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## Notes

# Water Wars: Canada's Upstream Battle to Ban Bulk Water Export

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### INTRODUCTION

"[T]he wars of the next century will be over water."<sup>1</sup> Over and over again it has been suggested that water will be the "oil" of the next century.<sup>2</sup> As fresh water resources are being depleted worldwide, businesses and governments are exploring opportunities to purchase water as a commodity.<sup>3</sup> In particular, people in arid regions of the United States, Asia and the Middle East are seeking to purchase water.

Canada is known for its abundant water resources. It is estimated that Canada contains up to twenty percent of the world's fresh water.<sup>4</sup> Since Canada's negotiation and signing of the North American Free Trade Agreement ("NAFTA" or the "Agreement"),<sup>5</sup> a controversy has been brewing over whether fresh water is an exception to the tradable goods covered by the

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1. WATER IN THE MIDDLE EAST: POTENTIAL FOR CONFLICTS AND PROSPECTS FOR COOPERATION 1 (Waltina Scheumann & Manuel Schiffler eds., 1998) [hereinafter WATER IN THE MIDDLE EAST] (quoting Ismail Serageldin, vice president of the World Bank in 1995).

2. See *id.* (citing former U.N. Secretary General Butros Butros Ghali, for his suggestion that the next war in the Middle East will be fought over water instead of oil).

3. See generally *Water, To Sell, or Not to Sell, Canada's H2O* "Water, Water Everywhere . . ." LONDON FREE PRESS, June 21, 1999, at C8, available at 1999 WL 19832556 [hereinafter *Water Everywhere*] (outlining foreign, especially U.S., interest in Canadian water).

4. See *Water Policy: There's Plenty Up North*, ECONOMIST, Jan. 23, 1999, at 26 [hereinafter *Water Policy*].

5. See North American Free Trade Agreement, Nov. 16-18, 1993, U.S.-Mex.-Can., 32 I.L.M. 289, 32 I.L.M. 605 [hereinafter "NAFTA"].

Agreement. With Canada taking legislative steps to ban bulk water export, particularly from the Great Lakes Region, some have questioned whether these efforts violate its obligations under international trade agreements, including NAFTA. Further, if water is exportable as a commodity, is that a sound way to manage the global water crisis? More specifically, is it justifiable to use the principle of national sovereignty to hoard a natural resource essential to human survival?

The first section of this Note will examine the global water situation, including a discussion of both Canadian and international water management and the applicable treaties. This section will also address the controversy associated with treating water and other natural resources as trade commodities. The second section will argue that since there is no comprehensive international water strategy, treating fresh water as a commodity is unreasonable and Canada's protective efforts to block the export of its water are justifiable. It will also suggest that the international community must continue to shift from thinking about water as a trade commodity to developing a binding policy that requires equitable distribution and utilization of water resources worldwide.

## I. WATER'S DUAL ROLE AS A NECESSITY AND A COMMODITY

### A. THE GLOBAL WATER SITUATION

On several levels, world use of fresh water is the cause of a complex global problem. Human water use has increased tenfold in the last hundred years and is approaching eighty percent of the volume of available fresh water.<sup>6</sup> Population growth and increased use only exacerbate this situation.<sup>7</sup> The World Bank estimates that by 2025 more than three billion people in fifty-two countries will face water shortages for drinking and sanitation.<sup>8</sup> Further, considering the lack of water resources in

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6. See Ranier Durth, *Transboundary Externalities and Regional Integration*, in *WATER IN THE MIDDLE EAST*, *supra* note 1, at 57 (citing D. MEADOWS ET AL., *DIE NEUEN GRENZEN DES WACHSTUMS* 79 (1992)).

7. See *id.*

8. See Colin Nickerson, *Canada Wants Water for Itself: A Ban on Bulk Exports of Water is an Effort to Keep the Resource from Being a NAFTA Commodity*, *PORTLAND PRESS HERALD*, Mar. 5, 1999, at 2A, available at 1999 WL 4476715. Even though seventy percent of the Earth's surface is water, it is estimated that only five

some regions, it has been suggested that water will become a "major element that defines national security."<sup>9</sup> The security problem is particularly serious in the Middle East, where many water sources are shared, and use exceeds renewable supplies. Jordan and Israel have been able to satisfy about twenty percent of their water needs with their shared non-renewable ground water resources.<sup>10</sup> Similarly, Saudi Arabia's water reserves may be depleted within fifty years.<sup>11</sup> In the United States, the problem is most notable in the Southwest, an arid region with poor water supplies and increasing development.<sup>12</sup>

Scarcity is certainly an issue, but only one part of the problem. Misuse of water is a more critical issue. For example, in California the agricultural industry uses eighty percent of the state's water resources to grow "low-value and water-intensive" crops in the desert.<sup>13</sup> Another part of the problem is waste. Canadian residents, for example, consume over 300 liters per

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percent is potable. See *Ontario wants U.S. to Join Ban on Exports of Water*, LONDON FREE PRESS, Oct. 15, 1999, at A10, available at 1999 WL 25338108.

9. Jörg Barandat & Aytül Kaplan, *International Water Law: Regulations for Cooperation and the Discussion of the International Water Convention*, in WATER IN THE MIDDLE EAST, *supra* note 1, at 12.

10. See Jochen Renger, *The Middle East Peace Process: Obstacles to Cooperation over Shared Waters*, in WATER IN THE MIDDLE EAST, *supra* note 1, at 50. On the other hand, some have noted the reluctance of warring nations to attack water resources in times of armed conflict, perhaps because countries are aware that retaliation against their own water resources could prove insurmountable. See Joseph W. Dellapenna, *Treaties as Instruments for Managing Internationally-Shared Water Resources: Restricted Sovereignty vs. Community of Property*, 26 CASE W. RES. J. INT'L L. 27, 31 (1994). Also, there is a fear that if a country's water resources are destroyed in conflict, the country losing the water will have no incentive to negotiate peace, as they must continue fighting for survival. *Id.* at 30.

11. See Martin O'Malley & Angela Mulholland, *Canada's Water*, CBC News Online, at <http://www.cbcnews.ca/news/indepth/water> (last visited Sept. 14, 1999).

12. It has, however, been suggested that the water crisis in the U.S. is really only a crisis over the availability of cheap water, and if water were cheaper, conservation would be less common. See Scott Phillip Little, *Canada's Capacity to Control the Flow: Water Export and the North American Free Trade Agreement*, 8 PACE INT'L L. REV. 127, 129 n.15 (1996) (citing RICHARD C. BOCKING, CANADIAN WATER: A COMMODITY FOR EXPORT? 5 (1986)).

13. Marq de Villiers, *Whose Water Is It? When a Sault Ste. Marie Company Wanted to Export Great Lakes Water to Asia Last Year, It Triggered an Argument Over Who Owned the Water. Despite all the Fuss, the Short Answer May Be: No One*, LONDON FREE PRESS, Aug. 21, 1999, at F3, available at 1999 WL 21943098 (quoting an editorial in Toronto's GLOBE AND MAIL); see also Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AM. J. INT'L L. 384 (1996) (arguing that there is enough water to meet present and future needs worldwide and that the real problem stems from poor distribution).

person every day.<sup>14</sup> Whether because of scarcity, misuse, waste, or a combination of those elements, it appears that water resources are not currently managed in a sustainable manner on the national or international level.<sup>15</sup>

## B. CANADA'S WATER RESOURCES

Canada is known for its abundant natural resources. With respect to water, there is widespread agreement that Canada contains about twenty percent of the world's fresh water, with most of the water located in the Great Lakes.<sup>16</sup> Fresh water has been called Canada's most valuable and cherished natural resource.<sup>17</sup> In contrast, the United States has the equivalent of one-tenth of Canada's fresh water, but nearly nine times more people.<sup>18</sup>

Many controversial proposals have been made for bulk export of Canadian water.<sup>19</sup> The crux of the argument is whether Canada's water is already considered, or should be classified as, an international trade commodity. The Canadian Environmental Law Association ("CELA") does not believe that Canadian water should be treated as a commodity, preferring to characterize it as a "public trust" and an "essential need."<sup>20</sup> Some Canadian financial experts, however, have predicted that by 2010 Canada will be exporting large quantities of fresh water to the United States and around the globe.<sup>21</sup>

While CELA is concerned with the environmental impacts of bulk water exportation, the organization does not believe it

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14. See Christine S. Stewart, *We Can't Waste A Drop of Water*, TORONTO STAR, July 7, 1999, available at 1999 WL 21018884.

15. See, e.g., *Water Policy*, supra note 4, at 29 (describing Canada's water management as inefficient, and suggesting that up to sixty percent of Canadian water is wasted).

16. See *id.* at 26. But cf. de Villiers, supra note 13 (arguing that such estimates are inaccurate and that it is actually closer to six percent).

17. See *Water Export Cited as a Huge Issue*, LONDON FREE PRESS, Oct. 5, 1999, at E10, available at 1999 WL 25337036 (citing Canada's ambassador to the U.S., Raymond Chretien).

18. See *Water Policy*, supra note 4.

19. Bulk water removal is defined as removal by man-made diversions, including canals, tanker ships, trucks or pipeline; removal for bottling is not considered a bulk removal. See *Canadian Government: Strategy [to] Prohibit the Bulk Removal of Canadian Water, Including Water for Export*, M2 PRESSWIRE, Feb. 2, 1999, available at 1999 WL 12604553.

20. O'Malley & Mulholland, supra note 11.

21. See *id.*

will help water-poor countries.<sup>22</sup> If water is shipped to areas in need, it will only be affordable to the wealthy, who would be able to assure the quality and quantity of their own water supply, while at the same time ignoring local water pollution and waste.<sup>23</sup> Although this may be true, few dispute that Canada enjoys abundant water resources while people in many parts of the world fear shortages. The critical question then, is how these limited and essential resources should be managed.

## C. TRADING IN NATURAL RESOURCES

### 1. Trade Generally

Natural resources are bought, sold, depleted and destroyed by trade and consumption, both worldwide and in Canada, without much consideration of the effects. "Every barrel of oil and kilo of copper pulled from the ground and sold to foreigners is gone forever, yet these are respectable Canadian industries."<sup>24</sup> The Canadian economy relies heavily on the international export of non-renewable resources such as gold, natural gas, oil and iron ore.<sup>25</sup>

Fresh water is also currently traded globally. States including Singapore and Hong Kong must buy water from neighboring territories, and the Caribbean islands import fresh water by tankers or barges to satisfy the growing water demand resulting from increased tourism.<sup>26</sup> One Canadian corporation made a bulk water export deal with an Alaskan town to ship water to China.<sup>27</sup> An Internet exchange, developed by a company called Azurix, arranges the buying, selling, storing and transporting of water in the United States.<sup>28</sup> Azurix hopes to

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22. *See id.*

23. *See id.*

24. de Villiers, *supra* note 13.

25. *See* Nickerson, *supra* note 8.

26. *See* Ulrich Küffner, *Contested Waters: Dividing or Sharing?*, in *WATER IN THE MIDDLE EAST*, *supra* note 1, at 79.

27. *See Water Policy*, *supra* note 4, at 29. The Global Water Corporation of Vancouver is getting "closer and closer" to actually shipping the water from Sitka, Alaska. *See id.* Some Canadians think that this might inspire the United States to agree to remove water from the list of NAFTA tradable goods because this is American water up for grabs. *See id.*

28. *See* Eric Reguly, *Bulk Water Exports Would Wash Jobs Away*, *GLOBE AND MAIL* (Toronto), Feb. 12, 2000, at B10. Azurix is a water resources company controlled by Enron, a \$50 billion pipeline company. *See id.* Enron wants "to do to water what it did with power." *Id.* Azurix has no business in Canada at this time,

extend the service to the global marketplace, perhaps including Canada.<sup>29</sup> Canada already has a booming industry for bottled water exports. In 1998, Canada sent 272 million liters of bottled water to the United States, and thirty-nine percent of "extracted" Canadian water is sold internationally.<sup>30</sup> This is significant because bottled water is recognized as a tradable commodity under NAFTA, and therefore has an impact on Canada's fresh water resources.

## 2. Trade Under NAFTA

NAFTA governs trade between Canada, Mexico and the United States, and was created with the intention of enhancing market access for goods traded within North America.<sup>31</sup> The Agreement functionally replaced the earlier Canada-U.S. Free Trade Agreement ("FTA").<sup>32</sup> Trade between the United States and Canada has substantially increased since the signing of NAFTA.<sup>33</sup> For example, between 1994 and 1998, exports to New England from Canada rose forty percent and exports from New England to Canada increased sixty-two percent.<sup>34</sup>

NAFTA covers all goods absent a stated exception.<sup>35</sup> This system is called a "negative listing process" and creates substantial obligations for the Signing Parties.<sup>36</sup> Nonetheless, Mexico refused to allow the Agreement to cover its energy

but an executive has said that access to Canadian water is part of the long-term plan. *See id.*

29. *See id.*

30. *See* Martin Mittelstaedt, *Bottled Water Gushing South: Canada Gets Little in Return*, GLOBE AND MAIL (Toronto), Sept. 22, 1999, at A8.

31. *See* BARRY APPLETON, NAVIGATING NAFTA: A CONCISE USER'S GUIDE TO THE NORTH AMERICAN FREE TRADE AGREEMENT 23 (1994).

32. *See id.* at 4; *see also* Free Trade Agreement, Dec. 22, 1987, U.S.-Can., 27 I.L.M. 281 (1988).

33. *See* Deborah Turcotte, *Canada May Put Limit on Water: State Province Heads Convene*, BANGOR DAILY NEWS, Oct. 5, 1999, available at 1999 WL 19809056.

34. *See id.*

35. Goods are defined in NAFTA, art. 201, as "domestic products as these are understood in the General Agreement on Tariffs and Trade or such goods as the Parties may agree, and includes originating goods of that party." *See* NAFTA, *supra* note 5, 32 I.L.M. at 298. The General Agreement on Tariffs and Trade contains a tariff item for water: "waters, including natural or artificial waters and aerated waters, not containing added sugar or other sweetening matter not flavouring; ice and snow." *See* APPLETON, *supra* note 31, at 4 (citing Harmonized Commodity Description and Coding System, GATT, BISO, 24 Supp. 5 (1998)); *see also id.* at 201 (arguing that "one must conclude that natural water will be treated as a good under the NAFTA, even when it is in its natural state.").

36. *See id.* at 16.

resources, particularly oil, blocking any foreign investment in that industry.<sup>37</sup> Canada similarly placed exceptions on cultural industries, such as media, magazines and movies.<sup>38</sup> None of the Parties, however, made such an exception for fresh water. Interestingly, some suggest that the Canadian government intended to exempt water, assuming it had been addressed in the Agreement.<sup>39</sup>

While there is no specific reference to fresh water as an exception under the Agreement, it arguably falls in as an exception by implication. Some have argued that NAFTA's incorporation of a list of exceptions from Article XX of the General Agreement on Tariffs and Trade (GATT)<sup>40</sup> could be interpreted to include an exception for water. The GATT list does not, in fact, expressly include water. Instead, the list includes exceptions for legislative measures "relating to the conservation of exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption."<sup>41</sup> Another provision allows measures "to preserve certain commodities in short supply."<sup>42</sup> A third provision permits the adoption by Parties of measures

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37. This was a disappointment for the United States, which may have hoped to gain access to those resources in order to reduce dependence on the Middle East for oil. See Sidney Weintraub, *The North American Free Trade Agreement as Negotiated: A U.S. Perspective*, in *ASSESSING NAFTA: A TRINATIONAL ANALYSIS* 8 (Steven Globerman & Michael Walker eds., 1993). The exception was accepted because of a provision in Mexico's Constitution prohibiting such foreign investment in oil resources. See MEX. CONST. art. 27, para. 4.

38. See NAFTA, *supra* note 5, annex 2106, 32 I.L.M. at 702 (incorporating these exceptions as listed in the Canada-U.S. Free Trade Agreement's art. 2012). These restrictions were based on Canada's concern over cultural sovereignty and Canada's proximity to the American cultural market. See APPLETON, *supra* note 31, at 189.

39. This includes Pat Carney, Canada's trade minister involved in NAFTA negotiations. See de Villiers, *supra* note 13. There is further support for this proposition in the Canadian government's NAFTA Implementation Act, in which Parliament included language preventing NAFTA from reaching water policy. See APPLETON, *supra* note 31, at 202. This statement may give some indication of how Canada feels about the subject, but is only a matter of domestic law and is not binding on the Parties. *Id.*

40. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Marrakesh, Apr. 15, 1994, 33 I.L.M. 1125; General Agreement on Tariffs and Trade, in 1995 DOCUMENTS SUPPLEMENT TO LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (John H. Jackson et al. eds., 3d ed. 1995) [hereinafter GATT].

41. GATT, *supra* note 40, art. XX (e). See also APPLETON, *supra* note 31, at 158; NAFTA, *supra* note 5, art. 2101, 32 I.L.M. at 699.

42. APPLETON, *supra* note 31, at 159; GATT, *supra* note 41, art. XX (j).



“necessary to protect human, animal or plant life or health.”<sup>43</sup> It is important to note that under NAFTA, however, Parties are restricted from imposing export taxes unless similar charges are placed on the same goods sold within its domestic market.<sup>44</sup>

One progressive feature of NAFTA is the opportunity for private individuals, as investors, to bring claims against NAFTA Parties for breaching obligations under NAFTA’s investment chapter.<sup>45</sup> Some suggest that these legal rights accorded to investors are the greatest threat to Canada’s water resources.<sup>46</sup> Their argument basically claims that if even one company were allowed to export water from Canada, water would become a commodity subject to international trade obligations.<sup>47</sup> Chapter 11 of NAFTA magnifies this concern because once a permit has been issued Canada may be precluded from denying similar permits to others regardless of the quantity they seek to export.<sup>48</sup> Several commentators argue that banning the sale of water has the same effect of making water a commodity.<sup>49</sup> Perhaps that is why some prefer to label this controversy as an issue of environmental concern rather than a trade issue.<sup>50</sup>

The exportation of water under NAFTA is a subject of considerable controversy in Canada. One expert suggests that while NAFTA is broad enough to include natural surface and ground fresh water, the Parties could nevertheless ban water exports.<sup>51</sup> However, the Party instituting the ban could expose itself to challenges by NAFTA investors and their governments, which could result in damage suits or trade retaliation.<sup>52</sup>

Other important procedural provisions of the Agreement have an important impact on its application. First, although the

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43. GATT, *supra* note 40, art. XX (b).

44. See APPLETON, *supra* note 31, at 27. This international trade principle is known as “national treatment,” and prevents countries from favoring domestic companies over foreign corporations.” Jon Geddes, *Should Canada Sell its Most Precious Resource? Water Wars*, MACLEAN’S, Mar. 6, 2000, at 20.

45. See APPLETON, *supra* note 31, at 149. This contrasts sharply with the traditional characteristic of international law whereby only States have standing in international legal disputes. *See id.*

46. See Little, *supra* note 12, at 145.

47. See Heather Scoffield, *Newfoundland Gives Support for National Water-export Ban*, GLOBE AND MAIL (Toronto), Oct. 2, 1999, at A6.

48. See de Villiers, *supra* note 13.

49. *See id.*

50. See *Water Everywhere*, *supra* note 3, at C8. Maude Barlow of the Council of Canadians predicts that such a disguise for the issue will fail. *See id.* She calls for an amendment to NAFTA banning water exports. *See id.*

51. See APPLETON, *supra* note 31, at 205.

52. *See id.*

Agreement is now restricted to the North American region, there is a provision for accession by other States.<sup>53</sup> Second, any Party to the Agreement may withdraw with a six-month notice to the other Parties.<sup>54</sup> Another important feature of NAFTA is that, unless explicitly stated otherwise, NAFTA essentially trumps all other international agreements.<sup>55</sup> All of the exceptions listed are international environmental agreements, addressing endangered species, the ozone layer, hazardous waste, and environmental protection of the Mexican-U.S. border.<sup>56</sup> The Parties can modify this list at any time.<sup>57</sup>

Further, NAFTA's inclusion of environmental issues is somewhat revolutionary for an international trade agreement.<sup>58</sup> With regard to such agreements, observers are often concerned that national efforts to exclude certain products for environmental reasons are really motivated by protectionism and hopes of creating a trade barrier.<sup>59</sup> In addition to environmental references in the Agreement itself,<sup>60</sup> a side agreement specifically addresses environmental issues related to NAFTA.<sup>61</sup>

#### D. WHY IS WATER DIFFERENT?

Perhaps the reason for this controversy is simply that water

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53. NAFTA, *supra* note 5, art. 2204, 32 I.L.M. at 702; *see* APPLETON, *supra* note 31, at 167 (suggesting that there are several States that are interested in joining the Agreement).

54. NAFTA, *supra* note 5, art. 2205, 32 I.L.M. at 703; *see* APPLETON, *supra* note 31, at 168.

55. NAFTA, *supra* note 5, art. 103, 32 I.L.M. at 297; *see* APPLETON, *supra* note 31, at 20.

56. NAFTA, *supra* note 5, art. 103, 32 I.L.M. at 297; *see* APPLETON, *supra* note 31, at 20.

57. NAFTA, *supra* note 5, art. 104, 32 I.L.M. at 298.

58. *See* APPLETON, *supra* note 31, at 191 (declaring NAFTA to be the "first international trade agreement to deal with substantive environmental issues").

59. *See* David A. Wirth, *Government by Trade Agreement*, in JOINING TOGETHER, STANDING APART: NATIONAL IDENTITIES AFTER NAFTA 113 (Dorinda G. Dallmeyer ed., 1997). This is addressed in GATT, *supra* note 40, art. XX.

60. *See* Robert A. Pastor, *NAFTA's Green Opportunity*, in ASSESSMENT OF THE NORTH AMERICAN FREE TRADE AGREEMENT 19 (Ambler H. Moss, Jr. ed., 1993) (stating that three of fifteen objectives listed in the Agreement's preamble address the environment, including strengthening the development and enforcement of environmental laws and regulations, promoting sustainable development and implementing the Agreement consistent with environmental protection and conservation).

61. North American Agreement on Environmental Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480.

is different from other natural resources. While most people are familiar with issues relating to water conservation and water quality, the issue of scarcity may be most critical due to the fact that water is a limited resource. The Council for Hemispheric Affairs points out that the replacement rate of water reserves is impossible to calculate.<sup>62</sup> Others suggest that only about one percent of Great Lakes water is replaced naturally every year by rainfall or feeder rivers, and that the other ninety-nine percent is "fossil water" from the melting of glaciers.<sup>63</sup> If rainfall is the replacement source, there could be potential problems with increasing pollution and rising toxicity due to acid rain.<sup>64</sup>

The removal of water in bulk quantities, combined with the slow or perhaps nonexistent replacement rate, results in important, although uncertain, environmental consequences. First, environmentalists are concerned about damage to the ecosystem in regions where water is removed in bulk.<sup>65</sup> They argue that maintaining ecosystems is critical to promoting sustainable development. In fact, several international environmental agreements already address that issue and support the protection of such areas. These agreements include the Convention on Wetlands<sup>66</sup> and the Convention on Biological Diversity.<sup>67</sup> Second, bulk water removal may not allow water levels to maintain their natural condition. For example, experts suggest that due to other causes the Great Lakes are already at their lowest water level in thirty-four years, the environmental effects of which are uncertain.<sup>68</sup> Others express great concern

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62. See *Water Policy*, *supra* note 4.

63. See de Villiers, *supra* note 13.

64. See O'Malley & Mulholland, *supra* note 11 (citing a report by the Swiss Federal Institute of Environmental Science stating that rainfall in Europe is full of toxic pesticides making it too dangerous to drink). North America has the same problem. See *id.*

65. See *id.* (suggesting that lower water levels will result in a greater disturbance of highly contaminated sediments in shallow harbors and channels, and reduced dilution of polluted waters).

66. Convention on Wetlands of International Importance, Feb. 2, 1971, 996 U.N.T.S. 245.

67. United Nations Conference on Environment and Development: Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (entered into force Dec. 29, 1993) [hereinafter: Convention on Biological Diversity]. The Convention aims at conservation and sustainable use of biological diversity, equitable sharing of its benefits, and the regulation of biotechnology. See PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 249 (7th ed. 1997).

68. *Canadians Organize Against Water Exports*, Environment News Service, at <http://ens.lycos.com/ens/dec98/1998L-12-15-01.html> (Dec. 15, 1998). *But see* de Villiers, *supra* note 13 (suggesting that the water levels were at excessively high in

over what will happen to an already stressed ecological system if water is removed in bulk for commercial purposes. Third, questions have arisen about the unknown impacts on the environment. It could be risky to permit bulk export without scientific knowledge of the long-term consequences.<sup>69</sup> Along those lines, the thrust of Canada's concern may be fear that, once trade in bulk water begins, it will be unstoppable. This is perhaps based on the questionable status of water under international trade agreements and because companies involved in trade may have the power to exert political influence to protect their interests.<sup>70</sup>

#### E. CANADA'S RECENT EFFORTS TO BAN BULK WATER EXPORT

In reaction to commercial export efforts, Canada invoked its sovereign rights and imposed a temporary moratorium on the bulk export of its water.<sup>71</sup> In September 1999, Canada announced its intention to introduce national legislation that would prohibit large-scale exports of freshwater. The proposed ban would apply to bulk exports by pipeline, tanker and truck, but not to bottled water.<sup>72</sup> Canada also called for legislation specifically to address bulk water exports from the Great Lakes.<sup>73</sup> This legislation was introduced in November 1999.<sup>74</sup> Part of the proposal called for a voluntary national accord prohibiting bulk water removal from major drainage basins, whether for export or otherwise.<sup>75</sup> Five provinces, however, initially rejected the idea of a voluntary national accord.<sup>76</sup>

1977 and that there has been little change since then).

69. See Stewart, *supra* note 14.

70. See Reg Gilbert, *This Is No Time To Tread Water*, LONDON FREE PRESS, Oct. 6, 1999, at A15, available at 1999 WL 25337098.

71. See Anthony DePalma, *Free Trade in Fresh Water? Canada Says No and Halts Exports*, N.Y. TIMES, Mar. 8, 1999, at A9.

72. See Canada: *Government decides against bulk water exports*, MINNEAPOLIS STARTRIB., Feb. 11, 1999, at A4, available at 1999 WL 7485671.

73. See *id.* The ban also calls for diplomatic steps with the United States. See *id.*

74. See David Ljunggren, *Canada to Turn off Tap on Bulk Water Exports*, SEATTLE TIMES, Nov. 23, 1999, at A2. Canadian Foreign Minister Lloyd Axworthy describes that by banning bulk shipping, rather than a ban on exports, Canada is ensuring that fresh water is to be protected and regulated in its natural state before it becomes an export issue. See *id.* This legislation was introduced as amendments to the International Boundary Waters Treaty Act in Parliament. See Laura Eggertson, *Ottawa Acts to Keep Bulk Water at Home*, TORONTO STAR, Nov. 23, 1999, available at 1999 WL 24005058.

75. See Eggertson, *supra* note 74.

76. "Its all for one in blocking the export of bulk water [:] Jurisdictional

Although Canada's federal government is trying to garner nationwide support for the national legislation, water and natural resources fall under provincial, not federal, jurisdiction.<sup>77</sup> While similar bans were enacted in some provinces, including British Columbia and Alberta,<sup>78</sup> the Council of Canadians has expressed concern that the remaining provinces may not follow suit.<sup>79</sup> The Newfoundland government recently gave "conditional approval" for the annual removal of fifty-two billion liters from a spring-fed lake for bottling and international export.<sup>80</sup> The ban adopted in Quebec provides exceptions allowing water transfers for bottling and electricity production.<sup>81</sup> Further, all of the provinces were expected to sign a federal agreement regarding such a ban in November 1999, but this did not happen.<sup>82</sup> As for provincial bans, the Alberta Water Act took effect on January 1, 1999. It demonstrates a commitment to sustaining Alberta's water resources for present and future needs. The Act specifically prohibits bulk water export to the United States.<sup>83</sup> Some have suggested that the solution to the water export problem could be found in a regional Canadian approach instead, since provincial governments are more accountable to public concern and more

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Disputes shouldn't get in the way of an effective federal-provincial plug," *GLOBE AND MAIL* (Toronto), Dec. 2, 1999, at A18. Interestingly, British Columbia's decision to reject was based on a perception that the wording was "too lax and would compromise B.C.'s own protection." *Id.* Alberta and Quebec, in contrast, do not want Ottawa telling them what to do with their "own water." *Id.*

77. See *Canadians Organize Against Water Exports*, *supra* note 68; APPLETON, *supra* note 31, at 16 (suggesting that since the provinces are not Parties to NAFTA they are under no direct obligation to follow its terms).

78. See *Canada Intends to Ban Bulk Exports of Its Water*, *WALL ST. J.*, Feb. 11, 1999, at A22.

79. One Month After Federal Announcement, State of Canada's Water as Precarious as Ever, Council of Guardians Media Release, <<http://www.canadians.org/release66.html>> (last visited Sept. 14, 1999).

80. See *Water Export Cited as a Huge Issue*, *supra* note 17. In this case, the McCurdy Group has asked for permission to export bulk water from Gisborne Lake. The Newfoundland government believes that bulk water exports should be banned in the future, but also believes that it cannot apply such a ban retroactively. See Scofield, *supra* note 47. Newfoundland announced that it will introduce legislation in Autumn 1999 to ban bulk water shipments. See Eric Reguly, *Water Fight with U.S. Has Just Begun*, *GLOBE AND MAIL* (Toronto), Oct. 23, 1999, at B2.

81. See Heather Scofield, *Quebec Imposes Ban on Water Exports*, *GLOBE AND MAIL* (Toronto), Sept. 4, 1999, at A5.

82. See *Water Export Cited as a Huge Issue*, *supra* note 17.

83. See Canadian Water Resources Association, "New Water Act in Alberta to man[age], conserve and protect Alberta's water resources," at <<http://www.cwra.org/new/arts/abwatact.html>> (last visited Oct. 26, 2000).

sensitive to local needs and problems related to water.<sup>84</sup>

Previous attempts to control and manage fresh water resources in Canada, however, were not successful. For example, Ontario's 1989 Water Transfer Control Act was never proclaimed, its Surface Water Transfer Policy (which expresses opposition to water transfers) carries "no legal weight," and its Water Resources Act of December 1998 has not been approved.<sup>85</sup>

Current attempts to create a national ban on water exports are most likely a direct result of proposals and agreements to export water already pending throughout Canada. In fact, several agreements have recently been made to export bulk water from Canada to other countries. Two of the disputes concern water export to Asian nations, with one making a claim against Canada under NAFTA. In that case, an American company, Sun Belt Water, filed suit in October 1999 against the Canadian federal government and the British Columbian government under NAFTA's Chapter 11 investor provisions, seeking \$10.5 billion in damages for not being allowed to buy water via bulk shipments because of a ban in British Columbia.<sup>86</sup> Sun Belt claimed that Canadian companies can fill tanker trucks for transport within the province for bottling, but foreign companies cannot.<sup>87</sup> Another case involved a Canadian company, Nova Group, which obtained a permit to export 600 million liters of Lake Superior water annually to Asia.<sup>88</sup> The permit was revoked when the Ontario government passed new

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84. See Little, *supra* note 12, at 154 (arguing that Article 1108 of NAFTA, under which Parties can set out existing, non-conforming measures maintained by a state or province, preserves provincial autonomy over items within provincial jurisdiction).

85. See O'Malley & Mulholland, *supra* note 11.

86. See Heather Scoffield, *B.C. Water Export Ban Brings U.S. Lawsuits: California Firm to Use NAFTA to Seek \$220-million (U.S.) in Damages from Ottawa*, GLOBE AND MAIL (Toronto), Dec. 9, 1998, at B1. The Sun Belt case stems from a 1990 joint venture with a Vancouver company to export water from British Columbia to California in supertankers. See *id.* The company is "demanding restoration of a water-export license cancelled by the B.C. government in 1991, and for compensation for lost business opportunities." *Damage Claim filed over water export*, LETHBRIDGE HERALD (Ottawa), Oct. 23, 1999, at 5, available at 1999 WL 24161933.

87. See Scoffield, *supra* note 86. Sun Belt claims that this violates NAFTA because provinces are not allowed to stop the international free flow of goods. See *id.*

88. See Heather Scoffield, *Firm Seeks Return of Water Export Permit: Nova Group Wants Controversial License Back Despite Ontario's Ban on Bulk Fresh Water Sales*, GLOBE AND MAIL (Toronto), Aug. 29, 1998, at B2, available at 1998 WL 24160668. The Foreign Ministry issued a permit to a Canadian company, the Nova Group, to export water to Asia. See *Canadians Organize Against Water Exports*, *supra* note 68.

rules banning the bulk export of water. The Ontario government was concerned that approving the permit would set a precedent in international trade law, with the potential of making all of Canada's fresh water resources available for exploitation by foreign corporations.<sup>89</sup>

While Canada's national efforts are significant, the terms of the Boundary Waters Treaty<sup>90</sup> seemingly created an obligation for Canada and the United States to cooperatively address water exports. In August 1999, the International Joint Commission ("IJC"), established by the Boundary Waters Treaty, recommended a six-month moratorium on federal, state, and provincial legislation in both the United States and Canada, preventing them from authorizing or permitting any new bulk sales or removals of surface or groundwater from the Great Lakes Basin, and suggesting they use caution with consumptive uses.<sup>91</sup>

Since then, the IJC has completed its assessment of transboundary water management, including visits to 12 cities in the Great Lakes Region for public hearings.<sup>92</sup> In March 2000, the IJC released its final report on the protection of the waters of the Great Lakes, modifying and adding to the preliminary findings. The IJC made over 20 conclusions and a number of recommendations. Several of its conclusions are important to this analysis: (1) water is a "critical resource" essential for "all forms of life and for a broad range of economic and social activities;" (2) "conservation measures can and should minimize the amount of water that is withdrawn and consumed in the Great Lakes Basin;" (3) "[r]emovals of water from the Basin reduce the resilience of the system and its capacity to cope with future, unpredictable stresses;" (4) "there is never a surplus of water in the Great Lakes system;" (5) water quantity and quality are "inextricably linked;" (6) a number of factors, including global population growth or climate changes, may affect the demand for water diversions and other bulk removals, but geography and economics may reduce those demands; and (7) "[t]here is little reason to believe that proposals for major

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89. See Scoffield, *supra* note 88.

90. Boundary Waters Treaty, Jan. 11, 1909, U.S.-U.K., 36 Stat. 2448.

91. See *IJC Recommends Moratorium on Bulk Removals and Sales of Great Lakes Water*, IJC Media Release, at <http://www.ijc.org/news/cde18081999e.html> (Aug. 18, 1999) [hereinafter *IJC Recommends*].

92. See *Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States*, International Joint Commission, at <http://www.ijc.org/boards/cde/finalreport/finalreport.html> (Mar. 15, 2000).

diversions will become economically, environmentally or socially feasible in the foreseeable future.”<sup>93</sup> However, the IJC also concluded that Canada and the United States could protect their water resources and preserve the Great Lakes basin ecosystem without violating the FTA, NAFTA or GATT.<sup>94</sup> The IJC conclusively stated “Canada and the United States cannot be compelled by trade laws to endanger the waters of the Great Lakes ecosystem.”<sup>95</sup>

#### F. INTERNATIONAL WATER LAW

Several aspects of international law address environmental issues, including those related to fresh water. First, some customary principles of international law apply to water. One of these principles is that a state’s sovereign rights as to natural resources are only limited by the requirement not to cause “significant environmental harm in other states.”<sup>96</sup> Further, international law recognizes the sovereign right of states to exploit their nation’s natural resources according to their own national policies.<sup>97</sup> Also, international law includes a general requirement for riparian nations to share equally in the fresh water resources on their borders.<sup>98</sup>

The international community has also attempted to codify measures addressing water management and environmental protection. These international considerations of water protection date back to 1966, when the International Law Association adopted the Helsinki Rules setting forth recommendations for “equitable utilization” of international

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93. See *id.* at 36-38 (quotations omitted).

94. See *id.* at 40.

95. See *id.* at 41. The report states that measures taken to protect water resources and preserve the integrity of the Great Lakes Basin ecosystem are not prohibited, so long as there is no discrimination against persons from other countries in their application, and so long as water policies are clearly articulated and consistently implemented so that “undue expectations” are not created. *Id.*

96. Jutta Brunnee & Stephen J. Toope, *Environmental Security and Freshwater Resources: Ecosystem Regime Building*, 91 AM. J. INT’L L. 26, 28 (1997). This principle is supported by a U.N. Resolution on Permanent Sovereignty over Natural Resources, adopted most recently on December 17, 1973. See G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9030 (1973), 13 I.L.M. 238.

97. See *United Nations Conference on the Human Environment: Final Documents*, Principle 21, U.N. Doc. A/CONF.48/14, 11 I.L.M. 1416 (1972); MALANCZUK, *supra* note 67, at 242.

98. See Brunnee & Toope, *supra* note 96, at 37 (suggesting that these principles are inadequate to promote environmental security).



fresh water resources.<sup>99</sup> The Helsinki Rules have been criticized for failing to sufficiently define water utilization or consumption, establish binding criteria for equitable utilization or fix clear priorities among different kinds of utilization.<sup>100</sup>

A decade later, the United Nations held its first water conference and adopted the Mar Del Plata Action Plan.<sup>101</sup> This was the first intergovernmental document to call for equitable management of international fresh water resources.<sup>102</sup> In 1992, the International Conference on Water and the Environment convened, giving rise to Agenda 21, which is considered the global environmental "action plan" for the twenty-first century and includes a chapter on managing fresh water resources.<sup>103</sup> In May 1997, the U.N. General Assembly adopted the International Water Convention, which set up rules for the "equitable and reasonable utilization of international fresh water resources."<sup>104</sup>

Part of the problem with the field of international environmental protection is that unless immediate action is required the lengthy and involved processes necessary for creating international environmental standards may not be effective.<sup>105</sup> As a result, global environmental norms created under the international legal system may often be "too little and too late." By the time an international environmental agreement is created new research or technology may have rendered that solution obsolete.<sup>106</sup> Perhaps more important, the efficacy of any international agreement is limited by the extent of national

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99. WATER IN THE MIDDLE EAST, *supra* note 1, at 1.

100. See Barandat & Kaplan, *supra* note 9, at 16.

101. See WATER IN THE MIDDLE EAST, *supra* note 1, at 2.

102. *Id.*

103. *Id.* at 2. However, the obligations of Agenda 21 are non-binding, see MALANCZUK, *supra* note 67, at 250. Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, 31 I.L.M. 1312.

104. See WATER IN THE MIDDLE EAST, *supra* note 1, at 2. Convention on the Law of the Non-navigational Uses of International Watercourses, May 21, 1997, 36 I.L.M. 700 [hereinafter "Water Convention"].

105. See MALANCZUK, *supra* note 67, at 245 (suggesting that even short periods may be too long for an effective response to an environmental problem). For instance, when the Montreal Protocol entered into force, the CFC reduction rates established in the instrument were already out of date. See *id.*

106. To deal with this problem, many environmental treaties are being created as frameworks that take account of changing needs and information. See, e.g., United Nations Conference on Environment and Development: Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 (Article 7 establishes a Conference of the Parties for ongoing review and decision-making).

participation and acceptance.

A discussion of international obligations is not complete without a discussion of sovereignty.<sup>107</sup> National possession and control of resources under the guise of national sovereignty inevitably comes into conflict with the concept of global equitable distribution. Absolute sovereignty over natural resources is not appropriate for determining water rights or responsibilities. For example, it has been suggested that the applicable law must shift from considering environmental degradation only when sovereign interests are threatened to evaluating each state's conduct in light of a global ecosystem approach.<sup>108</sup> Another source suggests devaluing the principle of sovereignty altogether and focusing instead on international solidarity with respect to water.<sup>109</sup> They argue for the fundamental importance of dealing with utilization rather than possession of water, because the concepts of possession and sovereignty "maintain an atmosphere that in the end generates conflict."<sup>110</sup> Undoubtedly, global sharing of water resources would fundamentally alter the current concept of water rights.<sup>111</sup> A team of lawyers from the United States and Canada recently drafted a legal opinion recommending that any regulation on water diversion must be nondiscriminatory and based on conservation and sustainable use of water resources.<sup>112</sup>

Water is likely to be the "oil" of the twenty-first century, with one key exception: while there are several alternative energy sources to oil, we do not yet know of reasonable alternatives to water for human survival. With the above discussion in mind, it seems clear that Canada may have made some serious mistakes regarding its water management policies. On the other hand, the international community as a whole has only recently taken concrete steps in the right direction. Nonetheless, there are reasonable alternatives for Canada and the international community that would give water higher

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107. The word "sovereignty" is used with a variety of meanings. It has been suggested that saying a state is sovereign really means that it is not a dependency of some other state. See MALANCZUK, *supra* note 67, at 17-18 (arguing that emphasis on sovereignty exaggerates state power and encourages abuse, but suggesting that the doctrine of sovereignty is losing ground in the West in the face of international interdependence).

108. See Brunnee & Toope, *supra* note 96, at 28.

109. See Barandat & Kaplan, *supra* note 9, at 25.

110. *Id.*

111. See Küffner, *supra* note 26, at 80.

112. See Martin Mittelstaedt, *Hard to Prevent Exports of Water, Lawyers Say*, GLOBE AND MAIL (Toronto), Oct. 15, 1999, at A8.

status than that of a trade commodity. A window of opportunity may still exist to establish a comprehensive international approach, in conjunction with national efforts, which would protect water resources from exploitation as an economic enterprise.

## II. CRAFTING A BETTER CANADIAN WATER POLICY

This section will first examine avenues that Canada should consider in addressing its water situation. The second part will tie Canada's water concerns to steps that must be taken internationally in order to reach a sustainable and equitable global solution.

### A. CANADA SHOULD FIGHT TO EXPRESSLY EXCLUDE FRESH WATER FROM NAFTA AND OTHER TRADE AGREEMENTS

Canada is facing a significant problem resulting from short- and long-term water mismanagement. Had Canada been proactive in addressing water issues prior to and during NAFTA negotiations, as Mexico was with its oil resources, the situation might be very different. However, Canada made a critical error by not making a specific exception for water in NAFTA.<sup>113</sup> Regrettably, Canada focused on the preservation of its culture, thus limiting its bargaining power to conserve its natural resources.<sup>114</sup> Mexico's decision to make a clear exception for its oil resources shows that the Canadian government could have taken steps to protect its own valued natural resource.

Nonetheless, Canada may still be able to argue for the exclusion of water from NAFTA. First, NAFTA's scope is broad. Thus, companies from the United States and Mexico will be able to take advantage of global water shortages. They could export water wherever it is needed, or wherever the price is the highest. Moreover, with other countries being considered as additional Parties to the Agreement, Canada's exposure to exploitation of its water resources might be greater than it thinks. As a result, it makes little difference that there are only three Parties to the Agreement.

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113. See *supra* text accompanying notes 35-39 for a discussion of Mexican and Canadian exceptions under NAFTA.

114. There are exceptions, however, from the Agreement's tariff schedule for fish and raw logs. See Reguly, *supra* note 80. One could argue that if fish are protected, water must be protected as well, in order to protect the habitat for the fish.

Second, no Canadian province has actually allowed bulk water export at this time. Until this happens, it is more credible to argue that water is not subject to NAFTA. In fact, provincial solidarity is increasingly backing the national ban, as contrasted with their earlier disagreements.<sup>115</sup> Because these resources are officially under provincial jurisdiction, this solidarity is a critical development. The Canadian provincial governments should deny any future permit requests and quickly resolve any permit applications or disputes that are pending. It is worth noting, however, that a Canadian company has already acquired the rights to export Alaskan water. One could argue that this move has already set up water as a commodity under the Agreement. Further, it is somewhat misleading to say that Canada wants to ban water export when it already exports large quantities of its water worldwide in bottles rather than in tankers, trucks and pipelines. At this time it appears as though the bottled water industry is looked at separately from discussions other forms of water removal. It would, however, make more sense to consider both of these issues simultaneously, as water removal holds all the potential consequences listed above, regardless of the vessel into which the water is placed for transport. The removal of all water in the aggregate should be the concern, and that includes water removed for bottling.

Finally, Canada could rely on the argument that water is excluded because of the list of exceptions from Article XX of GATT. For example, one Article XX provision addresses the conservation of exhaustible resources or resources in short supply, which includes water. However, Canada may be reluctant to rely on these provisions, as it may actually intend to reserve the financial benefits of inevitable water export for itself, considering the lucrative potential for profits from the bulk sale of water. In addition, any such measures invoked under these exceptions would require domestic use and conservation restrictions as well as such restrictions on other States.<sup>116</sup> If Canada were motivated by financial gain, rather

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115. As recently as March 1999, the Council of Canadians was concerned about provincial reluctance to "jump on board" that national moratorium and Quebec's refusal. See *One Month After Federal Announcement, State of Canada's Water as Precarious as Ever*, Council of Canadians Media Release, at <http://www.canadians.org/release66.html> (Mar. 10, 1999). *But cf.* Reguly, *supra* note 80 (noting that Newfoundland, the "last holdout" of the provinces, announced its decision to ban bulk water shipments in October 1999).

116. See *supra* text accompanying notes 40-44.

than environmental protection of water resources, domestic restrictions would not be effective. This is primarily because the trade agreements prohibit exceptions that disguise prohibited trade agreements or are otherwise acts of protectionism.<sup>117</sup>

If it is determined that water is included under NAFTA, and Canada goes ahead with the trade restrictions, Canada may open itself up to trade disputes and considerable financial liability for damage claims. Further, Canada may be liable to the companies who received permits that were later revoked, such as the Nova Group. This is not to say that Canada is unjustified in making this late effort to protect its water. To the contrary, this kind of effort is needed for proper management of the world's natural resources. Although a great deal can be accomplished through better management and less waste, those measures are not the entire solution.

Another way for Canada to protect its water resources would be to emphasize the environmental impacts of bulk water export. Because NAFTA is intended to be an environmentally friendly agreement, it would be plausible to argue that allowing bulk water export would violate the object and purpose of the Agreement, which could be viewed as violating international law.<sup>118</sup> However, this might be problematic since none of the international water agreements trump NAFTA at this time. On the other hand, perhaps the NAFTA Parties could modify the list of exceptions to include the 1997 Water Convention.

Another possibility that is more drastic would be to withdraw from the Agreement unless the other Parties agree to amend the Agreement to exclude water.<sup>119</sup> However, this approach runs the risk of admitting that water is not excluded from the Agreement, and should only be considered as a last resort. Also, this could be inconsistent because it is contrary to the reasons that the Agreement was signed in the first place: to

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117. See NAFTA, *supra* note 5; GATT, *supra* note 40. There is some speculation as to Canada's motives for excluding water, with one author suggesting that "Canada is less interested in keeping water permanently away from bulk buyers than devising a plan to circumvent the North American Free Trade Agreement and ensure that Canadian companies – not avaricious Americans – profit most." Nickerson, *supra* note 8.

118. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331, 8 I.L.M. 679.

119. While there has been no effort to amend the Agreement, the Parties made a joint and public statement on December 2, 1993, in which they stated that NAFTA creates no rights to the natural resources of any party unless water "in any form, has entered into commerce and become a good or product." See Little, *supra* note 12, at 140. See also *Water Everywhere*, *supra* note 3.

open and improve the trade market throughout North America. While withdrawal could have the effect of ensuring Canada's liability for claims prior to the amendment of the Agreement, the price would be small in comparison with the long-term environmental damage potential posed by bulk water export. Even if withdrawal from NAFTA is not a viable option, Canada should be careful not to enter into other international trade agreements that treat water the same way.

If national legislation banning bulk water export is the way to protect water resources, Canada should be cautious in drafting any such laws. One commentator suggests that the law must contain several key elements, including: (a) equal treatment for all NAFTA Party exporters so as not to violate NAFTA's Article 1102; (b) an environmental objective; and (c) the aim of regulating general water use and conservation.<sup>120</sup> These elements also cause some problems. For example, banning water export would take away potential bulk water exporters' rights to establish water export businesses. This loss might be unpopular in Canada, considering the lucrative nature of the export trade.<sup>121</sup> Further, as to national legislation, Canada would be wise to encourage similar national efforts in the other NAFTA countries, especially in the United States. While the Boundary Waters Treaty addresses the shared waters along the United States-Canadian border,<sup>122</sup> added protection of water along borders for similar policy reasons will ensure longer lasting security from the commodification of water. A further effort could involve establishing a Canadian water ministry to address the need for integrated water resource management.<sup>123</sup> While Canada's efforts are important, especially considering the abundance of water resources under its control, the international community also has a key role to play in ensuring future availability and access to fresh water resources for all states and all individuals.

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120. See Little, *supra* note 12, at 140.

121. *Id.*

122. See Boundary Waters Treaty, *supra* note 90.

123. See Ric Swihart, *Canadians Have Voice in Water Management*, LETHBRIDGE HERALD (Ottawa), Oct. 2, 1999, at 6, available at 1999 WL 24160668 (arguing that the bulk water problem is a result of fragmented governance and jurisdiction over Canadian water).

## B. ADDRESSING WATER SCARCITY AND MISMANAGEMENT WITH A COMPREHENSIVE TREATY STRESSING EQUITABLE DISTRIBUTION

Although Canada's resources are abundant at this time, there is little dispute that fresh water resources are both scarce and mismanaged worldwide.<sup>124</sup> Treating water as a trade commodity is not a sound way to manage the crisis on either national or international levels. In fact, the international community is as negligent as Canada in not addressing the water problem proactively and comprehensively, specifically as it relates to international trade.

International acceptance of changes in water law, stressing restricted sovereignty and equitable distribution of water, seems neither unreasonable nor impossible. In recent decades, comprehensive and flexible treaties have been created addressing very specific environmental problems, such as protection of the ozone layer, endangered species and biological diversity.<sup>125</sup> Only the International Water Convention of 1997 comes close to being a comprehensive agreement that addresses sustainable and equitable use of fresh water resources.<sup>126</sup> Since the long term effects of bulk water removal on the environment are still uncertain, it would be wise to employ the precautionary and preventative principles of international environmental law to ensure that more mistakes are not made in this area. Arguably, the needed treaty would require a mechanism for efficient amendment to the instrument as more information is gained.<sup>127</sup>

Because most environmental treaties recognize unlimited national sovereignty over natural resources, it is necessary to look at water from a different perspective. First, the U.N. Resolution declaring national sovereignty over natural resources is quite old, being last adopted in 1973, after repeated declarations every few years.<sup>128</sup> Things have changed with respect to the global water situation since 1973. While it may make sense to recognize unrestricted sovereignty over some

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124. See *supra* text accompanying notes 6-15.

125. See Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar.3, 1973, 12 I.L.M. 1085 [hereinafter CITES]; Convention on Biological Diversity, *supra* note 67. These agreements stress international principles such as equitable distribution, prevention and precaution.

126. Water Convention, *supra* note 104.

127. See Barandat & Kaplan, *supra* note 9, at 16.

128. G.A. Res. 3171, 28 U.N. GAOR Supp. No. 30, at 52, U.N. Doc. A/9030 (1973), 13 I.L.M. 238.

natural resources for purposes of development, water is simply different.

Also, because water resources tend to exist in developed rather than developing countries, the controversy between these nations as to development might not be triggered by a restriction on sovereignty. In fact, the potential challenge of convincing developed nations with abundant water resources to agree to share water equitably with developing nations would be paradoxical in light of the developed world's intense effort to convince developing nations to conserve and protect their own natural resources for environmental reasons.

The Convention on Biological Diversity establishes precedent for the creation of an international instrument that stresses equitable sharing of natural resources.<sup>129</sup> That treaty also takes into consideration the controversy between the developing and developed countries, by allowing these nations to share their resources and technology, as well as any benefits.

Also, this is not the first time there has been a suggestion to link trade restrictions to environmental preservation. The Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES) prohibits trade of certain species listed in the Convention. There, trade restrictions are identified as a logical approach to preventing exploitation of the world's natural resources. At the same time, it would be preferable not to reduce the protection of water to a trade commodity model.

### III. CONCLUSION

Water is not just another product. It should not be compared with other treasured and valuable natural resources for the very reason that it is essential for human survival. Canada is finally realizing the importance of its water resources and is attempting to protect them. While this is an important effort, one can still question Canada's motivation. Is the effort to ban bulk water exports driven by protectionist, environmentalist or economic concerns? It is unclear whether Canada is concerned with the international community's suggestion for equitable distribution of water. While restricted sovereignty is still a difficult and controversial concept for most

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129. Convention on Biological Diversity, *supra* note 67, art. 1 (stating the treaty objectives, which include the "fair and equitable sharing of the benefits arising out of the utilization of genetic resources").



nations, it is critical in the case of fresh water.

Individual states and the international community can and should continue efforts to better manage, protect and conserve water and the earth's other natural resources. However, in the case of water, it is not acceptable to hoard and protect a natural resource that is essential to the survival of human life under the principle of national sovereignty. Current predictions that water will be a major issue of national security in the future are probably accurate. Wars will not be fought over who wants power or which country has the best ideology, but over human survival and the need for fresh water. As one author put it, "exploitation of natural resources produces amenities marking the difference between poverty and wealth; but water is the life blood of existence."<sup>130</sup>

As a starting point, all nations should sign and ratify the International Water Convention to ensure a global solution to this problem. The Water Convention's framework structure may allow the solution to be reached sooner rather than later. Additionally, the world community should continue exploring alternatives to making water a commodity. A water conference, bringing together world leaders, water mavens and environmentalists, convened in March 2000 to "forge a global consensus around averting a water crisis . . . ."<sup>131</sup> This dialogue must continue. Otherwise, the water wars are just upstream.

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130. See William L. Griffin, *Great Lakes Diversions and Consumptive Uses In Historical International Legal Perspective*, 75 MICH. BAR J. 62, 66 (1996).

131. See Geddes, *supra* note 44, at 21. These are the comments of Canada's foreign aid official, Aly Shady. *Id.* The Conference took place in The Hague from March 17 to 22, 2000. World Water Forum, <<http://www.gci.ch/GreenCrossPrograms/waterres/sovereignty/thehague2000.html>> (last visited Oct. 26, 2000).