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Minister of Foreign Affairs

Ministre des Affaires étrangères

Ottawa, Canada K1A 0G2

The Honourable L'honorable
John Manley P.C., M.P. c.p., député

February 5, 2001

Le 5 février 2001

Dear Sir/Madam,

Madame, Monsieur,

I was pleased today to reintroduce in the House of Commons an *Act to Amend the International Boundary Waters Treaty Act* (IBWTA). The main element of the proposed amendments is to prohibit bulk removal of boundary waters out of their water basins, with principal effect on the Great Lakes. The Great Lakes and other boundary waters will now have protection from bulk removals under federal law. This is significant because the Great Lakes are of sufficient size to attract developers of bulk removal projects, including for the purposes of export, or diversions schemes.

Aujourd'hui, j'ai eu le plaisir de déposer encore une fois à la Chambre des communes la *Loi modifiant la Loi du Traité des eaux limitrophes internationales* (LTELI). Les amendements proposés visent principalement à interdire les prélèvements massifs d'eaux limitrophes des bassins hydrographiques, particulièrement dans les Grands Lacs. En vertu de la législation fédérale, les Grands Lacs ainsi que les autres eaux limitrophes bénéficieront dorénavant d'une protection contre les prélèvements. Il s'agit d'une mesure importante parce que les Grands Lacs sont assez vastes pour attirer des promoteurs de projets de dérivation ou de prélèvement massif de l'eau, notamment pour l'exporter.

The IBWTA is Canada's implementing legislation for the 1909 Canada-U.S. *Boundary Waters Treaty*. Through the Treaty, Canada and the U.S. are mutually obliged to protect natural levels and flows of waters shared by the two countries.

La LTELI est la loi canadienne de mise en œuvre du *Traité des eaux limitrophes* de 1909, en vertu duquel le Canada et les États-Unis ont l'obligation réciproque de protéger les niveaux et les débits naturels des eaux que les deux pays partagent.

News Release

February 5, 2001 (3:20 p.m. EST) No. 16

CANADA REINTRODUCES LEGISLATION

TO PROTECT THE GREAT LAKES FROM BULK WATER REMOVALS

John Manley, Minister of Foreign Affairs, today reintroduced amendments to the International Boundary Waters Treaty Act (IBWTA). The amendments will prohibit the bulk removal of water from Canadian boundary waters, including the Great Lakes.

"These amendments will protect the Great Lakes from bulk water removal under federal law," said Minister Manley. "We are taking a decisive step to ensure that this critical freshwater resource is protected for future generations."

The prohibition on removals will apply principally to the Great Lakes and other boundary waters, such as the international sections of the St. Lawrence River and Lake of the Woods in Ontario and the St. Croix and Upper St. John rivers in New Brunswick. Separate from the prohibition, the amendments introduced today will also set in place a licensing regime for boundary waters projects such as dams, obstructions or other works.

Environment Minister David Anderson said, "Prohibiting the bulk removal of this vital natural resource protects the ecosystems and communities that depend upon a sustainable supply of water."

The reintroduction of the amendments to the IBWTA is the last step in a three-part strategy to prohibit bulk water removals from all Canadian water basins, announced in February 1999. Last year, the International Joint Commission (IJC), at the request of Canada and the United States, completed a study and released a report that concluded that the ecological integrity of the Great Lakes needs protection. The recommendations make it clear that removals and diversions of water from the Great Lakes basin represent a permanent loss of water, and must be managed differently from uses of water within the basin. The IBWTA amendments are consistent with the IJC's conclusions and recommendations. In addition, the Minister of the Environment has been working with the provinces and territories to ensure that all of Canada's freshwater resources are protected. All provinces have already put in place or are developing legislation or policies that accomplish this goal.

Canada's border with the United States is formed, crossed or straddled by more than 300 lakes and rivers. The International Boundary Waters Treaty Act was passed by Parliament in 1911. It implements the 1909 Canada-U.S. Boundary Waters Treaty, which establishes principles and procedures for preventing or settling disputes, particularly regarding the quantity and quality of boundary waters between Canada and the United States.

- 30 -

A backgrounder is attached.

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Background

AMENDMENTS TO THE INTERNATIONAL BOUNDARY WATERS TREATY ACT

Canadians are looking to all levels of government to take action to assure the long-term security and integrity of Canada's freshwater resources. As we pass into the 21st century, federal, provincial and territorial governments need to co-operate to ensure a coherent and effective policy that preserves freshwater resources. The reintroduction of amendments to the International Boundary Waters Treaty Act (IBWTA) reaffirms Canada's commitment to act within its jurisdiction to prohibit bulk water removal.

What do the amendments do?

The main element of the proposed amendments to the IBWTA is to prohibit bulk removal of boundary waters (i.e. those shared between Canada and the U.S.) out of their water basins. With these amendments, the Great Lakes and other boundary waters will now have protection from bulk removals under federal law. This is significant because the Great Lakes are of sufficient size to attract developers of bulk removal – including for the purposes of export – or diversion schemes. The federal government is taking action within its jurisdiction to ensure that these incomparable freshwater resources, which belong to all Canadians, are protected from exploitation and environmental damage caused by the bulk removal of water.

Under the 1909 Canada-U.S. Boundary Waters Treaty and the IBWTA, the federal government has jurisdiction over boundary waters, such as the Great Lakes, in order to fulfill Canada's obligation under the Treaty not to affect unilaterally the level and flow of waters on the U.S. side of the boundary. The amendments would give the Minister of Foreign Affairs the authority to:

- impose a prohibition on removals of boundary waters out of their water basins. Exceptions will be considered, such as ballast water, short-term humanitarian purposes and water used in the production of food or beverages (e.g. bottled water); and
- introduce a licensing system, separate from the prohibition, formalizing a 90-year-old process under which the federal government and the International Joint Commission (IJC) have examined and approved certain projects, such as dams and obstructions, under the provisions of the Treaty. The licensing system would not cover ordinary municipal, industrial or agricultural

uses.

What about protecting all of Canada's water resources?

In February 1999, Canada announced a three-part strategy to prohibit the bulk removal of water out of all major Canadian water basins. Over the past two years there has been significant progress:

- Canada promised to take action within its jurisdiction by introducing the amendments to the IBWTA. This was done in November 1999. Today, the amendments have been reintroduced to the new session of Parliament.
- a proposal by the Minister of the Environment, in co-operation with the provinces and territories, to develop a Canada-wide accord to prohibit bulk water removals. This would apply to all waters. Each level of government would take appropriate action within its jurisdiction. All provinces have put into place or are developing legislation or regulations that accomplish this goal.
- Canada and the U.S. agreed to a joint reference to the IJC on consumptive uses, diversions and removals of Great Lakes waters, including for the purposes of export. The IJC's final report (Protection of the Waters of the Great Lakes, February 2000) concluded that the Great Lakes require protection, especially in the light of the uncertainties, pressures and cumulative impacts from removals, consumption, population and economic growth, and climate change. Recommendations for action to protect the ecological integrity of the Great Lakes Basin are directed by the IJC to all levels of government in Canada and the U.S. The IBWTA amendments are consistent with and supportive of the IJC's conclusions and recommendations.

Prohibition of bulk water removal out of water basins vs. an export ban: which is the better approach?

There is a consensus among Canadians that freshwater resources need protection from bulk removals. What is the best way of achieving this goal?

Prohibiting bulk water removal out of water basins is better than an export ban because it is more comprehensive, environmentally sound, respects constitutional responsibilities and is consistent with Canada's international trade obligations.

- Water is protected in its water basin, before the issue of exporting arises. This is an environmental protection measure of general application, aimed at preserving the integrity of ecosystems.
- Under the Canada-wide accord, each level of government has a responsibility and each level must take action. Canadian governments have full sovereignty over the management of water in its natural state, and in exercising this sovereignty are not constrained by trade agreements.
- Water is regulated in its natural state, before it has become a commercial good or a saleable commodity. This is consistent with Canada's international trade obligations.

An export ban may seem like a quick and simple solution. However, it does not focus on the environmental dimension, has possible constitutional limitations, and may be vulnerable to a trade challenge. An export ban would focus on water once it has become a good and therefore subject to international trade agreements. Because these agreements limit the ability of governments to control the export of goods, a ban on exports is likely to be contrary to Canada's international trade obligations. This contrasts sharply with the federal government's approach.



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OVERVIEW OF LEGISLATION AMENDING THE *INTERNATIONAL BOUNDARY WATERS TREATY ACT*

SUMMARY

The purpose of the amendments to the *International Boundary Waters Treaty Act* is to implement more effectively the 1909 Canada - U.S. *Boundary Waters Treaty*.

- 1) prohibiting the removal of boundary waters out of the water basin in which they are located;
- 2) requiring a licence from the Minister of Foreign Affairs for any activity in boundary or transboundary waters that would have the effect of altering the natural level or flow of waters on the United States side of the border;
- 3) providing clear sanctions and penalties for violations.

BACKGROUND

Water is an integral part of Canada's boundaries. More than 300 rivers and lakes form and run along or across this boundary. Over time, Canada and the United States together have developed a structure to manage this common resource. The 1909 *Boundary Waters Treaty* is a cornerstone of this cooperative relationship. Through the Treaty, Canada and the US are mutually obliged to protect natural levels or flows of waters shared by the two countries.

The Treaty established principles and procedures to prevent and resolve disputes, especially those dealing with the quantity and quality of boundary waters between Canada and the United States. The Act to implement the Treaty, the *International Boundary Waters Treaty Act*, was passed on May 19, 1911. Its main object was to establish the International Joint Commission, a binational organization. The proposed amendments provide for a clearer Act and a better implementation of the Treaty.

INTERNATIONAL BOUNDARY WATERS TREATY ACT: BASIS OF FEDERAL JURISDICTION

The *International Boundary Waters Treaty Act* establishes principles and mechanisms for dispute prevention and settlement, particularly with respect to the quantity and quality of boundary waters between Canada and the U.S.

The *Boundary Waters Treaty* was signed in 1909 by Great Britain, on behalf of Canada. Section 132 of the *Constitution Act, 1867* gives the federal Parliament the power to implement treaties of this type. The federal government therefore has jurisdiction over boundary waters and transboundary waters to the extent stipulated in the Treaty.

AMENDMENTS

Licences

The amendments provide that uses, obstructions, diversions and the construction or maintenance of works or other obstructions that affect the natural level or flow of water on the other side of the border are not permitted unless they have been approved by the Minister of Foreign Affairs.

Until now, the Government of Canada has reviewed applications and approved or denied them using a less formal system. The amendments will improve the existing approval system, making it more transparent and structured.

The licencing system will be developed through regulations, in accordance with Canadian administrative law.

Prohibition on removal of boundary waters

The prohibition is an environmental measure designed to preserve the integrity of water basin ecosystems. Removal of water out of a water basin, carried out once or repeatedly, is deemed to have an impact on the natural level or flow of U.S. boundary waters and is therefore prohibited, save for exceptions stipulated in the regulations.

Powers of the Minister of Foreign Affairs

The Minister of Foreign Affairs has the authority to issue, renew or modify a licence required under the Act, in accordance with the conditions, form and terms stipulated in the Act and the regulations.

If there are reasonable grounds to believe that a person has violated the Act or the conditions of the licence, the Minister may suspend or revoke the licence. The Minister must, however, give the person written notice explaining the reasons for suspending or revoking the licence. The alleged violator must also be given the opportunity to provide an explanation.

The Minister has the authority to order the removal of works or obstructions and to stop the work, uses or diversions that constitute a violation. The Minister also has powers of confiscation and may remove or destroy the forfeited objects in cases where a violator fails to comply with a Ministerial Order. A violator may be required to reimburse the government's costs.

Agreements or arrangements with the provinces

Subject to the approval of the Governor in Council, the Minister may enter into agreements or arrangements with the provinces with respect to the licencing system and the prohibition.

Offences and penalties

Any person who violates the prohibition, acts without a licence or violates the terms and conditions of a licence is liable to a fine or imprisonment.

A violator is deemed to have committed a distinct violation every day during which the violation was committed or continued.

If the violator realized a financial benefit as a result of the act or activity that constituted a violation, the violator may be subject to an additional fine equal to the financial benefit.

Injunction

If the Minister of Foreign Affairs files a motion for an injunction and the court finds that a person has done or is about to do or is likely to do any act constituting or directed toward the commission of an offence, the court may grant the motion and order the person to cease any activity which constitutes or is directed toward an offence.

The court will give the person 48 hours to act, unless the public interest and the urgency of the situation requires a shorter notice or none at all.

Regulations

The amendments provide for the power to issue regulations, which the existing Act does not. This power will make it possible to establish a licencing system, stipulate exceptions to the application of the Act, define terms, and so forth.

QUESTIONS AND ANSWERS

(General Issues on the Legislation)

Q.1 What is the purpose of the Bill?

- A. The main purpose of this bill is to prohibit the bulk removal of boundary waters out of their water basins, principally the Great Lakes. The bill will protect this precious natural resource from exploitation and environmental damage caused by bulk removal of water out of watersheds.

This is significant because the Great Lakes are of sufficient size to attract developers of bulk removals, including for the purposes of export, or diversion schemes out of water basins; and the federal government is acting within its jurisdiction to prohibit bulk removal of water, consistent with federal-provincial discussions to achieve a Canada-wide prohibition on the bulk removal of water. All provinces now have in place or are developing legislation or regulations which prohibit bulk water removal.

Separate from the prohibition, the amendments will formalize a 90 year old process under which the federal government and the International Joint Commission have examined and approved certain projects under the provisions of the *Boundary Waters Treaty*. Those projects have always required federal approval. Now they will need a licence from the Minister of Foreign Affairs. Such projects include dams, obstructions, causeways, etc. which would have the effect of altering the natural level or flow in boundary waters (e.g. a dam across a boundary water such as the St. Lawrence River) or in transboundary rivers where Canada is downstream (i.e. where a dam or obstruction in Canada would result in water backing up into the U.S.)

Q.2 What steps has the federal government taken to address the issue of bulk water removal?

- A. In February 1999, the federal government announced a strategy to prohibit the bulk removal of water, including for the purposes of export, from major Canadian water basins. The federal strategy is based on an environmental approach. The water basin approach treats water as a resource and not as a good, and is the most comprehensive and environmentally sound way to protect our water basins from environmental damage that can be caused by bulk removals. This approach respects federal and provincial jurisdictions, and is consistent with Canada's international trade obligations.

There are three parts to the strategy:

- by Canada: amendments to the *International Boundary Waters Treaty Act*, which will give the Minister of Foreign Affairs the power to prohibit bulk removals from *boundary* waters, principally the Great Lakes. The amendments were introduced in Parliament in November 1999. With the reintroduction of amendments to the Act, Canada is demonstrating its commitment by taking action within its jurisdiction.
- by Canada and the U.S.: a joint reference to the International Joint Commission (IJC), the independent, binational agency charged with preventing and resolving disputes, or investigating issues, over shared waters. The reference asked the IJC to study the effects of water consumption, diversion and removal, including for export, from *boundary* waters, with an initial emphasis on the Great Lakes. The IJC's final report (*Protection of the Waters of the Great Lakes*, February 2000) concluded that the Great Lakes require protection, especially in the light of the uncertainties, pressures and cumulative impacts from removals, consumption, population and economic growth, and climate change. Recommendations for action to protect the ecological integrity of the Great Lakes Basin are directed by the IJC to all levels of government in Canada and the U.S. The IBWTA amendments are consistent with and supportive of the IJC's conclusions and recommendations.
- federal/provincial: management of water in Canada is a shared responsibility. Therefore, the Minister of the Environment sought endorsement by provinces and territories of a Canada-wide Accord prohibiting bulk water removals from all major Canadian water basins. All provinces have put into place or are developing legislation or regulations which accomplish this goal.

Q.3 On February 9, 1999, the House of Commons passed a motion calling on the federal government to ban the export of water. Why has the federal government not followed this advice?

A. The federal government—indeed, all Canadians—agree that measures need to be taken to protect the integrity of Canada's water resources. The federal government's strategy of prohibiting the bulk removal of water from all major drainage basins in Canada is the best means to achieve this goal.

Prohibiting bulk water removal from water basins is a better approach than an export ban because it is more comprehensive, environmentally sound, respects constitutional responsibilities and is consistent with Canada's international trade obligations.

- Water is protected in its water basin, *before* the issue of its export arises. This is an environmental protection measure of general application, aimed at preserving the integrity of ecosystems.
- Under the Canada-wide accord, each level of government has a responsibility and each level must take action. Canadian governments have full sovereignty over the management of water in its natural state, and in exercising this sovereignty are not constrained by trade agreements.
- Water is regulated in its natural state, before it has become a commercial good or a saleable commodity. This is consistent with Canada's international trade obligations.

An export ban may appear as a quick and simple solution. However, it does not focus on the environmental dimension, has possible constitutional limitations and may be vulnerable to a trade challenge. An export ban would only regulate the cross-border movement of water once it has become a good and would therefore be subject to international trade agreements. This contrasts sharply with the federal government's approach.

Q.6 What is the International Joint Commission?

- A. The International Joint Commission is a binational independent body established in 1912 pursuant to the *Boundary Waters Treaty*. It consists of three members appointed by the Governor in Council of Canada and three members appointed by the President of the United States. The Commission performs the responsibilities assigned to it under the Treaty.

Q.7 What is the International Joint Commission's final report *Protection of the Waters of the Great Lakes*? What is the connection with the amendments to the Act?

- A. In February 1999, Canada and the U.S. gave a Reference to the International Joint Commission (IJC). The Reference asked the IJC to study the effects of water consumption, diversion and removal, including for export, from *boundary waters*, with an initial emphasis on the Great Lakes. The IJC's final report (*Protection of the Waters of the Great Lakes*, February 2000) concluded that the Great Lakes require protection, especially in the light of the uncertainties, pressures and cumulative impacts from removals, consumption, population and economic growth, and climate change.

Among other things, the report concluded that:

- the waters of the Great Lakes are a critical resource; on average, less than one percent of the waters of the Great Lakes is renewed annually.
- If all the interests in the [Great Lakes] Basin are considered, there is never a "surplus" of water...every drop of water has several potential uses...
- International trade law obligations—including the FTA, NAFTA, WTO and GATT—do not prevent Canada and the U.S. from taking measures to protect their water resources and preserve the integrity of the Great Lakes Basin ecosystem... so long as there is no discrimination by decision makers against persons from other countries in their application... Canada and the U.S. cannot be compelled by trade laws to endanger the waters of the Great Lakes...

Recommendations for action to protect the ecological integrity of the Great Lakes Basin are directed by the IJC to all levels of government in Canada and the U.S., and provide a basis for developing a consistent approach to protecting the waters of the Great Lakes on both sides of the border. These recommendations, if implemented, would make large-scale or long-distance removals of water from the Great Lakes virtually impossible.

The IBWTA amendments are consistent with and supportive of the IJC's conclusions and recommendations.

Canada is reviewing the report's recommendations, and will respond formally to the IJC early in 2001.

Q.10 What do the principal amendments consist of?

A. The amendments:

- will impose a prohibition on removals of boundary waters out of their water basin because it is deemed that the cumulative effect of such removal will alter the natural level or flow of waters on the other side of the border and lead to potential environmental degradation and exploitation of the water supply. Exceptions will be considered. This could include ballast water, short-term humanitarian purposes and water used in the production of food and beverages (e.g. bottled water).
- separate from the prohibition, will introduce a licencing system which will confirm the authority of the Minister of Foreign Affairs to approve or reject projects that could have an impact on the natural level or flow of boundary waters, waters flowing from boundary waters, or transboundary waters on the other side of the border. Ordinary uses for domestic or sanitary purposes would be excluded from the licencing regime in accordance with Article III of the Treaty. Such activities have traditionally been covered by provincial regulations and this would continue. Other traditional uses, such as agricultural and industrial withdrawals that remain within the basin, would not be covered by the licencing system.

Q.11 Does the licencing system apply to bulk water removal projects?

A. No. A bulk water removal project would be prohibited under the Act.

The licencing system applies to any use, obstruction or diversion of boundary waters that affects or is likely to affect the natural level or flow of the boundary waters on the other side of the boundary.

Q.12 Do the amendments cover groundwater?

A. Boundary waters, as defined in the Treaty, do not refer specifically to underground watercourses or groundwater. Groundwater was not an issue at the turn of the century and therefore it is difficult to argue that the contracting parties intended to cover this concept.

Q.13 Why are the amendments aimed at protecting waters on the U.S. side?

- A. The amendments are aimed at fulfilling Canada's obligation under the Treaty, i.e. not to affect the level and flow of waters on the U.S. side of the boundary. The same obligations apply to the U.S. with respect to Canada.

Q.14 What is the protection offered to the Canadian side of boundary waters by the U.S.?

- A. We have the *Boundary Waters Treaty* with the U.S. Canada has a long history of constructive relations with the U.S. in protecting shared waters. It is in the interests of all parties to protect the Great Lakes system. The Treaty contains rights and obligations of each country regarding water quality and water quantity in boundary waters, including the Great Lakes.

Also, U.S. law and practice differs along the border, from state to state.

In the Great Lakes states, the governors have a Congressionally-affirmed power to veto new "diversions" and could interpret this power to cover bulk water transfers to ships. The *Water Resources Development Act* (1986) provides that no bulk export or diversions from the Great Lakes can take place without the unanimous approval of all eight Governors of the Great Lakes states.

Under the Great Lakes Charter (1985), the Governors of the eight Great Lakes states notify and consult with each other, and the Premiers of Ontario and Quebec, on proposals for diversions and consumptive uses of waters within the Great Lakes Basin. The Charter is non-binding political declaration, but carries considerable weight with state and provincial governments.

Q.15 In December 2000, the Council of Great Lakes Governors unveiled a proposed Annex to the Great Lakes Charter with a new standard to govern water removals. This standard will permit removals under certain conditions. What is the Government of Canada's views on this standard?

A. Canada recognizes that states and provinces have important responsibilities in the management of the Great Lakes. However, with regard to the proposed Annex to the Charter, Canada has concerns on both the content and the form.

Canada considers that the standard being proposed in the Annex is too permissive and could open the door to large-scale, long-distance removals of water. Ontario, which participated in the discussions with the states that make up the Council, and environment groups on both sides of the border, have expressed similar concerns. The recommendations in the IJC final report (Protection of the Waters of the Great Lakes) represent a viable solution to the concerns of U.S. states.

Canada also has concerns that aspects of the Annex could conflict with the Canada-U.S. *Boundary Waters Treaty*.

Canada has registered its concerns with the Council in Chicago and the State Department in Washington. We will continue to work with the U.S. on this issue.

Regardless of the standard eventually adopted in the Annex to the Charter, Canada's efforts will be directed at ensuring that Canadian rights under the Treaty are protected. Any new common standard agreed to by the Council should be consistent with the rights and obligations of Canada and the U.S. under the Treaty.

The Council of Great Lakes Governors is made up of the eight Great Lakes states. The Great Lakes Charter membership is the same as the Council, plus Ontario and Quebec.

Q.16 Why is there no prohibition on the removal of boundary waters for transfer within the water basin?

A. When water is withdrawn within the water basin, most of it usually returns to the boundary waters by a natural route—there is essentially no or little net loss to the system. The effect of a removal of water *within the same water basin* on the natural level or flow of waters on the other side of the boundary is therefore assessed on a case-by-case basis. The amendments state that diversions of boundary waters *within the same water basin* will be covered by a licencing system set out in the amendments and not by the prohibition.

Q.17 The amendments prohibit the removal of boundary waters out of their water basins.

Does the prohibition cover the removal of non-boundary waters?

Does the prohibition apply to non-boundary waters that are connected directly to boundary waters within the same water basin?

A. No. This prohibition is based on and applies to *boundary* waters, only to the degree specified in the Treaty.

Provincial jurisdiction covers other waters. The federal strategy to prohibit the bulk removal of water out of major drainage basins recognizes the primary responsibility of provinces and territories for water management. As part of the strategy, the Minister of the Environment sought endorsement by provinces and territories of a Canada-wide Accord prohibiting bulk water removals. All provinces have put into place or are developing legislation or regulations which accomplish this goal.

Q.18 Will the Canadian Environmental Assessment Act review apply to projects requiring licences under the amended *International Boundary Waters Treaty Act*?

A. The issue is being reviewed as part of the development of regulations for the amended Act. Regulations are expected to be published in the Canada Gazette in due course after the amended Act comes into force.

Q.19 What is the constitutional authority being used by the federal government to take this action?

A. Section 132 of *The Constitution Act, 1867* gives the federal Parliament the jurisdiction to implement treaties signed by Great Britain on behalf of Canada (e.g. the *Boundary Waters Treaty*). The federal Parliament also has the jurisdiction to amend the implementing legislation for such treaties.

Q.20 Do the amendments to the Act expand federal jurisdiction or activities into provincial areas of competence?

A. No. Federal jurisdiction is being applied only to the degree stipulated in the Treaty. Only the federal government has authority to fulfill the Treaty's obligations.

The prohibition provision is being applied under Article III of the Treaty, i.e. bulk removal of boundary waters out of their water basin will alter the natural level or flow of waters on the U.S. side of the boundary.

With regard to the licencing provision, the informal system of federal and IJC approvals has operated for 90 years under Articles III and IV of the Treaty. Under the amended Act, the fundamental test of whether or not a future project triggers federal government and IJC involvement will remain precisely what it has been since 1909: does it fall within the scope of Articles III or IV of the Treaty? Only the federal government has the jurisdiction to discharge this Treaty obligation.

The federal government consulted extensively with the provinces on these amendments. We will continue to consult with provinces on how best to implement the licencing provisions. The details will be included in the regulations. Consultations with the provinces on the regulations will begin concurrent with the tabling of the legislation.

Q.21 Why did the federal government not prohibit removal of all waters located in Canadian territory?

A. The federal government does not have jurisdiction over all waters in Canadian territory. The *Boundary Waters Treaty* gives the federal government clear jurisdiction over boundary waters to the extent stipulated in the Treaty. Amending the *International Boundary Waters Treaty Act* was therefore the best way to achieve our objective, while respecting provincial jurisdiction.

With regard to territories, while devolution of some province-like responsibilities is underway, the federal government presently has responsibility for water in the three northern territories. Actions to prohibit removals in the North will be discussed in close consultation with the territories.

Q.22 Will there be problems of duplication or overlap with provincial laws or regulations?

- A. Over the past 90 years, the federal government and the IJC have dealt with approximately 30 applications related to projects in transboundary waters or waters flowing from boundary waters, and a similar number related to boundary waters, without any evidence of or problems with duplication or overlap. As there will be no substantive change to the existing procedure for applications and approval, we do not anticipate, under the amended Act, that there will be problems between federal and provincial areas of responsibility.

Nevertheless, should some problem arise, provision is made in the amendments that the Minister of Foreign Affairs may reach an agreement or an arrangement with a province respecting either the prohibition provision or the licencing regime.

Q.23 Have the provinces and territories been consulted?

- A. Yes, extensively.

During the summer of 1998, federal officials travelled to each province and territory to discuss the various options for a federal approach to bulk water removals.

Following the announcement of the federal strategy in February 1999, there were extensive discussions with the provinces and territories on all aspects of the federal strategy, including the amendments to the Act. Some adjustments were made in response to provincial input.

As regulations to the Act are being developed, the federal government will consult closely with the provinces.

QUESTIONS AND ANSWERS

(Trade)

Q.24 On February 9, 1999, the House of Commons passed a motion calling on the federal government to ban the export of water. Why has the federal government not followed this advice?

A. The federal government—indeed, all Canadians—agree that measures need to be taken to protect the integrity of Canada's water resources. The federal government's strategy of prohibiting the bulk removal of water from all major drainage basins in Canada is the best means to achieve this goal.

Prohibiting bulk water removal from water basins is a better approach than an export ban because it is more comprehensive, environmentally sound, respects constitutional responsibilities and is consistent with Canada's international trade obligations.

- Water is protected in its water basin, *before* the issue of its export arises. This is an environmental protection measure of general application, aimed at preserving the integrity of ecosystems.
- Under the Canada-wide accord, each level of government has a responsibility and each level must take action. Canadian governments have full sovereignty over the management of water in its natural state, and in exercising this sovereignty are not constrained by trade agreements.
- Water is regulated in its natural state, before it has become a commercial good or a saleable commodity. This is consistent with Canada's international trade obligations.

An export ban may appear as a quick and simple solution. However, it does not focus on the environmental dimension, has possible constitutional limitations and may be vulnerable to a trade challenge. An export ban would only regulate the cross-border movement of water once it has become a good and would therefore be subject to international trade agreements. This contrasts sharply with the federal government's approach.

Q.25 Would a ban on exports be contrary to the NAFTA?

- A. Under the NAFTA and the GATT, Parties cannot restrict or prohibit the export of goods except in certain, narrow circumstances. This provision in the GATT dates from 1947. A blanket prohibition on the export of water as a good, as for example, in the form of bottled water or water in tankers, could be vulnerable to a WTO or NAFTA challenge.

Q.26 Is a prohibition on the bulk removal of water from water basins contrary to NAFTA?

- A. No.

Preventing the removal of water from its natural state before it becomes a good is consistent with our trade obligations. This is reflected in the 1993 Joint Statement by the governments of Canada, Mexico and the United States:

"The NAFTA creates no rights to the natural water resources of any Party to the Agreement.... nothing in the NAFTA would oblige any NAFTA Party to either exploit its water for commercial use or to begin exporting water in any form. Water in its natural state in lakes, rivers, reservoirs, aquifers, 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."

Q. 27 What is the effect of the Joint Statement in international law and where is the evidence that the U.S. has agreed to it?

- A. The Joint Statement is an agreement between the governments of the NAFTA Parties on their interpretation of the treatment of water resources under international trade agreements, including the NAFTA. If a measure relating to water were to become the subject of dispute settlement or arbitration, the Statement would play an important and authoritative role as an interpretive guide as to the intent of the NAFTA Parties with respect to the relationship between water and the NAFTA rules.

All three governments of the NAFTA Parties made this statement publicly through separate press releases prior to the coming into effect of the NAFTA.

The principle that governments have full sovereignty over the management of water in its natural state was reconfirmed by the Deputy U.S. Trade Representative, in a formal submission to the International Joint Commission, where he indicated that under customary international law, non-navigational rights to a watercourse -- including the right to control or limit extraction -- belong solely to the country or countries where the watercourse lies.

Q.28 When does water become a good? How does this affect water in its natural state?

- A. Generally speaking, a good is an article that has entered into trade or commerce. Water in its natural state (e.g. in a lake or a river) has not entered into commerce in the sense of being transformed into a saleable commodity and is therefore not a good.

Furthermore, even if some water is extracted from its natural state to be made into a good (e.g. bottled water or water used as an ingredient in another bottled beverage), the remaining water in the source from which that water was drawn still constitutes water in its natural state, and therefore is still not a good.

In many respects, water in its natural state can be equated with other natural resources, such as trees in the forest, fish in the sea, or minerals in the ground. While all of these things can be transformed into saleable commodities through harvesting or extraction, until that crucial step is taken they remain natural resources and outside the scope of trade agreements.

This point is readily illustrated by looking at the fishing industry for a parallel example of a natural resource that can be transformed into a good. In that context, governments have a discretionary power to decide not only whether to allow fishing as a general policy, but also where and when fishing may take place, and the total quantity of fish that may be caught. From the standpoint of trade agreements, that discretion is not affected by previous decisions that allowed some fishing to take place.

Q.29 Nowhere in the NAFTA text is water excluded. In fact, it is listed in Canada's tariff schedule. Does this mean that water is covered by NAFTA?

- A. No. This is a mistaken view of the purpose of the tariff schedule.

Tariff schedules exist to provide a system of tariff classification for tariff negotiation purposes, to allow importers and exporters to readily identify the tariff, if any, that applies to a particular article, and for a range of other technical applications such as the administration of rules of origin and customs valuation.

The tariff schedule does not define *what* is a good, nor does it tell us *if or when* water is a good. It only tells us that when water *is* a good, it falls under a particular tariff heading.

Q.30 Isn't it contradictory to say that water is not covered by NAFTA, but that an export ban on water would be vulnerable to trade challenge?

A. No. You must distinguish what water you are talking about.

Export bans apply to goods or products. There are many products in which water is the major component, for example, bottled water, beer, soft drinks, fruit juices made from concentrate, as well as certain industrial products. All of these are commercial products or goods and are legitimately traded. Measures affecting trade in these products are subject to the NAFTA and WTO rules. An export ban on such products, simply because they contain water, would clearly be inappropriate, and would likely fall afoul of those rules.

In contrast, the NAFTA Joint Statement on water confirmed that water in its natural state is not a good and is not covered by trade agreements. Canada's approach of prohibiting bulk water removal out of water basins is consistent with Canada's international trade obligations, including the NAFTA. It protects and regulates water in its natural state, before the issue of its export arises and before it has become a commercial good or a saleable commodity, or has been incorporated in a manufactured product.

Q.31 If some water, such as water used for municipal, industrial or agricultural purposes, is considered a good, does that mean that all water must be treated as a good and therefore be subject to the trade agreements?

A. No.

Only water that has been extracted and commercialized in the sense of having been transformed into a saleable commodity would become a good. Examples would include water that has been or is intended to be bottled for sale, or that is to be used as an input for a manufactured product. Water remaining in its natural state would not be a good.

Furthermore, the removal of water from its natural state does not necessarily mean that it becomes a good. Whether the extraction of water for municipal, industrial or agricultural uses transforms that water into a good is a complicated question. It can really only be answered on the basis of the specific factual and legal circumstances under which that particular water is removed from its natural state.

In any event, it would not change the status of the natural source from which it was drawn. The water remaining in that source would still be in its natural state and therefore not subject to trade agreements.

Q.32 How can the federal government be certain the amendments to the Act or the federal government's strategy will not be challenged, and a trade panel decide against Canada?

A. The federal government's responsibility to Canadians is to design an approach which protects the integrity of Canada's water resources, is environmentally sound and holds the least risk of trade challenge. The federal government's strategy is based on a careful analysis of all of the legal and environmental factors, and is well-grounded in policy and law. The federal government considers that an export ban would run a far greater risk of trade challenges, thereby exposing Canada's water resources.

Canada's views have been supported by a wide range of expert opinion.

- The International Joint Commission (IJC), which is an independent binational commission, came to similar conclusions in its final report (*Protection of the Waters of the Great Lakes*, February 2000) after exhaustive public hearings and submissions that included governmental and independent experts representing every point of view;
- The principle that governments have full sovereignty over the management of water in its natural state was reconfirmed by the Deputy U.S. Trade Representative, in a formal submission to the International Joint Commission, where he indicated that under customary international law, non-navigational rights to a watercourse—including the right to control or limit extraction—belong solely to the country or countries where the watercourse lies.

Canada cannot prevent other countries, or, in the case of Chapter 11 of the NAFTA, private investors, from challenging its laws and regulations before dispute settlement or arbitration panels. The important question is whether such a challenge is likely to succeed. Canada's strategy is the most effective approach from the standpoint of achieving the policy goal of protecting the environmental integrity of Canada's ecosystems and water basins while minimizing the risk that such a challenge would succeed.

The federal government considers that an export ban would run a far greater risk of being vulnerable to such a challenge.

Q.33 If one project for export of water is allowed, does this open the floodgates to exports of water generally? Can we "turn off the tap"?

A. There is nothing in Canada's international trade obligations that would require that future projects for the removal of water for bulk exports be approved, simply because past projects have been approved. Canadian governments retain full sovereignty over the management of Canadian water in its natural state.

The possible impact of the approval by a province of a bulk water removal project would be limited to the province involved and, in terms of affecting similar future project applications would depend, in the first instance, on the particular regulatory regime that governs such approval processes.

The NAFTA does not require all provinces to adopt the same regulatory regime. It merely requires that each province, within its regulatory regime, not treat foreign goods or investors less favourably than it treats its own goods or investors.

Thus, if one province's legislation permitted removal of water and a project were to be approved, other provinces could still have legislation that prohibited removal of water without running afoul of national treatment requirements.

Within a province that did permit removal of water, future applications for approval to remove water would still have to be considered on its merits in the light of the legislation, (including environmental assessment requirements in the particular province), and in accordance with principles of administrative law, such as fairness and reasonableness. Such a regime would also have to be applied without discriminating between applicants on the basis of their nationality.

Q.34 Why is "water removal" being prohibited? Is this a disguised trade measure?

A. This initiative is not a trade measure, disguised or otherwise.

The prohibition fulfills Canada's obligation under the Treaty, i.e. not to affect the level and flow of waters on the U.S. side of the boundary. The prohibition is also a non-discriminatory environmental measure of general application aimed at preserving the integrity of ecosystems within water basins. The *Boundary Waters Treaty* and the *International Boundary Waters Treaty Act* deal with water in its natural state, i.e. in the lakes and rivers along the boundary. The prohibition does not target the export of water as a good.

The prohibition recognizes that bulk removal of water out of drainage basins should be managed differently from within basin uses. Bulk removal involves the permanent loss of water to the basin. Given the dependency of ecosystems and communities within the basin on this supply of water, bulk removal is considered to represent an unsustainable use of water.

The measure is consistent with Canada's international trade obligations as reflected in the 1993 Joint Statement by the governments of NAFTA countries (Canada, Mexico and the United States), to the effect that water in its natural state is not a tradeable good and is not subject to the terms of any trade agreement.

Canada's approach is better than an export ban because it protects water at its source from bulk removal outside the water basin by any company, Canadian or foreign.

Q.35 Are the *International Boundary Waters Treaty Act* and the *Boundary Waters Treaty* exempted from NAFTA?

A. The question is not relevant. The Treaty and the Act are not trade-related in any way. They have no relation to NAFTA, nor does NAFTA govern them in any way.

The 1909 *Boundary Waters Treaty* and the *International Boundary Waters Treaty Act* are instruments which deal with water in its natural state along the Canada-U.S. border. The Preliminary Article of the Treaty defines boundary waters as "...the waters from main shore to main shore of the lakes and rivers and connecting waterways...", i.e. water is unambiguously defined in its natural state.

Q.36 Could a prohibition on bulk removal from water basins lead to a challenge by US investors in Canada under Chapter 11 of the NAFTA?

A. A prohibition on the bulk removal of water from its water basin is not aimed at regulating investment, whether by Canadian or foreign investors; it is an environmental measure intended to protect and preserve the integrity of the ecosystems dependent on that basin, as well as the integrity of the water basin itself.

In so far as such a prohibition may affect a Mexican or U.S. investor or investment, the NAFTA investment rules require only that the measure does not discriminate based on the nationality of the investor, and does not expropriate the investment of such an investor.

Q.37 We understand there are some grandfathered water export permits in BC.

A. The BC Water Protection Act lists 5 licences for specific amounts of water. We are not aware of the terms and conditions of these licences, and therefore cannot comment on them.

Q.38 What is the status of the Sun Belt case?

A. The Sun Belt case has been pending since late 1999 and arbitration has not yet started. Canada takes the position that Sun Belt has not satisfied the prerequisites for triggering the arbitral process. We cannot speculate on Sun Belt's next steps.

Q.39 With Sun Belt's US\$10.5 billion lawsuit, have we lost control of Canada's water?

A. No.

There is nothing in Canada's international trade obligations that would require future projects for the removal of water for bulk exports to be approved, just because other projects have been given approval in the past. Canadian governments have full sovereignty over the management of water in its natural state, and in exercising this sovereignty are not constrained by trade agreements.

The Sun Belt case has been pending since late 1999 and arbitration has not yet started. Canada takes the position that Sun Belt has not satisfied the prerequisites for triggering the arbitral process. We cannot speculate on Sun Belt's next steps.