

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.

ACTIVITIES OTHER THAN THE AMENDMENTS

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 out of all major Canadian watersheds. As a result of this initiative, all provinces have put into place or are developing legislation or regulations which accomplish this goal.

A joint reference to the International Joint Commission (IJC), the independent, binational agency charged with preventing and resolving disputes, or investigating issues, over waters shared with the U.S. 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.

Bulk Water Removal and International Trade Considerations

Introduction

In February 1999, the federal government announced a strategy to protect the integrity of Canadian water resources by prohibiting the bulk removal of water out of major Canadian water basins, including for purposes of export. Canadians are concerned about the long-term security of freshwater and want governments to act to conserve and protect this precious resource. To achieve this objective the federal government has proposed a Canada-wide approach which is environmentally sound, respects the key role played by provinces as the managers of natural resources and is consistent with Canada's international trade obligations. There are three components to this approach:

- 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. All provinces have put into place or are developing legislation or regulations which accomplish this goal.
- amendments by the federal government to the 1911 *International Boundary Waters Treaty Act* (IBWTA), which implements the 1909 Canada-U.S. *Boundary Waters Treaty*. The amendments will give the Minister of Foreign Affairs the authority to prohibit bulk removals from *boundary* waters. 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; and,
- a Canada-U.S. reference to the International Joint Commission (IJC), the independent, binational agency charged with preventing and resolving disputes, or investigating issues, over waters shared with the U.S. 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

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This comprehensive environmental approach ensures that both the federal and provincial governments will do their part within their jurisdictions to preserve the integrity of the ecosystem within the water basins.

The federal government's strategy is based on a careful analysis of all of the legal, trade and environmental factors, and is well-grounded in policy and law. At the federal level, the amendments to the *International Boundary Waters Treaty Act* will prohibit the bulk removal of water from boundary waters. The Preliminary Article of the *Boundary Waters 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 as in its natural state. The federal government, through discussions on a Canada-wide accord, will be asking the provinces to take similar measures within their areas of jurisdiction.

In summary, the federal strategy to prohibit bulk removals of water from Canadian water basins is an environmental measure of general application aimed at preserving the integrity of the ecosystem within the water basin. The approach of prohibiting removal of water from its natural state outside of its water basin has been chosen because it is more comprehensive environmentally, it respects provincial jurisdiction, and it is consistent with international trade obligations. An export ban would be a less comprehensive approach as it would not address environmental dimensions (e.g. the prohibition of bulk removal from all Canadian water basins) and may be vulnerable to a trade challenge.

International Trade Considerations

The issue of whether water is subject to international trade agreements, such as the North American Free Trade Agreement (NAFTA) and the World Trade Organization's agreements (WTO), has been raised in some quarters.

This question raises three separate but related issues:

- whether these trade agreements apply to water;
- whether allowing the removal and export of some water creates a precedent, compelling Canada or any province to allow the removal and export of all water; and,
- the relationship between bulk water removal and Chapter 11 of the NAFTA.

1. Water as a Natural Resource; Water as a Good¹

The NAFTA and the WTO generally prohibit restrictions on the exportation of goods, subject to certain exceptions, none of which are likely to be applicable for present purposes. Therefore, it is necessary to determine whether and when water would be considered a "good" and subject to these trade agreements.

In the absence of a definition of good in the NAFTA or the WTO, recourse may be had to the ordinary meaning of the word "good" as defined, for example, in dictionaries. Based on the ordinary meaning of the word good, that is, something that can be traded for value, or a saleable commodity, water in its natural state is not a good.

Some observers have suggested that, because Canada's (and most other countries') tariff schedule includes "natural waters" as a tariff heading, this means that all water must be considered to be a good. This is a mistaken view of the purpose of the tariff schedule. The tariff schedule does not define what is a good; it merely provides an organizational structure for the purposes of tariff negotiations and customs administration. In other words, it does not tell us if and when water is a good; it only tells us that *when* water is classified as a good, it falls under a particular tariff heading.

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 the trade agreements.

The NAFTA countries reinforced this viewpoint in December 1993 when they issued a joint statement, in the context of the NAFTA coming into force, which indicated that "unless water, in any form, has entered into commerce and becomes a good or product, it is not covered by the provisions of any trade agreement, including the NAFTA...Water in its natural state in lakes, rivers, reservoirs, aquifers and the like is not a good or product...".

Furthermore, the International Joint Commission stated in its August 1999 interim report on bulk water removal from the Great Lakes that, "it would appear unlikely that water in its natural state (e.g., in a lake, river, or aquifer) is included within the scope of any of these trade agreements since it is not a product or good...".

Water does not become a good until it is removed from its natural state and enters into commerce as a saleable commodity, such as in bottles or in bulk containers. It would not include water provided by licence, or as a service by municipalities or a province for domestic, industrial and

¹ Trade agreements variously use the terms "good" and "product" and, in the case of the NAFTA, the two are treated as interchangeable. For ease of reading, this document will use the term "good" as indicative of both terms.

agricultural uses where the charge for such water reflects the cost of supplying it rather than a price for it as a commodity. Even if that water were considered a good, it would only be in respect of that particular water and not water remaining in its natural state. Likewise, the issuance of a licence to withdraw some water for a limited purpose, such as a temporary use, is not sufficient to transform that water into a good. In that situation, it is more accurate to speak of a right of use, rather than a right in goods.

Because water in its natural state is not a good and therefore outside the scope of the trade agreements, the proposed Accord on bulk water removal, and any federal or provincial measure regulating the extraction of water in its natural state, would not be subject to international obligations concerning trade in goods.

2. Exports of Water as a Precedent

A second issue is whether allowing some water to be extracted and put into commerce as a good, including for export, would create a precedent requiring that all other requests to extract water and transform it into a good for commercial purposes, including for export, be granted, anywhere in Canada.

There is nothing in international trade agreements which would require that future projects for the bulk extraction or removal of water, including for export, be approved just because previous bulk water removal projects have been approved. From the standpoint of trade obligations, the fact that a government has allowed the extraction and transformation of some water into a good, including for export, does not mean it (or another government within Canada) must allow the extraction and transformation of other water into a good in the future.

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.

3. Bulk Water Removals and NAFTA Chapter 11

Chapter 11 only applies to measures adopted or maintained by a NAFTA country relating to investors, and investments of investors, of another NAFTA country in its territory. It also provides a mechanism for dealing with investor-state disputes relating to a NAFTA country's alleged breach of its obligations under Chapter 11.

The principal obligations of Chapter 11 most often cited as relevant to bulk water removals are:

- providing national treatment; and,
- paying compensation in cases of expropriation.

National Treatment

The national treatment obligation requires that any measure adopted or maintained by Canada relating to an investor, or the investment of an investor, of another NAFTA country, must accord treatment no less favourable than that it accords, in like circumstances, to its own domestic investors and investments.

For example, a regulatory measure relating to an investor, or an investment of an investor, of another NAFTA country, would be consistent with the national treatment obligation if it prohibited the removal of bulk water from water basins in a manner that did not discriminate between investors, in like circumstances, on the basis of nationality. Canada's proposed strategy with respect to the prohibition on bulk water removals from water basins is in keeping with this obligation.

Expropriation and Compensation

The NAFTA provides that the Parties may not nationalize or expropriate an investment of an investor of another Party, either directly or indirectly, or take measures tantamount to expropriation, unless it satisfies certain criteria, including the payment of compensation. A claim for compensation could only arise where there was an investment that had been expropriated. A regulatory measure designed to conserve and manage water resources, if properly implemented, should not constitute an expropriation. Any claim for compensation would have to be examined in light of the details of the individual case.

4. Conclusion

In so far as trade in goods is concerned, the NAFTA and the a joint reference to the International Joint Commission (IJC), the independent, binational agency charged with preventing and resolving disputes, or investigating issues, over waters shared with the U.S. 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 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. WTO do not impose disciplines on the ability of governments to regulate the extraction of water from its natural state, nor do they create obligations that would compel Canada or any province to allow the extraction of bulk water, including for export, without any limits. Because the proposed Accord relates to water in its natural state, it would not be subject to the provisions of these trade agreements with respect to trade in goods.

Furthermore, as long as regulations governing the extraction of water from its natural state do not discriminate among NAFTA investors, or investments of investors, in like circumstances, on the basis of nationality, such regulations will be consistent with the national treatment obligation of Chapter 11 of the NAFTA. Also, such measures, if properly implemented, should not constitute an expropriation under the NAFTA.

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