Why is the Federal Government so Reluctant to Protect Canadian Water Resources?

A Water Fact Sheet

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There are many reasons to be critical of the lack of federal leadership when it comes to the stewardship of Canadian water resources – not least among them is the lack of a meaningful federal water policy. But recent proposals to export Canadian water, and a NAFTA claim by a US corporation for $hundreds of millions because BC refused it a water export license, have brought a new urgency to safeguarding public control of this vital resource in the new era of privatization, deregulation and free trade .

In response to growing public concern about water exports, the federal government has abandoned early suggestions that it would ban water exports and is now proposing a federal-provincial accord, ostensibly for the same purpose. Unfortunately its strategy appears to have been determined by a reluctance to confront the reality that under NAFTA and World Trade Organization (WTO) rules, water export controls are prohibited. Moreover, under NAFTA, Canada is also precluded from denying US investors and service providers the same access to Canadian water it allows Canadian companies, communities, and residents.

But instead of seeking amendments to these agreements, Canada is attempting to finesse these trade constraints by adopting the highly dubious position that water in its "natural state" is not a tradable "good" and therefore not subject to international trade rules. Furthermore, by focusing attention on water as a tradable commodity, the federal government is ignoring the fact that under NAFTA, **water is both an investment and service even if it is not considered to be a "good".**

However, rather than confront these problems directly, the federal government seems to be hoping that if it ignores them, they'll go away. This is particularly troubling because of the consequences of under-estimating the impact of trade rules, including the fact that under NAFTA, once the tap is turned on – it is impossible to turn off. It is also fair to point out that this same government offered similar assurances about the security of Canadian cultural programs in the free trade context. But its protests did nothing to deter the WTO from ruling them out of order, or prevent the US from announcing $300 million in retaliatory trade sanctions when Canada failed to remove them quickly enough.

The following fact sheet attempts to shed critical light on what the federal government is doing, or more appropriately not doing, to safeguard Canadian water from unregulated export demands. It also identifies the actions that are needed if this goal is to be achieved.

Water Under Free Trade

Several provisions of both the WTO and NAFTA dramatically curtail Canadian policy and regulatory options when it comes to water management and conservation. For water export controls, the most obvious conflict is with the blanket prohibition against all export controls that is a common to both trade regimes. This can be found in GATT Article XI (a provision common to both NAFTA and the WTO) which simply prohibits the use of quantitative export controls on any product *destined for the territory of any other contracting party.*

While the federal government readily acknowledges this constraint, it argues that because water in "its natural state" should not be considered a "good" or "product," it would not therefore be subject to Article XI. This is the entire premise upon which current federal strategy concerning water exports is built. But for the following reasons, this argument is very unlikely to persuade a trade dispute panel called upon to decide whether Canadian water measures violate free trade disciplines.

Water as a "Good"

First, water in its natural state is considered a commercial good under both international and US law. In fact in a leading case involving efforts by a state government to restrict bulk groundwater exports, the US Supreme Court explicitly found that groundwater in its natural state was an article of commerce on the US Constitution.

Second, a very large proportion of Canadian water has already been licensed for commercial use by industry, agricultural producers, utilities, and for human consumption. In fact many Canadian water resources are already taxed to their limit.

Third, as many have pointed out, water is listed as a good under NAFTA and WTO and no provision would limit the application of these trade agreements to bottled water.

Water as an Investment and a Service

Fourth, and most importantly, even if Canadian arguments were, against long odds, to prevail – a more fundamental problem exists because under NAFTA water is subject to rules concerning investment and services, even if it isn't a "good." In fact the federal government has quietly conceded this point in a memo prepared for the Canadian Council of Ministers of the Environment.

…foreign investors seeking to establish investment, or with established investments, for the removal of water from its natural state would have to be treated in the accordance with the obligations of the Chapter (such as national treatment, minimum standard of treatment and the four requirements for an expropriation, if there is one). [emphasis added]

(Unpublished, *Options Paper for Canadian Council of Ministers of the Environment*, discussing various options for the Minister's CCME meeting, May 19-20, 1999 – see discussion of International Trade Considerations, attached.)

In other words Chapter 11 disciplines apply to Canadian water resources, including access rights to water in its natural state. This means that, once governments allow water to be withdrawn from its natural state, as they have done on countless occasions for purposes that range from large scale industrial use to personal consumption, the same rights must be accorded foreign investors. Not to put too fine a point on it, under NAFTA investment rules foreign investors are guaranteed access to Canadian water resources.

The Rights of Foreign Investors

The fact that water is subject to NAFTA investment rules is particularly troubling because under these rules any foreign investor can make a claim directly against Canada to enforce the very broadly worded investor- rights NAFTA created. Moreover, such disputes will not be resolved by Canadian courts, but by international tribunals operating entirely outside of the context of Canadian law, or judicial procedures.

There are now several instances of these provisions being invoked by US investors to challenge Canadian environmental initiatives. Among these is the case of Sun Belt Water Inc., which late last year filed notice of intent to submit a claim for more than $200 million concerning certain actions by the BC government which it asserts unfairly deprived it of the opportunity to export bulk water from British Columbia.

The extraordinary risks associated with such investor claims underscore the importance of moving quickly to implement federal legislation banning water exports and to negotiate international measures to prevent such claims from arising in the future.

A Canada-wide Accord Will Not Protect Canadian Water

At first glance, the notion of such an *Accord* might seem like a reasonable approach for dealing with the problem of bulk water exports, after all it does embrace the concept of watershed management, which has strong appeal from an environmental policy perspective. But when viewed in a broader context, the federal government's strategy seems more of a smoke screen to conceal its reluctance to act on its own constitutional mandate to ban bulk water exports. It is worried that by doing so, it will be embarrassed by a trade/investor claim that will expose the fact that it has sacrificed public control over Canadian water to its trade agenda.

Moreover, there are several reasons for concluding that an Accord will do little if anything to protect Canadian water.

First, the Accord would of itself do nothing to actually prohibit export initiatives. This would require legislation, and when it comes to international trade, it is the federal government, and not the provinces that has constitutional authority to regulate. This should understandably raise questions about the purposes of an Accord which would shift responsibility to provincial governments for matters they have no constitutional mandate to address.

Second, the Accord would not legally bind the provinces. Thus governments, perhaps upon a change of political administration, would be free to abandon obligations they may have agreed to.

Third, by indicating that provinces will be free to develop their own approach to achieving the goals of the Accord, the federal government is setting the stage for a patchwork of policies and

regulations across the country. Even more troubling is that by entering into an Accord, provincial governments may actually be exposing themselves to claims that they provide National Treatment with respect to any licenses or permits to provincial water resources. This raises the spectre of an export approval sanctioned by any province or the federal government setting the de facto standard with respect to which all other provinces must then conform.

In other words this Accord would itself do nothing to prohibit water exports, but might well undermine this objective by exposing Canada to investor-state claims that would not otherwise arise, or that would be easier to defend against should they be brought.

What The Federal Government Should be Doing to Protect Water

The first priority for preventing bulk water removals from Canada is the enactment of federal legislation designed specifically for this purpose**.** Moreover, delay in taking this action may significantly increase Canada's exposure to trade disputes, or investor claims, particularly if water export initiatives proceed in the absence of a federal statutory prohibition.

Furthermore, no matter how carefully designed, Canadian measures to prevent bulk water exports or diversion projects would still be vulnerable to trade challenges and/or investor-state claims. This means that once water export controls are in place, the next step is for Canada to negotiate international measures to protect domestic water export controls from trade/investor disputes, these should include:

1. A broad exception for water export controls under NAFTA and the WTO, including an explicit exemption for all water related measures from the investment provisions of NAFTA.
2. The negotiation of an International Agreement on Water Sovereignty that would explicitly recognize the sovereign authority of both Canada and the US to ban water exports and explicitly take precedence over Canadian trade and investment obligations in the event of conflicts with them.

Protecting Water is More Important than Protecting NAFTA

It is discouraging that the federal government appears willing to abandon its responsibilities to steward Canadian water resources rather than seek amendments to the trade agreements that it now concedes drastically limit its options to do so. Instead it is attempting to finesse those trade constraints by adopting a strategy that is very unlikely to survive a trade challenge of foreign investor claim.

It is critical for Canadians to make their views known about whether they believe that sacrificing public control over water resources is a reasonable price to pay for preserving the federal government's trade agenda.

To learn more about this issue please visit our web-site: www.wcel.org or contact Steven Shrybman at sshrybman@wcel.org.