

The Next Privatization of Public Assets: Domestic and Trade Implication Related to Water Right and Land Acquisition

Jennifer C. Gerbasi

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/sdlp>

 Part of the [Environmental Law Commons](#), [International Law Commons](#), [International Trade Law Commons](#), and the [Water Law Commons](#)

Recommended Citation

Gerbasi, Jennifer C. "The Next Privatization of Public Assets: Domestic and Trade Implication Related to Water Right and Land Acquisition." *Sustainable Development Law & Policy*, Winter 2005, 23-19, 77.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *Sustainable Development Law & Policy* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

THE NEXT PRIVATIZATION OF PUBLIC ASSETS: DOMESTIC AND TRADE IMPLICATIONS RELATED TO WATER RIGHT AND LAND ACQUISITION

by Jennifer C. Gerbasi*

INTRODUCTION

Few issues unify a community like the potential that a local water source might be privatized, particularly by a foreign multinational water or energy conglomerate. Communities across the globe react passionately to stop private takeovers of publicly owned treatment works, whether it is an operations and management contract, or the actual purchase of the facility. Commonly cited examples include the failed privatizations in Cochabamba, Bolivia; canceled contracts in Manila, Philippines and in Atlanta, GA; and the public outcry that halted a contract in Stockton, CA. The Bolivia contract is particularly relevant to the U.S. trend toward private ownership of water. Bechtel held the rights not only to provide water services, but also to charge residents for rainwater collected from their roofs.

In the U.S., private interests are responding to water scarcity by investing in water rights and land in order to sell it to the highest bidder. Generally this is a transfer from agricultural use to municipal use. Citizens in the source communities are protesting these ventures that may affect their access to water, the value of their property, and the economic development of their communities. Government officials are considering whether private individuals should be allowed to sell water (which is legally the property of the state held in trust for the public good) back to the public at a profit.

This paper examines how current trends in private investment, including investor rights and government obligations under international trade agreements, may complicate public control of water supplies. While the free market approach to water management may be attractive to states that either require more or have excess water to sell, the economic and environmental effects of long-term transfers of water control to the private sector are largely unknown. Foreign participation in delivering services and buying on the market increases the likelihood that U.S. regulations will be challenged under international trade agreement obligations. With population growth increasing demand, and improvements in technology making long distance transfer of water feasible, it seems

unlikely that North America will be able to avoid water trade conflicts. A level of consistency between state law regimes could mitigate the threat and expense of international conflicts.

WATER SCARCITY COAST TO COAST

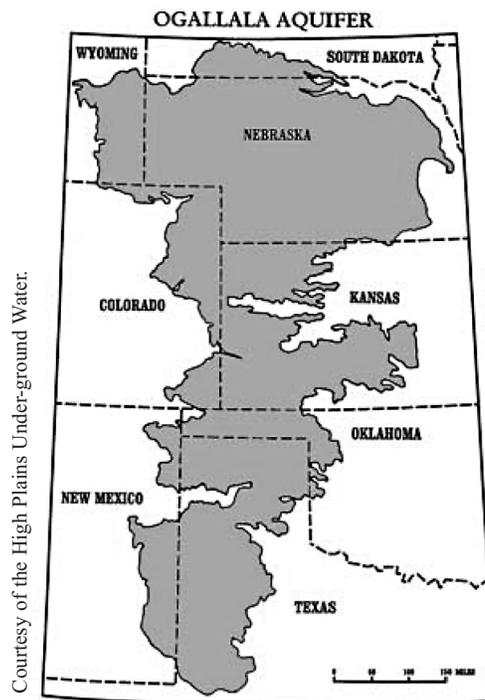
The United States is experiencing droughts from New York to Texas, aquifers that drain faster than they can be recharged and shortages in cities and farming regions. Former Colorado Attorney General Ken Salazar has predicted “the greatest water war we have seen in decades and decades” if the state’s five-year drought continues, since rivers that flow through six other states

begin in Colorado.¹ Private companies are responding to the expected scarcity by obtaining leases to public and private water rights. The market for bulk water transfers is already attracting municipal consumers anxious to secure consistent and long-term sources of water. Farmers are earning so much from selling their water to municipalities and companies investing in water pipelines that water is often referred to as the “farmers’ 401K.” However, the impact that water transfers will have on the quality of farm land, the environment, public health, and the economy of farming communities is largely unknown. “[I]rreplaceable water is a public safety issue,” said Texas Agriculture Commissioner Susan Combs, “All economic activity follows water – development, jobs, houses, hospitals, nursing homes – every single location depends on water.”² The U.S. will have to decide if water allocation is best left to the supply and demand of the open market or to a coordinated government effort that allocates resources in the public interest.

Because the two may not be mutually exclusive, balancing public and private control will be a challenge in the near future.

PRIVATE INVESTMENT IN WATER RIGHTS

Water transfers are not new but are changing in volume and foreign participation. Some investors buy land and water rights



Farmers from South Dakota to Texas share the Ogallala Aquifer and may be affected by withdrawals hundreds of miles away or the neighboring field. The aquifer is being depleted faster than it can recharge.

* Jennifer C. Gerbasi is a Policy Fellow at the Harrison Institute for Public Law, Georgetown University Law Center. Please direct questions or comments to: 111 F Street NW Suite 102D, Washington, DC 20901, 202/662-9611, jcg35@law.georgetown.edu.

specifically to benefit from the demand for water. Others already have rights vested through land ownership or historical usage. In either case, selling the rights to bulk transfer companies is becoming a popular option.

Colorado transfers tens of thousands of acre-feet (“af”) through private, voluntary actions every year.³ (An acre-foot is 325,581 gallons, which is enough to flood an acre one foot deep or supply a family of four for a year). The majority of these transfers comprised less than 5,000 af, excluding government reclamation projects. In a single transaction, the Metropolitan Water District of Southern California agreed to purchase 250,000 af of water taken out of private farm production in the central valley. U.S. Filter (then owned by French water giant Veolia, formerly named Vivendi) purchased 45,000 acres of farmland in order to participate in the sale.⁴ Azurix, owned by the largest private provider of water services in the U.S., the German corporation RWE, offered at one time to pay for the Florida Everglades restoration in return for rights to a portion of the water that it would then sell water to cities.⁵

The increasing level of private and foreign participation raises questions about the water management role of both the U.S. Government and international institutions. U.S. water markets are maturing and many countries have expressed interest in purchasing bulk water.⁶ However, questions remain regarding the effect on U.S. trade obligations once it has allowed water to be transferred between basins or countries. Some suggest that once one U.S. state sells water for bulk transfer, all U.S. states will be obligated to allow trading partners access to bulk water. Since Sitka, Alaska has contracted through a vendor to sell 40 million gallons of water per year to customers from Hawaii to Singapore and Saudi Arabia, this question is ripe for discussion in the U.S.

PRIVATE MARKETING OF BULK TRANSFERS

Bulk transfers between countries have been going on for years, but only recently has demand and the cost of technology made North American ventures affordable for buyers worldwide and profitable for entrepreneurs. Right after the North American Free Trade Agreement (“NAFTA”) was announced, Gerry White of McCurdy Enterprises, a real estate firm in Newfoundland,⁷ offered to sell lake water to China in tankers; Canada has 20% of the world’s fresh water. However, many Canadians consider this resource a part of their national heritage and are hesitant to support any commercial ventures to export water. Although that deal was not permitted, North America’s demand for water is growing and will continue to put pressure on water-abundant regions to sell. In Mr. White’s opinion, “[t]rying to stop people from selling water is like telling Saudi Arabia not to sell oil.”⁸ There are still some cost restraints to transoceanic water shipments. Many companies are investing now in the hope that scarcity will drive the price up enough to make long distance transfers a fiscally attractive option for cities in the U.S. market.

T. BOONE PICKENS

Like other former oilmen, T. Boone Pickens has invested heavily in the prospective water market. Currently he has a per-

mit to pipe 200,000 af of water from under 90,000 acres⁹ to cities around Dallas/Fort Worth. The plan will require an initial investment of \$1.2 billion for the pipe structure and a sale price of over \$775 per af to make the transfer across hundreds of miles profitable.¹⁰ (In comparison to \$4 in Idaho, \$596 in Oklahoma and up to \$900 in Southern California.)¹¹ These water transfers would reduce water available for irrigation in the source community by 10% and use 50% of the water table in four counties over the next 100 years.¹² So far, Pickens has had fewer takers than he expected, but he is confident that the market will pick up.¹³ Other investors have demonstrated similar confidence. Stock analysts are pushing water as a great buy that is sure to pay off due to the consistent profits in water industries, the investment that will be required to update ancient or build new drinking water systems to serve new growth, and the value added by scarcity. Indeed, water-related transactions are already worth \$400 billion per year.¹⁴

RIO NUEVO

There are more than 30 groundwater schemes proposed in Texas as of March 2004. One of the largest is a proposal to pump 50,000 af from six arid counties to cities in west Texas.¹⁵ Rio Nuevo, a limited liability company comprised of oil, gas, and communications businessmen, is planning to mine water from more than 640,000 acres. Rio Nuevo has applied to lease 355,000 acres of state land in Texas and has obtained the water rights to approximately 290,000 acres from hundreds of private properties. Public opposition to the venture is high, but the State General Land Office (“GLO”) has made clear its interest in the sale of state water.¹⁶ Through the GLO, Texas would earn royalties similar to payments for coal or oil. These revenues would be earmarked for education budgets. This has created conflict between state and local officials in the Rio Nuevo case, though; communities that neighbor the state lands and share the aquifer are not convinced that the increase in state revenues is worth the possible decrease in property value that may result from the water mining. Rio Nuevo has stated that it will only take as much water from the ground as farmers would have used to irrigate their land. Nevertheless, the volume worries hydro-geologist Marshall Jennings of Texas State University in San Marcos, who says that the withdrawals will be unsustainable at two to six times the recharge rate.¹⁷ Rio Nuevo demonstrated their lack of water savvy in their first proposal by suggesting that they would transport the water down the Rio Grande, which would cause a good percentage of their investment to literally evaporate.

U.S. GOVERNMENT RESPONSE TO GROWING MARKETS

Water law in the United States is a prime example of federalism at work. The criteria for awarding permits or changes of use (generally from agriculture to municipal or environmental use) vary by state, creating a patchwork of surface water and ground water regulations. Most western states follow systems of prior appropriation or court adjudicated rights; whereas, eastern states generally follow a common law riparian system. Recognizing that the “reasonable use” standard of common-law

riparian doctrine is too fluid to manage water withdrawals in a market economy, many riparian areas (e.g. Florida, Virginia) are developing more detailed water laws that codify historical use within a permit system.¹⁸ While markets are often created for efficient transfers during times of drought, a permit and registration system provides regulators a baseline for future allocations. Similarly, a transferable-use system relies on defined property rights provided by the permit system.¹⁹ Still, these state-level property rights cannot conflict with federal law standards, which include treaties, as laid out in the Supremacy Clause of the Constitution. Thus alterations to the permit and property regime must conform to the 5th and 14th Amendment takings clause.

TRADITIONAL REGULATION OF WATER RIGHTS

Water may receive less protection than other property in the U.S. takings system because it is shared and re-used. Generally, real property rights or copyrights include the right to exclude all others from use of the property. However, water rights in the United States are usufructory, meaning that the holder has the right to *use* a certain volume of water but does not *own* that physical unit of water outright unless it has been legally captured. The holder of the water right is limited by obligations to other right holders to use the water reasonably and return enough of the water either downstream or to the aquifer to supply other approved uses of water.

Water is also distinguished from other property because of the historical recognition that a water right is protected by reasonable and beneficial use of water rather than by mere, unexercised possession.²⁰ In *Hudson County Water v. McCarter*, Justice Holmes asserted that the public had an indisputable and omnipresent interest in maintaining rivers at full capacity.²¹ The exception, he wrote, was when water was diverted for a better use, assuming it is restored afterward. He reasoned that private uses should be forbidden from diminishing “one of the great foundations of public welfare and health.”²² Justice Holmes made that proclamation in 1908 and clearly communicated the position of the Supreme Court on the need to strike a balance between private profit and public good. Takings legislation is largely focused on the reasonable expectation of the investor. Both this and subsequent court decisions serve as notice to rights holders that the property right in water is not absolute and may be taken without compensation in certain circumstances.²³ In light of the new pressures to share water internationally, Holmes’ statement is informative as to the rights of downstream users. Holmes not only speaks of reasonable use but also of the return of the water for downstream users. This theme is popular in U.S. water litigation. It would seem on its face that, at least for surface waters, export would permanently deprive the downstream user of use of the water. If this deprivation of access to water harms downstream users, they might be able to stop the withdrawal. Such issues may be common if bulk transfers of water become more accepted through the market or treaty obligations.

TEXAS

Texas has made great strides in water management in the last ten years, including the creation of 88 groundwater man-

agement districts to track and permit water withdrawals and use. The Edwards Aquifer Authority set a 450,000 af cap on withdrawals to make sure that the aquifer is not depleted faster than it can be recharged.²⁴ Texas has taken these steps to better control diversions and water uses, since the Texas Water Development Board has estimated that over the next 50 years the state will have to conserve or find replacement water for 5 million af.²⁵ However, in areas that are not controlled by a groundwater management district, Texas still follows the rule of capture. The rule of capture allows landowners to take unlimited quantities of water regardless of the impact on neighboring wells. An estimated 60% of the Rio Nuevo project is from land governed by this common law system.²⁶ In response to this project, Lieutenant Governor Dewhurst created a state Senate committee specifically to investigate state water leases. This committee has commissioned a study to quantify the groundwater available for transfer without environmental harm. Of note, Dewhurst rejected the Rio Nuevo project when he was the land commissioner.²⁷

WEST VIRGINIA

West Virginia passed its first water rights statute last year, making some business groups concerned that they might lose access to state water.²⁸ The statute declares that all water not privately owned or subject to a riparian right is “held by the state in stewardship” for all citizens of the state.²⁹ Additionally, the state is starting a registration system to track current and future water use.

GREAT LAKES

Congress amended the Water Resources Development Act in 2000 to allow the Great Lakes to prohibit any diversion or export from the lakes unless all eight Great Lakes governors consent.³⁰ Generally this would be considered a violation of the dormant commerce clause since it limits the transfer of goods (water) from the lakes. The United States Supreme Court decided in *Sphorhase v. Nebraska* that a state could not consider out-of-state transfers as a basis for denying a permit.³¹ The Great Lakes are a special case due to significant sharing of the resource with Canada. The region has been co-governed under the International Joint Commission just as the Mexico – U.S. border water is governed by the International Boundary Water Commission. In response to NAFTA as well as internal pressures to sell water abroad, Canada placed a temporary moratorium on bulk water transfers and raised awareness of management challenges with the U.S. Great Lakes region.

Since that time, the Council of Great Lakes Governors (“CGLG”) has drafted the Great Lakes Charter Annex 2001 (“Annex”) that lays out an approval process for all withdrawals from the lakes.³² The CGLG consists of the governors from the eight states that border the lakes and the premiers of two Canadian provinces (Ontario and Quebec). The goals of the Annex are to preserve economic and social development and environmental protection. The Annex requires a supermajority vote³³ to approve all diversions or consumptive uses over five million gallons per day (“mgd”) with lesser quantities left to the

states. In order to measure the current use of lake water each state must begin to register all withdrawals over 100,000 gallons per day system within a year of the Annex going into effect.³⁴ This will be a significant step toward greater control, since Michigan, Pennsylvania, and Indiana do not require permits or registration at this time.³⁵ Most relevant to this discussion is the requirement that water withdrawn from the lakes must be

International Center for Settlement of Investment Disputes (“ICSID”). Three panelists hear the two countries and make a binding decision. The panel interprets the plain language of the text using international common law standards, not the law of either Party nation.

NAFTA was signed in 1993 by Canada, Mexico, and the United States and created a status for foreign investor equivalent to that of nation states. These disputes are also heard by an international tribunal either under ICSID or the United Nations Commission on International Trade Law (“UNCITRAL”) rules. NAFTA set new standards for governance of free trade agreements subjecting non-compliant nations to significant fines. NAFTA has been used as a template for bilateral investment treaties and regional agreements, for example the Central American Free Trade Agreement (“CAFTA”) and the Chile-U.S. Free Trade Agreement.

International trade agreements are designed to promote the free movement of goods, services, and capital, and to limit government interference with the free market. Current U.S. commitments under goods and services treaties arguably limit government measures related to water management. The threat of international disputes may impact environmental legislation and conservation efforts or change the dynamic between the permitting agencies and the applicants. Some environmentalists fear that trade agreements may allow Parties to export large quantities of water depleting local supplies for human consumption and damaging the environment.⁴¹

WATER AS A “GOOD”

The term “good” refers to a commodity that “can be valued in money and so be the subject of commercial transactions.”⁴² former U.S. Trade Representative (“USTR”) Mickey Kantor stated, “[w]hen water is traded as a good, all provisions of the agreements governing trade in goods apply,” suggesting that no special protection has been reserved for water.⁴³ More recently current USTR Robert Zoellick reiterated this in the context of bottled water, saying that “nothing in the WTO agreement requires local authorities to permit bulk extractions of water that would be contrary to sound resource management and conservation or that would create hazards to human health. Of course, once local authorities decide to permit bulk water to be extracted from an aquifer, bottled, and sold as an article of commerce, WTO rules would likely apply to the sale of that article of commerce.”⁴⁴ Water was included as a good in the voluntary GATT treaty⁴⁵ and NAFTA adopted by reference the GATT definition of water as a commodity and the GATT rules for the non-discriminatory use of goods.⁴⁶ In essence, for purposes of international trade, water is considered a good and could be treated like any other commodity.

COVERAGE OF WATER UNDER FREE TRADE AGREEMENTS

There has been a debate about whether water is covered by NAFTA and whether the trade agreement grants foreign investors rights to export the resource. In response to public outcry, the U.S., Canada, and Mexico released a letter before the

© 2003. Her Majesty the Queen in Right of Canada, Natural Resources Canada.



returned to the same basin or with special permission to somewhere else in the watershed.³⁶ This restriction creates a preference for local users since it makes long distance transfers more expensive. The Council of Canadians has raised concerns that the Great Lakes plan is too permissive and will encourage greater water use rather than sustainable levels,³⁷ and business interests have suggested that it is too strict and the thresholds for regional review too low.³⁸ Some of the legal opinions offered to the CGLG suggest that this forward-looking undertaking is likely to have trade implications.³⁹

TRADE AGREEMENT CONCERNS

Although the United States has been a member of trade agreements for most of its history, fiscal liability of the country for domestic regulation is new. The General Agreement on Tariffs and Trade (“GATT”) was created after WWII to avoid trade wars and promote growth of the world economy. The treaty related to tariffs and customs provisions at the border. During the last decade the U.S. has pursued several additional multinational free trade agreements. The World Trade Organisation was established in 1995 to oversee the GATT and the new General Agreement on Trade in Services (“GATS”) to which there are now 148 member countries. GATS requires governments to subject selected public services to open bidding and restricts mechanisms that give government agencies a competitive advantage. GATS is relevant to the water debate, but is outside the scope of this paper.⁴⁰

GATT was a voluntary agreement prior to 1995. Concurrent with the establishment of the WTO, the obligations became binding and violations subject to retaliatory sanctions. Disputes regarding the GATT and GATS are heard at the

treaty was signed that may have created confusion by saying that water is not included in NAFTA or any other treaty.⁴⁷ This conflicts with the text of GATT and statements from the USTR, and illustrates the conflict between the popular demand that water be given special consideration and the commodity status of water in trade negotiations. NAFTA not only adopted the GATT language regarding water, but it broadened the scope of the United States commitment. Mel Clark, former senior trade negotiator, interpreted NAFTA as stepping beyond GATT by regulating *exports* as well as imports.⁴⁸ Under GATT, a nation could put high taxes on products or resources that were exported. GATT was focused on keeping import tariffs low and customs procedures at the border streamlined.⁴⁹

After more than 50 years of negotiations, tariffs are at an all time low. The new generation of treaties includes services and

"The NAFTA creates no rights to the natural water resources of any Party to the agreement ...nothing in the NAFTA would oblige any NAFTA party to either exploit its water for commercial use or begin exporting its water in any form. Water in its natural state in lakes, rivers, reservoirs, aquifers, water basins and the like is not a good or product, it is not traded, and therefore is not and never has been subject to the terms of any trade agreement."

1993 Joint Statement by the Governments of Canada, Mexico, and the United States

attempts to create a predictable, stable, and level playing field by discouraging or eliminating government measures that are *non-tariff barriers* to trade such as performance bonds, residency requirements, local resource content, and subsidies.⁵⁰ Article 201 of NAFTA defines government measures as any law, regulation, procedure, requirement, or practice.⁵¹ Regulations at all government levels are presumed to be barriers to trade if they restrict the free flow of goods, services, or capital. The burden is on the government to prove that a law is necessary rather than enjoying the principle that laws are rationally related to the public interest. In order to provide the regulatory climate for this strategy, the participating countries agree to a set of international guidelines that limit the powers of national and sub-national discretion in lawmaking.⁵²

CAUSES OF ACTION: EXPROPRIATION AND NATIONAL TREATMENT VIOLATIONS

Expropriation

Trade agreements have historically contained an investor chapter ensuring that Party countries would not nationalize investments made within their borders. Conflicts were resolved diplomatically between countries. NAFTA included a novel

form of dispute resolution that gives investors access to an international tribunal instead of the U.S. or trading Party's court system. Investors can bring Party nations into arbitration if a government measure interferes with the profits expected from an investment. Changes to water permits or the ability to transfer water after a foreign investor has bought water rights might be considered "expropriation" if the change interfered with the return on an investment in the U.S. If a community levied export taxes on water to discourage transfers from the basin, it might be interpreted as an expropriation by a dispute panel. NAFTA Article 314 specifically prohibits export taxes since these taxes interfere with the free flow of goods; so the export tax allowed under GATT as a management option may carry trade liability.⁵³ It should be noted that although the U.S. reserved the right to limit the export of logs, it made no explicit exception for water.⁵⁴

Expropriation is similar to the U.S. takings law, but property is broadly defined to include market share and future profits, and compensation may be awarded for partial losses of profit or loss of a particular use. There is no clear formula that explains how such losses might be calculated, but it is clear from past dispute awards that partial takings will be rewarded.⁵⁵ Loss of value due to regulations is not recoverable in the U.S. courts if value remains and other economic uses exist. The trade agreement text and past decisions indicate that the arbitration panels may treat land use planning, the character of ownership rights, and obligations to share natural resources with participating nations significantly differently than domestic courts.

National Treatment

NAFTA Chapters 3 and 11 may obligate the Parties to give each other access to natural resources by requiring "national treatment," meaning Party nations must treat foreign investors' property rights at least as well as domestic investors, or the nation may have to pay for the right to discriminate. Any government measure that gives domestic users a competitive advantage might be a violation of national treatment. The Great Lakes Annex, for example, may be exposed to some risk due to the requirement to return water withdrawn to the basin, which effectively bars bulk transfers from the basin.

THE EXCEPTION FOR EXHAUSTIBLE RESOURCES

NAFTA also adopts by reference the exception for government measures enacted primarily to conserve "exhaustible natural resources," which may include water.⁵⁶ The term is not defined in either trade instrument, and it has been argued in the literature that water is recyclable and therefore would not fit in this category. If water is not considered exhaustible then government agencies would not be able to use the exception to justify special treatment for water resources and might face trade sanctions.

The exceptions to the trade rule recognize a government's right to take measures "necessary to protect human, animal or plant life or health." However, obligations to other Parties qualify that right to regulate. The exhaustible resources exception states clearly that these measures may include regulations "essential to the acquisition or distribution of products in gener-

al or local short supply,” but goes further to say that “all countries are entitled to an equitable share of the international supply of resources.”⁵⁷ The exception further requires that any restrictions to conserve exhaustible resources must be applied equally to domestic and foreign producers and consumers. A three-part test measures the legitimacy of the regulation by considering whether (1) domestic restrictions are equal to the foreign restrictions; (2) the objective is primarily conservation related; and (3) the land involved is within national jurisdiction.⁵⁸

If water were defined as an exhaustible resource, NAFTA Articles 309 and 315 requiring “proportional sharing” of traded goods would apply. Like national treatment, proportional sharing severely restricts a government’s right to limit exports in natural resources once trade has been established. For example, if bulk exports of water are allowed up to a certain amount, the average amount of the previous 36 months would have to be continued regardless of changes in the availability of water.⁵⁹ A country would have to grant a foreign investor continuing access proportional to the continued access of domestic users (i.e. a 10% decrease for one must be matched by a 10% decrease for the other). These requirements are not assuaged by any mechanism allowing for changes in circumstances in the exporting country. As a result, a community may choose to restrict foreign access to water, but the U.S. might have to pay compensation to disappointed investors or service providers that lose business.

WATER DISPUTES UNDER TRADE AGREEMENTS

Most NAFTA claims are filed against domestic environmental laws. Sun Belt, Inc. a U.S. company that had contracted to move Canadian water to northern California, claimed that a temporary moratorium on water transfers was an expropriation of their investment. While their Canadian partner settled out of court for several hundred thousand dollars, Sun Belt chose to file a claim under NAFTA for \$10 billion, representing scarcity profits over time.⁶⁰ While the case has not proceeded, planners and regulators would benefit from understanding the conditions that made such a claim appealing.

BECHTEL V. BOLIVIA

Obtaining an investor-to-state dispute settlement is very valuable to multinational companies (“MNCs”) that do not trust the local court systems in the countries in which they invest or want a lower threshold for takings compensation than the host country law provides. As part of its legal strategy, U.S.-based Bechtel incorporated its subsidiary, Aguas del Tunari, in the Netherlands when it signed a contract with Bolivia to provide water and sewerage services. This action, taken two years before the dispute arose, earned Bechtel access to file a \$25 million claim⁶¹ for compensation under a treaty between the Netherlands and Bolivia. The U.S. did not have an investment treaty with Bolivia that would have forced Bechtel to sue in the Bolivian courts had it not registered a subsidiary in the Netherlands. Bechtel’s sophisticated use of the trade arena is an important lesson that is sometimes overlooked. This technique of “forum shopping” creates obligations to

investors from countries that were not negotiated or ratified by both Parties. Bolivia made a commitment to the Netherlands, not the U.S. Bolivia may have made a different choice had this loophole been evident at the time of the agreement. Similarly, most international arbitration has been between private MNCs and governments unfamiliar with the international laws interpreted by the arbitration panelists.

RIO GRANDE VALLEY IRRIGATORS V. MEXICO

August 27, 2004 marked the first time a government agency filed notice to submit a claim under NAFTA Chapter 11 on investment. Citing frustration with the U.S. State Department’s slow diplomatic negotiations with Mexico, seventeen irrigation districts representing farmers, ranchers and landowners, 29 independent water right holders, and a water supply company came together to demand \$500 million from Mexico for expropriating their investments in water.⁶² Private property attorneys are representing the group in their claim that Mexico illegally withheld over one million af of water owed to the U.S. under a 1944 treaty. They claim that Mexico diverted the water to help its farmers increase productivity while driving Texas farmers out of business through man-made drought. This kind of favoritism is a violation of the investor protections of NAFTA, and the claim alleges both national treatment and expropriation claims. At the time of this printing, the parties are within the 90-day waiting period between the “Notice to Submit a Claim” and the actual filing. The dispute settlement rules require a 90-day cooling off period in hope that the parties will settle the dispute without arbitration. If successful, the claimants will receive compensation from Mexico.

THE POTENTIAL EFFECTS OF WATER TRANSFER

Though many states and regions are proactively developing permit and registration systems (e.g. the Great Lakes Annex, the Florida/Georgia/Alabama river compact, and Texas Groundwater Districts), many questions surrounding the effects of water transfers have not been adequately researched. Little is known about the economic and environmental impact of the source or destination communities. In addition to the obvious conflict between in-stream water levels for the fishing industry, communities may lose terrestrial recreation revenues from game hunting and other ecotourism. There is also likely to be a multiplier effect on farming communities that lose employed farm hands, feed stores, mechanics, and restaurants to water farmers who remove their land from production. As Rex Buchanan of the Kansas Geological Survey observed, there is “an amazing ripple effect because of the water. Without water, you don’t have corn. Without corn you don’t have feedlots. And without feedlots, you don’t have meat packing plants.”⁶³ As a Culberson County, Texas man faced with the Rio Nuevo project noted, “when our windmills don’t pump water then we have no value,” which in turn leads to devaluation of the land, lower tax revenues, and smaller budgets for schools and public services.⁶⁴ It is more than a question of prioritizing between using 6,000 af of water to grow one acre of melons or supplying 6,000 families with water for a year.

CONCLUSION

Trade agreements encourage free markets for goods and services and discourage government interference. Bulk water transfers under these conditions require a more coordinated approach to water management. There has not been enough focus on the long-term effects of inter-basin bulk water transfers or water exports. By allowing and encouraging increased transfers from agricultural to municipal uses as well as the purchase of bulk transfers, governments are setting precedents for future investors. The cost of the transfers on the open market may be used to value takings cases when laws are put in place later due to data suggesting that environmental harm is occurring in source areas. Foreign investors might invest without understanding the usufructory property status of water or the authori-

ty of the government to manage water for the public good. Ambiguity in water laws might lead to claims brought under trade agreements that undermine state and local efforts to responsibly manage the resource. In 2005, the administration plans to sign at least four bilateral investment treaties and two regional trade agreements with investor-state provisions. States and localities would benefit from having a coordinated water strategy before investment increases and expectations of permit approvals create compensable takings claims in the U.S. or the international arena.



Funding for this research was provided by the FORUM on Democracy and Trade and the Doris Duke Conservation Fund. David Sykes and Nauman Malik provided research for this article.

ENDNOTES: The Next Privatization of Public Assets

¹ Ron Bain, *Salazar sees water war if drought continues*, GRAND JUNCTION DAILY SENTINEL, Sept. 24, 2004.

² Ramona Nye, *Water Issues Heat Up in Texas*, TEXAS AGRICULTURE TODAY, available at http://www.agr.state.tx.us/media/ag_today/com_agt1.htm (last visited Dec. 20, 2004).

³ Clay J. Landry and Terry L. Anderson, *The Rising Tide of Water Markets*, in ITT INDUSTRIES GUIDEBOOK TO GLOBAL WATER ISSUES, available at <http://itt.com/waterbook/tide.asp> (last visited Dec. 20, 2004).

⁴ Michael Gardner, *Imperial decision*, COPLEY NEWS SERVICE, Dec. 8, 2002 available at <http://www.signonsandiego.com/news/reports/water/20021208-9999-water.html> (last visited Dec. 20, 2004).

⁵ *Supra* note 3.

⁶ Chris Maravilla, *The Canadian Bulk Water Moratorium and Its Implications for NAFTA*, 10 Currents: Int'l Trade L.J. 29 (Summer 2001).

⁷ Stephen Handelman, *Exporting Fresh Water*, TIME MAGAZINE, Aug. 5, 2001.

⁸ *Id.*

⁹ Dan Egan and Lee Bergquist, *Great Lakes tempt a thirsty nation*, MILWAUKEE JOURNAL SENTINEL, Dec. 7, 2003.

¹⁰ Ron Smith, *Either that, or be drained: T. Boone Pickens floats his ideas for selling water*, FARM PRESS, Mar. 21, 2002.

¹¹ Glen Martin, *Bush's water contracts criticized: Opponents say feds failed to follow environmental law*, SAN FRANCISCO CHRONICLE, Sept. 13, 2004.

¹² *Supra* note 10.

¹³ *Supra* note 10.

¹⁴ Gary Stern, *Water's Rising Fortunes*, UTILITY BUSINESS 4, June 2002.

¹⁵ G. Scharrer, *Plan Would Sell Texans Back Their Own*, EL PASO TIMES, Nov. 2, 2003.

¹⁶ Matt Jenkins, *Mixing oil and water in the Lone Star State*, WESTERN ROUNDUP, Nov. 24, 2003.

¹⁷ Lee Hancock, *West Texans speak out against plans to sell billions of gallons*, THE DALLAS MORNING NEWS, Dec. 3, 2003.

¹⁸ J.W. Eheart and J.R. Lund. *Water-use Management: Permit and Water Transfer System*, in WATER RESOURCES (Larry W. Mays, ed., McGraw Hill, N.Y., 1999).

¹⁹ *Id.*

²⁰ K. Dorrity, *Will Federal Environmental Regulation Be Permitted to Infringe on State Vested Water Rights?*, 11 UCLA J. ENVTL. L. & POL'Y 113 (1992).

²¹ See *Hudson County Water v. McCarter*, 209 U.S. 255 (1908).

²² B.H. Thompson, *Takings and Water Rights in Water Law: Trends, Policies and Practice*, in WATER LAW: TRENDS, POLICIES AND PRACTICE 43-56 (Carr et al. 1995).

²³ *Id.*

²⁴ S.B. 1477, 1993 Tex. Gen. Laws 2350, §1.14(b).

²⁵ Rochelle, M., *Water Law, Environmental Flows: Competing for Limited Resources*, 67 TEX. B. J. 202 (Mar 2004). See also *U.S. Army Corps of Engineers role in the nation's water resource needs in the 21st century* (2004) (statement of E.G. Rod Pittman, Chairman of the Texas Water Development Board to the U.S. Senate Committee on Environment & Public Works), available at http://epw.senate.gov/hearing_statements.cfm?id=219977 (last visited Dec. 20, 2004).

²⁶ Andrew Stuart, *Committee to Begin Compiling Proposals on Water Lease Laws*, THE DESERT-MOUNTAIN TIMES, Mar. 18, 2004.

²⁷ Ralph Blumenthal, *West Texans Sizzle Over a Plan to Sell Their Water*, NEW YORK TIMES, Dec. 11, 2003.

²⁸ McCormick, Gavin, *Business groups try to weaken Senate water bill*, CHARLESTON HERALD-DISPATCH, Mar. 5, 2003.

²⁹ XX W. VA. CODE 15 (Water Resources of the State).

³⁰ Water Resources Development Act § 504, 114 Stat. 2572 (2000).

³¹ *Sporhase v. Nebraska* ex rel. Douglas, 458 U.S. 941 (1982).

³² Northeast Midwest Institute, *Great Lakes Water Diversions* (Feb. 20, 2004), available at http://www.nemw.org/glwater_divert.htm (last visited Dec. 20, 2004).

³³ Draft of Great Lakes Basin Water Resources Compact § 3.4 (July 19, 2004).

ENDNOTES: THE NEXT PRIVATIZATION *Continued from page 29*

³⁴ *Id.* at § 7.2.

³⁵ *Supra* note 22.

³⁶ Draft Great Lakes Basin Water Resources Compact, Appendix 2, Procedures Manual, Section IV(C). 19 Jul 2004.

³⁷ Steven Shrybman and Sack Goldblatt, *Mitchell Legal Opinion: "Great Lakes Basin Sustainable Water Resources Compact and the Diversion of Great Lakes Waters,"* prepared for the Council of Canadians, Oct. 2004.

³⁸ Letter from Council of Great Lakes Industries ("CGLI") to David Naftzger, Executive Director of the CGLI (Oct. 15, 2004).

³⁹ Steven Shrybman, *Great Lakes Basin Sustainable Water Resources Compact and the Diversion of Great Lakes Waters*, available at http://www.canadians.org/display_document.htm?COC_token=coc_token&id=1025&isdoc=1&catid=78 (last visited Dec. 20, 2004).

⁴⁰ See E. Tuerk and R. Holland, *GATS, Water and the Environment*, CIEL and WWF International Discussion Paper (Oct. 2003) for a good overview of water and GATS internationally.

⁴¹ *Id.*

⁴² *Supra* note 6 at 33.

⁴³ Barry Appleton, *NAVIGATING NAFTA: A CONCISE USERS GUIDE TO THE NORTH AMERICAN FREE TRADE AGREEMENT 202* (Carswell Thomson Professional Publishing, 1994) (Barry Appleton is a Canadian attorney who has represents investors in NAFTA claims).

⁴⁴ Letter from Robert Zoellick to U.S. Representative (now Senator) John E. Sununu, quoted in Jonathan Leavitt, *Globalization in our local economy: our water, their profits*, ZNET (July 8, 2003), at <http://iticwebarchives.ssrc.org/Z%20Mag/www.zmag.org/content/showarticle6b0c.html?SectionID=13&ItemID=3879> (last visited Dec. 20, 2004).

⁴⁵ WTO SECRETARIAT, *GUIDE TO THE GATS: AN OVERVIEW OF ISSUES FOR FURTHER LIBERALIZATION OF TRADE IN SERVICES* (Kluwer Law International, London, 2001).

⁴⁶ North American Free Trade Agreement, Dec. 17, 1992, art. 201, 19 U.S.C. §§ 3301-3473 (1993) [hereinafter NAFTA].

⁴⁷ I. Dendauw, *The Great Lakes Region and Bulk Water Exports – Issues of International Trade in Water*, Paper Presented at the Dundee Water 2000 International Conference (2000).

⁴⁸ M. Clark, *Contrary to Government Assurances - Control of Canada's water yielded to the U.S. by NAFTA*, THE MONITOR, April 2000 (Mel Clark is a former senior trade negotiator for Canada).

⁴⁹ *Id.*

⁵⁰ H. Mann and K. von Moltke, *NAFTA's Chapter 11 and the Environment*, International Institute for Sustainable Development (Working Paper, 1999).

⁵¹ North American Free Trade Agreement, Dec. 17, 1992, art. 201, 19 U.S.C. §§ 3301-3473 (1993).

⁵² M.C. Gordon, *DEMOCRACY'S NEW CHALLENGE: GLOBALIZATION, GOVERNANCE, AND THE FUTURE OF AMERICAN FEDERALISM* (Demos, New York, 2001).

⁵³ NAFTA *at art.* 314.

⁵⁴ See NAFTA *at arts.* 301, 309.

⁵⁵ In *Metalclad v. Mexico*, the panel awarded the investor \$16.7 million for a building though it could have been used for any purpose that didn't contaminate the groundwater (as the investor's toxic waste facility would have).

⁵⁶ NAFTA *at art.* 1112; see also General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

⁵⁷ GATT *at art.* XX(j).

⁵⁸ GATT *at art.* XX(g); see also *International Trade and its Environmental Integrity*, in ENVIRONMENTAL MANAGEMENT IN PRACTICE: VOLUME I, chp. 18 (B. Nath et al, eds., Routledge, New York, 1998).

⁵⁹ NAFTA *at art.* 315.

⁶⁰ In the Matter of the North American Free Trade Agreement, Chapter 11, Notice of Claim and Demand for Arbitration, Sun Belt Water, Inc. v. Her Majesty the Queen, Oct. 12, 1999.

⁶¹ *Aguas del Tunari v. Republic of Bolivia* Case No. ARB/02/3.

⁶² See *Rio Grande Valley Irrigators v. Mexico*, Intent to Submit a Claim under the North American Free Trade Agreement, Aug. 27, 2004.

⁶³ *Supra* note 9.

⁶⁴ Linda Bailey Potter, *Loud and Clear: Leave our water alone*, ALPINE AVALANCE, Dec. 2, 2003.