CONFLUENCE OF THE LAW OF FRESH WATER RESOURCES AND INTERNATIONAL TRADE:
Do Canada's International Trade Obligations Apply to Canada's Fresh Water Resources?

by

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Abstract

This thesis explores whether international trade rules apply to Canada's fresh water resources. In order to determine if international trade rules apply, in particular the rules contained in GATT 1947, GATT 1994, and NAFTA, three questions are posed by the author. The first question focuses the enquiry on the legal characterization of fresh water resources in the selected international legal instruments to determine the obligations contained in the trade agreements apply. The second question is, if the first question cannot be answered, what other interpretive tools can be employed to come to an answer. Finally, the third question is, if international trade obligations apply the the bulk export of fresh water resources, are there any exemptions which can be employed to limit or prohibit the bulk export of the resource.

In order to answer these questions, the author applies a traditional legal doctrinal analysis. This provides a method of analyzing the legal texts of the international agreements and other legal materials in an orderly and systematic manner. Using this methodology, the author engages with the primary materials to determine the ordinary meaning of the words and phrases used in the texts.

In addition to the analysis of the legal texts, the author reviews the history of the development of Canada's international trade and foreign policy through the lens of the international relations theory of exogenous shock.

By using the theory of exogenous shock as an interpretive aid, the author is able to provide justification in concluding that the preferred interpretation that Canada's international trade obligations found in GATT and NAFTA do not apply to Canada's fresh water resources.

Preface

This thesis is original, unpublished, independent work by the author, Brett Jason Nash. The opinions reflected in this thesis are the author's own and do not reflect the opinions of the Department of Justice Canada or the Government of Canada.

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Acknowledgements

Researching and writing a thesis is a relatively solitary endeavor. However, many people have contributed in many ways to the development of my ideas. I have had many discussions with many people on a variety of topics which seemed to have no connection to this thesis. However, these discussions about ideas and themes in sociology, history, economics, geography, cultural studies, and gender and race studies have formed how I see the law and how international relations and international law affect and are affected by other disciplines. It may not be readily apparent in this thesis of the full extent of the influence other academics have had, but I do want to acknowledge their impact on my academic development.

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1 Introduction: Charting the Course

Amid the discussions on climate change in recent years, there have been numerous reports of droughts, decreasing levels in the ground water and reservoirs, and stresses on regional water resources due to increasing urban, industrial, and agricultural uses. Much of the attention has been on the Southwestern region of the United States of America and parts of Australia. In Canada, which is generally regarded as "water rich", there have even been concerns about drought and decreasing volumes of water available to support the current needs in regions, particularly the Prairies. Water restrictions were imposed in the Metro Vancouver area in the summer of 2015 due to decreasing levels in reservoirs, unthinkable to many due to the region being located in a temperate rainforest.

However, this appears to be a new reality for many regions of the world. The water available for industrial, agricultural, and human uses is being stressed due to a myriad of factors. Not only are there concerns about local water reserves but also plans are being developed to augment local reserves with water diverted from water courses or piped into regions to minimize the water deficit. This is not a recent development, but has reached a critical juncture.

The object of this thesis is to determine whether the exploitation and conservation of Canada's fresh water resources is subject to Canada's international trade obligations. The means to determine this is by analysing the texts of

international trade agreements to which Canada is a party that may apply to the fresh water resources. In addition to the texts of these agreements, other interpretive tools will be employed to attempt to provide guidance of how these instruments can be interpreted in order to provide a basis to answer the question. In this thesis, the focus is on fresh water as opposed to salt water. The term "fresh water resources" used throughout the thesis refers to fresh water from sources such as aquifers, rivers, lakes, and ice caps and to describe an exploitable quantity of water.[1]

Canada is one of the world's nations that has been endowed with large fresh water reserves. Some estimates by Environment Canada put Canada's fresh water reserves at 20 per cent of the world's total fresh water.[2] This fresh water is located in large lakes throughout the country and in its rivers, smaller lakes, streams, aquifers, and mountain snow and ice pack. However, Environment Canada estimates that Canada only has 7% of the world's renewable fresh water resources.[3] Some hydrologist and environmental scientists classify water as a resource that is renewable through the water cycle, but is at risk of becoming a exhaustible resource due to increased industrial uses, which do not return the used water to the natural system. Industrial uses of water include manufacturing processes, resource extraction, and agricultural irrigation. Other major uses include domestic and residential uses and, most importantly, as drinking water. With increased global

[1] The terms "water" and "fresh water" are used interchangeably by various authors and when using quotes from those authors, the terms they use will be kept in the quotations.
[2] Environment Canada website http://www.ec.gc.ca/eau-water/default.asp?lang=En&n=1C100657-1 Date Modified: 2012-02-16.
[3] *ibid*.

demand for agricultural and industrial uses, locating new sources of fresh water to meet that demand by regions with small reserves becomes increasingly more urgent.

There was a planned project to ship fresh water resources from a region of British Columbia that is abundant in water to a place that has a water deficit. This plan developed by the Goleta Water District in California involved the transboundary transportation of fresh water resources. Plans like this bring into play principles of international law and may invoke provisions of international trade agreements. The extent to which international trade agreements are applicable to such situations is uncertain. The importance of an answer to this question can be shown by the following case examples.

In 1990, two companies entered into a joint venture in British Columbia. Snowcap Waters Ltd. and Sun Belt Water Inc. planned on developing a business to ship fresh water resources from Tzela Creek, which empties into Toba Inlet on the coast of British Columbia north of Powell River. The British Columbia government granted a license to Snowcap in 1989 allowing it to withdraw 200 acre-feet[4] of fresh water resources from the creek for the purposes of marine bulk export. The joint venture planned on shipping the fresh water resources to California and other destinations by tanker. Snowcap and Sun Belt actively pursued customers relying on the license and the Crown policy to support the export of fresh water resources

[4] an acre-foot of water is defined by the volume of one acre of surface area to a depth of one foot and is 43,560 cubic feet. There are two definitions of the acre foot (differing by about 0.0006%) depend on whether the international or U.S. survey foot is used.

to the United States. Sun Belt was invited to enter into a contract by the Goleta Water District in California for the supply of fresh water resources in bulk by marine transport in December 1990. [5]

Around the same time, officials from the British Columbia Ministry of Environment wrote to Snowcap to advise them that they could apply to increase the annual withdraw from the creek and stated:

> … to obtain rights for greater quantities of water, an application should be made to the Comptroller of Water Rights. Such an application will be judged on its individual merits provided that the water to be licensed for export is surplus to local and provincial requirements and that the export operation does not impact significantly upon other resource values including environmental and land-use concerns.[6]

In addition to the above information, the Deputy Minister wrote to Snowcap informing them "the Government of British Columbia's policy is to approve applications for export of water from coastal streams provided that the water is surplus to the needs of British Columbia and is environmentally acceptable."[7]

In December of 1990, officials of the Ministry of Environment "advised [Snowcap and Sun Belt] that if Snowcap met the usual requirements of the *Water Act (B.C.)*[8], it would receive permission to expand the Tzela Creek license"[9] so that the Goleta Water District's requirements for fresh water could be met. Based on

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[5] *Snowcap Waters Ltd.* v. *British Columbia*, 1997 CanLII 810 (BC SC), 34 BCLR (3d) 139, para. 12 (*Snowcap*).
[6] *ibid*, para. 7.
[7] *ibid*, para. 8.
[8] *Water Act (B.C.),* R.S.B.C. 1979 chap 429.
[9] *Snowcap*, para. 12.

this, the Goleta Water District chose Sun Belt to enter into the contract to supply fresh water resources in bulk.

At the same time as Snowcap and Sun Belt were involved in establishing a bulk exporting operation, Rain Coast Water Corp. (which was previously named Coast Mountain Aquasource Ltd. and Aquasource Ltd.) was developing its fresh water resources exporting operation. Rain Coast proposed in 1983 to withdraw water from Freil Lake, British Columbia, also close to Powell River. The water was to be exported internationally and Rain Coast was focusing on the California market. Rain Coast secured a foreshore license from the Government of British Columbia in 1985 permitting it to ship water in bulk from the lake to Hotham Sound where it would be loaded into marine transport vessels.[10] The Government of British Columbia issued a water license to Rain Coast in 1986 allowing Rain Coast to take 1,125 acre-feet of water per year from Freil Lake.[11]

On March 18, 1991, Order in Council #331 pursuant to section 22 of the *Water Act (B.C.)*[12] was issued imposing a moratorium on the issuance of licenses for the exportation of bulk fresh water resources by tanker. On June 21, 1991, the Legislature of British Columbia enacted the *Water Protection Act*[13] that "had the effect of prohibiting the export of water British Columbia in containers of sufficient size or capacity to economically serve [Snowcap and Sun Belt's] intended business

[10] *Rain Coast Water Corp.* v. *British Columbia*, 2008 BCSC 1182, para 3.
[11] *ibid*.
[12] *Water Act (B.C.)*, R.S.B.C. 1979 chap 429.
[13] *Water Protection Act*, RSBC 1996, c. 484.

markets."[14] Both Snowcap and Sun Belt commenced an action in the Supreme Court of British Columbia for damages resulting from the prohibition to export bulk fresh water resources and the resulting inability of Sun Belt to satisfy its contract with the Goleta Water District.

In addition to the action commenced in the British Columbia Supreme Court, Sun Belt Water, Inc. delivered a notice to the Government of Canada in November 1998 under the *North American Free Trade Agreement* (NAFTA)[15]. In its *Notice of Intent to Submit a Claim to Arbitration*[16] under Chapter 11 of NAFTA, Sun Belt Water, Inc. alleged that the British Columbia Government violated investment protection provisions in Articles 1102, 1103, 1104, and 1105 of Chapter 11 NAFTA, as well as provisions of the *Canada- U.S. Free Trade Agreement*[17] and Article XI of the *General Agreement on Tariffs and Trade 1994* (GATT 1994)[18].[19] In the Notice dated November 27, 1998, Sun Belt Water, Inc. alleges that the British Columbia Government favoured a B.C. company by entering into a secret agreement giving the company special terms of access to fresh water resources for export. In addition, the March 18, 1991 moratorium imposed a prohibition of granting new water

[14] *Snowcap*, para. 15.
[15] *North American Free Trade Agreement between the Government of Canada, the Government of Mexico, and the Government of the United Stats,* 17 December 1992, Can T.S. 1994 No. 2. [NAFTA]
[16] *Sun Belt Water, Inc. v. Government of Canada, Chapter 11 NAFTA Notice of Intent to Submit a Claim to Arbitration*, November 27, 1998, Sun Belt Water, Inc. Disputing Investor. Retrieved from *Government of Canada, Foreign Affairs, Trade and Development Canada* website archive. www.international.gc.ca/trade-agreements-accords-commerciaux 2013-05-09.
[17] *Canada – U.S. Free Trade Agreement*, Can T.S. 1989 No.3.
[18] *General Agreement on Tariffs and Trade, 1994*, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [GATT 1994].
[19] *Sun Belt Water, Inc. v. Government of Canada*, p. 3.

licences is alleged to have been in violation of NAFTA and GATT 1994 that caused Sun Belt Water, Inc. to suffer a loss on their investment in a water export enterprise.

In a 1993 article entitled "NAFTA drinks Canada Dry"[20], the question was raised with respect to the applicability of NAFTA to exports of fresh water resources. In this article, the author Don Sullivan points out that in 1992 there were differing opinions regarding the applicability of trade treaties to large scale exports of fresh water resources: the Canadian Government, with Brian Mulroney as Prime Minister at the time, asserting that exports were not considered or negotiated during the NAFTA negotiations and therefore not subject to NAFTA; and the Rawson Aquatic Institutes' assertion that, pursuant to their analysis, exports of fresh water resources are not exempted or excluded due to the operation of the national treatment and general investment provisions.[21] Sullivan, a self-identified environmentalist activist, focuses on the environmental impact of large-scale water exports and raises concerns about water exports and the implications if fresh water resources are a "good" as defined in NAFTA and access rights are given to the United States.[22]

In 1999, the then Minister of Foreign Affairs the Honourable Lloyd Axworthy, and the then federal Minister of Environment Honourable Christine Stewart

[20] Sullivan, Don, "NAFTA Drinks Canada Dry" in *Canadian Dimension* Mar/Apr 93, Vol. 27, Issue 2, p 16.
[21] *ibid.*
[22] *ibid*, p. 17.

announced a strategy to prohibit bulk removals of fresh water resources and exports from Canadian water basins.[23]

The New York Times published an article in its March 8, 1999 edition entitled *Free Trade in Fresh Water? Canada says No and Halts Exports*[24] in which the author, Anthony DePalma, recounts the long history of US/Canada relations when it comes to fresh water and the plight of Sun Belt Water, Inc. DePalma paints a rosy picture of Canada's abundance and excess of water and chides Canada for opposing this view and, as DePalma says, Canada's belief that "it has little or none to spare"[25]. He quotes Lloyd Axworthy as saying "it [fresh water resources] is not just a commodity"[26] when he announced the moratorium on the bulk export of fresh water. DePalma does go to the heart of the matter when he writes "[b]ottled water is already covered under Nafta (sic), but some Canadians worry that any export permit … for bulk water would make it a tradable good throughout North America. Similarly, any attempt simply to ban water exports would actually acknowledge that fresh water … is a commodity and bring it under trade-agreement regulations."[27]

In 2007, Professor Thomas Gunton of the School of Resource and Environmental Management at Simon Fraser University, along with Joshua MacNab and Murray Rutherford, revisited the issue by addressing the Canadian

[23] Canada, Department of Foreign Affairs and International Trade, "Strategy Launched to Prohibit the Bulk Removal of Canadian Water, including Water for Export," Press Release, 10 February 1999.
[24] DePalma, Anthony, "Free Trade in Fresh Water? Canada Says No and Halts Exports", March 8, 1999, online edition www.nytimes.com/1999/03/08/world/free-trade-in-fresh-water-canada-says-no-and-halts-exports.html
[25] *ibid*.
[26] *ibid*.
[27] *ibid*.

Government's *Accord for the Prohibition of Bulk Water Removal from Drainage Basins* that was proposed in 1999.[28] The authors look at the variations among the provinces in their policies and regulation of water to determine if there is a truly Canadian approach. They then assess if these policies and regulations violate the terms of NAFTA and the WTO[29] agreements – GATT 1947[30] and GATT 1994[31]. They point out that in addition to considering provincial and federal regulation, it is important to consider Canada's other international obligations respecting water, in particular the *Boundary Waters Treaty*[32] and river specific bilateral agreements. The authors' analysis fails to come to an answer to their question.

The fundamental question that arises from these cases is how international trade law and trade agreements apply to bulk exports of fresh water resources. At present, it is uncertain how these international obligations apply to bulk exports and if they do, how will the provisions be interpreted.

[28] MacNab, J., Murray B. Rutherford, and Thomas I. Gunton. "Evaluating Canada's Accord for the Prohibition of Bulk-Water Removal from Drainage Basins: Will it Hold Water?" *Environments.* 34:3: 57-76.

[29] *Marrakesh Agreement Establishing the World Trade Organization, Apr 15, 1994,* The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 4 (1999), 1867 UNTS 154, 33 ILM 1144 (1994) [WTO]

[30] *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187, Can TS 1947 No 27 [GATT 1947]

[31] *General Agreement on Tariffs and Trade 1994, Apr 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A,* The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 17 (1999), 1867 UNTS 187, 33 ILM 1153 (1994) [GATT 1994]

[32] *Treaty Between the United Kingdom and the United States of America Concerning Boundary Waters and Questions Arising Along the Boundary Between Canada and the USA,* United States and United Kingdom, 11 January 1909, 36 US Stat 2448, UKTS 1910 No 23 (Boundary Waters Treaty).

1.1. What Questions Need to be Answered?

As stated previously, the fundamental question which is raised in these circumstances is whether the provisions of international trade agreements apply to the bulk transfer of fresh water resources. The answer to this question will determine if the fresh water resource is the subject of international trade law due to being included in the definition of a "good" or "product" contained in the legal texts, and if so, whether it can be exempted from international trade obligations under the natural resource or other exemptions. In order to do this, an analysis of the texts of the trade agreements, legal dispute resolution cases, and domestic case law will be undertaken to determine how the various tribunals have interpreted the rights and obligations parties have with respect to fresh water resources. This analysis will aid in determining a legal definition of fresh water resources and how international obligations should be applied when disputes concerning fresh water resources arise. In order to accomplish this, the following questions will be posed:

1. Does the legal characterization of fresh water resources in international legal instruments to which Canada is a party result in the bulk export of fresh water resources being subject to international trade obligations?

2. If the legal characterization of fresh water resources is inconclusive, what interpretive tools can be employed to clarify the issue?

3. If the bulk export of fresh water resources is subject to international trade obligations, can any of the exemptions contained in the agreements be used to limit or prohibit its bulk export?

The answer to these questions is of particular importance to Canada. The implications of the legal characterization of fresh water resources in trade agreements could have significant environmental impacts if fresh water resources are a "good" or "product" and no exemptions are applicable.

However, conservation of exhaustible resources is one such policy objective that is expressly dealt with in the agreements and may provide for an exemption to the applicability of the trade rules. With respect to fresh water resources, it may be the case that development and export restrictions are necessary in order to ensure a steady domestic supply as long as possible, to protect the purity of the reserves, as well as protection of ecosystems and the environment in line with the international legal principle of the precautionary approach.

1.2. How Will These Questions Be Answered: Methodological Approach

In order to answer these questions, the methodology of traditional legal doctrinal analysis will be employed. Michael Pendleton describes the process of legal doctrinal analysis as involving "identifying, reading and digesting the area of

concern"[33] by the writer by gathering cases, statutes, preparatory materials, and subsequent commentary in order to undertake an adequate analysis.[34] He states that this exercise involves "reflection on the law and applying one's own imagination to gain new insights"[35]. This approach allows the writer to engage with the primary materials and identify novel approaches to the subject matter, based on the writer's legal philosophical and theoretical assumptions. Edward Rubin also defines the traditional doctrinal methodology of law, which he calls standard legal scholarship, as a "work [that] combines a critique of an existing decision with a prescription … for a different approach… [and] is characterized by in normative quality and direct engagement of its recommendations with identifiable legal decision-makers."[36] What legal scholars are doing is "not trying to describe the causes of observed phenomena, but to evaluate a series of events, to express values, and to proscribe alternatives."[37]

In analyzing the legal materials, the principles of statutory interpretation will be key. Ruth Sullivan's works *Statutory Interpretation*[38] and *Sullivan and Driedger on the Construction of Statutes*[39] set out the key principles which will guide the interpretation of the relevant statutes and legal instruments to answer the questions regarding the legislative interpretation of fresh water resource. Sullivan

[33] Pendleton, Michael, "Non-empirical Discovery in Legal Scholarship – Choosing, Researching and Writing a Traditional Scholarly Article" in *Research Methods for Law*, Mike McConville and Wing Hong Chui, eds. (Edinburgh: Edinburgh University Press, 2007), page 162.
[34] *Ibid.*
[35] *ibid*, page 163.
[36] Rubin, Edward L. "Law And and the Methodology of Law" 1997 Wis. L. Rev. 521, p. 522.
[37] *ibid*, p. 527.
[38] Sullivan, Ruth, *Statutory Interpretation* (2d Ed.) (Toronto: Irwin Law, 2007).
[39] Sullivan, Ruth, *Sullivan and Driedger on the Construction of Statutes* (4th Ed.) (Toronto: Butterworths, 2002).

states that the generally accepted approach to statutory interpretation is the "modern principle" as first described by Elmer Driedger. The modern principle is that "the words of an Act are to be read in their entire context, in the grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament"[40] To complement this, courts in Canada have adopted the ordinary meaning rule with respect to implementing the modern principle. This approach has been sanctioned by the Supreme Court of Canada on many occasions, and most recently in the case of *R.* v. *Tse*[41]. As Sullivan explains, the ordinary meaning rule is "not [the] dictionary meaning, but the meaning that would be understood by a competent language user upon reading the words in the immediate context."[42]

Although these principles are specifically discussed in the context of statutory interpretation, the interpretation of case law is undertaken in a similar manner. Philip Frickey writes in his article *Faithful Interpretation*[43] about the use of ordinary meaning in legal analysis of texts[44]. He discusses the difference between what linguists mean by the term and what legal scholars mean by the term and draws a distinction between the two. He asserts that linguists are not normative unlike the legal scholar, who is "not merely a literal reader, but faithful to the many broader concerns wrapped up in the established practices of the legal interpretive

[40] Driedger, Elmer A., *The Construction of Statutes* (Toronto: Butterworths, 1974), p. 67.
[41] *R.* v. *Tse*, 2012 SCC 16.
[42] Sullivan, *Statutory Interpretation*, p. 50.
[43] Frickey, Philip P., "Faithful Interpretation" (1995) 73 Wash. U. L. Q. 1085.
[44] *ibid*, p. 1090.

community."[45] Alani Golanski also contends that what judges do is not really linguistic science.[46] Golanski further contends that "law and linguistics pursue different ends ... [and] linguists construing statutes will miss legally decisive issues"[47] and ultimately, the courts do not need to turn to linguistic science and linguists to do what courts have traditionally done (interpreting laws), and as Sullivan states, which they are "ideally suited [to do] … having performed it for centuries in the context of the common law."[48]

Two principles which Professor Coté discusses in his work[49], *Noscitur a sociis* and *Ejusdem generis*, are particularly helpful in determining the meaning of terms in legislation and international agreements and treaties.[50] *Noscitur a sociis* means that the meaning of a term is "revealed by association with others" usually in a list. Coté uses the example of the word "horn" which has multiple meanings, however, when it is found in a list including "trombone, horn, and clarinet" the meaning is clear.[51] *Ejusdem generis* means a "generic or collective term that completes an enumeration".[52] Coté explains that such a term "should be restricted to the same genus as those words [contained in the list], even though the generic or collective term may ordinarily have a much broader meaning."[53]

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[45] *ibid*, p. 1091.
[46] Golanski, Alani, "Linguistics in Law, (2002-2003) 66 Alb. L. Rev. 61, p. 61.
[47] *ibid*, p. 63.
[48] Sullivan, *Statutory Interpretation*, p. 101.
[49] Côté, Pierre-André, *The Interpretation of Legislation in Canada*, (3d Ed.) (Scarborough: Carswell, 2000).
[50] *ibid*, p. 311.
[51] *ibid*, p. 313.
[52] *ibid*, p. 315.
[53] *ibid*, p. 315.

With respect to the international legal aspect in this work, it will be necessary to employ an international law doctrinal methodology. Stephen Hall describes how this methodology is similar to, but does differ somewhat from, the traditional doctrinal methodology.[54] He points out that in the international law sphere, "it is not possible to point to institutions endowed with readily identifiable legislative and executive functions"[55] and "international judicial organs as exist are not endowed with compulsory jurisdiction."[56] Even without an international system of government and legislation, there is a body of international legal rules. These rules are generally found in the guise of customary international law and "supplemented by rules and principles which are agreed upon in treaties."[57]

This system of law is "positive international law" as they are guiding rules and principles that have been agreed upon by the states that have mutual relations.[58] The principles found in customary international law are often found in domestic laws and positive international law often "co-exists with, and is conditioned by, numerous general principles" found in the domestic systems.[59] Although international law does not ascribe to the doctrine of *stare decisis*, "decisions of international and domestic courts and tribunals are often highly persuasive"[60] in making determinations in international legal disputes. Hall identifies the following of sources of international law: treaties; custom; judicial

[54] Hall, Stephen, "Researching International Law" in *Research Methods for Law, supra* note 27, p. 182 ff.
[55] *ibid*, p. 182.
[56] *ibid*.
[57] *ibid*.
[58] *ibid*.
[59] *ibid*.
[60] *ibid*.

decisions; acts of international organizations; and soft law. The challenge to the legal scholar is sourcing all the various information, as it is not found in one compendium or reporting series, unlike most domestic legal materials.

When the two legal systems intersect in an area of law, how that interaction is dealt with is important. Ruth Sullivan points out that the Supreme Court of Canada has "emphasized the relevance of international law norms and values in the interpretation of domestic law."[61] She points to the case of *Baker* v. *Canada (Minister of Citizenship and Immigration)*[62] as support for her position. Justice L'Heureux-Dubé wrote in paragraphs 67 to 71:

> International treaties and conventions are not part of Canadian law unless they have been implemented by statute … therefore have no direct application within Canadian law. Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review

In 2007 the Supreme Court of Canada held in *R.* v. *Hape*[63] that "[i]t is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law … based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations". Among the international materials on which Canadian courts rely are text of treaties, international law instruments, preparatory works, international tribunal decisions

[61] Sullivan, *Construction of Statutes*, p. 425.
[62] *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 1 S.C.R. 817.
[63] *R*. v. *Hape* 2007 SCC 26, para. 53.

and reasons, case law of other jurisdictions interpreting international law, and administrative guidelines issued by international agencies.[64]

The way in which international law is incorporated into Canadian domestic law is a function of unwritten constitutional principles.[65] Gib van Ert describes the unique Canadian reception of international law into domestic law as function of the royal prerogative over foreign affairs as an executive function, not a legislative one. In order for a treaty to become domestic law, it must either be implemented by statute or be incorporated into the common law. If the principle in issue is a matter of customary international law, van Ert explains that "it is said to be directly incorporated by the common law, without the need for legislative intervention"[66] but can be overridden by express legislative provisions. van Ert argues that treaties and customary international law is a factor to be used in interpreting domestic law and that "[i]nternational law is part of the interpretive exercise."[67]

Given that the scope of this work is to ascertain the legal characterization of fresh water resources with a view to the protection of the resource, the methodology chosen will provide the proper tools to accomplish that goal. When considering the methodology, the possibility of employing a law and sociology, a law and economics, and a law and geography methodologies were considered. When considering these other methodologies, all of which are empirical in nature, it was determined that the questions can be answered and the objective achieved with a

[64] Sullivan, *Construction of Statutes*, p. 427.
[65] van Ert, Gib, "Dubious Dualism: The Reception of International law in Canada", (2009-2010) 44 Valparaiso U. L. Rev. 927, p. 927.
[66] *ibid*, p. 930.
[67] *ibid*, p. 932.

traditional doctrinal methodology and does not require an empirical methodology. Although there is value in the other methodologies, those methodologies would be better employed in a work that had as its objective the analysis and critiquing of the prevailing law and neo-liberal economics theoretical underpinnings of international trade law which would result in a new normative approach to the field.

Prior to applying the methodology to the legal texts of the international agreements to determine an answer to the research questions, a review of the historical context of Canada's development of international trade and foreign policy will be undertaken in Chapter 2. In Chapter 3, selected Canadian boundary and transboundary agreements are canvassed to elucidate how fresh water resources are characterized in these non-trade international agreements. The analysis of the legal texts of GATT 1947, GATT 1994, and NAFTA is undertaken in Chapter 4 by applying the chosen methodology. Finally, a summary and concluding remarks about broader implications follows in Chapter 5.

2 An Upstream View: A Retrospective of Canada's International Trade Relations and Foreign Policy

Any discussion regarding Canada's current obligations and responsibilities with respect to the conservation, protection, and exploitation of its fresh water resource in the context of international agreements need to be put in a historic context. The history and development of Canada's trade and international relations illustrates the effect of international events on domestic policy decisions surrounding Canada's economic and diplomatic goals. The following review gives us and understanding of how the policy shifts over time and how international agreements are implemented and interpreted in light of shifting international relations.

Canada's colonial and national history is one that is dominated by trade. This trade has primarily been with three imperial nations: France, Great Britain, and the United States.[68] This economic reality has been a major factor in the Canadian style of nationalism.[69] One key element of the drive to confederation was economic stability, which would provide for national security. The national policies that had emerged included among its goals an economic plan that promoted Canadian manufacturing, protection from American competition, and settlement of the

[68] Inwood, Gregory, *Continentalizing Canada: The Politics and Legacy of the MacDonald Royal Commission*, (Toronto: University of Toronto Press, 2005) p. 20.
[69] *Ibid,* p 19.

West.[70] This allowed Canada to move away from a colonial outpost of Great Britain towards nationhood.

Canada entered into international trade negotiations after World War II at a time when the nature of the Canadian economy was being debated domestically. The rise of trade liberalization post World War II raised concerns about the primary and secondary effects of free trade.[71] The primary effects included the concern that structure of the Canadian industrial environment being mostly a "branch-plant" to American corporations inhibited the ability of industry to take full advantage of economies of scale and that management decisions would be influenced and controlled by foreign owners.[72] Although there were concerns about entering into free trade, it was clear from the global environment that trade liberalization was a trend that was gaining traction and was seen as necessary for economic development in the post-World War II era. As Professor J.L. Granatstein states it is a "truism to say that every trade agreement benefits some and hurts others" and free trade "is very much an emotional political issue".[73] "[T]here are not very many lessons in history that stand out clearly; on that does, however, is that free trade

[70] *Ibid,* p. 20.

[71] Stairs, Denis and Gilbert R. Winham "The Politics of Canada's Economic Relationship with the United States: An Introduction" in The Collected Research of the Royal Commission on the Economic Union and Development Prospects for Canada (The MacDonald Commission), Vol. 29 The Politics of Canada's Economic Relationship with the United States, D. Stairs and G.R. Winham (C) at p. 5.

[72] *ibid*.

[73] Granatstein, J.L. "Free Trade between Canada and the United States: The Issue That Will Not Go Away" in The Collected Research of the Royal Commission on the Economic Union and Development Prospects for Canada (The MacDonald Commission), Vol. 29 The Politics of Canada's Economic Relationship with the United States, D. Stairs and G.R. Winham (C) p. 50.

between Canada and the United States has major political implications in Canada. Any political leader who forgets that does so at his peril."[74]

In 1982 a Royal Commission was established to study the nations economic and trade future. This Commission is formally named the *Royal Commission on the Economic Union and Development Prospects for Canada*, but is usually referred to as the Macdonald Commission for its chair Donald Macdonald. The importance of this Royal Commission should not be understated as it was the largest social science research project ever undertaken in Canada.[75] The Commission produced seventy-two volumes of research findings, which included historical, policy, and economic reports. The Commission's final report, and the supporting research reports, are a useful tool to understand how historically international trade has influenced Canada's economic development and how policy changes have been influenced by reactions to internal and external conflicts.[76]

2.1 An Historical View of Canada's Trade Relations and Trade Policy

Professor J.L. Granatstein, in writing for the Macdonald Commission, traces the development of the idea of free trade by looking at the crisis points since the mid 1800's: The reciprocity treaty of 1854; its abrogation in 1866; the campaign for reciprocity that culminated in the 1891 election; the 1911 reciprocity agreement and the election; the impact of the Great War (WWI); the trade agreements of 1935

[74] *ibid*.
[75] Inwood, *Continentalizing Canada*, p. 6.
[76] *ibid*, pp. 7 – 8.

and 1938; the Hyde Park agreement of 1941; free trade discussions of 1947-1948; the Auto Pact of 1965.

By the mid 1980's, 80 percent of Canada's exports to the US entered free of duty and 66% of American exports to Canada were free of duty. This was in a worldwide environment in which tariffs had fallen substantially due to international trade treaties and multinational trade negotiations since 1946. However, as tariffs fell, non-tariff barriers were put up in their wake. It was considered at the time that in order to protect the survival of Canadian industries, closer trade ties to the US had to be established to protect the market from the increasingly hostile global trading environment.

As Granatstein points out, "reciprocity has always been contentious".[77] He explains that throughout Canadian history, there has been a fear of the United States and more of a desire to embrace Canada's British heritage and focus on the Commonwealth. This fear of the US and connection to Britain was a consequence of the concern that Canada would be "pulled into the American Union as another state".[78] It is Granatstein's contention that Canada's international relations and trade policy has historically been influence by these fears and that Canadian nationalism is a factor which matters and colours policy development and negotiations.

[77] *ibid*, p. 48.
[78] *ibid*.

Trade policy is often a tool that is modified in response to external events in order to implement foreign policy and achieve the desired foreign policy goals. In fact, looking at the dynamics of Canada's trade policy will show Canada's major foreign policy aims. As professors Gecelovsky and Kukucha state "[s]ince the days of the European presence on the continent, trade concerns have been an important component of Canada's foreign relations and, today, of its foreign policy".[79]

Just as Granatstein, Stairs, and Winham conduct an historical overview of Canada's trade relations for the Macdonald Commission, John Whalley, Colleen Hamilton, and Roderick Hill analyze Canada's foreign and trade policies for the Commission. Whereas the historical analysis is a traditional historiographical look at the events surrounding the various phases in Canada's trade relations with other states, especially the colonial states, the policy analysis is based more on the ideologies at play which influenced the development, implementation, and modification of Canada's policies over time. Other writers have built on this analysis, as well as critiquing it, resulting in a fluid discourse regarding Canada's foreign trade policy evolution.

Whalley, Hamilton, and Hill rely on the historical context of Canada's trade policies in order to identify future trade policy options. They proceed on the premise that the Canada's national development is rooted in its trade policy "since the origins of the nation itself lie partly in trade policy conflicts."[80] They contend

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[79] Gecelovsky, Paul and Christopher J. Kukucha, "Foreign Policy Reviews and Canada's Trade Policy: 1968 – 2009" in *American Review of Canadian Studies,* Vol. 41, Issue 1, 2011, p. 37

[80] Whalley, Hamilton and Hill, "Canada's Trade Policies in Context" in *Canadian Trade Policies and the World Economy* (Toronto: University of Toronto Press, 1985), p. 34.

that Confederation itself was the result in large part of the United States withdrawal from the 1854 reciprocal free trade treaty in 1866. Furthermore, the development of the National Policy in 1879 is the result of failed attempts to enter into trade agreements with Britain and the United States immediately after Confederation, as the prevailing thought was that these types of arrangements were preferable to protectionism. However, since negotiations failed with the other nations, the Canadian government adopted what they saw as a second-best policy of tariffs to protect the fledgling nation. The National Policy looked inwards to developing the western part of Canada by means of subsidies of transportation, among others. It guaranteed a market for the producers in central Canada and encouraged higher wages, which curtailed emigration from Canada southward.[81]

Gecelovsky and Kukucha echo the same sentiments in respect to the importance of trade in Canada's foreign policy. One of the earliest governmental departments was the Department of Trade and Commerce, established in 1892. Shortly after the Department was established, full time trade commissioners were appointed and began to travel abroad to establish trade relations with other states. In illustrating how important trade issues are to Canada they state:

> That trade matters were central to Canada's foreign policy was a view articulated in 1942 by the then Assistant Under Secretary of State for External Affairs Hugh Keenleyside, when in the context of Canada he wrote that 'trade and other economic factors are fundamental to 90% of all international relations and are thus worthy of, and in fact demand, consideration by the most competent and responsible officials available'. The same sentiments were voiced almost 40 years later when an official in the Department of External

[81] *ibid*.

> Affairs remarked that 'Canada's external policies and its foreign activities must relate directly to [Canada's] national interest and that interest is 90% oriented towards trade and commerce.' … In short, Canada is and has always been 'a trading nation.'[82]

In the years following Confederation, protectionism was maintained, but was modified over time. A "one size fits all" tariff regime was not advantageous to the Canada market, so a system of tariffs developed in which different tariffs were applied to different trading partners. Up until the post WW II period, the highest level was applied to trade with states that had not negotiated a special treaty with Canada. The United States was among these states. Lower tariffs were imposed on states with a special treaty, and lower yet were applied to trade within the British Empire.[83] During this time, the governments of the day felt that a policy of protectionism was the only political option as the protectionist sentiment had a firm gasp among the populace. Politicians during this period would not try to, nor did not try to, explore policy alternatives as they were of the feeling that it would be fatal to retaining office.[84]

The Great Depression had changed the playing field and forced the governments of many nations to assess their foreign relations and trade policies. One of the main reactions to the Depression was the increase in tariffs. However, the United States' President Roosevelt and his government were of the opinion that the high level of tariffs on international trade was one of the main factors that exacerbated the Depression. They developed a "Good Neighbor Policy" and began

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[82] Gecelovsky, and Kukucha, p. 39.

[83] *ibid*. It is interesting to note that the special treatment Canada gave to trade within the British Empire was not necessarily reciprocated. This did change, however, with the establishment of the1932 Commonwealth System of Preferences.

[84] *ibid*, p. 42

negotiating bilateral reciprocal trade agreements with it largest trading partners.[85] With this development, the Roosevelt government developed the notion of "most favored nation". Canada was one of the first of the trading partners to attain this status, which also reflected a significant change in Canada's protectionist trade policy. This development and shift in trade policies of major trading nations set the stage for the multilateral trade negotiations in the post WWII era.[86]

What emerged out of the Great Depression and World War II was the development of a globally focused integrated trade and financial system. The goal was for international trade relations to be governed by principles of non-discrimination and transparency in trade relations and trade barriers. In addition, eventually all non-tariff barriers would be eliminated in favour of tariffs, which would subsequently be subject to negotiation, reduction, and even elimination in some cases.[87] Although Canada was involved in the development of the post war economic order, the United Kingdom and the United States were primarily responsible for establishing the general parameters.[88] This international economic order was premised on "liberal principles such as reducing barriers to trade to allow for the free flow of goods on the basis of comparative advantage, developing a set of international rules to regulate member states' trade policy, developing a mechanism

[85] *ibid*, p. 42
[86] *ibid*, p. 43
[87] *ibid*, p. 43
[88] Gecelovsky and Kukucha, p 38.

to settle disputes among states amicably, and creating a set of international institutions to promote and enforce the economic order."[89]

What emerged in 1947was the General Agreement on Tariffs and Trade[90], better known as GATT 1947. According to Whalley, it has been "increasingly apparent to Canadians that during the postwar years, the rest of the world ha[d] not maintained the same allegiance to the spirit of the GATT that Canada ha[d] shown."[91] At the time of the establishment of the Macdonald Commission, the existing trade policies were being questioned as a result of the proliferation of regional trade agreements and the increase in use by states of non-tariff trade barriers that affected the ability to negotiated changes to GATT 1947. In addition to this, the Canadian government became concerned about the shift in attitudes of the United States government toward trade with Canada, starting in the early 1970s.

Up to this time, Canada and the United States had recognized the special relationship and also entered into the *Auto Pact* in 1965[92], which allowed for duty free trade in auto equipment and parts between the two. However, this was being challenged as the United States implement protective trade measures.[93] On August 15, 1971, President Nixon announced that the United States was implementing "a range of measures targeted at rescuing the US from its first trade deficit of the

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[89] Gecelovky and Kukucha, p. 39.
[90] *General Agreement on Tariffs and Trade,* 30 October 1947, 58 UNTS 187, Can TS 1947 No 27 (entered into force 1 January 1948) (GATT 1947).
[91] Whalley, p. 46.
[92] *Agreement concerning Automotive Products between the Government of Canada and the Government of the United States of America*, Canada Treaty Series 1966/14.
[93] *ibid*, p. 47.

century, … largely due to the war in Vietnam."[94] The measures included: a 10 percent surcharge on goods entering the United States; export subsidies to US corporations; end of the convertibility of the US dollar to gold; and an end to the pegged value of gold. This was called the Nixon Shock and most of the measures were aimed at Canada as it had an $800 million trade surplus with the United States in 1970.[95]

After the scare of the Nixon Shock, the Trudeau government reassessed the Canada - US trade relationship and, in October 1972, the Secretary of State Mitchell Sharp outlined Canada's 'options for the future'. Sharp outline three options: (1) maintenance of the status quo; (2) closer integration with the US; and (3) to develop and strengthen the Canadian economy in other aspects of its national life and in the process reduce the present Canadian vulnerability.[96] In light of this, the Canadian government adopted the "third option" which focused on increasing trade with Europe to counterbalance the reliance on trade with the United States. In addition, more focus was placed on trade with Asian states and Latin America.

In conjunction with the realignment of the trade aspect, the "third option" included an element of controlling foreign direct investment in Canadian enterprises by means of the Foreign Investment Review Agency (FIRA)[97]. This agency was given the mandate to review proposed direct investment in Canadian industries. The main focus of the review was to ensure that such foreign

[94] Gecekovsky and Kukucha, p. 41.
[95] *ibid*.
[96] *ibid*.
[97] The Foreign Investment Review Agency was established by the *Foreign Investment Review Act*, S.C. 1973-74, c. 46.

investment, and the resulting control of Canadian industry, would be of significant benefit to Canada.[98]

Another stressor to Canada's international trade was the competition that was developing from newly industrialized states whose goods had comparative advantages over Canadian good due to lower labour and other input costs. Up until this time, Canada's relationship with these nations was generally that of a compassionate nation providing development aid and other forms of aid. As the competition in the realm of trade increased in the 1970s, Canada's relationship with these nations changed from the provision of untied aid to tied aid and increasingly restrictive trade policies.[99]

As Whalley points out, Canada's trade policies are influenced by a multitude of factors. Canada is, and always has been, a small trading nation. Trade policies have a significant impact on the domestic life of Canadians. With this in mind, trade policies have an effect on industrial development, Canada's involvement in international aid and development, foreign ownership of Canadian industries.[100] Canadian governments and population have tended towards protectionism as a mechanism to protect self-determination, but that has become harder to hold on to in an evolving global economy. As a result, Canada has had to readjust its foreign and trade policies to take on new challenges.

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[98] Whalley, p. 48 – 50.

[99] Whalley, p. 47. Untied aid is international aid that is provided without conditions. Tied aid is generally when aid is given, but with conditions that the aid is used to buy technology or goods from the state which provides the aid, thus restricting the use of the aid provided.

[100] *ibid*, p.133

Professor Michael Hart takes a similar view to the historical policies Canada adopted with respect to reciprocity and international trade. He concludes that the decision of Canada to enter into trade negotiations with the United States in the 1980's was based on economic considerations. The survival of Canadian industries and businesses seemed to be at stake "in the face of the overwhelming economic superiority enjoyed by the United States" especially in light of the United States persistent protectionism.[101] What was intended was a negotiated, rules based relationship would ease tensions in what had been adversarial and the rules would be binding on both of the governments. This was seen as a means to reduce conflict between the nations and provide a measure of stability and an environment that would promote greater economic prosperity and efficiency.[102]

Hart argues that the seeds of the trade negotiations in 1980's were sown in 1935 when President Franklin Roosevelt and Prime Minister Mackenzie King "carved out a special relationship (sic) between the two countries" which was used to exempt Canada from measures aimed at other trading partners.[103] With the signing of the GATT in 1947, Canada and the US had in effect entered into an agreement that would regulate bilateral trade with rules and processes to resolve disputes. Although the Canadian government entered into GATT in 1947 and supported gradual trade liberalization, Hart argues many economic actors in Canada in the post war period were in favour of maintaining protectionist measures. This

[101] Hart, Michael, "Of Friends, Interests, Crowbars, and Marriage Vows in Canada-United States Trade Relations" in D'Haenens, Leen, ed. *Images of Canadianess: Visions on Canada's Politics, Culture, and Economics.* (Ottawa: University of Ottawa Press, 1998) at p. 209.
[102] *ibid*, p. 214.
[103] *ibid*. p. 208.

opposition would continue on and become a vocal opposition to trade negotiations in the 1980's.

When the Canadian government announced it was entering into trade negotiations with the United States in the 1980's, it came as a surprise to many Canadians. Through Canada's history, free trade was one of the most politically divisive issues. Prime Minister Brian Mulroney was elected in 1984 on a platform that did not include international trade as a component. Previous prime ministers did not have negotiating trade agreements as part of their agendas, either. This impetus to enter into negotiations with the United States after the 1984 election was as largely a result of lobbyists from outside of the government advocating that better relations with the US would be one of the results of free trade.[104] The lobbyist, which have been described as employing professional rather than partisan rationales, were also able to tap into aspects of the Conservative government's goals in order to justify entering into negotiations. Along with the goal of ratcheting down the adversarial tone of Canadian-American relations, the Conservative goal of reduction of government intervention in the marketplace and allow more flexibility of market players to influence the Canadian economy.[105]

Despite the Mulroney Government's willingness to enter into trade negotiations with the US, there were many groups who still feared reciprocity and integration of economic systems. These "populist" groups raised concerns about the threat to Canadian culture, environmental protection, equality, and Canadian social

[104] *ibid*, p. 213.
[105] *ibid*.

programmes (such as health care, education, social assistance, among others). As Hart states, "[t]he debate pitted a corporate internationalist vision against a populist nationalist one".[106] In sum, Hart argues that the rationale for Canada to enter into a trade agreement with the United States was based on economic stability and growth, although protection of Canada's national identity was a by-product of the economic benefits.

In his review of the impact of the Macdonald Commission, Professor Gregory Inwood reviews Canada's economic history and policy development, particularly from the 1980s onward. While his main focus was on the work of the Commission and its impact, he conducts a review of the economic and political environment and the changes it experienced. His main observation is that there was a disconnect in the early 1980s of the nationalistic sentiment and social democratic style of government arising out of the social movements of the 1960s, which were reinforced by the Trudeau government's "third option", and the economic crisis of 1981 and the rise of liberal economic policies, exemplified by the neo-conservative "Reaganomics" and "Thatcherism". According to Inwood, this resurrected trend of neo-conservatism[107] and continentalism exposed Canada to be subject to the hegemonic power of the United States, and threatened the social programmes and

[106] *ibid*, p. 215.

[107] Liberalism in North America is generally used in relation to social issues. Neo-conservatism generally used in relation to open markets and minimal state intervention. In other regions of the world, the term liberalism is used in it classic sense in both social and economic matters, following the terminology used by Smith, Locke, Ricardo, and Mill, among others. In describing economic liberalism post-1980, I will use the term "neo-conservative" to be consistent with the usage in the North American academy.

nationalistic policies, which had taken hold and gained support from the majority of Canadians. [108]

With the election of Ronald Reagan in 1980 and the depression of 1981, the United States administration began implementing policies aimed at dismantling socialist programmes and restrictions on businesses. According to Inwood, the Reagan administration's right-wing advisors "were intuitively unsympathetic to the state-centred economic development strategies often employed by Canadian governments [and that the] Canadian government represented a dangerous socialist menace to the accumulation of capital".[109] As he states, "the Reagan administration preached liberalization abroad and protectionism at home, and it targeted the Canadian government with a vengeance."[110]

At the same time as the Reagan administration was forging new economic and foreign policies, Canadian businesses were forced into becoming more multinational in nature. The "third option" looked to new markets and Canadian businesses were experiencing new competition, which resulted in the shift from domestic market focus to external markets. The lowering of tariffs as a result of GATT, Canadian enterprises were able to make the shift to exporting to foreign markets. In addition, Canadian foreign direct investment increased and Canada became a net exporter of capital, mostly to the United States.[111] With this trend already well established by the 1981 depression, Canadian businesses began to put

[108] Inwood, Gregory *Continentalizing Canada: The Politics and Legacy of the Macdonald Royal Commission* (Toronto: University of Toronto Press, 2004), p. 33.
[109] *ibid*
[110] *ibid*
[111] *ibid*

pressure on the Canadian government to look toward integrationist policies with the United States in order for them to protect their foreign investments.[112] What arose was a schism in Canadian society and among the regions.

As Inwood describes, an ideological polarization developed in Canada between the neo-conservative, free market supporters who wanted less government involvement in all aspects of life, especially economic, and the supporters of democratic-socialism who supported welfare and social programmes and who generally supported a higher level of government intervention in the economy. Alberta was the poster child for the neo-conservative side due to its well-publicized disagreements with Ottawa, especially over the National Energy Programme. Alberta lead the campaign, along with businesses with significant direct investment in the United States, for closer ties with the United States and greater economic integration. On the other side of the debate, the labour movement was the standard bearer supporting the social programmes and protectionist policies, which developed from the "third option".[113] This schism, plus the lingering effects of the 1981 depression, forced the Canadian government to reassess its policies. The means by which a comprehensive review of the policy options would be carried out was with a royal commission. Thus, the Macdonald Commission was formed in 1982.

In the 1980s, the policy focus began to shift from one of reliance on GATT and sectoral protectionism to a more open, liberalized trade with a greater number of

[112] *ibid*, p. 34.
[113] *ibid.*

states. During this period, Canada began to see a rise in the importance and reliance on exports as a significant portion of its gross domestic product (GDP). The majority of exports have been to the United States. As a result of this, Canada's economic health is dependent on international trade. This has a significant influence on many policy objectives of the Canadian government and options it has at its disposal to optimize Canada's future economic health. Added to this is the increase in the Canadian provinces looking at international markets for their products, rather than relying on inter-provincial trade.[114] This has added another dimension in the development of national foreign and trade policy. As Gecelovsky and Kukucha point out, "anyone attempting to craft a trade policy for Canada, …, needs to be mindful of differences of both the provincial and sectorial levels. Trade policy is not singular but rather plural in character, as each province and central group … wants something different from Canada and for the government to be responsive to its particular concerns."[115]

Canada's trade policy exhibited continuity during the period of 1968 to 2009. Despite each successive government vowing to reduce Canada's dependence on trade with the United States and diversifying external markets, at the end of each of their mandates Canada's dependence on the United States as a market for Canadian goods was greater than at the beginning of their mandate.[116]After Prime Minister Trudeau established the Macdonald Commission, his Liberal Party lost the national election to the Progressive Conservatives lead by Brian Mulroney. In addressing

[114] Gecelovsky and Kukucha, p. 40.
[115] *ibid*.
[116] *ibid.*

the issue of opening up trade with the United States and negotiating a free trade agreement during the lead up to the election, Mulroney was steadfastly against the idea and is quoted as saying "the country could not survive with a policy of unfettered free trade" and went on to say that since Canada is in many ways a branch plant economy that companies would "crank[] up their plants throughout the United States in bad times and shutting their entire branch plants in Canada."[117] On another occasion, Mulroney is quoted as saying "[d]on't talk to me about free trade, that issue was decided in 1911. Free trade is a danger to Canadian sovereignty".[118] However, after being elected prime minister and having the benefit of the Macdonald Commission report, Mulroney changed his mind. He stated that there were three reasons why he changed his mind: first, the rise of protectionism in the United States which was devastating to Canadian industries; second, the move in Europe to establish a stronger trading bloc; and third, the Commission report and its examination of Canada's economic prospects.[119]

As Inwood states, of all of the economic policies which Canadian governments considered in the post-WWII era, free trade with the United States was generally considered the most unlikely policy to adopt. Even Prime Minister Mulroney was opposed to the idea when he took office. Inwood states that the origins of the change in policy considerations in this period can be traced to the "climate of crisis" in the early 1980s in foreign relations between the United States

[117] *ibid*, p. 36.
[118] *ibid*.
[119] *ibid*, p. 36

and Canada.[120] American business lobbied the Reagan administration to address the restrictions Canada had placed on foreign corporations and their "freedom" to do business in Canada at the same time as the Americans increasingly protectionist policies regarding the domestic markets were seen as a threat to the Canadian business community, and the Canadian economy as a whole. This "climate of crisis" forced all policy options to be considered, even free trade with the United States. In addition, the Canadian bureaucracy within the Department of External Affairs and the Department of Industry, Trade and Commerce was restructured to allow for the implementation of the new policy alternatives.[121]

2.2 International Relations Theory of Exogenous Shock and Its Role in Changes in Canada's Foreign Policy Shifts and Subsequently Canada's Trade Relations

As is shown by the preceding discussion, policy considerations are subject to pressures from unexpected external forces, which sometimes result in adoption of previously rejected options. To understand how and why these external forces cause such a change in policy positions, it is instructive to look to the study of international relations and foreign policy development.

Professors Jonathan Paquin and Phillippe Beauregard have conducted an analysis of Canada's foreign policy alignment. Their analysis attempts to determine

[120] *ibid*, p. 37
[121] *ibid*, p. 38

if the policy choices are dependent on outside forces in an attempt to co-ordinate Canada's policies with those of its allies, or are they primarily conceived and developed unilaterally. They "attempt[] to shed light on the issue of alignment by moving beyond the simple assertions and anecdotal analysis that have sometimes exaggerated and distorted Canada's behavior on the International scene."[122] They point out an important distinction between "alignment" and "concordance" in policies with other states. They define alignment as "the government publicly adopt[ing] the position of another government after the fact, or, to state it differently, when a state modifies or updates its position in order to 'bring it in line with that of another'."[123] They define concordance as follows:

> when two or more governments adopt the same position at the same time. This could be explained by convergence between allies, that is, when two or more governments share similar interests and reach the same position without consulting one another. It could also result from coordination, that is, when governments discuss and coordinate positions prior to announcing.[124]

This distinction is important in the analysis as it shows the level of independence or unilateralness is inherent in the policy development and implementation.

In their analysis, Paquin and Beauregard look at the history of continentalism in Canada. They refer to Professor Granatstein and Michael Hart and their argument that "suggests that since the United States is Canada's main economic partner and

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[122] Jonathan Paquin and Philippe Beauregard (2013). "Shedding Light on Canada's Foreign Policy Alignment", *Canadian Journal of Political Science*, September 2013, Vol 46, Issue 3, p. 618

[123] *ibid*

[124] *ibid*, p 619

security provider through NORAD and NATO, Canada has no real choice but to align its policies and positions with those of the United States, regardless of the preferences and behavior of other states and allies … Canada's strong ties with the United States are the 'indispensable foundation of Canadian foreign-policy in all its dimensions'."[125] As such, this view of contentaltism presumes that Canada's interests cannot be dissociated from those of the United States resulting in an alignment of Canada's foreign policy with that of the United States.

Missing in the continentalist argument are the close ties Canada has with Britain and Europe. "Transatlantism" traditionally described North America's ties with Europe generally. However, a second definition of "transatlantism" developed in Canada to describe the relationship between Canada and Europe, sometimes called "Europeanism". This relationship survives as a result of key values which Canada and Europe generally share, including social welfare, international law, and human rights.[126] This relationship is sometimes underplayed, but Paquin and Beauregard argue that it is an important element of the analysis as "the European Union is currently Canada's second-largest trading partner after the United States and that Canada is currently embracing the strategy of increasing trade relations with the EU in order to stimulate growth and reduces economic dependency on the United States. "[127] They point out that this echoes Prime Minister Trudeau's third option in that it strives for diversification of Canada's foreign relations to reduce the vulnerability of being aligned tightly with the United States.

[125] *ibid*, p 619 – 620.
[126] *ibid*, p. 621.
[127] *ibid.*

They also focus on the the links uniting the Anglo-Saxon world and the "shared special relationship and a collective identity in international relations, which initially were racially defined by the British Empire and later evolved around the US hegemonic power."[128] They show that despite some disagreements, the affinity between the states of the Anglo-Saxon world have been consistent. As a result, they contend that this "Anglosphere" perspective would predict that the Canadian government would stand with its Anglo allies in times of crisis.[129]

"Unilateralism" is the last theory that the authors consider in their analysis. The conventional wisdom in the study of foreign relations is that small nations, such as Canada, rarely act unilaterally as the risks of acting out of step with their larger allies could result in alienation or retaliation. The analysis of the policy statements from the Harper government do indicate, however, that Canada is increasingly unilateral in its policy decisions and does not always support decisions of it traditional allies. They contend that this new trend of making unilateral decisions is to "emphasize [Canada's] values and protect its interests in the world" which "emphasizes the fact that we live in a dangerous world where there is no natural harmony of interests among states."[130] They illustrate this with a remark made by Prime Minister Harper in a 2011 speech: "we take strong, principled positions in our dealings with other nations – whether popular or not – and that is what the world can count on from Canada."

[128] *ibid*, p 622.
[129] *ibid*, p. 623
[130] *ibid*

The conclusions of their analysis show that Canada follows a "transatlantism" policy alignment, aligning its policy choices with those of the United States and its main European partners, with the United States carry much more weight in this group than other states resulting in Canada and European states aligning their policies with those of Washington. Of all the nations that were the focus of this analysis, Canada was the state that most often aligned its policy choices with its partners. Thus, despite the public statement by Prime Minister Harper, Canada does not act unilaterally in the foreign policy sphere. In fact the analysis shows that Canada "appear[s] dependent on the transatlantic community and [is] reluctant to take the lead in managing foreign crises."[131]

Following on this conclusion with respect to Canada being a "follower" in developing its foreign policy positions, Professor Stephanie Golob analyzes Canada's foreign policy and trade policy development in the light of the international relations theory of "exogenous shock". She looks at what are the drivers of change in Canada's foreign policy and how Canada reacts to shocks to the international order.

Professor Stephanie Golob differs in the characterization of Canada's decision to enter into a free trade agreement with the United States. She argues that trade policy was not the driver, rather it was a result of security policy.[132] She analyses the events which lead up to the 1985 Canada-US Free Trade Agreement and the

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[131] *ibid*, p. 638

[132] Golob, Stephanie R. "Beyond the Policy Frontier: Canada, Mexico, and the Ideological Origins of NAFTA", *World Politics,* Vol. 55, No. 3 (April 2003) at p. 362.

subsequent NAFTA through the lens of international relations theory and what she calls the concept of a "policy frontier". She asks the question "under what conditions and through which mechanisms can previously forbidden policy options become recoded, enabling the policy frontier to be transcended"?[133] In other words, what events cause such concern amongst the policy analysts that they will discard previously strongly held positions ("policy frontiers") and turn 180 degrees to enter into negotiations with the goal of bilateral free trade?

Golob argues that a policy frontier is the manifestation of a national interest that has the sanction of state legitimacy. These frontiers often develop over time and can become embedded in the national discourse as necessary for the protection of the national identity. Golob defines them as "barriers erected by historically held and sacred ideas of sovereignty, security, and national identity that make certain choices unavailable as 'normal' policy options. To go 'beyond the policy frontier', state elites must risk their own legitimacy, bound up as it often is in the symbolic language of national pride, historical memory, and defense of the nation".[134] In respect to the issue of bilateral trade, Canadian policy had been to resist strongly reciprocity with the US as both Granatstein and Hart had illustrated. Golob sets out to understand why such a long held policy, which she labels as a policy frontier, was transcended in 1985 with the Free Trade Agreement.

Golob accepts that in order to transcend the policy frontier, there must be an exogenous shock. An exogenous shock is a significant event that can call into

[133] *ibid*.
[134] *ibid*.

question the existing policy and begin a debate on possible shifts in policy. Naomi Klein wrote about and popularized this theory in her book *The Shock Doctrine*[135] and illustrated how economic crises, natural disasters, and wars can shock the existing policy landscape and invite the consideration of new policy tools. Golob takes this further and argues that there needs to be more than a shock. In what she calls a critical juncture, she states that in addition to the exogenous shock, the existing policies have to be discredited "due to their implication in the crisis or their inability to respond to it successfully"[136] and the existing institutional discourse is challenged. Furthermore, the bureaucratic institutions that controlled the policy agenda become marginalized in favour or those that espouse the emerging policies. It is this environment that allows formerly rejected policies, such as reciprocity in Canada and US trade relations, to become considered as policies that can respond adequately to the new, "shocked" reality.

Golob argues that the economic recession of 1981-1982 represented such a critical juncture and that it "discredited the nationalist and statist economic policies of the 1970's and opened up a period of disillusionment and uncertainty over [Canada's] economic health and international identity".[137] She argues that up until 1982, Canadians saw that the choice of accepting reciprocity was in effect deciding between "the state or the States"[138] and the recession "called into question the government's ability to maintain policies such as universal health care and limits on

[135] Klein, Naomi *The Shock Doctrine: The Rise of Disaster Capitalism* (Toronto; Random House, 2008)
[136] Golob, "Beyond the Policy Frontier", p. 378.
[137] *ibid*, p. 374.
[138] *ibid*, p. 388.

direct foreign investment that had distinguished Canada from the U.S. and thus fostered its separate identity".[139] The recession was the result of two exogenous shocks: the fall in the price of oil which put in jeopardy the energy sector's importance in being an economic engine; and the rapid increase in interest rates and the ballooning of national debt and deficits.

As a result of this economic shock, Prime Minister Trudeau established the Macdonald Commission to review the future of Canada's trade policy and economic development. With such a public policy debate, policy "entrepreneurs" were able to argue that the existing trade policy with the US was no longer appropriate and put forth new policy options that had been dismissed as beyond the former policy frontier. Social scientists, economists, lawyers, and business leaders were able to provide input to the Commission and provide alternatives to the discredited policy frontier.[140] The result of this review of the policy landscape was the government transcending the old policy frontier of anti-reciprocity and entering into bilateral trade negotiations with the formerly feared economic powerhouse. Golob argues that one of the considerations in deciding on the new policy was that the rules based trade agreement would put limits US unilateralism and thereby establishing certainty in the relationship. She sums up the decision to transcend the policy frontier was a trade off of "some" economic sovereignty (being market access to US firms) for greater certainty. "This trade off metaphorically guaranteed future

[139] *ibid*.
[140] *ibid*, p. 380.

prosperity, which would in turn provide the resources to 'protect' and 'defend' national values"[141]

Understanding the policy environment and events which lead up to negotiating and ratifying GATT 1947, Canada-US FTA, and NAFTA is important in developing policies and reactions to future shocks. With respect to the issue of trade in fresh water resources, the analysis of the historical events can assist in attempting to predict policy directions in circumstances when development pressures, natural disasters, or economic shocks that put pressure on fresh water resources. As will be discussed in subsequent chapters, international trade law is often influenced by world events and shifts in generally accepted policies and goals. When these policies and goals shift, so does the interpretation of the analysis of the provisions in the negotiated agreements.

The Canadian strategy to prohibit the transfer or export fresh water resources in bulk is such a policy that can be subject to a shock and a shift in policy options. Likewise, the 1993 joint statement of the NAFTA parties, which states that fresh water is not subject to NAFTA provisions, is a policy statement outside of the text of the agreement that can also be subject to exogenous shocks and one or more parties attempting to transcend the policy frontier. As a result, an analysis of the WTO and NAFTA texts with a view to providing a level of certainty with respect to the characterization of fresh water and the treatment it is afforded under the agreements is required to determine if fresh water resources are a "good" or

[141] *ibid*, p. 390.

"product" as defined in the agreements. If the answer is "no", then there is a high level of certainty that Canada can develop policies and legislation that may shield the resource from a variety of critical junctures and subsequent pressures from other nations. If the answer is "yes", then policies and regulation are subject to a changing landscape and will not provide as much certainty. However, certain exemptions from trade rules contained in the agreements may be able to provide increased certainty, but the policy landscape may be more susceptible to pressures to limit the application of the exemptions.

3 Reading the Currents: A Review of Selected Boundary and Transboundary Water Agreements in Canada

Prior to considering the legal texts of international agreements, it is useful to review Canada's constitutional landscape and other instruments which affect Canada's fresh water resources. These instruments provide a framework in which one can situate the discussion regarding trade obligations. In addition, a review of other legal instruments, agreements, and obligations may provide guidance as to how Canada's trade obligations may be interpreted when it comes to their applicability to fresh water resources.

In this chapter, a review will be undertaken of Canada's constitutional framework which governs the powers to legislate in respect of the various forms fresh water resources take. Included in this review are emerging issues of constitutional importance, namely the intersection of Aboriginal rights and resources and potentially conflicting international obligations. Following this will be a review of two significant bi-lateral treaties concerning Canada's fresh water resources, the *Boundary Waters Treaty*[142] and the *Columbia River Treaty*[143], and cross boarder municipal water sharing agreements. These two treaties and agreements may be instructive in the analysis of Canada's trade obligations. The review will then consider other international legal instruments which affect fresh water resources and will round out the understanding of how fresh water

[142] *Treaty between Great Britain and the United States relating to Boundary Waters and Questions arising along the Boundary between the United States and the Dominion of Canada*, United States and United Kingdom, 11 January 1909. 36 US Stat 2448, UKTS 1910 NO 23 (*Boundary Waters Treaty*).

[143] *Treaty between Canada and the United States of America Relating to Cooperative Development of the Water Resources of the Columbia River Basin,* Washington, January 17, 1961, 15 UST 1555, TIAS No 5638, 542 UNTS 244, (*Columbia River Treaty*).

resources are viewed in various legal contexts and will provide a framework of understanding of how fresh water resources are characterized at law.

3.1 Constitutional Division of Powers of Legislation and Regulation of Fresh Water (ss. 91 and 92) and the Crown's Prerogative to Make Treaties

As a result of the nature of Canadian federalism, each jurisdiction in Canada has enacted legislation and regulations affecting the development of fresh water resources. Part VI of the *Constitution Act 1867*[144] comprises sections 91 to 95 and is entitled "Distribution of Legislative Powers". This part divides the legislative powers among the legislatures, mostly in sections 91 and 92. Generally speaking, the legislative authority is split based on the nature of the subject matter and whether it is local in nature or interprovincial or cross boundary in nature.

Section 91[145] enumerates the subjects of exclusive legislative authority of the Parliament of Canada. In the text preceding the enumerated list, the Parliament of Canada is granted the residual legislative authority. The text is as follows:

> 91. It shall be lawful for the Queen, by and with the Advice of Consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by the is Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated;

[144] *Constitution Act 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 (*Constitution Act 1867*).
[145] *Constitution Act 1867*, s. 91.

Within this part of the section, where a subject is not explicitly the subject of provincial legislative authority, the federal parliament has authority. As Professor Peter Hogg writes, this residual power is a result of the peace, order, and good government (POGG) filling any gaps in the division of powers as well as the "national concern" doctrine.[146] The specific enumerated grounds in s.91 which would give the federal Parliament legislative authority to enact provisions and regulations concerning water bodies include:

s.91(2) – the regulation of trade and commerce;
s.91(10) – navigation and shipping;
s.91(12) – sea coast and inland fisheries;
s.91(24) – Indians, and lands reserved for the Indians.

Section 92[147] sets out the exclusive legislative powers of the provincial legislatures. This list is exhaustive, but as Professor Hogg points out, there are two provisions which are very broad in scope and can appear on the face of them to conflict with the POGG power and other areas of federal authority[148]. These two sections are s.92(13) -- property and civil rights in the province and s.92(16) -- all matters of a merely local or private nature in the province. Other provisions in s.92 which may involve legislative authority over the regulation, development and conservation of fresh water resources include:

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[146] Hogg, Peter, Constitutional Law of Canada, Fifth Edition Supplemented, (Toronto: Carswell, 2005) supplemented to December 2012 pp. 17-1 ff. The interpretation of the POGG power and the gap, national concern, and emergency power doctrines, arise from the residuary nature of the POGG power. The gap branch flows from necessity to have one level of government to have jurisdiction over an area which has not been specifically allowed for in the text of the Constitution documents. The national concern branch flows from the identification that some matters have a national dimension even if the origin of the issue is of a local or provincial nature. The legislative authority would then rest with the federal Parliament so that important legislative provisions would provide for consistency across the country. Finally the emergency branch flows from the necessity of having federal legislation in highly exceptional or abnormal circumstances such as war or famine or other disasters.

[147] *Constitution Act 1867,* s. 92.

[148] *ibid.*

> s.92(5) – the management and sale of the public lands belonging to the province and of the timber and wood thereon;
>
> s.92(10) -- local works and undertakings other than such as are of the following classes:
>
> (a) lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;
>
> (c) such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

In addition to the section 91/92 division of legislative authority, section 92A[149] may have an impact on legislation and regulation of fresh water resources depending on circumstances particular to certain watersheds, aquifers, or bodies of water. Section 92A divides legislative authority between provincial legislatures and the Parliament of Canada in relation to non-renewable natural resources, forestry resources, and electrical energy. Section 92A reads, in part, as follows:

> (1) In each province, the legislature may exclusively make laws in relation to:
> (a) exploration activities in the province,
> (b) development, conservation, and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
> (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.
> (2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the

[149] *Constitution Act 1867*, s. 92A.

> generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.
> (3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

The implications of this constitutional arrangement are that the legislative authority to enact legislation and regulations that affect fresh water resources is divided among 14 jurisdictions. There are at least 104 different pieces of provincial and territorial legislation and regulation that specifically deal with water supply and water resource management.[150] In addition to the legislation, policies are made affecting water governance by numerous government departments. Federally, Environment Canada and the Department of Fisheries and Oceans play a significant role in governance of the water resource, however nine other federal departments affect water governance in a secondary manner. These include Finance Canada, Industry Canada, National Defence Canada, Public Works and Government Services, among others.[151] As a result, there are at least 23 pieces of legislation, regulation and policies covering the water resource.

The Library of Parliament Background Paper entitled *Bulk Water Removals: Canadian Legislation*[152] outlines the legislation from the various jurisdictions which specifically deal with bulk removals of fresh water resources. What is illustrated by the summary of the legislation is that every jurisdiction in Canada has some legislation that prohibits, to various degrees, the taking of water from a water shed or basin by means of

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[150] Hill, Carey et al "A Survey of Water Governance Legislation and Policies in the Provinces and Territories" in Karen Bakker ed *Eau Canada: The Future of Canada's Water* (Vancouver: UBC Press, 2007) p. 369 ff.
[151] *ibid* p. 375.
[152] Johansen, David *Bulk Water Removals: Canadian Legislation, Library of Parliament Background Paper* Publication No. 02-13-E (Ottawa: Library of Parliament, 2010)

diversion, removal, or convey for removal from a province or Canada. The impetus of this background paper was the federal government's 1999 strategy to prohibit bulk removals from Canada's water basins. This included the removal of fresh water resources for export. The strategy referred specifically to the 1993 joint statement[153] of the governments of the three NAFTA countries in relation to the applicability of the trade agreement to fresh water resources. The federal government's strategy was based upon the principle that "the protection of water in its natural state as a water management and environmental issues rather than as a trade issue."[154]

The strategy set out three elements: proposed amendments to the *International Boundary Waters Treaty Act*[155]; a study of the Great Lakes and the effects of water consumption, diversion, and removal; and a Canada-wide accord on bulk water removals. The third element of the strategy was an explicit recognition that the Canadian provinces have constitutionally entrenched powers over water management and that any effective strategy would have to include the provinces' cooperation and participation. As stated in the background paper, the *International Boundary Waters Treaty Act* was amended with the amendments to prohibit bulk removals of fresh water resources from the Canadian portion of the boundary waters coming into force in December 2002. In addition, a study was conducted and a report was issued by the International Joint Commission[156] that the boundary waters between Canada and the United States require protection in light of environmental, industrial and urban stressors on the fresh water resources. It is the third

[153] 1993 Statement by the Governments of Canada, Mexico, and the United States.
[154] *ibid,* p. 1
[155] *International Boundary Waters Treaty Act,* R.S.C. 1985, c. I-17 as amended
[156] The International Joint Commission is established by the International Boundary Waters Treaty and its roles and responsibilities are outlined in the treaty.

element which has proven more difficult in that an accord has not been entered into by all the provinces with respect to prohibiting bulk removals.[157] Despite the fact that no accord has been entered into, as is illustrated above, the provinces have enacted legislation dealing with bulk removals and restrictions on the removal of fresh water resources from the provinces.

As shown by the constitutional provisions, there is an element of interpretation in determining whether certain watersheds, aquifers, or bodies of water are non-renewable and whether a work affecting the water is of a national concern, inter-provincial, or cross boundary in nature.

In addition to the legislative authorities, international characteristics of trade in fresh water resources involve the treaty making power in Canada. Although water authorities may be able to enter into direct contracts with foreign or domestic corporations, treaties and trade agreements will dictate some of the major terms and conditions of such agreements and the domestic regulation of access and exploitation of fresh water resources. The authority to enter into treaties with other states lies with the federal government. As Professor Hogg points out, there is no particular grant of treaty making power in the *Constitution Act 1867*. British North America, at the time of Confederation, was only self-governing with respect to domestic matters. As Canada was still part of the British Empire, the common law applied to grant the executive branch in Great Britain the power to enter into treaties on behalf of the Empire, as the Imperial Government in Great Britain was the entity that had international legal personality.[158]

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[157] *ibid*, p. 2

[158] Hogg, Peter, *Constitutional Law of Canada*, p. 11-2.

The common law prerogative power of foreign affairs was delegated by King George IV to the Governor General in Canada in the *1947 Letters Patent*[159] expanding the office of Governor General of Canada. Professor Hogg argues that this instrument delegates to the federal executive branch of the government of Canada, the power to enter into treaties binding Canada.[160] As such, the Canadian Parliament does not have any formal role in making treaties and there is no legal requirement for Parliament to approve or ratify the treaty negotiated by the executive.[161] However, an informal process was followed until 2008 by the executive to put a motion before both houses of Parliament for a resolution of approval. Since 2008, the executive tables the treaty in the House of Commons with an explanatory memorandum and waits 21 sitting days before ratifying the treaty or introducing implementation legislation.[162]

3.2 Implications of Section 35 *Constitution Act, 1982*, Aboriginal Title and the Duty to Consult on Treaty Making and the Development of Fresh Water Resources

In recent years, there has been an increase in litigation commenced by Canada's Aboriginal peoples challenging government actions based on claims of Aboriginal title and the duty on the Crown to consult[163] if an asserted Aboriginal right may be affected. In relations to fresh water resources, there have been challenges to decisions which affect

[159] *Letters Patent Constituting the Office of Governor General and Commander-in-Chief of Canada, 1947*, 1947 C Gaz, Extra, No. 12, Vol. LXXXI, p. 1.
[160] *ibid.* p. 11-2
[161] *ibid,* p. 11-4
[162] *ibid,* p. 11-5
[163] The content of the duty to consult when asserted Aboriginal rights and title are affected by a decision of the Crown was articulated by the Supreme Court of Canada in *Haida Nation* v. *British Columbia (Minister of Forests),* [2004] 3 SCR 511, 2004 SCC 73, and *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)*, [[2004] 3 SCR 550, 2004 SCC 74.

the water levels and flow of rivers and claims of title to the subsurface water resource. In relation to Canada's negotiation of international agreements, there has been challenges to the Crown prerogative to enter into international agreements without consulting Aboriginal peoples.

3.2.1 Section 35 of the *Constitution Act, 1982* and Aboriginal Rights and Title to Surface and Subsurface Water

On July 13, 2011, Reasons for Judgment were delivered by the British Columbia Supreme Court in the case of *Halalt First Nation* v. *British Columbia (Minister of Environment)*.[164] The matter concerned a petition brought by the Halalt First Nation alleging that the Provincial Crown did not discharge its constitutional duty to consult them in the course of conducting an environmental assessment. The First Nation asserts Aboriginal rights and title to an area in which wells were to be constructed to pump groundwater from the Chemainus Aquifer on Vancouver Island.[165] The First Nation alleged that the Provincial Crown had knowledge of their assert claim to the groundwater and as such owed the First Nation a duty to consult with respect to any project which would affect its interests.[166] As the matter proceeded by way of Petition, the Reasons for Judgment did not adjudicate the asserted title claim, rather it was restricted to the issue of the duty to consult.

In coming to its conclusions concerning the breach of the Provincial Crown's duty to consult the First Nation, the court did undertake what it called a *prima facie*

[164] *Halalt First Nation* v. *British Columbia (Environment)*, 2011 BCSC 945.
[165] *ibid*, para. 3 – 4.
[166] *ibid*.

determination of the claim for Aboriginal title to the groundwater. The court found that the Halalt First Nation had established such a *prima facie* claim and then turned its analysis to the content of the duty to consult in light of the *prima facie* Aboriginal right to the groundwater.[167] The court found that the Province of British Columbia "owed a duty of consultation and accommodation to Halalt concerning the actual scope of the Project, which the year-round extraction of groundwater as the sole source of water for Chemainus."[168]

The decision of the British Columbia Supreme Court was appealed to the British Columbia Court of Appeal and a decision overturning the original decision was issued on November 22, 2012.[169] The Court of Appeal overturned the decision based on the determination that in fact there had been deep consultation with the First Nation, and therefore, the duty to consult was discharged. The Court of Appeal did not address in depth the *prima facie* determination of the right, as it felt that in light of the issues on appeal it was not critical to undertake the analysis. Rather, the Court of Appeal focused on the nature and depth of consultation to determine if the chambers judge had erred in finding that the duty to consult was not discharged. This leaves the issue open with respect to an Aboriginal right and title to fresh water resources.

Given that the court found that there was a *prima facie* s. 35 Aboriginal right to the fresh water resources, the door is open for any Aboriginal group to assert that their s. 35 right may be such that it takes precedence over governmental actions concerning the

[167] *Halalt First Nation* v. *British Columbia*, paras. 489 ff.
[168] *ibid*, para. 750.
[169] *Halalt First Nation* v. *British Columbia*, 2012 BCCA 472.

conservation, extraction, and diversion of fresh water resources as well as have priority over international obligations in respect of fresh water resources.

For example, the Akisq'nuk First Nation in the Kootenay Region of British Columbia were granted rights to water flowing through their reserve when Indian Commissioner O'Reilly approved the Minutes of Decision, Upper Kootenay Indians, Reserve No.3 on August 9, 1884.[170] The Minutes of Decision include the provision that "[a]ll water flowing through this reservation is assigned to the use of the Indians". With this provision, and the fact that the waters flowing through this reserve are part of the Columbia River watershed, there is a strong basis for the Akisq'nuk First Nation (the current name of the Upper Kootenay Indians) to assert Aboriginal rights and title which could affect the provincial and federal governments' acts concerning these waters and the Columbia River system as a whole. Furthermore, there may be an unknown number of similar Minutes of Decision in existence which could have an effect on the governments' management of the fresh water resources.

3.2.2 The Constitutional Duty to Consult Aboriginal groups by the Government prior to negotiating and implementing international agreements – *Canada China Foreign Investment Protection Act* challenge

In a similar vein to the assertion of Aboriginal right and title to water and the duty to consult, the duty to consult has arisen in a case involving the Government of Canada negotiating an investment treaty with the People's Republic of China. In the case of

[170] *Minutes of Decision, Upper Kootenay Indians, No. 3*, Indian Reserve Commissioner P. O'Reilly, Dated at Kootenay, B.C., August 9, 1884, retrieved from the Union of British Columbia Indian Chiefs website, *Federal and Provincial Collections of Minutes of Decision, Correspondence and Sketches* (http://jirc.ubcic.bc.ca) locator: 08 09 1884 Columbia Lake/Upper Kootenay, Binder 8, Corr No 3041/84 pg 5-6.

Hupacasath First Nation v. *The Minister of Foreign Affairs Canada and the Attorney General of Canada*[171] the Hupacasath First Nation brought an application for judicial review of the federal government's negotiation of the *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments* (CCFIPPA)[172]. The First Nation argued that the federal Crown had an obligation to consult with the First Nation prior to ratifying the CCFIPPA or taking steps to bind Canada.[173] The First Nation argued that by entering into CCFIPPA, Canada is negatively affecting their exercise of "rights to conserve, manage and protect lands, resources and habitats in accordance with traditional Hupacasath laws, customs and practices", their ability to entry into treaty, and the ability of disputes to be resolved in a traditional manner instead by international law.[174]

The court dismissed the judicial review, not based on the substantive arguments of the intersection of the CCFIPPA and the First Nation's s. 35 rights, rather that the First Nation was not able to show sufficient causal link between the negotiation and ratification of CCFIPPA and the particular rights asserted.[175] The matter was appealed to the Federal Court of Appeal by the First Nation. The Federal Court of Appeal dismissed the appeal on January 9, 2015 on the basis that the negotiating and ratification of the CCFIPPA did not directly concern the First Nation or the resources over which they assert rights and title.[176] The Court agreed that the result of the CCFIPPA would likely be increased investment in Canada by Chinese nationals but "more investment in Canada does not necessarily lead to the

[171] *Hupacasath First Nation* v. *Canada (Foreign Affairs)*, 2013 FC 900.
[172] *Agreement between Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments* Done at Vladivostok on 9 September 2012; Entry into Force: 1 October 2014, Canada Treaty Series 2014/26.
[173] *ibid*, para 2.
[174] *ibid*, para 18.
[175] *ibid*, para 147 – 150.
[176] *Hupacasath First Nation* v. *Canada (Attorney General),* 2015 FCA 4, at para 114.

conclusion that the appellant's Aboriginal rights will be affected."[177] The Court did make a comment in obiter that if the First Nation's position were taken to the extreme that there is a duty to consult every time the federal government makes decisions affecting investment and development in Canada, every First Nation in Canada would have to be consulted if there were any possibility that their Aboriginal rights and title could be affected. This situation would result in the government's governance to be unworkable.[178]

Even with this result from the Federal Court of Appeal, there is a possibility for Aboriginal groups to be consulted each time the Crown negotiates a treaty which may have an impact on the rights and title asserted. The nature of the rights and title and the types of provisions in such international agreements are not known at this time, but it worthwhile being on the alert for the potential of challenges to the Crown's prerogative power in this regard.

3.3 *Boundary Waters Treaty*

The *Treaty between Great Britain and the United States relating to Boundary Waters and Questions arising along the Boundary between the United States and the Dominion of Canada*[179] (*Boundary Waters Treaty*) is an example of a treaty entered into by the Imperial Crown on behalf of the Dominion of Canada in 1909. The preamble of the treaty outlines the purpose of the treaty as a "peace and friendship" treaty in that it expresses the desire of the parties "to prevent disputes regarding the use of boundary waters and to settle all questions which are now (sic) pending between the United States

[177] *ibid*, para 118.
[178] *ibid*, para 120.
[179] *Treaty between Great Britain and the United States relating to Boundary Waters and Questions arising along the Boundary between the United States and the Dominion of Canada*, United States and United Kingdom, 11 January 1909. 36 US Stat 2448, UKTS 1910 NO 23 (*Boundary Waters Treaty*).

and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise". [180]

The articles of the treaty set out specifics in order to attain these goals. The Preliminary Article[181] defines what is meant by the "boundary waters". It states that "[f]or the purposes of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or portions thereof, along which the international boundary between the United States and the Dominion of Canada passes". This article does, however, exclude "the waters of rivers flowing across the boundary". As will be discussed, these transboundary rivers often have treaties devoted to them.

The articles of the *Boundary Waters Treaty* deal with specific issues in order to achieve the purpose which was set out in the preamble. Article I[182] contains a provision which maintains the free navigation for the purpose of commerce. Article II[183] deals with the right of diversion of waters on each parties own side of the boundary, but also provides for remedies is such a diversion causes "any injury on the other side of the boundary". Article III[184] deals with the issue of the natural level or flow of boundary waters by means of diversion or obstruction. This article also refers to the International Joint Commission (IJC) and sets out its jurisdiction as a body that has the authority to

[180] Preamble, *Boundary Waters Treaty*.
[181] Preliminary Article, *Boundary Waters Treaty*.
[182] Article I, *Boundary Waters Treaty*.
[183] Article II, *Boundary Waters Treaty*.
[184] Article III, *Boundary Waters Treaty*.

approve such diversions or obstructions. Article IV[185] also provides authority to the IJC to approve the construction of dams that would result in a change to the natural water level and flow in boundary waters and cross boundary waters and also provides for the prohibition against polluting boundary waters or cross boundary waters that would injure the health or property of the other.

The establishment, composition, rules and guiding principles of the IJC are set out in Articles VII to XII[186]. The IJC is composed of six commissioners, three appointed by each of the parties, and a bureaucracy which enables the commission to carry out its duties. The IJC is granted the jurisdiction over and render decisions involving the use, obstruction, or diversion of the waters as set out in Articles III and IV that require the approval of the IJC. The IJC is mandated in Article VIII to adhere to uses of fresh water resources in the following order of precedence: uses for domestic and sanitary purposes; uses for navigation, including the service of canals for the purposes of navigation; uses for power and for irrigation purposes.[187]

This treaty is primarily a treaty to establish a dispute resolution mechanism to allow Canada and the United States to mediate disputes of the navigation, diversion, and damming of boundary waters. According to the IJC's own accounting of its history, the *Boundary Waters Treaty* was the result of ongoing disputes concerning diversion of water for irrigation purposes west of Lake Michigan. These diversions caused Lake Michigan's water levels to drop significantly, which in turn, affected the navigation of the Great

[185] Article IV, *Boundary Waters Treaty*.
[186] Articles VII, IX, X, XI, and XII, *Boundary Waters Treaty*.
[187] Article VIII, *Boundary Waters Treaty*.

Lakes for commercial purposes.[188] This treaty has been seen as a success story in bi-lateral relations and resolution of a century's worth of disputes and compromises. It has been said that this treaty forged new ground in dealing with ongoing competing uses of fresh water resources by the establishment of a permanent commission with jurisdiction beyond that of simply regulating navigation.[189] Despite this praise, the *Boundary Waters Treaty* and the IJC have been criticized as being dated in their mandates and have not kept up to changes in the priorities of water uses, issues relating to water quantity, and in relation to ground water issues.[190] Despite this, there has not been a call to reopen the treaty and negotiate changes as the IJC has been seen as being flexible in its interpretation of the treaty and has exercised its authority in a robust manner.[191]

3.4 *Columbia River Treaty*

The *Treaty Between Canada and the United States of America Relating to Cooperative Development of the Water Resources of the Columbia River Basin*[192] is example of a non-Empire treaty which Canada entered into with respect to transboundary water courses. This treaty was the result of a number of issues being referred to the IJC regarding works on watercourses in the Columbia River Basin. Theses matters were referred to the IJC, even though the Columbia River is a transboundary watercourse and

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[188] The International Joint Commission Website "The Origins of the Treaty" accessed May 26, 2014. http://www.ijc.org/en_/Origins_of_the_Treaty

[189] Muldoon and McClenaghan, "A Tangled Web: Reworking Canada's Water Laws" in *Eau Canada*, p. 246.

[190] Saunders and Wenig, "Whose Water? Canadian Water Management and the Challenges of Jurisdictional Fragmentation" in *Eau Canada*, p. 131.

[191] *ibid*, p. 132.

[192] *Treaty between Canada and the United States of America Relating to Cooperative Development of the Water Resources of the Columbia River Basin,* Washington, January 17, 1961, 15 UST 1555, TIAS No 5638, 542 UNTS 244, (*Columbia River Treaty*).

not a boundary water, due to the working of Article II of the *Boundary Waters Treaty*.[193] As discussed previously, Article II allowed for legal remedies if the use on one side of the boundary injures a party on the other side. In addition, Article IV of the *Boundary Waters Treaty*[194] required IJC approval for works that affect the water level on either side of the boundary. These situations arose in many instances along the watercourses in the Columbia River Basin. Two dams, which were built in the United States, which were the focus of much debate are the Grand Coulee Dam and the Libby Dam. These dams were the subject of two applications to the IJC and, in particular the Libby Dam application, was a major factor in the commencement of negotiations towards a *Columbia River Treaty*.[195]

In December of 1959, The IJC transmitted its report entitled *Report on Principles for Determining and Apportioning Benefits from Cooperative Use and Storage Waters and Electrical Interconnection within the Columbia System*[196] to both the United States and Canadian governments. This began the negotiating of the *Columbia River Treaty* in earnest. The two governments came to an agreement and signed the treaty on January 17, 1961. However, due to the constitutional division of powers, the treaty was delayed in being ratified by Canada. The Province of British Columbia has the jurisdiction over development of fresh water resources within the province. In order for the federal government to ratify the treaty, they had to negotiate with the province, which wanted

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[193] Article II, *Boundary Waters Treaty*.
[194] Article IV, *Boundary Waters Treaty*.
[195] Bankes, N., *The Columbia Basin and the Columbia River Treaty: Canadian Perspectives in the 1990s*, Northwest Water Law & Policy Project, Lewis & Clark University www.lclark.edu/dept/water January 31, 2001, p. 26.
[196] *Report on Principles for Determining and Apportioning Benefits from Cooperative Use and Storage Waters and Electrical Interconnection within the Columbia System*, December 1, 1959, online, International Joint Commission, http://www.ijc.org/files/publications/ID238.pdf .

certain assurances with respect to their resource. The province wanted a binding agreement to sell their downstream power benefits to the United States at an acceptable price, assurances the two federal governments would approve the sale, and the clarification of certain terms of the treaty.[197] The negations with the British Columbia resulted in an agreement and Canada and the United States negotiated a Protocol by and Exchange of Notes. Canada finally ratified the treaty on September 16, 1964.[198] Canada and B.C. entered into an agreement to sell B.C.'s downstream power benefits, and through BC Hydro, an agreement was entered into with a coalition of Pacific Northwest utilities to sell the benefits for a thirty year fixed term for each of the three dams covered by the treaty.[199]

3.5 Boundary Communities Municipal Water Agreements

Another example of transboundary water agreements is found in the transboundary cooperative projects that provide municipal water to border communities. Generally, the circumstances surrounding such transboundary water transfers arise in small border communities, which are very close in proximity and often only separated by the line of the international boundary, in order to deal with poor water quality or inadequate supply.[200] The solution to the water supply issue for these communities is to enter into inter-local agreements in order to share infrastructure and save on costs, even though the volume of water involved is small. Patrick Forest, in his work in geography and local water supplies, surveyed 12 such local agreements. Among his findings is that

[197] *ibid*,p. 41
[198] The United States ratified the treaty on March 23, 1961.
[199] Bankes, p. 42.
[200] Forest, "A Century of Sharing Water Supplies between Canadian and American Borderland Communities" p. 2.

"these transboundary local water supplies evolved endogenously and independently from each other, building on decades of cooperation in social, institutional, and economic realms."[201] He also states that a common element is that the inter-local agreements were the result of local initiatives, but sometimes involved provincial and federal governments. These inter-local water agreements are "the sharing of a local public service in response to either compromised water quality or inadequate water quantity."[202]

3.6 *Helsinki Rules*, UNWC, and *Berlin Rules*

The International Law Association adopted *The Helsinki Rules on the Uses of the Waters of International Rivers*[203] in 1966. The *Rules* were adopted as the result of ongoing negotiations as a result of increased reliance and development on rivers and lakes after the Second World War. It became clear that the absence of rules or customary international law principles regarding the non-navigational uses of international waters would result in conflicts between states along trans boundary watercourses. Beginning in the late 1800s, various theories of states' rights and obligations in respect of the use of international rivers and lakes began to emerge but were not always compatible.[204]

One of the first of these principles to be espoused is the *Harmon Doctrine*. This Doctrine was set out in an 1895 opinion of Judson Harmon, the Attorney General of the United States at the time, in response to a question of the uses of the waters of the Rio Grande, which is shared by the United States and Mexico. Harmon's conclusion was that

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[201] *ibid.*
[202] *ibid.* p. 26.
[203] *The Helsinki Rules on the Uses of the Waters of International Rivers*, International Law Association, Report of the 52nd Conference 484 (1967)
[204] Salman, Salman M.A. "The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law" *Water Resources Development* (2007) Vol 23, No. 4, p. 627.

"a state is free to dispose, within its territory, of the waters of an international river in any manner it deems fit, without concern for the harm or adverse impact that such use may cause to the other riparian states."[205] This doctrine of absolute territorial sovereignty has been criticized since its pronouncement as basic international law principles generally prohibit one state from causing harm to another, including when riparian rights are in play. As such, the *Harmon Doctrine* has not been recognized as part of customary international water law.

Other principles regarding international watercourses developed over time. These include absolute territorial integrity, limited territorial sovereignty/integrity, and the community of co-riparian states in waters of an international river. The first principle, absolute territorial integrity, establishes a right of one state to demand the natural flow of a river into its territory from the upper riparian state and imposes a duty not to restrict the flow of the river to downstream riparian states. This principle favours the downstream riparian states and has also been criticized as being unbalanced, thus, it is not regarded as part of international water law like the *Harmon Doctrine*.[206]

The second principle of limited territorial sovereignty or limited territorial integrity asserts that each riparian state has the right to use the waters of an international river and has a duty to ensure that its use does not harm the other riparian states. This principle views the balance of use and harm prevention as the main goal. The third principle looks at a cooperative approach to the use of the international watercourse in a community of co-riparian states. This principle is based on a view of the river and its

[205] *ibid*, p. 627.
[206] *ibid*

basin as an economic unit and the rights to the use of the water are held collectively or in manner as agreed upon by the collective. This principle has not been accepted due to the difficulties in co-riparian states agreeing to give up their rights to a collective with potentially differing domestic goals and policies.[207]

Given the conflicts among the four principles which had emerged and the increased development, the International Law Commission (ILC), Institute of International Law (IIL), and the International Law Association (ILA), the latter two being non-governmental scholarly legal organizations established in 1873, began work on developing resolutions and rules regarding international watercourses after the Second World War. The first IIL resolution was the *Madrid Resolution* of 1911 that prohibited activities that harmed the other riparian states, which was in striking opposition to the *Harmon Doctrine*. Later, the IIL modified the *Madrid Resolution* in 1961 with the adoption of the *Salzburg Resolution*. The ILA, on the other hand, took a different approach that focused on the equitable use of international watercourses. Its first resolution was adopted in 1956, referred to as the *Dubrovnik Statement*. Sovereign control of the waters within each states own boundaries was recognized in the Statement, but it required consideration of the effects of that use on other riparian states. This was modified by the *New York Resolution* of 1958 and was the precursor to the *Helsinki Rules*.[208]

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[207] *ibid*, see also McCaffrey, Stephen C. "The progressive development of international water law" in *The UN Watercourses Convention in Force: Strengthening international law of trans boundary water management*, Flavia Roches Loures and Alistair Rieu-Clarke, eds. (Oxford: Routledge, 2013) p. 11.

[208] *ibid* p.628.

The *Helsinki Rules* further developed the water basin approach to the rights and duties of development on trans boundary watercourses and moved away from the river and lake focus. The *Helsinki Rules* have had a significant impact on the international law of watercourses and are still referred to in negotiations by states, despite the adoption of the United Nations *Convention of the Law of Non-Navigable Uses of International Watercourses* (*UNWC*)[209].[210] The ILA committee that prepared the Rules proposed to the United Nations General Assembly that the ILC study the issue, using the *Rules* as a model. After lengthy consideration, the *UNCW* was adopted in 1997. As Professor McCaffrey states, the "heart" of the *UNWC* is contained in Part II: General Principles and Part III: Planned Measures. Articles 5 and 6 contain the principle of equitable utilization and the relevant factors to determine if it is equitable. As McCaffrey states, the principle and factors were not controversial as they followed very closely to the *Helsinki Rules*.[211] What was innovative was the inclusion of the equitable participation provisions in the *Convention*. The participation provisions incorporate the concept of co-operative participation in international watercourses.

Despite the *UNWC* being adopted, it is not yet in force.[212] After the adoption of the *UNWC*, the ILA addressed the issue of whether the *Helsinki Rules* were in need of revision. The project started in 2000 and the proposed revisions were presented and approved at the ILA conference held in Berlin in 2004. The title was changed to *The*

[209] *Convention of the Law of Non-Navigable Uses of International Watercourses*, 36 ILM 700 (1997); G.A. Res. 51/229, U.N. GAOR, 51st Sess., 99th mtg., UN Doc A/RES/51/229 (1997), (*UNWC*).

[210] McCaffrey, p. 12. The Convention is often referred to as the UN Watercourses Convention or UNWC for short.

[211] *ibid*, p. 18.

[212] As at June 2, 2014 the United Nations Treaty Database reports that the UNCW is not in force. There are 16 Signatories to the Convention and 35 parties. Neither Canada nor the United States are Signatories or parties to the Convention.

Berlin Rules on Water Resources[213]. The new rules, which were more expansive than the previous rules, consist of 73 articles and include all water resources, national and international. One distinguishing characteristic of the *Berlin Rules* for the previous principles is that there is an obligation on each basin state to "manage" the water resource in an equitable and reasonable manner. [214]

Although the *Helsinki Rules*, the *UNWC*, and the *Berlin Rules* are not binding international law, they have all had their influence on customary international law in relation to international watercourses. The Permanent Court of International Justice (PCIJ) and its successor the International Court of Justice (ICJ) have referred to these instruments in decisions of three non-navigational uses of international watercourses disputes that were referred to the courts. These three cases are the *Meuse* case[215], the *Gabčíkovo* case[216], and the *Pulp Mills* case.[217] In these cases, the courts addressed international water law and, according to Professor McCaffrey, made a number of significant statements. In *Gabčíkovo*, the court held that Hungary has a basic right to the equitable and reasonable sharing of the resources of an international watercourse which was not derived from the treaty, rather which is found in customary international law.[218] McCaffrey and others have identified the ICJ's statement as evidence of how the equitable and reasonable utilization principle has become a "cornerstone of the law in the

[213] *The Berlin Rules on Water Resources*, International Law Association, Report of the 71st Conference 3 (2004); 71 ILA 337, 385 (2004), (*Berlin Rules*).
[214] Salman, p 636. The definition of "manage" in the Berlin Rules is contained in Article 3(14).
[215] *Diversion of Water from the Meuse* (Netherlands v Belgium), PCIJ Rep Series A/B No 70
[216] *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v Slovakia) (Judgment) [1997] ICJ Rep 7
[217] *Case Concerning Pulp Mills on the River Uruguay* (Argentina v Uruguay) (Judgment) [2010] ICJ Rep 14
[218] McCaffrey, p. 14

field."[219] Furthermore, the ICJ has applied the community of interest principle in the same case in its statement that there is a common legal right which is held equally by each riparian state in the use of the whole course of the river and that the modern development of this principle to non-navigational uses is evidenced by the adoption of the *UNWC*.[220]

In the *Pulp Mills* cases, the ICJ invoked the principle of equitable and reasonable utilization in interpreting the requirements under the *1975 River Uruguay Statute*[221] despite the fact that the statute itself does not refer to equitable or reasonable utilization. Furthermore, the court found that the principles found in the *UNWC* to take into account the interests of the other riparian state and to protect the watercourse were applicable to the matter when the Statute was silent, as these principles contained in the *UNWC* are part of the customary international law.[222]

3.7 Summary

These four examples show how treaties and legal instruments contain a number of objectives and principles and illustrate those different approaches and how these principles develop over time. Although there are many other agreements which could be surveyed, these examples are examples of an Imperial treaty (*Boundary Waters Treaty*), a treaty in which Canada had to involve a province in its negotiation and implementation (*Columbia River Treaty*), both of which are bilateral treaties, the multilateral *Helsinki Rules* and its successors, and inter-municipal cooperation agreements for the provision of

[219] *ibid.*
[220] *ibid.*
[221] *Statute of the River Uruguay*, 26 February 1975, UNTS vol. 635, p. 91.
[222] *ibid,* p. 15

public water supplies. Besides differing in who the parties are as well as the number of parties, they illustrate temporal characteristics. These temporal characteristics are the result of the prevailing policy considerations, industrialization and economic conditions, as well as general awareness and concern for environmental health and protection.

Despite the differences among these legal instruments, there is one striking similarity. They are primarily concerned with development along transboundary watercourses and seek to preserve the access to and a consistent flow and level of the watercourse. By attempting to achieve this, the agreements establish rights of states along international watercourses regarding the use of fresh water resources and imposing a duty on that state to protect the fresh water resources or flow on behalf of the other riparian states. In addition, protection from pollution was added in later in time. What is not addressed in any of these agreements is a notion of fresh water resources as a commodity. Except for the prohibition from diversion without consent in the *Boundary Waters Treaty*, the issue of permanently taking water out of the body of water is addressed. It may well be read into portions of the agreements relating to the obligations to ensure the water flow, but that is generally in relation to damming of the watercourse for the production of hydroelectricity.

In light of this, it appears that fresh water resources have not been seen as a commodity of trade until recently. This shift in characterization of fresh water resources may have an effect on how these agreements are interpreted in the future and how trade agreements may be used to advance the case for the trade of fresh water resources in bulk. In order to determine if trade agreements, rather than specific trans boundary water agreements, are applicable to fresh water resources and their commoditization, we must

look to the terms of these trade agreements and their provisions to determine if fresh water resources are in fact a commodity subject to the provisions of trade agreements.

4 Reading the Downstream Currents: Do GATT/WTO and NAFTA Change the Status Quo?

In order to determine if fresh water resources in bulk is a trade commodity under the terms of the agreements, we must turn to the legal texts of the WTO and NAFTA and consider the provisions contained in the agreements and how they have been interpreted in an attempt to discern if fresh water is subject to the WTO/NAFTA regime.

In discussing the applicability and implications with respect to fresh water resources, the provisions dealing with trade in goods contained in GATT and WTO are key. In addition, corresponding provisions in NAFTA will provide the rules which apply to the North American trading bloc, to the extent that they differ from the GATT/WTO provisions. The WTO texts will be considered first, particularly GATT 1947 and GATT 1994. As GATT predated NAFTA and set the foundation of NAFTA, it is important to understand the legal text as it has been interpreted before addressing the provisions of NAFTA. As well, NAFTA is a Regional Trade Agreement as contemplated in GATT Article XXIV and so the discussion concerning the text will guide the analysis of the NAFTA text.

In support of this approach, it is instructive to look at Part One of NAFTA which contains a specific reference to GATT Article XXIV. NAFTA is established

pursuant to that provision and NAFTA Article 103 affirms the Parties[223] existing rights and obligations under GATT and other agreements to which the Parties are signatories. Article 103 also provides that "[i]n the event of any inconsistency between this Agreement [NAFTA] and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement." [224]

This provision is consistent with Annex 1A of the WTO Agreement, which states that "[i]n the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent or the conflict."[225] After considering the provisions in GATT 1994, the provisions of NAFTA will be considered and if there are any conflicting provisions, resolve them in the manner contemplated by the agreements.

4.1 *GATT 1947*, *GATT 1994*, and *WTO* and Their Applicability to Fresh Water Resources

GATT 1947 comprises four parts. Parts I and II are the parts that need to be considered in order to answer the question reading the applicability to fresh water

[223] when using the term "the Parties" I am using it in the manner in which is consistent with the usage in NAFTA and refers to the signatories, being the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America.
[224] NAFTA, Article 103.
[225] WTO, Annex 1A.

resources. Part I sets out the general principle of Most-Favoured-Nation Treatment. This principle is outlined in Article I(1), which states that:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[226]

Article I (2), (3), and (4) outline certain exceptions to the Most-Favoured-Nation principle, which are mostly recognizing pre-existing agreements between nations.

Part II contains specific provisions and rules. Included in this section are the articles pertaining to National Treatment (Article III), Anti-Dumping (Article VI), Elimination of Quantitative Restrictions (Article XI), Subsidies (Article XVI), State Trading Enterprises (XVII), Emergency Action (XIX), General Exceptions (XX), and Security Exceptions (Article XXI). This part supplements the general equal treatment provision in Article I and identifies practices which had been used in the past to restrict imports from targeted nations, which were often seen as a threat to the domestic industry.[227]

[226] GATT 1947, Article I(1).
[227] GATT 1947, Part II.

The first step in the analysis to determine if water is subject to the WTO regime is to determine if water fits within the definition of "good" or "product" as defined in the legal texts. One striking feature of GATT 1947 and GATT 1994 is that there is no definition section that sets out definitions of the terms used in the agreements. As such, the general intention of the agreements has to be determined and specific articles of the agreements have to be read in order to determine the "ordinary meaning" of the terms contained in the agreements. Analyzing the usage and context of the terms throughout the agreements assists in arriving at a definition of the terms.

Prior to analyzing the texts, it is necessary to determine a standard definition for the terms "goods" and "product" as a starting point. As Sullivan sets out in her work, and as discussed previously, the dictionary meaning of a term is not conclusive, however it does provide a starting point and baseline from which to proceed. The Oxford English Dictionary defines "goods" as "saleable commodities; merchandise, wares". "Commodity" is defined as "a thing of use or value; specifically, a thing that is an object of trade, especially a raw material or agricultural crop". "Merchandise" is defined as "the commodities of commerce; goods to be bought and sold" and "wares" is defined as "articles of merchandise or manufacture; goods, commodities". "Product" is defined as "a thing produced by an action, operation, or natural process; … that which is produced commercially for sale."

The purpose and intent of GATT is set out in the preamble. Included in the statement of the desire for economic growth among the Members so as to improve the standard of living among the parties by reducing barriers to trade, the preamble contains the aspiration that the objectives can be achieved in part by "developing the full use of the resources of the world and expanding the production and exchange of goods."[228] This preamble would suggest that it was the intention of the parties when GATT 1947 was negotiated that resources, outputs of production, and goods would be subject to the provisions contained in the subsequent articles of the agreement. This also is in line with the definitions of "goods" and "products" as found in the Oxford English Dictionary. In order to be certain about the scope of the agreement, we have to look deeper into the text to see how the intentions are specifically expressed and the terms are specifically used.

A review of the text, including the annexes and amendments since its entry into force, shows that the term "good" or "goods" in the context of a commodity appears 15 times. In Annex I – Notes and Supplementary Provisions, the term "goods" has a limiting provision in GATT 1947 Article XVII Paragraph 2. It states that "the term "goods" is limited to products as understood in commercial practice, and is not intended to include the purchase or sale of services."[229] This together with the statement in the preamble that the purpose is to "expand[ ] the production and exchange of goods"[230] would lead to a strong inference that the subject of GATT

[228] GATT 1947, Preamble.
[229] GATT 1947, Article XVII(2).
[230] GATT 1947, Preamble.

would be commodities which have gone through an industrial process and afterwards, are the subject of transboundary exchange.

When the text is further reviewed, the terms “product” and “products” are used 221 times. With this use of the term “product” more prevalent in the text of GATT than the term “goods” together with the specific limiting provision in Annex I, it would be reasonable to read the agreement as covering items of exchange which have gone through an industrial process prior to being considered a “good” or “product” of trade.

However, from the review of the texts of GATT 1947 and GATT 1994, it is inconclusive whether the importation or exportation of fresh water resources is included within the definition of “good” or “product”. With this uncertainty, a more conclusive answer may be found in other documents or statements of the parties on this matter.

The international community has addressed the issue of fresh water resources in relation to the use, allocation, and protection of transboundary watercourses in a number of agreements. The agreements that have been reviewed have not referred to the fresh water resources as a commodity, which would be subject to other agreements such as GATT. A broader review of the international agreements in place that deal with all waters shows a general intent on the prevention of pollution or the safe access to and navigation of the waters.

In these circumstances, there is little guidance from other sources to assist in determining whether fresh water resources are subject to the rules of trade agreements. As such, applying various theoretical approaches to the question and arriving at an acceptable and considered manner in which to resolve the question will have to be undertaken in order to make the determination.

4.2 Do Any of the Provisions in NAFTA Modify the Relationship Developed in GATT as Among the NAFTA Parties?

Turning to the text of NAFTA, the relevant provisions to determine if there is a different approach to the classification of fresh water resources under NAFTA than under GATT are contained in the Preamble, Chapter Two – General Definitions, and Chapter Twenty-One – Exceptions.

The Preamble to NAFTA sets out the desired goals and guiding principles that the three countries expressly resolved should apply to trade among and between the Parties. Specifically, the Preamble states that the Parties intend on "build[ing] on their respective rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of cooperation".[231] They also resolve to "undertake each of the proceeding [goals] in a manner consistent with environmental protection and conservation", "safeguard the public welfare", "promote sustainable development", and "strengthen the development and enforcement of environmental laws and regulations".[232] These goals and principles

[231] NAFTA, Preamble.
[232] *Ibid.*

are instructive when analyzing the text to answer the question of the applicability to fresh water resources.

Unlike GATT, Chapter Two of NAFTA has a section of definitions of general application. In Article 201, "goods of a Party" is defined as "domestic products as these are understood in the *General Agreement on Tariffs and Trade* or such goods as the Parties may agree, and includes originating goods of that Party."[233] Although there is a formal definition of "goods of a Party" in the agreement, it is so broadly defined so as not to be of particular assistance in determining if fresh water resources are a "good". Looking back to the previous discussion of the meaning of "good" or "product" in GATT, the definition of a "good" or "product" would imply that some industrial process would have to be applied to the fresh water resource for it to fall within the definition in Article 201. As with the earlier discussion, it is not conclusive whether fresh water resources are a "good" under NAFTA as bulk transfer of fresh water resources requires no, or minimal, industrial processing in order to export it. The result is similar to GATT in that one would have to look to extrinsic evidence in order to determine the intentions of the Parties as to whether or not fresh water resources are to be subject to the NAFTA trade rules.

The issue of foreign access to Canada's fresh water resources was a live issue during the negotiation of NAFTA. In response to this, the Canadian government took the position that NAFTA "does not apply to water in its natural state."[234] While

[233] NAFTA, Article 201.
[234] Johansen, David *Bulk Water Removals, Water Exports and the NAFTA*, 20 February 2001, revised 31 January 2002. Library of Parliament, Parliamentary Information and Research Service. PRB 00-41E, Catalogue Number YM32-5/00-41E-PDF, p 8.

NAFTA was still being negotiated, the Canadian government released a publication in August 1992 entitled *The NAFTA Manual*[235] which states that NAFTA does not apply to large-scale exports of water or inter-basin transfers or diversion of water, which is states is contrary to federal policy. The government states that NAFTA only applies to water packaged as a beverage or in tanks.[236] Furthermore, the then Assistant Deputy Attorney General of Canada, Konrad von Finkenstein, appeared before the House of Commons Legislative Committee on Bill C-115 (NAFTA Implementation) and stated that the trade in water requires that water be a good and subject to the NAFTA rules, it would have to be bottled or put in tanks, otherwise it was not a good.[237]

In addition, to answer the question about the applicability of NAFTA to fresh water resources, the governments of Canada, United States, and Mexico issued a joint statement in December 1993 expressly stating that the intention of the Parties was that water was not subject to the rules of NAFTA unless it "entered into commerce and become[s] a good or product."[238] In light of this Joint Statement, the parliamentary testimony, and *The NAFTA Manual*, there is sufficient extrinsic evidence to support the conclusion that water, other than bottled water or water in tanks, was not intended to be subject to the trade rules in NAFTA.

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[235] *North American Free Trade Agreement: The NAFTA Manual* (Ottawa: External Affairs and International Trade Canada, 1992).
[236] *The NAFTA Manual*, 1992, p.6 and the section entitled NAFTA – Water, no page numbers provided.
[237] Johansen, *Bulk Water Removals,* p. 9.
[238] 1993 Statement by the Governments of Canada, Mexico, and the United States.

4.3 The Competing Ideas of Public Good and Commercial Resource to Aid in Deciding the Preferred Interpretation

Fresh water is a unique compound that is essential for all forms of life on earth and there are no substitutions for fresh water. However, competing views on how to categorize and treat fresh water resources in our economic and legal systems have developed. Before coming to a determination what the preferred interpretation of the provisions of NAFTA and WTO is, it is important to engage in a discussion about the competing approaches to natural resource use, consumption and conservation. On its face, the discussion appears to be dichotomous, however, on a deeper analysis there is more of a continuum of approaches ranging from the complete non-commoditization of water, due to its perceived nature as a public good, to an approach based on property rights, which advocates for the market being the regulator.

Professor Edith Brown Weiss identifies the main question as whether the market is the best mechanism to regulate the consumption of fresh water as it may result in a more efficient use of water and meet the water needs of various users, municipal and agricultural. She points out that these entities are in the market of buying and selling fresh water resources and "some argue that fresh water is a commodity, which ought to have a price, and that the price ought to be high enough to ensure that water is used efficiently."[247] She recognizes that there is an

[247] Brown Weiss, Edith, "Water Transfers and International Trade Law" in Edith Brown Weiss, Laurence Boisson de Chazournes & Nathalie Bernasconi-Osterwalder, eds. *Fresh Water and International Economic Law* (Oxford: Oxford University Press, 2005), p. 61.

unanswered question as to the applicability of trade law to the fresh water resource. As she states it, the answer to the question "whether the GATT 1994 applies to bulk transfers of water has important policy implications for international trade, water and agricultural policy, and ecosystem protection"[248] and thus, the final determination must be carefully thought out. In her opinion there are reasons for and against the applicability of trade agreements to fresh water resources. Considerations which favour the applicability include the recognition that it is a commodity, levels the playing field for trade in fresh water resources, and it protects against disguised barriers to trade. Considerations against the applicability of trade agreements include the constraint of a state's ability to protect ecological systems, complications to long-term management of fresh water resources, allowing trade considerations to dominate the resolution of conflicts in uses, and the abdication of authority to resole claims to trade dispute settlement mechanisms.[249]

Brown Weiss explains that water did not have a price except for the cost of its extraction and treatment until the last half of the twentieth century. It was during the last half century or so that water has become a subject of water markets and began being priced.[250] It has been during this time that a market developed on an international scale but at the same time some states where resistant to the export market developing within their jurisdictions.[251] It is from this newly emerging landscape that the question arises as to the applicability of international trade

[248] *ibid*, p. 77.
[249] *ibid*, p. 80 – 81.
[250] Brown Weiss, Edith, "Water Transfers and International Trade Law" in *Fresh Water and International Economic Law* p. 61.
[251] *ibid*.

agreements to the fledgling international market for fresh water resources.[252] Brown Weiss identifies the conflicting positions being, on the one hand, a view that "water is a commodity, which ought to have a price, and that the price ought to be high enough to ensure that water is used efficiently"[253] and, on the other hand, a view that "the commodification of water [is] inappropriate and regard[s] fresh water as a public good, or as the common heritage of humankind."[254] In her opinion, this shows an apparent conflict between environmental and human rights disciplines and that of international trade.[255]

This description of the conflicting approaches is echoed by Urs Lauterbacher and Ellen Weigandt. They set out the dichotomy in terms of symbolic value and intrinsic value of water.[256] The proponents of the symbolic value of water do so because of its essential qualities and importance to life[257] and espouse the position that there is a basic human right to water which would result in not price being attributable to fresh water resources.[258] The proponents of the intrinsic value of water do so based on the apparent and localized scarcity of fresh water resources, which invites the application of economic principles to create a market and derive a price for the fresh water resource.

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[252] *ibid*.
[253] *ibid.*
[254] *ibid.*
[255] *ibid*, p. 62
[256] Lauterbacher, Urs and Ellen Weigandt, "Cooperation or Confrontation: Sustainable Water Use in an International Context" in *Fresh Water and International Economic Law,* p. 13
[257] *ibid.*
[258] *ibid.*

According to the proponents of the intrinsic value approach, water has a cost (including the costs of extraction, maintenance, opportunity costs, and externalities of its use and consumption) and an associated price. It follows from this that the most important exercise is to determine the proper price in order to achieve the optimal use.[259] Lauterbacher and Weigandt argue that "[s]ociety must therefore derive norms, rules, and institutions that provide incentives to achieve equitable and efficient use of this vital resource."[260] They argue that in order to achieve the goal of optimal use, recognizing property rights in the fresh water resource is the most appropriate way to optimize its exploitation and distribution.[261]

Céline Lévesque also describes this tension between the competing views. Lévesque focuses on the North American context and acknowledges the two competing views but also argues that the way fresh water resources are characterized varies according the circumstances. She identifies examples when water is treated as a public good and when it is considered a commodity and governed by international trade rules. Through her analysis of the NAFTA Chapter 11 challenge *Bayview Irrigation District et al* v. *United Mexican States*[262], Lévesque concludes that "from a trade law perspective, a bottle of water sold as a 'good' or 'product' is subject to international trade disciplines."[263] When water is in its natural state as part of a river flow, aquifer, or a lake, it is not subject to trade law.

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[259] *ibid.*
[260] *ibid.*
[261] *ibid*.
[262] Award of ICSID Arbitral Panel, *Bayview Irrigation District et al v. United Mexican States*, ICSID Case No. ARB (AF)/05/1 (2007) (International Centre for Settlement of Investment Disputes).
[263] Lévesque, Céline, "Investment and Water Resources: Limits to NAFTA" in *Sustainable Development in World Investment Law*, p. 414.

However, "beyond this certainty, … , much relating to water and its commodification remains open to debate."[264] As Lévesque puts it "[t]he 'extremes' of course are more easily dealt with: water bottle versus river flow … [t]he water muddies considerably, however, in the middle zone."[265] The answer, in her opinion, rests on which side of the debate gains primacy; sustainable development and environmental considerations, or trade considerations.[266] The fundamental point on which the two sides disagree is at which point "water can be said to have 'entered into commerce'"[267] She argues that as a result of the *Bayview* decision, water rights are subject to trade laws but it is not clear if trade law is applicable in other situations.

This uncertainty of fresh water resources' status within trade law and the tension between the two sides of the debate is addressed by William Schreiber. In his work about sustainable development, he discusses the necessary balancing of economic concerns with environmental protection.[268] Unlike Lauterbacher and Weigandt, Schreiber considers that that there is arguably a human right to water. Schreiber takes the position that the international community should be placing a priority on the use and sustainable development fresh water resource in order to respect any human right to water. The recognition of a human right to water would impose certain obligations on states to ensure that the resource is used in a responsible manner for the global community. But it is up to the individual states to

[264] *ibid.*
[265] *ibid,* p. 416.
[266] *ibid,* p. 415.
[267] *ibid.*
[268] Schreiber, William, "Realizing the Right to Water in International Investment Law: An Interdisciplinary Approach to BIT Obligations" 48 Nat. Resources J. 431, at p. 432.

determine how that obligation is fulfilled.[269] Complicating this, as Schreiber states, is the position of the World Bank and International Monetary Fund (IMF) that water is an economic good and their promotion of privatization of state-owned water utilities. Schreiber argues "this economic emphasis, by commodifying water as a resource, detracts from water's role as a necessary part of social and cultural goods."[270] The implications of the actions of the IMF is that fresh water resources would become an economic resource, providing financial benefits to corporations at the expense of respecting a human right.

Schreiber's position that there is a human right to water relies on General Comment 15 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR)[271] and how it defines the nature of the right. He states that the "right to water is a fundamental human right implicitly recognized within the International Bill of Rights and that … the right to water is a prerequisite for all other human rights."[272] The International Bill of Rights contains primary rights and each right is interdependent and indivisible from other rights. Schreiber argues water is a prerequisite for the realization of all other human rights and the fact that fresh water resources are not explicitly referred to in human rights declarations and bills of rights should not limit the interpretation and not include fresh water resources.[273] Schreiber arrives at this position as the ICESCR recognizes a right to water as a basic human right but limits it to a necessary amount for personal and

[269] *ibid*, p. 433.
[270] *ibid,* p. 434.
[271] *ibid,* p. 438.
[272] *ibid*, p. 438.
[273] *Ibid,* p. 440.

domestic use. In recognizing this right, Schreiber argues that development and commercialization of water needs to be balanced with the content of the human right to water. It flows that states cannot infringe the individual's access to water in favour of third parties or foreign states. Furthermore, states will have to refrain from causing harm to the water source and ensure the safety of the water user.[274] In particular, Schreiber warns that the consequences of increasing privatization of water systems and the pressures of international investment treaties interfere with the ability of the individual to exercise the right to water.

In contrast to Schreiber's position, Professor Pooja Parmar challenges the current discourse on the human right to water as being the result of developments in international human rights law and sustainable development. Parmar does not dispute the goal of the human right to water and the importance of ensuring access to the resource. Rather, Parmar challenges the basis for establishing the right as grounded in Western liberal ideology which, in her opinion, is the result of the "dominant 'universal' human rights discourse [that] is in fact 'a globalized Western localism'."[275] This localism does not take into consideration the plurality of lived experiences and does not address many forms of suffering and depravation. Her basic premise is that a human right to water, in a legal sense, does not reflect what the people aspiring to human rights mean by a human right.[276] Her concern in using human rights discourse when addressing the needs of people for such a basic

[274] *ibid,* p. 445.
[275] Parmar, "Revisiting the Human Right to Water" Australian Feminist L.J., 06/2008, Issue 28, p. 81.
[276] *ibid,* p. 81.

human need is that the uncertainty and dispute around what the human right encompasses "renders rights susceptible to co-optation by hegemonic forces."[277] Parmar proposes that the special nature of the fresh water resources and the need to avoid the pitfalls of the current rights discourse, which tends to view the right as an entitlement to a minimum volume of water, should take us away from the focus on a basic entitlement and toward a focus on the local needs. This focus will shift the concept from limiting the potential right, thus further marginalizing the lived experience, to the concept of identifying the local needs. She proposes further that "[o]nce measured and prescribed, needs are translated into entitlements."[278] This would have the desired effect on limiting the development of the water resource in a way that would respect the rights of the local citizenry.

On the other hand, the market efficiency approach to water is an economics based approach to the use and conservation of resources. The writers who follow this approach generally are of the opinion that economic market forces will result in a price of water that provides for sustainable development and a certain level of conservation, thus reaching an equilibrium point of supply and demand. This costs/price approach is based on the basic economic principle that economic actors act rationally, often referred to as *homo economicus*. This assumption leads to a belief held by many commentators in the international trade discipline that there is an economic balance that will be achieved even if the commodity in question is an exhaustible, scarce, or special resource.

[277] *ibid,* p. 82.
[278] *ibid*, p. 89.

To illustrate this, Professor Joseph Dellapenna states, "efficient management of public goods is problematic: If one invests in developing or improving a public good, others who invest or pay nothing ('free riders') will benefit from the investment because they cannot be excluded."[279] As a result, he states, there is a disincentive to invest in these projects and requires the community to take on the responsibility that all will pay. If this is not done, then demand will approach supply and the result will be that the users are "locked into a 'tragedy of the commons', destroying the resource."[280] This view, according to Dellapenna, resulted in the increased call for market regulation of the use of fresh water resources. It was bolstered in the early 1980's, coinciding with the election of the Thatcher government in the United Kingdom and the Reagan Administration in the United States. These governments were receptive to decreased government involvement in many sectors of the economy and favoured market forces as the regulator of the supply, demand, and ultimately the price for resources. In this environment, advocates of the market alternative found a voice and were being listened to by all levels of governments. Some of the results of this lobbying were the privatization of water utilities and the creation of a market for "raw water"[281].

The proponents of economic regulation of fresh water resources believe that sustainable use will result when all costs, financial and social, are taken into account when setting the price, and thus affecting the demand. Rational management of the

[279] Dellapenna, Joseph W., "The Market Alternative", in J.W. Dellapenna and J. Gupta, eds., *The Evolution of the Law and Politics of Water*, (Dordrecht, Nld.: Springer, 2009), p. 374
[280] Dellapenna, *The Market Alternative*, p. 374.
[281] *ibid*, p. 378. "Raw water" is the terms used to describe water in bulk in its natural sources.

resource and efficient use is the ultimate goal and justification of the market being the mechanism to regulate the use of the water resource.[282] As Dellapenna states "[t]he supposition that economic theory accurately represents how people think, and therefore enables accurate prediction of how they will behave, has failed in numerous experiments … studies show that irrationality is built into how people make decisions, irrationality that prevents the market models from working as economists assume."[283]

Professor Dan Tarlock also considers the economic arguments for classifying water as a commodity. He describes is as follows:

> The basic idea behind current water reallocation policy is that the market rather than water administrators (bureaucrats) should determine the comparative value of alternative water uses. From an economic perspective, water is simply another commodity to be bought and sold with the lowest possible transaction costs. Economists have long argued that too much water is devoted to low value uses and thus water allocation patterns are inefficient. The difference between the value of water for irrigated agriculture and alternative uses remains the primary economic rationale for water marketing. A 1996 United States National Academy of Science/National Research Council report explains the marginal position of irrigations concisely: '[t]he value of water in agriculture is generally less than in industrial and municipal uses … [and] [b]ecause it is so expensive to develop additional water supplies, only the higher-value water uses are likely to be justified economically'.[284]

Tarlock, like Dellapenna, associates the rise in acceptance of the economic justification for the commodification of water with the rise of neo-liberal thought, as supported by the Thatcher and Reagan governments. He identifies effect on local

[282] *ibid,* p. 382.
[283] *ibid,* p. 383.
[284] Tarlock, "Water Transfers: A Means to Achieve Sustainable Water Use" in *Fresh Water and International Economic Law*, p. 38.

level operations of the shift in policy at the higher levels as follows: "the shrinking fiscal support for water development and the devolution of federal power have created a more fluid water policy environment. Neither irrigated agriculture nor municipal water suppliers will be able to control the policy agenda as they did in the past."[285] Furthermore, Tarlock states "water marketing advocates argue that reduced transaction costs will promote more transfers. Proposals to reduce the transaction costs of transfers include streamlining existing processes and creating incentives to conserve and transfer the saved water."[286]

The primary means by which markets for fresh water resources are created is by the creation of water rights, a form of property right. By creating a property right, the holder of the right is able to alienate the subject of the right by sale or licence and exercise it with minimal interference from the state. With parties holding such proprietary rights, they are free to enter into agreements to sell the right to extract fresh water resources to a third party who will provide the greatest economic advantage to the rights holder. This market approach to the allocation and use of fresh water resources is consistent with neoclassical economic ideals, that is, that the market allocates resources more efficiently than governments.[287]

The notion that the market will result in an efficient allocation of resources is based on the assumption that the costs are known and considered and that the demand and supply will result in the fresh water resources being allocated to the

[285] *ibid*, p. 39.
[286] *ibid*, p. 40.
[287] *ibid*, p. 38.

best and highest value use. However, what is often missing in the analysis is the full appreciation of the long term costs, both financial and environmental. When these future costs are taken into account, they are discounted to reflect the future aspect and the probability that they will be incurred. By discounting these costs, and not taking into account externalities, the present price that the buyer would pay will not be sufficient to offset all the costs, including future costs. The market tends to focus on the immediate cost of getting the resource from the seller to the buyer.[288]

One aspect of the creation of water rights, either by recognition of riparian rights or prior appropriation, is that the power dynamics in relation to the use and regulation of fresh water resources is altered. As Tarlock states, the party that controls the policy agenda holds the power in relation to allocation and uses of fresh water resources. If the market is to govern, the power is shifted from local water management districts and the state to buyers and sellers who determine the allocation and use based on who will pay more for the fresh water resource.[289] One of the implications of this is that the state loses the ability to implement policies and programs, such as regional development and environmental conservation. In addition, the government loses the role of the arbiter of competing demands for the resources. It also loses the ability to be a buffer of the vagaries of the market forces.[290]

[288] *ibid*, p. 41
[289] *ibid*, p. 40
[290] *ibid*, p. 40.

With the government losing most of its influence on the planning, use, and allocation of fresh water resources, long term stability is compromised. Markets tend to be quick to react to changes in supply and demand, whereas government policy is slower to shift and balances competing interests based on policy. In regions where there is a market mechanism that allocates fresh water resources, the experience has been that *ad hoc* measures have been introduced to address non-economic issues such as environmental concerns, economic diversification, and social issues.[291] The market allocation may be seen as a rational and efficient mechanism to allocate fresh water resources, but it risks creating water monopolies, over-exploitation, predatory pricing, and inequities in distribution.[292]

As can be seen by the arguments in favour of the application of economic and market approaches to the use of the water resource, the focus is on efficient use and management through a proper price level. This approach, as mentioned above, is predicated on the idea that the actors will act rationally and the price will reflect all the costs, financial and social. However, since many of the social costs will not be known for many years in the future, it is not known how the market will reflect those costs in setting the price. One would hope that the present valuing of the future effects and costs would be such that future and intergenerational effects would be adequately reflected which would result in a bias in favour of lower consumption today for a more sustainable supply for the future.

[291] *ibid*, p. 41.
[292] *ibid*, p. 59.

Another frailty in the economic market approach is that once an essential resource becomes a commodity of trade, its supply and distribution can be used as a bargaining chip for states or multinational enterprises to achieve other goals. Although this might be rational for the holder of the supply to use the resource as a bargaining chip to achieve business and political goals, this is not what economists anticipate when they assume that parties would act rationally. This has been seen numerous times in relation to the international market for crude oil and the oil price shocks. In the event that an exporter of fresh water resources withholds the supply to a region in need of additional water, the price increases in that region which would likely result in a windfall to the exporter. This would through the market into disequilibrium and likely violate one of the principles of trade agreements. Although the recipient region would have recourse through the dispute resolution mechanism, the length of time to have the matter heard would result in significant increases in the costs to the affected region or require developing alternate sources. This distortion in the market place is opposite to the goals of the economic approach as the market would be in disequilibrium and the optimal distribution of the fresh water resource would not be achieved.

4.4 What Are the Potential Effects of Exogenous Shock on the Treatment of Fresh Water Resources Under GATT and NAFTA?

As illustrated by the discussion above, the determination of the issue of whether bulk water transfers are subject to trade rules will be dependent on which side of the discussion one takes. If it is determined that the definitive interpretation

(or a strong determination) of the applicability of trade agreements to fresh water resources by the definition of "good" or "product" or with strong and reasoned foundation that is generally accepted by the parties, there is a level of certainty going forward how to categorize and treat fresh water resources at international law and its status could only be changed by means of multi-lateral negotiation. If the situation results in an equivocal determination of the issue (or a soft determination), in other words where there is a general acceptance of the characterization of fresh water resources yet there in an ongoing debate, the question is not resolved and the applicability of trade agreements to fresh water resources would be subject modification and reinterpretation over time in light of contemporaneous circumstances. If one adds the international relations theory of exogenous shock to the discourse, it may resolve the matter in favour of certainty over ambiguity.

As has been illustrated in the discussion of the theory of exogenous shock, long held policy positions can be fundamentally altered when unexpected situations arise as a result of crises in geographic regions or economic sectors. These crises result in the acceptance of previously rejected policy options and can result in changes to domestic and international regulations. In the case of fresh water resources and bulk exports, a crisis in one region may result in a shift in the characterization of fresh water in its natural state from public resource to that of a commodity of trade in the attempt to get access to other state's supplies to alleviate their shortfall.

To better illustrate this, one could employ a hypothetical situation. In this hypothetical situation, it will be assumed that the soft determination of the issue of the applicability of trade rules to fresh water is that they do not apply. Assume that the State of California is the major producer of agricultural produce in North America, and that industry is a significant contributor to the state's GDP as well as to the national GDP. Let's now assume that there is a significant drought in California which has caused the failure of a majority of the food crops. This results in a significant decrease in the state's GDP and causes a financial crisis. This crisis has ripple effects and is also felt nationally as well as in Canada, but to a lesser extent. As a result, the State of California and The United States government put in place emergency water sharing legislation and create a market for fresh water in its natural state and provides for the bulk transfer of this water to California.

In these circumstances, let's now assume that California wants to access British Columbia's fresh water resource to alleviate its drought and get its agricultural industry back on track. The California and United States governments begin putting political pressure on the Canadian and British Columbian governments to allow for the purchase of and bulk transfer of water from the lakes and rivers of British Columbia, and elsewhere if needed. This would be forcing the Canadian and British Columbia governments to reverse its previously held policy of preventing bulk transfers of water from watersheds. This economic shock and political pressure from Canada's largest trading partner could be significant enough to cause the Canadian officials to reconsider previously rejected policy options: bulk transfer of fresh water resources. This situation has been seen before, particularly

in the 1980s when the Canadian officials shifted for a policy of non-integration with the United States and entered into a free trade agreement with the United States due to the depression of 1981.

This hypothetical could, however, have a different result if there were a strong determination regarding the application of trade rules to fresh water resources. If the definition of "good" or "product" did not include fresh water resources as no industrial process had been applied, it would be harder for the shock to result in a reconsideration of a policy as it would be backed by the strength of the determination under international trade law. In order for the political and economic pressure to result in a change in the *status quo*, extensive negotiations to re-open the trade agreements to add fresh water resources to the definition of a "good or product of trade" or to negotiate an additional agreement specifically dealing with the transboundary bulk transfer of fresh water resources. In the case of the trade agreements, this process would be a multi-lateral process that would have numerous challenges and would take a significant period of time. In the case of a new transboundary bulk water transfer agreement, negotiating an agreement from scratch would likely also take a significant length of time. These situations would be less reactionary to the crisis and would likely result in a more measured response to the crisis and political pressure.

If the goal of states is to have sovereignty over their fresh water resources and for the international community to have a degree of certainty regarding the applicability of trade rules, the preferred situation would be to agree that fresh

water resources are not included in the definition of "good" or "product" in GATT. This would allow states to enact domestic legislation and regulation for its protection and conservation, as well as to ensure a sustainable domestic supply without the chilling effect of reprisals from other states by using provisions in trade agreements.

Since this is not necessarily the current situation and the applicability of trade provisions is uncertain, there may be other means by which to exclude the rules of trade law from applying to fresh water resource. In particular, the exception provisions in contained in GATT Article XX.

4.5 If Fresh Water Resources Are Interpreted to Be Included in the Definition of "Good" or "Product", Can Article XX Be Used to Exempt Fresh Water Resources from the Rules of GATT?

For the purposes of the discussion regarding fresh water resources, the important sections of Article XX are: the chapeau; subsection (b) – necessary to protect human, animal, or plant life or health; and subsection (g) – relating to the conservation of exhaustible natural resources.[293]

The chapeau has been the subject of a number of disputes and has been written about in WTO jurisprudence. Since the objective of GATT and other trade agreements is the reduction or elimination of trade barriers, exceptions to the trade

[293] GATT 1947, Article XX.

rules are restricted, as one would expect. However, there are certain domestic policies that a state should be able to pursue that may, in effect, be inconsistent with the overall objectives of the trade agreement. This requires compromise and a balancing with duties and other obligations. The exceptions in Article XX result in a "recurring difficulty … to strike a balance between policies that are in line with a government's legitimate objective but sensitive to non-discrimination against foreign competition and measures that are in line with government's legitimate objectives but inconsistent with the ideals of free trade."[294]

The WTO Appellate Body (AB) issued a report in the dispute between the United States, appellant, and Brazil and Venezuela, appellees.[295] The AB considered in *US – Gasoline* the issue of whether a measure imposed by a state is consistent with Article XX upon the application of a two-tiered test. The AB relied on the provisions of the *Vienna Convention on the Law of Treaties* regarding general rules of interpretation. This provision states, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose." The AB considered the wording of Article XX and first turned to the text in XX(g) regarding conversation of exhaustible resources. The AB determined that the measure in question fell within the terms of XX(g), the AB then turned to the chapeau of Article XX. In order for the

[294] Ngangjoh-Hodu, Yenkong, "Relationship of GATT Article XX Exceptions to Other WTO Agreements" Nordic Journal of International Law (2011) 219 – 234, p. 221. See also Doyle, Christopher, "Gimme Shelter: The "Necessary" Element of GATT Article XX in the Context of the China – Audiovisual Products Case" Boston University International Law Journal, Vol. 29: 143.

[295] *Report of the World Trade Organization Appellate Body United States – Standards for Reformulated and Conventional Gasoline* AB-1996-1, WT/DS2/AB/R 29 April 1996. (US – Gasoline).

measure to be a valid exception under this article, it also has to satisfy the requirement that the measure "not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement* [and] … must be applied reasonably, with due regard to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."[296]

Subsequently, the AB issued a report in 1998 in *US – Shrimp Turtle*[297], a dispute between the United States, appellant, and India, Malaysia, Pakistan, and Thailand, appellees. The AB addressed the matter of a measure which the United States imposed requiring "the use of approved TEDs [turtle excluder devices] at all times and in all areas where there is a likelihood that shrimp trawling will interact with sea turtles, with certain limited exceptions."[298] The AB addressed the issue of Article XX(g) again and found the Dispute Panel misapplied the two-tiered test the AB had established in *US – Gasoline* and reaffirmed that the approach should not be a "chapeau-down" approach, rather the approach is first to assess the measure as against the particular exceptions in Article XX(a) to (j), then consider the objectives contained in the chapeau. As the AB commented in *US –Shrimp Turtle*, after a measure is provisionally justified under one of the subsections, "if it is ultimately to

[296] US – Gasoline, p. 22.
[297] *Report of the World Trade Organization Appellate Body United States – Import Prohibition of Certain Shrimp and Shrimp Products* AB-1998-4, WT/DS58/AB/R 12 October 1998. (US – Shrimp Turtle).
[298] US – Shrimp Turtle, p. 2.

be justified as an exception under Article XX, [it] must also satisfy the requirements of the introductory clauses – the "chapeau" – of Article XX."[299]

It would appear that the terms of the exceptions with respect to health and exhaustible resources would be relatively easy to satisfy the requirements of the chapeau if it can be shown that the measures imposed are legitimate regulatory policy choices and not a disguised restraint of trade.[300] As the Dispute Panel noted in *United States – Restrictions on Imports of Tuna*[301], "the objective of sustainable development, which includes the protection and preservation of the environment, has been widely recognized by the contracting parties to the General Agreement."[302] The Panel further stated that it "had to resolve whether the contracting parties, by agreeing to give each other in Article XX the right to take trade measures necessary to protect the health and life of plants, animals and persons or aimed at the conservation of exhaustible natural resources, had agreed to accord each other the right to impose trade embargoes for such purposes … and found that [no recognized method of interpretation] lent any support to the view that such an agreement was reflected in Article XX."[303]

The question that arises from the decisions interpreting Article XX, is whether Article XX could be used to prohibit or restrict the importation or exportation of fresh water resources.

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[299] *ibid*, p. 55.
[300] N.-Hoda, p. 225.
[301] *Report of the Panel United States – Restrictions on Imports of Tuna* DS29/R, 16 June 1994 (US – Tuna Dolphin).
[302] US – Tuna Dolphin, p. 56.
[303] *ibid*, p. 57.

In addition to the text of the chapeau to Article XX, the two exceptions which would apply to any restriction of trade in fresh water would be found in Article XX(b) and XX(g). Articles XX(b) provides for measures necessary for the protection of human, animal, or plant life or health. It is indisputable that water is necessary for the health and continued life of all humans, plants, and animals. However, in order for the trade restriction to be a valid one, the measure must be necessary for the protection of life or health. In a country like Canada, which has an abundance of fresh water, any measure restricting the exportation of fresh water resources from its boundaries would likely fail the two-tiered test. If there were to be a shortage of water in a particular watershed or aquifer in a region of Canada, domestic measures could be taken to alleviate that shortage, including restrictions on municipal, industrial, and agricultural uses, temporary diversion of watercourses, or bulk transfers from areas of abundance. Given Canada's hydrogeology, it would be difficult to envisage a situation in which the Canadian government could impose a complete ban on exports of fresh water resources in order to protect life and health. As such, the first part of the two-tiered test would not be met and the provision in the chapeau would not have to be addressed.

Article XX(g) could have a different result, however. This provision allows for restrictions on trade for the conservation of exhaustible natural resources, if done in conjunction with restrictions on domestic consumption. The first question to be answered to determine if this provision could apply is whether fresh water resources are an "exhaustible natural resource".

In the past, the water cycle was seen as an ever renewal of the fresh water resource, especially in Canada. Levels in lakes and rivers dropped in summer months with a corresponding increase in the springtime. Rain would replenish depleted supplies of water, as would the snow when it melted. The cycle was seen as a constant and there were little worries about the resource disappearing. In fact, most Canadians have been told that Canada has as much as 25% of the world supply of fresh water. Professor John B. Sprague, as freshwater scientist (limnologist), postulates that this misinformation is based on the volume of water in Canada's fresh water lakes. However, he points out that water sitting in lakes is different from the renewable supply.[304] According to Sprague "the renewable supply is what falls from the sky and runs off in rivers, often passing through lakes as it moves to the sea [s]ome goes underground, replenishing aquifers that can be tapped by wells [t]hese flows are renewed every year and count as the water supply."[305] Sprague adopts the World Resource Institute's (WRI)[306] definition of renewable fresh water as "salt-free water that is fully replaced in any given year through rain and snow that falls on continents and island and flows through rivers and streams to the sea."[307] Using this definition and using the WRI's data, Canada has approximately 6.5% of the world's renewable fresh water supply.

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[304] Sprague, John B. "Great Wet North? Canada's Myth of Water Abundance" in Karen Bakker, ed., *Eau Canada: the future of Canada's water* (Vancouver: UBC Press, 2007), p. 23.
[305] *ibid*.
[306] The World Resource Institute, according to their published mission and goals, is an independent, no-partisan, non-profit global research institute which, as one of its goals, the goal to "achieve water security by mapping, measuring, and mitigating water challenges."
[307] Sprague, "Great Wet North?", p. 23.

Sprague points out that many of the policy decisions surrounding the use and conservation of the water supply has been based on the previous misconception of the volume of the Canadian supply of fresh water. If this misconception persists, then policy decisions based on an assumption of an excess supply of water could have significant consequences if the renewable supply is not able to balance the consumption.[308]

In the context of trade rules, an argument could be made for the restriction of commercial exportation of fresh water resources from Canadian water basins based on the WRI definition of renewable water supply. If it could be shown that the volume of rain and snow is lower than that which has historically been recorded, then there could be valid restrictions as the fresh water supply would not be a renewable resource, rather an exhaustible resource. However, any restriction on the transboundary transfer of fresh water resources would have to be imposed together with restrictions on domestic uses. Arguably, this could be done on a water basin by water basin basis, rather than nationally.

In order for this exception to the trade rules apply if fresh water is determined to be subject to trade rules, there must be sufficient evidence to support the claim that fresh water in Canada is exhaustible. There is some evidence that some water basins are experiencing lower than historical levels, however, that is likely not enough at this time to declare fresh water as an exhaustible resource in Canada.

[308] *ibid*, p. 31.

4.5.1 Chapter 11 and Its Potential Chilling Effect on Imposing Environmental and Conservation Measures

As was illustrated by the *Sun Belt* case, there is a risk of litigation pursuant to NAFTA Chapter Eleven if governments rescind licenses due to change in environmental, or other, policies. This risk of Chapter Eleven claims could influence the choices of policies implemented, or changes in policies, that a government may consider if the circumstances arise which would normally see restrictions on use of fresh water resources. If an exogenous risk were to be present, it could have a chilling effect on governmental actions in respect of the fresh water resources and the full consideration of potential Chapter XX exemptions not be realized.

In the *Sun Belt* case, the Chapter Eleven notice was precipitated by the British Columbian government changing its policy on bulk water exports and cancelling a license to export water to California. The potential financial liability to the Canadian government as a result of this action was the claimed loss of the value of the investment and income stream which would have flowed from the continuing exportation.

Chapter Eleven of NAFTA covers investments that an investor of one Party makes in a commercial enterprise. The basic principles of national treatment and most-favoured-nation treatment are applicable to investments under this chapter. The risk to the Parties can be substantial if the impugned action interferes with a large scale, long-term project, such as the bulk transfer of fresh water resources from one jurisdiction to another. Although there may be domestic policy reasons to

make a decision such as in the *Sun Belt* case, there may be monetary consequences if the interpretation of the provisions of NAFTA are such that the investment is in an enterprise the goal of which is trade in goods or the provision of services.

Professor Paul Kibel and Jon Schutz discuss this issue of NAFTA Chapter Eleven Investment provisions and its applicability to investment in water resources.[309] They look at a case involving the 1944 Rivers Treaty between Mexico and the United States regarding the Rio Grande[310] and a Chapter Eleven claim brought by private water users in the State of Texas against Mexico.[311] According to Kibel and Schutz, this decision of the International Centre for Settlement of Investment Disputes (ICSID) in this case[312] represents the "most significant consideration of the legal relationship between cross-border water law and foreign investment law."[313] The claimants, Bayview Irrigation District, claimed that due to Mexico not living up to its obligations under the 1944 Rivers Treaty by guaranteeing a specified volume of water in the Rio Grande, the members of Bayview Irrigation

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[309] Kibel, Paul Stanton and Jon Schutz, "Two Rivers Meet: At the Confluence of Cross-Border Water Law and Foreign Investment Law" in M-C. Cordonier Segger, M.W. Gehring, and A. Newcombe, eds. *Sustainable Development in World Investment Law* (The Hague, Netherlands: Kluwer Law Intl., 2011) p. 749 ff.

[310] *Treaty Relating to the Utilization of Colorado and Tijuana Rivers and of the Rio Grande*, United States and Mexico, 3 Feb. 1944, 59 US Stat. 1219, T.S. 994, 3 U.N.T.S. 313 [1944 Rivers Treaty].

[311] *Request for Arbitration Under the Rules Governing the Additional Facility for the Administration of Proceedings by the International Centre for Settlement of Investment Disputes and the North American Free Trade Agreement between Bayview Irrigation District et al., and The United Mexican States* (19 Jan. 2005), online: <http://naftaclaims.com/Disputes/Mexico/Texas/TexasClaims_NOA-19-01-05.pdf> [Notice of Arbitration].

[312] Award of ICSID Arbitral Panel, *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB (AF)/05/1 (2007) (International Centre for Settlement of Investment Disputes), at 11–12, online: World Bank, www.naftaclaims.com/Disputes/Mexico/Texas/Bayview_Jursdictional_Award_19-05-07.pdf> [June 2007 ICSID Award]. The Decision is available at: www.naftaclaims.com/Disputes/Mexico/Texas/Bayview_Jursdictional_Award_19-05-07.pdf

[313] Kibel and Schutz, "Two Rivers Meet", p. 752.

District were not able to withdraw their allocated volume of water for agricultural purposes resulting a decreased agricultural yield and consequential financial losses.[314]

In its decision, the ICSID NAFTA Chapter Eleven Tribunal considered the claimants asserted claim to a specific volume of water. The Tribunal concluded that "private non-State parties (such as the Texans) did not have standing to enforce rights granted to Mexico and the United States under the 1944 Rivers Treaty, and that even such State-to-State claims would likely be governed by the dispute resolution mechanisms set forth in the 1944 Rivers Treaty"[315] rather than NAFTA. However, Kibel and Schutz argue that the Tribunal's reasoning opens up the possibility that a breach of a treaty between nations could be the basis of a Chapter Eleven claim if it were found that the claimant had an investment in another NAFTA Party under the other treaty.[316] This could well expand the scope of liability on the federal governments of the NAFTA Parties to obligations outside of those contemplated during the negotiation of NAFTA to pre-existing treaty obligations.

4.6 Does the Discourse on Food Security and International Trade Assist in Answering the Question?

As is seen by the foregoing discussion, it is unsettled whether fresh water resources are a good or product under trade law, or if the general exemptions would

[314] *ibid*, pp 758 – 760.
[315] *ibid*, p 765.
[316] *ibid*, p 767.

apply to the bulk transfer of the resource. Given the special nature of the resource, we can look for guidance to another essential element for human life: food.

Food items are subject to trade law, and have been from the beginning of trade and trade law. Colonial empires were established by the trade in agricultural products. In Great Britain, protectionist laws were brought in to shield local producers from cheaper imported products. The "Corn Laws" were enacted by the British Parliament in 1815 with the *Importation Act 1815*.[317] The effect of this legislation was to drive up food prices, especially the main staples such as bread. These laws also had the effect of denying the colonies a market for their goods upon which they had become dependent. The British Parliament took notice of this and, in the case of Canada, enacted the *Canada Corn Act*[318] in 1843 to allow for the importation of Canadian grain at lower import duties. The laws were generally repealed in 1846 which lead to a decrease in the price of grains due to the influx of cheaper imported grains. This increase in importation and decrease in local production also corresponded to a decrease in agricultural labourers who left the country to find work in urban, industrial labour jobs.[319]

With such a dramatic change in the agricultural sector in Great Britain in the late 1800's, a situation of food insecurity was created. When political events resulted in the outbreak of World War I, Great Britain found itself experiencing a shortage of food and steps had to be taken to increase domestic production to feed

[317] *Importation Act 1815,* 55 Geo. 3 c. 26.
[318] *Canada Corn Act (1843)*, 6-7 Vict. 1843, c. 29.
[319] Easterbrook, William Thomas and Hugh G.J. Aitken, *Canadian Economic History* (Toronto: University of Toronto Press, 2002), p. 287 ff.

its citizens. Protectionist measures were re-instated over the next few years in an attempt to stabilize the domestic food supply and reduce dependence on external, volatile sources.[320]

As Professor Carmen Gonzalez states this protectionism was well established by the time GATT 1947 was signed. The protectionism was institutionalized and in the post-World War II period "the United States and Western Europe provided generous subsidies to their agricultural producers and utilized both tariff and non-tariff import barriers to protect them from foreign competition."[321] In her opinion, "the 1947 GATT succeeded in reducing tariffs on manufactured goods, but permitted agricultural protectionism to flourish in the United States and Western Europe."[322] At the same time that these protectionist measures and subsidies were being used in the "Global North" (primarily Western Europe, United States, and Canada), the "Global South" struggled with the lack of resources needed to diversify economically and "most developing countries imposed taxes on agricultural producers to finance industrialization and lacked the resources to provide farmers with significant subsidies."[323]

In the 1970's, the prices of petroleum products increase significantly and affected the fuel intensive agricultural sector. As a result of this many developing countries borrowed heavily to finance the importation of the needed fuel and other petroleum based agricultural inputs. When interest rates started to increase in the

[320] *ibid.*
[321] Gonzalez, Carmen, "The Global Food Crisis: Law, Policy, and the Elusive Quest for Justice" Yale Human Rights & Development L.J. [Vol. 13 2010] p. 466.
[322][322] *ibid.*
[323] *ibid.*

early 1980's, and agricultural commodity prices fell, "developing countries incurred crippling amounts of debt that they were increasingly unable to repay [and] [b]y the mid-1980s, two-thirds of African countries and nearly three-quarters of Latin American countries had agreed to implement structural adjustment programs mandated by the World Bank and the IMF as conditions for receiving new loans or restructuring existing debt."[324] This debt crisis ushered in more economic reforms, spearheaded by the Global North, and caused heightened vulnerability of the Global South to food insecurity.

As Gonzalez points out, "it is important to recognize that world market prices for agricultural inputs and agricultural commodities are distorted by the market power of transnational corporations."[325] She points out further that:

> three companies control eighty-two percent of all U.S. corn exports. The top three agrochemical corporations control approximately half of the global agrochemical market, and the top ten control nearly ninety percent of that market. Although thousands of seed companies and breeding institutions were in existence decades ago, ten firms currently dominate over two thirds of the world's proprietary seed sales. This market concentration enables a small number of agribusiness conglomerates to manipulate market prices to their advantage at the expense of small farmers and consumers in the Global North as well as the Global South. In addition, these agribusiness conglomerates dominate the agricultural research agenda, and have used their considerable political influence to persuade U.S. government officials to support biofuels as the solution to climate change, to promote genetic engineering as the solution to the food crisis, and to demand greater access to developing country markets in bilateral and multilateral trade negotiations while

[324] *ibid*, p. 468.
[325] *ibid*, p. 470.

> maintaining lavish agricultural subsidies in the domestic market.[326]

In order to protect food security in vulnerable areas from exogenous shocks, Gonzalez argues that steps have to be taken to reform international agricultural trade. She sees that ". [w]hat is required is a fundamental reorientation of policy at the national and international levels away from deregulation toward targeted and thoughtful regulatory strategies designed to respect, protect, and fulfill the human right to food."[327] She premises her argument on the right found in *The International Covenant on Economic, Social and Cultural Rights* which recognizes the "fundamental right of everyone to be free from hunger" and imposes obligations on states to protect that right. In addition, she relies on the *Universal Declaration of Human Rights*[328] and its protection of the human right to food. She argues that this extends to states which are not signatories to the *The International Covenant on Economic, Social and Cultural Rights*[329] as the *Universal Declaration of Human Rights* has been elevated to the status of customary international law.[330]

Finally, Gonzalez argues that to ensure food security and the protection of the human right to food "will require a holistic re-conceptualization of international law that integrates human rights, environmental protection, and trade and investment law rather than relegating them to separate spheres. Such a vision must be premised on the hierarchical superiority of human rights norms and must regard

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[326] *ibid*, p. 470.
[327] *ibid*, p. 473.
[328] *Universal Declaration of Human Rights*, G.A. Res. 217a (iii), U.N. Doc a/810 at 71 (1948).
[329] *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3, [1976] ATS 5, 6 ILM 360 (1967).
[330] *ibid,* p. 474.

trade and investment as means toward the realization of human rights and environmental objectives rather than as ends in themselves."[331]

When we consider Gonzalez's arguments with respect to the revisioning of international trade and investment law regarding agricultural commodities and food security, we can see that similar conditions exist with respect to trade in fresh water resources. Her argument that the re-conceptualization of the law is need in relation to food security could give guidance and support to the argument that fresh water resources should not be considered as a subject of trade and investment law as the fundamental nature of the resource is vital to human, animal, and plant life. If one were to reverse the focus from trade rules applying to resources and commodities, we can further the goals of conservation and protection of the resource by exempting fresh water resources from trade agreements. If there were to be a need for fresh water resources in a region experiencing drought or other water crisis, then other international cooperation or agreements could be negotiated to transfer the needed supply to that region. This could result in a more effective means of resource protection and conservation as well as supporting human and environmental rights and goals.

4.7 Answering the Question: Do International Trade Agreements Apply to Fresh Water Resources?

As is illustrated above, the answer to the question whether Canada's international trade obligations apply to fresh water resources is not clear cut.

[331] *ibid,* p. 477.

However, when we look at the text of the WTO and NAFTA and apply the principles of statutory interpretation, it lends itself to a conclusion that fresh water resources are not a "good" or "product" found in the agreements. When the standard definitions of "good" and "product" are considered, an industrial process needs to applied to the resource in order for it to be included in the definition of a good, product, or a commodity of trade. However, if the fresh water resources become a *de facto* commodity of trade due the the existence of a market for the resources, there may be an argument that fresh water resources are subject to trade rules.

If extrinsic evidence is considered, it may be shown that the intention of the parties is that fresh water resources are intended to be exempt from the application of trade rules. The extrinsic evidence includes the 1993 statement by the leaders of the NAFTA parties regarding fresh water resources, international treaties and conventions, and domestic legislation and regulations. We can see from these instruments that fresh water resources are not intended to be treated as a commodity, rather more akin to a public good.

Since it is not clear which interpretation holds with respect to the texts of the WTO and NAFTA, we can look at the various approaches to fresh water resources to assist us in coming to a preferred definition. These approaches split between considering fresh water resources as public good or as a commodity of trade in the commercial market. As the discussion has illustrated, there are weaknesses with respect to preferring the market alternative as the preferred approach as conservation, environmental protection, and regulation of the exploitation of the

resources by the government may be hampered by the market being the means by which the resources are allocated.

It may be a more socially acceptable approach to consider fresh water resources as a public good and not a commodity of trade. Accepting this as the preferred approach would result in the resources falling outside the ambit of trade obligations and would allow governments to implement policies and regulations to allocate fresh water resources among competing interests with the goal being the maximum overall societal benefit. Although proponents of the market approach would argue that there are inefficiencies in the allocation of fresh water resources by treating it as a public good, these inefficiencies would likely be acceptable to the general populace. The goals to be achieved would include the protection of regional agricultural and industrial industries, environmental protection, and the protection of domestic urban supplies of water.

Another reason why the public good approach to fresh water resources is the preferred approach is that the governmental regulation and allocation of fresh water resources to competing uses would be less susceptible to exogenous shocks than would a market driven system of allocation. Fresh water resources are a vital resource and it would be in the public's interest to protect the resource from being subjected to policy options that had previously been rejected as not being optimal. If an economic, environmental, or political shock were to occur that was significant enough for the government to reconsider previously rejected policy options, it may result in the government opening up Canadian watersheds and water basins for

extraction of fresh water resources for export to trading partners as if it were like any other good or product. In order to avoid this, a recognition that fresh water resources are not a commodity, but are a public good, may result in the government being able to resist such shocks.

Taking into consideration the interpretation of the legal texts, the statements of the parties to NAFTA concerning the applicability to fresh water resources, other international treaties and conventions, and domestic legislation concerning the conservation, allocation and preservation of fresh water resources, the conclusion is that the provisions contained in the WTO and NAFTA do not apply to fresh water resources as they are not a "good" or "product".

5 Retracing the Upstream Path: Summary and Future Considerations

Looking back to the beginning of this enquiry, the goal is to determine whether fresh water resources are subject to Canada's international trade obligations. The importance of engaging in the enquiry rests on the ever increasing focus on fresh water resources as an exploitable resource which has increasingly been stressed due to municipal, domestic, agricultural, and industrial uses. These uses have drawn down the natural aquifers in many regions of the world and the response has been, in some cases, looking to distant reserves of fresh water resources which potentially can augment the local reserves. Two such examples are the cases Snowcap Waters Ltd. and Rain Coast Water Corp. that had planned to ship fresh water resources from British Columbia to California.

Since there have been proposals for bulk, transboundary exports of fresh water resources, the determination of the applicability of international trade obligations is particularly timely. In order to come to a determination of the three questions are posed to guide the enquiry. These questions are posed in order to determine if fresh water resources are included in the definition of a "good" or "product" contained in the legal texts of NAFTA and GATT. The first question that is posed focuses the enquiry on the legal characterization of fresh water resources in the selected international legal instruments to determine if it is subject to the obligations contained in the trade agreements. The second question posed is if the first question cannot be answered, what other interpretive tools can be employed to come to an answer. Finally, the third question is if international trade obligations

apply to the the bulk export of fresh water resources, are there any exemptions which can be employed to limit or prohibit the bulk export of the resource.

In order to answer these questions, a traditional legal doctrinal analysis is employed. The legal doctrinal analysis provides a method of analyzing the legal texts of the international agreements and other legal materials in an orderly and systematic manner. This methodology allows one to engage with the primary materials based on the ordinary meaning of the words and phrases used in the texts. As Rubin Edwards states, what legal scholars do in employing this methodology is "to evaluate a series of events, to express values, and to proscribe alternatives."[332] In order to answer the questions that are posed, this methodology supports the review of the historical context, competing normative frameworks, and to consider alternative conclusions in order to come to a conclusion.

To begin the task of answering the questions, and in following the dictates of the methodology, a review of the development of Canada's international trade policy and foreign relations is undertaken. This review allows an evaluation of the series of events which have led us to the current legal environment and gives us a context to see the change in expressed values and choices made in the area of international trade and foreign policy. The Macdonald Commission report provides a comprehensive look at the series of events and values which led up to Canada entering into the *Canada –US Free Trade Agreement* which was a stark departure from the previously held policy toward international trade. The international

[332] Rubin, Edward L. "Law And and the Methodology of Law", p. 522.

relations theory of exogenous shock has been used to explain such a significant shift in Canada's international trade policy. Using this theory to explain the policy shift provides a basis on which to identify potential challenges to existing and future policy choices and pressures in relation to the interpretation of trade agreements.

After engaging in a review of other international agreements which concern Canada's fresh water resources, a textual analysis of GATT and NAFTA is conducted to determine if the terms "good" and "product" contained in the agreements include fresh water resources. When the ordinary meanings of the words are considered and viewed in the context of the entire agreements, the answer to the question is "likely no" but it is inconclusive due to the imprecise definitions of "good" and "product" and the lack of guidance as to what level of industrial processing must be applied to the fresh water resource in order for a resource to become a good or product.

Given that the answer is inconclusive, extrinsic evidence is canvassed an attempt to uncover the intention of the parties to the agreements. In addition, alternative views of the legal status of fresh water resources are considered. When this is done, the questions are answer and the conclusion is that the provisions of NAFTA and GATT do not apply to fresh water resources as they are not a "good" or "product" as contemplated by the agreements.

However, when this conclusion is viewed in light of the possibility of an exogenous shock, the conclusion could be challenged in favour of one that has been considered a proscribed alternative. This potentiality is one which keeps the issue

alive and worthy of continued attention by policy makers and academics. By remaining in the policy makers' conscience, adequate attention can be paid to the matter in line with prevailing social and political attitudes so as not to gradually move toward an unexpected or unwanted result – that is that fresh water resources in bulk would be subject to trade regulation as a good or product.

As is shown in the review of other legal instruments, the International Joint Commission is an established and long standing body which is uniquely situated to regularly monitor the pressures on Canada's fresh water resources and the shifting attitudes towards its uses and protection. The expertise and knowledge that the IJC has could be leveraged in the future to evaluate proposed shifts from existing policy options, as between Canada and the United States, to ensure that the optimal balance between use and conservation of the fresh water resource is achieved, including the possibility of bulk exports.

The nature and extent of Aboriginal and treaty rights as protected by s. 35 of the *Constitution Act 1982* is one emerging area which could have a significant impact on future policy options in relation to the use and conservation of fresh water resources. It also may have an impact on the ability of Canada to agree to any international agreements which affect the bulk transfer of fresh water resources, especially from areas that are subject to Aboriginal title or traditional territory claims. As this area of law is in its infancy, policy makers will have to keep abreast of the developments as it will have a direct impact on exploitation of natural resources, including fresh water resources.

In addition to future domestic considerations, there are considerations that would be applicable on a North American wide basis. There are increasing attempts by US corporations and water districts to access more fresh water resources which will exert pressure on policy makers. This pressure could shift the range of acceptable policy options in favour of bulk transboundary transfers. However, the risk of NAFTA Chapter 11 claims against the federal government may have an opposite effect as there is a risk that permitting transfers and subsequently cancelling or restricting the transfers could result in claims for significant compensation for investment losses to be paid by the federal government.

Finally, there are global considerations. Since GATT is a multi-national agreement, many parties could try to apply pressure to add fresh water resources as a natural resource product and have the trade rules apply. This pressure is likely to come from states that lack sufficient fresh water resources due to various factors, such as hydrogeology, increased industrialization, or population growth. These states will have to look outside their borders to satisfy their increased needs and may try to gain access to resources through trade agreements. Connected to this is the possibility that the pressure put on water rich states would be advanced in the guise of a humanitarian need or that it is required to satisfy a basic human right. Although it is possible to satisfy humanitarian needs or purported human rights by separate agreements between states, there will likely be pressure resolve this by use of the already existing framework of NAFTA, GATT or other bi-lateral trade agreements.

The conclusion is that bulk transboundary transfers of fresh water resources are not intended to be subject to international trade rules. However, the recognition of the increasing need for domestic, industrial, and agricultural uses shows that the matter needs to be part of the ongoing policy discourse in relation to natural resources and international trade. If it fades from the policy agenda, we might find that there are significant and unintended human and environmental consequences.

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