

# Opening the Floodgates

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Ever since the advent of free trade Canadians have worried that trade rules would one day be used to challenge Canadian efforts to restrict bulk water exports. They needn't hold their breath any longer because a US based company, Sun Belt Water Inc., has decided to do just that. While a yet to be established ban on such water exports by the federal government would help, the only certain way to head off similar claims is to amend NAFTA to explicitly preclude them.

In fact Sun Belt's claim follows the lead of the other US corporations (Ethyl Corporation and S.D. Myers) which have taken advantage of the powerful enforcement provisions in NAFTA's investment chapter to challenge other Canadian environmental laws.

Relying on these rules, Sun Belt is seeking more than \$200 million (US) from Canada because of BC legislation banning bulk water exports. The company claims that BC's law violates several NAFTA-based investor rights including, in this case, its right to export BC water by tanker to California.

Sun Belt argues that it is entitled to the same access to Canadian water as Canadians enjoy. Anything less is discriminatory and offends the principle of National Treatment, a cornerstone of free trade. Having been denied that access by BC's export ban, it now claims compensation for the profits it would have made, had free trade rules been observed.

There is some irony, however, in the fact that Sun Belt's claim for "equitable treatment" is being made under NAFTA's investor-state suit provisions which are not available to Canadian companies. Moreover, the point is unlikely to be lost on those Canadian companies currently seeking water export approvals in other provinces, which may now wonder whether they should restructure as US corporations to gain similar access to NAFTA's enforcement machinery.

As long as no company succeeds in getting export approval, Canada may argue that NAFTA rules simply do not apply to bulk water exports. But as soon as any export permit is issued, water would undeniably become a tradable good and, therefore, subject to the full array of free trade rules. This explains why several groups have recently renewed their calls for federal legislation similar to BC's ban on bulk water exports.

But after promising to enact such legislation, the federal government now seems inexplicably to be retreating from that commitment – choosing instead to refer the matter for further discussion to the International Joint Commission or the North American Commission on Environmental Cooperation. Unfortunately, neither institution has the authority to rewrite, or influence the enforcement of NAFTA trade rules.

Certainly, federal legislation banning all bulk water exports will make it harder for companies like Sun Belt to argue unfair treatment. But even should the federal government ban water exports, Sun Belt would still have the right to challenge such a law under NAFTA, just as it has BC's legislation. Ultimately, neither federal nor provincial laws are shielded from such suits which may well result in water export controls being determined inconsistent with NAFTA rules.

In such a case, Canada's commitments in NAFTA would prevail over federal and provincial law, and companies like Sun Belt would be entitled to compensation. Moreover, this determination will not be made by Canadian courts or legislators, but rather by international commercial arbitration panels, such as the one that will be convened to determine the Sun Belt claim, and which conduct hearings behind closed doors and without the benefit of media or public access.

For years the federal government has assured Canadians that water would not be subject to the type of claim that Sun Belt has just made. There is only one certain way for Canada to guarantee that protection and this is to negotiate within NAFTA a clear and unequivocal exception for water. Canada, the US and Mexico should also rectify another serious error that was made during NAFTA negotiations, which was to allow foreign corporations direct access to NAFTA's powerful enforcement machinery.

Trade disputes should be reserved to national governments. Foreign corporations with a bone to pick with public policy or law should have to settle for the same legal remedies that protect the interests of Canadian citizens and businesses. If Canada and its NAFTA partners fail to accomplish this reform, it seems inevitable that they will be confronted with a flood of litigation, of which the Sun Belt, Ethyl, S.D. Myers cases are only the first trickle.