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STATUS OF BULK WATER EXPORTS UNDER NAFTA

Binda Preet Sahni

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I. INTRODUCTION

The North American Free Trade Agreement¹ (“NAFTA”) went into effect on New Year’s Day 1994. The signatory members are the United States, Mexico, and Canada. While the purpose of NAFTA is to promote investment in those regions, the treaty does not establish whether water is a saleable good. The text neither mentions the word “water,” nor does it expressly prohibit transactions involving water.² This terse dichotomy leads to the following issue.

The issue is whether freshwater reserves can be extracted for sale or preserved as natural resources. Is water a *good* and a *commodity*? If considered a commodity, then fresh water is a property right. That means that governments and private investors can sell bulk water. This argument is strengthened by NAFTA’s further omission of a clause stating that a right to water is a human right. A nexus between water access and human rights would have entitled environmental protection through the public trust doctrine.³

The loopholes listed above act in favor of treating water as an item of commerce. The main supporting factor is that the potential

¹ North American Free Trade Agreement, U.S.-Can.-Mex., art. 301, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

² Byrant Walker Smith, *Water as a Public Good: The Status of Water under the General Agreement on Tariffs and Trade*, 17 CARDOZO J. INT’L & COMP. LAW 291, 309 (2009). Laurie R. Blank, *Rules of Engagement: Law, Strategy and Leadership* 1, 9 (Emory Public Law Research Paper No. 11-168, 2012), available at <http://ssrn.com/abstract=1872505>

³ Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970).

earning power of water is plausible. At least 13% of the world's renewable freshwater is in North America.⁴ Clearly a global market exists and can be targeted; it consists of water scarce consumers with consumption and agricultural demands.⁵ Therefore, the export of surface and ground water from the U.S. and Canada can offer viable business opportunities to public and private investors. NAFTA recognizes *locus standi* for juridical persons that invoke the investment and dispute settlement provisions of Chapter 11.

Claim by an Investor of a Party on Behalf of an Enterprise 1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under: (a) Section A or Article 1503(2) (State Enterprises), or (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.⁶

In order for NAFTA to exempt trade-in-water, a definition of "water" must be inserted that would make environmental preservation paramount. This would void the commercial status of water in member states. Unless NAFTA is amended to include discussion of water, there is nothing in the text to preclude the sale of water. Any attempts by the U.S. or Canada to block the sale of water to Mexico and the rest of the world can become subject to Chapter 11, Article 1110,⁷ and Article

⁴ U.N. ENVIRONMENTAL PROGRAMME, GLOBAL ENVIRONMENT OUTLOOK 3 170 (2002), available at <http://www.grida.no/geo/geo3/english/pdfs/prelims.pdf>; see also Adrian McDonald & Susannah Isabel Brown, *Water in Canada: Resources and Issues*, 16(2) BRIT. J. CAN. STUD. 259 (2003), available at <http://liverpool.metapress.com/content/v376321645g4w554/?genre=article&id=doi%3a10.3828%2fbjcs.16.2.4>.

⁵ Jose Cuesta, *Food Price Watch*, THE WORLD BANK, YEAR 4, ISSUE 14 (Feb. 2014) 6.

⁶ NAFTA, *supra* note 1, art. 1117.

⁷ *Id.* at art. 1110(1) ("No Party shall directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law

1120,⁸ permitting disputes to be submitted to international arbitration under the ICSID Convention or the UNCITRAL Arbitration Rules. Chapter 11, Article 1110 is the Expropriation and Compensation clause. It is triggered when an investor alleges discriminatory treatment:

Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.⁹

Canada and certain U.S. states have attempted to circumvent Article 1110 by enacting legislation to ban the bulk export of water. These precautions are noteworthy – but not sufficiently comprehensive. They are limited in geographical scope. For example, in Canada the Transboundary Waters Protection Act¹⁰ operates on a federal level and is restricted to transboundary waters. The provinces retain individual options of exporting water. In the U.S., common law and statutes safeguard the right to retain water sources. The Supreme Court ruled that ground water is not an article of interstate commerce in *Tarrant Regional Water District v. Hermann*.¹¹ Alaska is the only state to allow bulk water exports, but applies environmental and health based balancing factors to determine if it should grant water permits,¹² while

and article 1105; and (d) on payment of compensation in accordance with paragraphs 2 to 6”).

⁸ *Id.* art. 1120.

⁹ *Id.* art. 1102(1).

¹⁰ International Boundary Waters Treaty Act and the International River Improvements Act, S.C. 2013, c. 12 (Can.) [hereinafter Transboundary Waters Protection Act].

¹¹ *Tarrant Reg'l Water Dist. v. Hermann*, 133 S. Ct. 2120, 2137 (2013).

¹² Water Use Act, ALASKA STAT. § 46.15.080 (2014)(a) The commissioner shall issue a permit if the commissioner finds that (1) rights of a prior appropriator will not be unduly affected; (2) the proposed means of diversion or construction are adequate; (3) the proposed use of water is beneficial; and (4) the proposed appropriation is in the public interest. (b) In determining the public interest, the commissioner shall consider (1) the benefit to the applicant resulting from the proposed appropriation; (2) the effect of the economic activity resulting from the proposed appropriation; (3) the effect on fish and game resources and on public recreational opportunities; (4) the effect on public health; (5) the effect of loss of alternate uses of water that might be made within a reasonable

California recognizes the right to safe drinking water and sanitation as a human right.¹³

This paper examines the impact of NAFTA on the status of bulk water exports in Canada and the United States. It discusses the above mechanisms, and where applicable, the relevant links with Chapter 11.

II. CANADA

The Constitution Act of 1982 gives provinces control over their non-renewable natural resources, which would include water resource management.¹⁴ The federal government maintains jurisdiction over federal water boundaries. In spite of this, the federal government can become liable for the acts of provincial governments in the event of a NAFTA Chapter 11 expropriation claim. Such risks and assuming of responsibility result from the interplay of international trade law with domestic law. How this can occur is discussed below.

Where the sale of bulk water is concerned, provincial water legislation does not necessarily protect the rights of buyers even if a water permit is conferred. Investors can resort to NAFTA safeguards against the Government of Canada, mainly the right to sue or seek arbitration. The inconsistent application of provincial laws was demonstrated in British Columbia in the 1990s, when the provincial government revoked a policy¹⁵ to permit bulk water removal and export. Earlier, British Columbia had granted a water permit to a local

time if not precluded or hindered by the proposed appropriation; (6) harm to other persons resulting from the proposed appropriation; (7) the intent and ability of the applicant to complete the appropriation; and (8) the effect upon access to navigable or public water.”).

¹³ CAL. WATER CODE § 106.3 (West 2013).

¹⁴ Constitution Act, 1982, *being* Schedule B to Canada Act, 1982, c.11, § 92A(1) (U.K.) (“In each province, the legislature may exclusively make laws in relation to (a) exploration for non-renewable natural resources in the province; (b) development, conservation and management of non-renewable natural resources . . .”).

¹⁵ *Sun Belt Water, Inc. v. Canada*, NAFTA, Ch. 11, ¶1 (1998) (“In the early 1980’s, the BCG developed and published a policy supporting the export of surplus fresh water in bulk by marine transport. Under the Water Act, the Provincial Crown and the BCG owned all water. Interested parties were entitled to apply to the Controller of Water Rights for licenses to take water from coastal streams and rivers for the purposes of export by marine transport.”) [hereinafter Notice of Intent *Sun Belt Water v. Canada*].

company, Snow Cap Waters Ltd.¹⁶ In 1990 Snow Cap Waters Ltd. formed a joint venture with an American Company, Sun Belt Water Inc., to supply water in the other NAFTA States.¹⁷

In 1990, SUN BELT was established as a single purpose company and represented a private enterprise initiative to address the critical need for additional supplies of fresh water in Southern California, Nevada, Arizona and Baja California-Mexico. This initiative also relied on the clearly articulated BCG policy to support the export of its fresh surplus water by marine transport. As of 1990, the BCG had confirmed its policy by issuing six licenses to export water and a further nineteen (19) were under consideration.¹⁸

Clearly, Sun Belt had relied on the issuing of the water license to plan the rest of its business strategy. It allocated supplementary financing and expertise for its investment.

In addition to its relationship to its Canadian joint venture partner, SUN BELT entered a number of strategic corporate alliances to address the large scale capital and infrastructure requirements necessary to deliver water from Canada by marine tanker to the United States and Mexico.¹⁹

In 1991 British Columbia imposed a permanent moratorium on all water licenses—past permits and present and future applications.²⁰ Sun Belt interpreted the regulatory measure as an act of expropriation.²¹ It was unable to perform the contracts for supplying Canadian water to

¹⁶ *Id.* ¶ 10.

¹⁷ *Id.*

¹⁸ *Id.* ¶ 35.

¹⁹ *Id.* ¶ 36.

²⁰ *Id.* ¶ 16.

²¹ See *Marvin Feldman v. Mexico*, ICSID Case. No. ARB(AF)/99/1, Award, ¶100 (Dec. 16, 2002).

its customers.²² Next the British Columbia Water Protection Act was amended in 1996 to ban water extraction.²³ Section 4 provides:

- (1) Except for a registered licence, no licence, approval or permit under the *Water Act*, whether issued before, on or after the date this section comes into force, confers any right to drill for, divert, extract, use or store water for removal from British Columbia,
 - (a) to dispose of or sell water to a person for removal from British Columbia,
 - (b) to convey or transport water for removal from British Columbia,
 - (d) to remove water from British Columbia, or
 - (e) of property in respect of water removed or intended to be removed from British Columbia.²⁴

Sun Belt contested the legislative setbacks as expropriation directed against its projected investments. In 1998 Sun Belt invoked Article 1119 of NAFTA to deliver a Notice of Intent to Submit a Claim to Arbitration.²⁵ The company alleged that it had endured discriminatory treatment as a foreign investor.²⁶ It requested Canada to rectify the wrongs with fair and equitable treatment *in accordance with international*

²² *But see Lake Simcoe Ice and Cold Storage Co. v. McDonald*, [1901], 31 S.C.R. 130, 131–32 (Can.) (interpreting a Letters Patent to allow defendant's commercial activities even if the government had granted the Letters Patent to the plaintiff).

²³ Water Protection Act, R.S.B.C. 1996, c. 484, art. 4 (Can.).

²⁴ *Id.*

²⁵ See ALASKA STAT. §46:15:080 (2014). This statute was the legislative setback constituting a breach of the contract. *See also* NAFTA, *supra* note 1, art. 1119.

²⁶ NAFTA, *supra* note 1, art. 1102(1) (“Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments”); *Id.* art. 1103(1) (“Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”); *Id.* art. 1104 (“Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103”).

law.²⁷ One year later, Sun Belt filed a Notice of Claim and Demand for Arbitration²⁸ pursuant to the UNCITRAL Arbitration Rules. The Notice sought full monetary damages, including costs for lost business opportunities and remedies available under international law.²⁹ Sun Belt argued that Canada had breached its obligations of transparency and fairness under Article 102 of NAFTA and Articles 26 and 27 of The Vienna Convention on the Law of Treaties.³⁰ However, it is uncertain what the status of the arbitration is at this time and, indeed, if the dispute proceeded to arbitration³¹. The absence of a definite outcome emphasizes how provincial water management that is arbitrary can undermine NAFTA's investment aims.

The Transboundary Waters Protection Act came into effect on June 19, 2013. It prohibits the bulk removal of water that flows across the international boundary between Canada and the U.S.³² Section 10 reads:

“bulk removal” means the removal of water from boundary or transboundary waters and the taking of that water, whether it has been treated or not, outside the Canadian portion of the water basin – set out in Schedule 2 – in which the waters are located:

²⁷ See *Sun Belt Water v. Canada*, ¶4–5; NAFTA, *supra* note 1, at art. 1105(1) (“Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security”); See also *Metalclad Corp. v. United Mexican States*, ICSID, ¶ 103 (2000).

²⁸ *Sun Belt Water Inc. v. Her Majesty The Queen*, NAFTA, Ch. 11 (1999).

²⁹ *Id.* at 2.

³⁰ *Id.* at 5; NAFTA, *supra* note 1, art. 102(1) (“The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to: a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; b) promote conditions of fair competition in the free trade area; c) increase substantially investment opportunities in the territories of the Parties”); See also Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith”); *Id.* art. 27 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”).

³¹ *Carten v. Canada* [2009] F.C. 1233, paras. 11 & 18 (Can. B.C.).

³² Transboundary Waters Protection Act, S.C. 2013, c. 12, (Can.).

- (a) by any means of diversion, including by pipeline, canal, tunnel, aqueduct or channel; or
- (b) by any other means by which more than 50 000 L of water are taken outside the water basin per day.

This definition does not guarantee full environmental preservation of water resources. It recognizes exceptions in the forms of commercial goods that contain water. "Bulk removal does not include the taking of a manufactured product that contains water, including water and other beverages in bottles or other containers, outside a water basin."³³ According to section 10(b), the daily quota of water that can be removed is 50,000 liters. It is important to further distinguish that any water that is taken and then put in manufactured products is no longer in its natural state. The water becomes an object of purchase and consumption. Consequently, the Act relinquishes protection. As a good, that water now becomes subject to trade law including the NAFTA treaty. Perhaps the Act should have confirmed that a person who gains access to water under section 10(b) does not acquire property rights. A similar issue was considered in *Bayview Irrigation District v. United Mexican States*,³⁴ a Chapter 11 water dispute between Mexico and entities in the U.S. The ICSID Arbitral Tribunal ruled,

One owns the water in a bottle of mineral water, as one owns a can of paint. If another person takes it without permission, that is theft of one's property. But the holder of a right granted by the State of Texas to take a certain amount of water from the Rio Bravo/Rio Grande does not 'own', does not 'possess property rights in', a particular volume of water as it descends through Mexican streams and rivers towards the Rio Bravo/Rio Grande and finds its way into the right-holders irrigation pipes. While the water is in Mexico, it belongs to Mexico, even though Mexico may be

³³ *Id.* § 10.

³⁴ *Bayview Irrigation Dist. v. United Mexican States*, ICSID Case No. ARB/AF/05/01, Award ¶ 116 (June 19, 2007).

obliged to deliver a certain amount of it into the Rio Bravo/Rio Grande for taking by US nationals.³⁵

Overall, however, the Transboundary Waters Protection Act attempts to have a deterrent effect. It imposes civil and criminal penalties on offending individuals and corporations. Fines range from \$15,000 to \$1,000,000.³⁶ Prison sentences can extend from six months to five years.³⁷ The plaintiff has the onus to establish a due diligence defense.³⁸ He must show that he exercised due diligence to prevent the commission of the offense.³⁹ Unfortunately, the Act omits criteria for establishing a due diligence standard, though Section 36(2) lists “aggravating factors” that could serve as benchmarks.⁴⁰ This shortcoming has the potential to create uncertainty and an application of inconsistent standards in NAFTA disputes that are heard first in Canadian courts and then submitted to international arbitration. Firstly, a tribunal that hears a NAFTA arbitration claim is not bound to follow the precedents and evidentiary rules of courts in NAFTA member states. Secondly, NAFTA tribunals (UNCITRAL or ICSID) are not obligated to follow a uniform interpretative approach among themselves. The reasons being that tribunal proceedings are generally confidential and do not adhere to the doctrine of *stare decisis*. Thirdly, the most significant factor to consider is that the Transboundary Waters Protection Act does not supersede NAFTA. Article 103.2 of NAFTA establishes that the Agreement prevails at all times—whether the NAFTA claim is deliberated in a Canadian court or a NAFTA tribunal.⁴¹

Thus, it is likely that a NAFTA tribunal will construe the due diligence defense in favor of an aggrieved investor as well as place less

³⁵ *Bayview Irrigation Dist. v. United Mexican States*, ICSID Case No. ARB/AF/05/01, Award ¶ 116 (June 19, 2007).

³⁶ Transboundary Waters Protection Act, S.C. 2013, c. 12, §§ 24–25, § 31 (Can.).

³⁷ *Id.* § 24.

³⁸ *Id.* § 26.

³⁹ *Id.*

⁴⁰ *Id.* § 36(2).

⁴¹ NAFTA *supra* note 1, art. 103.2, Dec. 17, 1992, 32 I.L.M. 289 (1993) (“In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement.”).

weight on the legal significance of the International Boundary Waters Treaty Act. What is the solution? Member states should amend NAFTA to expressly exempt water as a commercial good or product. Until then the sale and export of bulk water can be deemed legal.

III. UNITED STATES

The U.S. Supreme Court has retracted from encouraging interstate sale of water.⁴² In *Tarrant Regional Water District v. Hermann*, the Court denied the export of water from Oklahoma to Texas.⁴³ Common law and statutory limits placed on water diversion are recent. In 1982 and 1992, the U.S. Supreme Court and the state of Alaska authorized bulk water exports.⁴⁴ In contrast, in 2012 and 2013, the U.S. Supreme Court and the state of California prioritized environmental rights over economic gains.

In *Sporhase v. Nebraska*, the Supreme Court held that groundwater is an article of commerce, regulated by Congress.⁴⁵ It struck down a Nebraska statute, which placed constraints on interstate groundwater transfer.⁴⁶ The law had deprived adjoining states from buying water from Nebraska unless there was a reciprocal system. The adjoining state was required to withdraw water and supply Nebraska in return.⁴⁷ The Court's rationale for declaring the statute unconstitutional was based on a right to life approach that "water, unlike other natural resources, is essential for human survival."⁴⁸ Surprisingly, the Court did not uphold this fact in *Tarrant Regional Water District*. It discouraged interstate commerce by ruling that Oklahoma water apportionment statutes were constitutional.⁴⁹ By applying contract law, the Court held that cross border rights did not exist to allow diversions of surface water to Texas and other states.⁵⁰ However, the judgment also recognizes issues of water rights and

⁴² *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982).

⁴³ *Tarrant Reg'l Water Dist. v. Hermann*, 133 S. Ct. 2120, 2123 (2013).

⁴⁴ *Sporhase*, 458 U.S. at 941; *Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2123.

⁴⁵ *Sporhase*, 458 U.S. at 949–50.

⁴⁶ *Id.* at 960.

⁴⁷ *Id.* at 944.

⁴⁸ *Id.* at 952.

⁴⁹ *Tarrant Reg'l Water Dist.*, at 2136, 2137.

⁵⁰ *Id.*

management based on the public trust, sustainable development, and precautionary and inter-generational equity principles—despite not naming the doctrines.⁵¹ The explicit mention of these doctrines in future cases or legislation is needed to define water access or preservation as environmental rights. This also would offer clarification if a dispute proceeds to a NAFTA Chapter 11 forum. The doctrines form principles of international trade and environmental law,⁵² the former of which includes NAFTA jurisprudence.

Alaska and California have enacted groundbreaking water legislation, which incorporate the above doctrines. The Alaska Water Use Act contains the following clauses for bulk water removal and sale.

AS 46.15.035. Appropriation or Removal of Water Out of Hydrologic Units to Other Hydrologic Units; Water Conservation Fee; Reservation of Water For Fish.

- (a) Water may not be removed from the hydrologic unit from which it was appropriated to another hydrologic unit, inside or outside the state, without being returned to the hydrologic unit from which it was appropriated nor may water be appropriated for removal from the hydrologic unit from which the appropriation is sought to another hydrologic unit, inside or outside the state, without the water being returned to the hydrologic unit from which it is to be appropriated, unless the commissioner
 - (1) finds that the water to be removed or appropriated for removal is surplus to needs within the hydrologic unit from which the water is to be removed or appropriated for removal, including fishing, mining, timber, oil and gas, agriculture, domestic water supply, and other needs as determined by the commissioner;

⁵¹ *Id.* at 2132, 2137.

⁵² *Gabcikovo Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. Report No. 7 at 78, 93, 95, 104 (Sept. 25).

- (2) finds that the application for removal or appropriation for removal meets the requirements of AS 46.15.080 ; and⁵³

AS 46.15.037. Sale of Water By the State.

- (a) The commissioner may provide for the sale of water by the state if
- (1) the water has first been appropriated to the state in accordance with the requirements of this chapter;⁵⁴

These provisions emphasize resource conservation instead of exploitation. At this time, Alaska is the only U.S. state to allow bulk water exports. Clearly, it would be in favor of including water as a good or commodity under NAFTA.

Under section 106.3 of the California Water Code,⁵⁵ California indirectly supports the commercialization of water under NAFTA. However, it does not seek a role as a supplier of water past its borders. Section 106.3 focuses on access to water as a human right for California residents.⁵⁶ The text calls for efficient water governance to ensure water preservation.

- 106.3. (a) It is hereby declared to be the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.
- (b) All relevant state agencies, including the department, the state board, and the State Department of Public Health, shall consider this state policy when revising, adopting, or establishing policies, regulations, and grant criteria when those policies, regulations, and

⁵³ The Water Use Act, Alaska Stat. § 46.15.035 (2014), *supra* note 11.

⁵⁴ *Id.* § 46.15.037.

⁵⁵ California Water Code § 106.3 (2012); 2012 Cal. Stat. 524.

⁵⁶ *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 952 (1982).

criteria are pertinent to the uses of water described in this section.

- (c) This section does not expand any obligation of the state to provide water or to require the expenditure of additional resources to develop water infrastructure beyond the obligations that may exist pursuant to subdivision (b).
- (d) This section shall not apply to water supplies for new development. (e) The implementation of this section shall not infringe on the rights or responsibilities of any public water system.

Unfortunately, section 106.3 fails to mention bulk water exports. Such inconsistency strongly suggests that California is adverse to exporting water since it is a scarce resource, but California is not necessarily opposed to buying water to meet the needs of its population. California's necessity for importing water was demonstrated in the Sun Belt Water Inc. - Canada water dispute discussed earlier.⁵⁷ The company was a California entity whose purpose in applying for a water permit in British Columbia was to supply water to a town in California. Unexpectedly, the government of British Columbia rescinded the water permit, and Sun Belt Water was unable to perform the contract. The policy reasons—economic or patriotic⁵⁸—behind the cancellation by Canada are unknown. Nonetheless, they do not serve the objectives of international trade law as sought by NAFTA. The market factors of transnational supply and demand were not met.

IV. CONCLUSION

NAFTA is a visionary trilateral free trade agreement. Therefore, the ambiguity around the issues of bulk water export should have been anticipated even before NAFTA came into effect in 1994. The fault rests

⁵⁷ See Notice of Intent Sun Belt Water v. Canada, *supra* note 13, at ¶ 4–5.

⁵⁸ Michael I. Krauss, NAFTA Meets the American Torts Process: O'Keefe v. Loewen, 9 GEO. MASON L. REV. 69, 96 (2000).

with the drafters. The United States, Mexico, and Canada failed to address whether water is a good or commodity under NAFTA.

The absence of a definition of water has led to foreseeable differences of opinion between environmental and commercial sectors in member states. However, there is no indirect or express prohibition against bulk water export in the treaty. For these reasons, it can be "read in" that sale and transfer of the natural resource is permissible.