

~~Cause Study~~
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Water will be Canada's fastest growing exportable resource.

[Advertisement for Water Conference, Aggu.'94.]

Canadian and American engineering companies have proposed nine multi-billion dollar projects within the last three decades.¹ Although none of the projects have gained official endorsement, the mega-projects are indicative of the private commercial sector's vision of the opportunities which lie in the exportation of Canadian water resources.

In a recent book entitled Water Diversion and Export: Learning from the Canadian Experience, the authors summarized the potential for environmental degradation

A diverse set of changes occurs when one river system is dammed and its flow diverted to another... A variety of biophysical changes are predictable. Moderate earthquakes and climate change are to be expected in the vicinity of large impoundments. Erosion and turbidity decrease primary biological productivity in some existing lakes and rivers. Forests, agricultural lands, and wildlife habitat may be lost in perpetuity and existing fisheries habitats destroyed. Mercury is released into the water column and bioaccumulates in fish to levels which makes them unsuitable for human consumption. This condition persists for 20 to 30 years at a minimum and longer in areas where erosion or organic-rich soil continues.²

These forms of environmental degradation are not unknown in the Great Lakes. When the St. Lawrence Seaway was opened the Lakes'

¹ Refer to John Walley, Canada's Resource Industries and Water Export Policy (Toronto; University of Toronto Press) 1986 at pp.183-9 for a review of the six major projects, which include: the North American Water and Power Alliance (NAWAPA), the Central North American Water Project (CeNAWP), the Kuiper Diversion Scheme, Western States Water Augmentation Concepts, the Magnum Diversion Scheme, and the Great Recycling and Northern Diversion (GRAND) Canal.

² J.C. Day and Frank Quinn, 1991, p.178

fisheries were nearly devastated by the migration of the Atlantic lamprey eels. Similar degradation occurred with the migration of the zebra mussel into the Lakes' system. History has demonstrated that water diversion schemes also transfers foreign fish, plants, parasites, bacteria and viruses. The environmental effects are neither predictable nor necessarily recoverable.

Other environmental considerations include the current level of toxins in the Lakes. Significant diversions would decrease the dillution of the pollutants, resulting in the increased toxicity of the water. In addition, current studies predict that if the Great Lakes water levels were reduced by 30 cm, it would become necessary to begin large scale dredging programmes in order to maintain shipping depths. The added pressures of diversionary schemes, acting in conjunction with predicted climatic warming effects amount to unrecoverable drainage patterns.³

However, the implications of these transfers extends beyond the potential for temporary or "fixable" environmental degradation. According to a 1989 study by the Rawson Academy of Aquatic Science, if Canada develops a programme of water export on any scale which creates an American dependence for the product, the Canadian government would have difficulty reversing an established market and imposing export restrictions given the constraints imposed by the Canada/United States Free Trade Agreement [FTA], and similar provisions under the recently negotiated North American Free Trade

³ The Great Lakes Institute at the University of Windsor predicts that the Greenhouse Effect could cause water levels in the Great Lakes to decrease by as much as 75 cm by the year 2035.

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~~Agreement [NAFTA].~~⁴ This is to say, if Canada turns water into a marketable commodity, that market must remain accessible to their southern neighbours.

The extent to which state, provincial and federal governments have "marketed" water remains a question open to debate. However, in the Great Lakes bioregion, water diversion and interbasin transfer schemes have become a part of the area's historical development.

Historical Development of Water Diversions in the Great Lakes Region

Throughout the twentieth century, the Great Lakes bioregion has been subjected to large diversion schemes. The Long Lake and Ogoki diversions, initiated in 1939 and 1943 respectively, brought water from the Albany River Basin into Lake Superior. The Welland Canal brought water from Lake Erie into Lake Ontario. Finally, the water of Lake Michigan Basin was diverted at Chicago for municipal and sanitary uses, and then discharged into the Illinois Waterway which eventually drained into the Mississippi River Basin.

However, the diversions in the bioregion have not been limited to large-scale diversions. Pressure on the water resource has grown incrementally. The 1988 drought on the lower Mississippi River persuaded Illinois Governor James R. Thompson to request that federal authorities triple the Chicago diversion to the Illinois River which would discharge into the Mississippi River for the

⁴ Jon Johnson, "Water Exports and Free Trade: Another Perspective" in A.L.C. de Mestral and D.M. Leith (eds), Canadian Water Exports and Free Trade (Ottawa; Rawson Academy of Aquatic Science) December 1989 at 36.

duration of the summer. This unilateral act challenged the authority of the 1986 Water Resources Development Act which required formal consent of all eight Great Lakes governors for any new diversionary schemes. Ontario, Michigan and Wisconsin threatened legal retaliation, and the U.S. Army Engineering Corp concluded that the proposed diversion would not succeed. Eventually, the drought abated before any action was taken, and the issue became theoretical.

Additional pressure on the water resource may be found in the following smaller projects including:

- * The Pleasant Prairie diversion of 1990, diverted water from _____ to replace the city's tainted well water which had been naturally contaminated by radium.
- * In Wisconsin, the Kenosha diversion of August 1991 provided an expedient measure to supply water, through a system of pipelines, to a rapidly developing section of the city.
- * In 1991, Lowell, Indiana initially requested permission to divert 3.8 million gallons per day (mgd), later downgraded to 1.7 mgd, from Lake Michigan into the Mississippi River. Michigan, Ontario and Quebec opposed the diversion.
- * The Walpole Island Indian Band has requested that a water pipeline be constructed to Lake Huron, because their current water supply ^{from the St. Clair River} is polluted.
- * Illinois's DuPage County, in the suburbs of Chicago, is currently constructing a \$350 million pipeline to serve the community's depleted aquifers.

More recent proposals include Michigan's Mud Creek Irrigation Proposal which has given environmentalists' cause for concern. The proposal ^{would result in consumptive ~~use~~ losses} suggests a diversion of 6.1 to 8.7 mgd from Lake Huron (Saginaw Bay) to irrigate approximately 750 hectares of land. The net result would be a 20% increase in yields for 13 property owners.

Large-scale projects are springing up on both sides of the

a proposal

from TransCanada Pipeline for

The Ontario government is currently considering ~~the~~ proposed Georgian Bay Pipeline which would include the construction of 150 km of pipeline from Georgian Bay, Collingwood, to eventually service Kitchener, Barrie and North York. The \$500 million project would divert 227 million litres per day (_____)

there's

effectively divert 50 mgd from its final destination - Lake Erie.

Given the established historical pattern of diversion schemes

in the Great Lakes, how will the trade deals affect the water resources in the bioregion?

The Great Lakes Water and the NAFTA

Water Is In the NAFTA

Any discussion of water export issues must acknowledge that the Canadian government has repeatedly denied the inclusion of large-scale water diversions within the FTA or the NAFTA. Indeed, Section 7 of the Canadian implementing legislation for the FTA states

For greater certainty, nothing in this Act of the Agreement, except Article 401 of the Agreement applies to water.⁵

Presumably, a similar clause would be attached to the NAFTA's implementing legislation.

It is submitted that these article would not exempt water from the trade deals. Under current trade law, a nation cannot unilaterally attach conditions to an agreement without concurrent recognition by the other signatories explicitly agreeing to the

Relationship between state requirements to drinking water need EIA in Canada's in US. NAFTA decisions

⁵ Bill C-2, "An Act to Implement the Canada-United States Free Trade Agreement", section 7(1). Article 401 deals with the elimination of tariffs on goods.

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exemption. The United States' government has not clearly recognized the Section 7 exemption. Therefore, given the following discussion it is submitted that water is included within the terms of the FTA and the NAFTA.

With regard to water, tariff heading 22.01 of the NAFTA includes

"Waters, including natural or artificial mineral waters and aerated waters, not containing added sugar or other sweetening matter nor flavoured; ice and snow."

The Harmonized System⁶ Explanatory Note for the heading states that

This heading... covers ordinary natural water of all kinds (other than sea water...). Such water remains in this heading whether or not clarified or purified.⁷

When a trade panel considers the legal definition of the goods covered under a tariff heading, the focus is upon the wording of the heading itself, and the explanatory notes related to the heading.⁸

⁶ The Harmonized Commodity and Coding Description System, signed at the 1983 International Convention, is a system for import classification adopted by many countries, including Canada and the United States.

⁷ Supra, note 2 at 4.

⁸ Mel Clark and Don Gamble, "Water Exports and Free Trade" in A.L.C. de Mestral and D.M. Leith (eds), Canadian Water Exports and Free Trade (Ottawa; Rawson Academy of Aquatic Science) December 1989 at 8-9 in which it is noted that Interpretative Rule 1 for interpreting the Harmonized System states "The Sections, Chapters and Sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes". Thus, Mr. Crosbie's contention in the Montreal Gazette that the schedules only refer to water under the "Beverage, Spirits and Vinegar" Chapter remains a serious misnomer.

General Rules for the Interpretation of the Harmonized System, listed in North American Free Trade Agreement, Schedule Part A, p.8.

Any "good" encompassed within a tariff heading annexed to the FTA or NAFTA is subject to the rights and obligations established by the agreement. This legal obligation was clearly understood by the trade negotiators in light of the exemptions provided for raw logs and unprocessed fish.⁹ In contrast, both the Canadian and American Tariff Schedules annexed to the Agreements included Tariff Heading 22.01 which covered all natural water except sea water with no regard for how it is packaged or transported.¹⁰

Compounding the issue, the signatories to the NAFTA have acknowledged that water is a "good". The 1992 Statement of the International Conference on Water and the Environment held as a basic principle that "[w]ater has an economic value in all its competing uses, and should be recognized as an economic good." Canada was a signatory to the statement.

Article 201.1 of the FTA and NAFTA [] define "goods" as "domestic products as these are understood in the General Agreement of Tariffs and Trade...".¹¹ Thus, in order for water to be a "good" under the Agreements, it must be a "product" under GATT. A product under GATT must be "gathered, stored, bottled or otherwise packaged or delivered". Clearly, water in bottles or tankers would constitute a product. In light of the fact that oil or natural gas

⁹ North American Free Trade Agreement, Minister of Supply and Services Canada, 1992, Annex 301.3, Section A, items 1. and 2.

¹⁰ Ibid. at 49. James Linton, "Water Export: The Issue that Won't Go Away" 5 (56) Canadian Water Watch [May-June 1992].

¹¹ Reference can be made to the full definitions in Article 201.1 of the FTA and Article 201 of NAFTA in which goods of a Party means domestic products as these are understood in the General Agreement on Tariffs and Trade or such goods as the Parties may agree, to include originating goods of that Party.

in a pipeline is a product, it would be reasonable to presume that water, under similar conditions, would also be deemed a product.¹²

In applying this trade theory, it is necessary to note several aspects of water treatment within the Great Lakes bioregion. Historically, water diversion schemes have developed on an ad hoc, incremental basis. However, a precedent pattern of "acceptable" diversions has been established in transportation, municipal water supply and irrigation markets.

The current Michigan Mud Creek proposal demonstrates the common perception that a plentiful supply of irrigation water is necessary for increased economic yield. Ignoring for the moment the issues associated with this form of unsustainable agriculture, the Michigan proposal focuses upon the role of water as a factor in production - a "good". Similarly, the Georgian Bay Pipeline proposal in Ontario emphasizes the growth in demand for a municipal water supply and the comparative toxicity of the current dwindling supply. Once again, water in a pipeline has assumed a function within the Great Lakes economy and the characteristics associated with a "good".

Recent legal studies have concluded that there is an international trend towards the treatment of water as a commodity. [] In addition, the NAFTA has established of a continental market which acknowledges water as a commodity.¹³ As a Mexican resource economist concluded at the 1992 Vancouver water conference

¹² Supra, note 4 at 28-29.
¹³ Linton, April 1993

...as full fledged trade integration between the three members of North America strengthens, the economic force to include water among the list of tradable goods will tend to manifest itself...

... NAFTA...thereby increases the probability of contemplating a continental model of water tradings to ameliorate Mexico's water problems and eventually strengthen its hydrological potential. An all-important implication of open commerce and free-trade is the salutary effect of this policy for an effecient resource allocation and use, among the member countries which conform the regional trade bloc. This factor leads inexorably toward a continental trade model for (admittedly nonstandard) goods like water."¹⁴

Given this understanding of commodities in trade law and the historical pattern of diversions established within the Great Lakes bioregion, both Canada and the United States have established obligations and rights to the waters of the bioregion. Following this conclusion, the relevant questions become: (1) What are the obligations of Canada and the United States under the NAFTA with regard to current and future diversions?, and (2) What are the rights of the Party Governments under the NAFTA, and the associated rights of interested groups with regard to the water resource?

The Obligations:

1. National Treatment

In trade legaleze, National Treatment means that one country will accord another country identical treatment to that which it provides nationally. The purpose of this doctrine is to prevent a single country from utilizing domestic measures (taxes, laws,

¹⁴ Roberto Salinas Leon, Academic Director, Centre for Free Enterprise Research, Mexico City, "Water and North American Free Trade: Problems and Prospects for a Viable Water Market in Mexico", in J.E. Windsor (ed.) Water Export: Should Canada's Water before Sale?, Proceedings of a Conference held in Vancouver, B.C., May 7-8, 1992, Canadian Water Resources Association, 1992, pp.181-205.

regulations, etc) to provide protection to nationals. Chapter 3, Article 301.1 of the NAFTA [FTA Article 105] requires the signatories to accord National Treatment with respect to the trade of goods. Other article relevant to services and investment are discussed at a later point in the paper.

Controversy arises with regard to the obligations implied under the NAFTA, as compared to those of the GATT because GATT National Treatment does not apply to exports, investment, and services such as engineering and construction. These are new obligations assumed under the NAFTA and the FTA. Furthermore, the ability to use trade remedies under the NAFTA is confined. Article 309 of the NAFTA states that

no Party shall adopt or maintain any prohibition on the ... exportation ... of any good destined for the territory of another Party, except in accordance with Article XI of the GATT...

Article XI [Quantitative Restrictions] of the GATT prohibits the use of prohibitions and restrictions on exports and imports. Because the exceptions to Article XI are temporary in nature and recent trade decisions have emphasized a strict interpretation of the interrelationship of GATT Articles III [National Treatment] and XI [Quantitative Restrictions],¹⁵ it is arguable that the

¹⁵ In the Salmon and Herring decision, it was held that the conservation measure used to protect the natural resource could not constitute a disguised barrier to trade. Upon subjective analysis the panel determined that the absolute requirements of the Canadian government constituted a disguised barrier. However, the panel concluded that they would entertain modifications to the requirements that would be more appropriate for conservation purposes. Thus, the panel established jurisprudence supporting a GATT determination of an "appropriate" environmental standard in light of trade requirements.

to do a tuna

In Dolphin/Tuna the panel considered international trade law obligations, but could not compare to competing international

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exemptions from trade obligations will not apply to water exports.¹⁶

Applying this discussion to the Great Lakes, it is argued that the Canadian federal and provincial measures intended to protect the shared water resources of the Great Lakes would be contrary to the NAFTA. The results are twofold.

In the first instance, the purpose of the FTA and the NAFTA is freer trade. Regulations and prohibitions on an exported resource implemented for the purpose of preserving the resource amounts to a disguised barrier to trade, and ultimately contrary to the theory of free trade. Article 314 of the NAFTA states that no Party shall implement a tax duty or charge on the export of any good, unless a similar charge is applied to domestic consumption. In other words, Canadian water exporters could not charge American consumers more than they were charging Canadian consumers, and visa versa.

[Assume for purposes of argument that the Georgian Bay Pipeline is constructed and supplies municipal water to southern Ontario urban centres. If the Corporation providing that service were to extend into the United States, the cost per unit and for distribution could not exceed the cost charged to Canadian consumers, despite the potential for increased environmental damage. The primary

environmental obligations. The MMPA was domestic legislation, and was not supported by an international covenant. Some authorities have suggested that while a country cannot use restrictive trade practices to impose domestic environmental standards on another nation with different environmental laws, it might be possible to utilize trade measures if there was a concurrent international environmental obligation which could be said to modify the GATT obligation. [check Ft#67]

Imports of Tuna; Herring and Salmon; Undersized Lobsters

¹⁶ A.L.C. de Mestral FT 19, p.105.

objective is freer trade, not environmental preservation.

In the second instance, any laws enacted must be applied without discrimination to all investment or provided services. However, because of the lack of harmonized standards regarding quality and quantity water issues, any new legislation implement with the intention of preserving an environmental standard could be challenged as a disguised barrier to trade.

To conclude, the new National Treatment obligations developed under the NAFTA pose a significant barrier for a local or federal government to inhibit the growth and development of water export infrastructure.

2. Proportional Sharing

Article 315 and 316 of the NAFTA, commonly referred to as the "proportionality clause", states that the limited restrictions on exports which are allowed under GATT Article XI [Quantative Restrictions] and XX [Exemptions] are allowed in the NAFTA only if they do not reduce the total proportion of that good made available for export over a 36-month period or another negotiable period of time. This clause applies to the export of all Canadian goods, including water. It should be noted that, the "other negotiable period of time" is new clause under the NAFTA, differing from its sister provision under FTA (Article _____), that has not been clarified and may be of relevance during a period of water shortable. Furthermore, under Annex 316, Mexico has been exempted from these provisions.

With reference to the Great Lakes issues, regardless of the consumption per person ratio, or alternative conservation efforts

established to preserve the integrity of domestic resources, once a resource is committed to export, it is committed to export. Arguments regarding excessive consumption practices or the lack of conservation standards are irrelevant in light of the proportionality provisions of NAFTA.

3. Limitations on Indirect Controls - Investment, Services, Regulations, Standards

The NAFTA has effectively deprived its Parties of traditional trade measures used to protect natural resource. Therefore, it becomes necessary to examine indirect controls which could be manipulated by provincial, state or federal governments in attempting to regulate or control water export. However, upon examination, it is clear that the following provision would not provide sufficient protection for the Great Lakes:

* Article 1114, which relates investment activity and environmental concerns, is so loosely worded that it is not certain if the clause could be used to stop a proposed investment scheme.

* Because the Canadian government failed to exempt specific economic activities as did the Mexican government under Article 1101(2), Article 1106(1) prohibits a Party from imposing requirements on the establishment, acquisition, expansion, management, conduct or operation of the investment of an investor.

* Under Chapter 12, National Treatment is accorded to service providers. Therefore, governments are obligated to treat service providers, including water export companies, in an identical fashion.

* Article 1207 disallows Quantitative Restrictions.

* Article 1208 commits the parties to liberalizing licensing and performance requirements.

Effectively, these provisions commit the parties to treating any developers, investors, or service providers in a similar manner. A Party could not discriminate against a foreign investor

or developer in order to prohibit or regulate the development of a water export infrastructure.

The Rights: Relationship to Sovereignty and Decision-Making

Although water marketing has the potential to improve the efficiency of water utilization, the trend has also weakened provincial and state obstacles to water transfer. The Center for International Environmental Law, based in Washington, noted that "[w]here ten years ago, it was virtually impossible to conceive how water would ever flow through the labyrinth of local laws necessary to complete a large-scale interbasin transfer, now allocation is increasingly being conducted through the market."¹⁷ Effectively, under the NAFTA the decision making authority and ability to regulate water diversions has moved from the state, provincial and federal level to an trinational panel.

Chapter 20 of the NAFTA outlines the function and obligations of the trade panel. Important aspects of this process include:

- * The trade panel will meet and make its decision in almost total secrecy. (Article _____)
- * Final panel reports may be withheld. (Article _____) *not made public*
- * In making a decision, the trade panel will consider the text of the agreement based upon their trade expertise. (Article _____)
- * It is at the discretion of the panel to consider outside scientific expertise. The discretion is dependent upon the consent of both parties. Additionally, the outside evidence may only be provided with regard to questions of fact. However, either party may request a report by a scientific

¹⁷ Center for International Environmental Law, "Interbasin Water Transfers After NAFTA: Is Water a Commodity or Ecological Resource?", Draft Working Paper, Washington, DC, December 20, 1992, p.20. [check to see if may quote/or get final paper]

review board. (Article _____)

* Only governments may raise complaints under the NAFTA; no citizen participation is permitted. (Article _____)¹⁸

Over the past 20 years, Great Lakes' organizations motivated by environmental concerns have developed effective networking links and lines of communications with the local and federal governments. The result has been the ability to participate and contribute to the development of water policy in the bioregion. The NAFTA will limit this ability to participate.

Disputes regarding access to a demanded resource will be heard before a secret trade panel, which will perform its own investigation or contract the services of a scientific review board. This limitation of the ability of interested parties to contribute to the decision-making process will result in the emphasis upon trade considerations to the exclusion of other relevant issues, including the environmental degradation experienced in the Great Lakes bioregion which would inevitably result from the depletion of its water resources.

Implications of Water Diversions wrt Trade in the Great Lakes Bioregion

In a 1992 study, the Canadian Centre for Policy Alternatives drew several basic conclusions regarding the implications of the NAFTA for future water export, including:

* ... if a provincial government were to allow water removal from a stream or acqifer, there is every reason to believe that the access to or use of that water could not be

¹⁸ David Hunter and Paul Orbuch, "Intervasin Water Diversions After NAFTA" Center for International Environmental Law p.12

restricted to Canadian

* ... once a diversion or a river or stream is allowed, a pipeline approved, [or] a water tanker port established, there would be no obvious way for Canadians to reserve that water for use within Canada.

* ... the proportionality clause means that (under ordinary circumstances) once that water tap is opened, no Canadian government can force it closed.

These conclusions pose a unique problem for the citizens of the Great Lakes bioregion. The demand for water resources, specifically the fresh water resources of the Great Lakes, will increase as both Americans and Canadians search for alternatives to a quickly growing polluted water supply. By establishing "viable" diversionary schemes and draining the Great Lakes' waters, the bioregion will be committed to a policy of environmental degradation that will not be reversable under NAFTA.