Article 315.

[6.](#) Article XX(g) also requires that export restrictions not be "arbitrary or unjustifiable discrimination". This has been narrowly interpreted and would likely not be a problem so long as Canada's export restrictions applied to all other countries: see *United States - Prohibition of Imports of Tuna and Tuna Products from Canada*, GATT Basic Instruments and Selected Documents, 29S./108 (February 22, 1982) at 108. See also Steve Charnovitz, "Exploring the Environmental Exceptions in GATT Article XX" (1991) 25 *Journal of World Trade* 37; Kyle McSllarrow, "International Trade and the Environment: Building a Framework for Conflict Resolution" (1991), 21 *Environmental Law Reporter* 10589.

[7.](#) *United States -- Prohibition of Imports of Tuna and Tuna Products from Canada*, GATT Basic Instruments and Selected Documents, 29S./108 (February 22, 1982).

[8.](#) *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, Final Report, 16 October 1989.

[9.](#) *Canada -- Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Basic Instruments and Selected Documents, 35 S/98 (March 22, 1988) at 114.

[10.](#) CUSFTA, Article 409 and NAFTA Article 316 refer to proportionate reduction in supply shipments and "total supply of that good of the Party maintaining the restriction".