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TRADE REGULATION OF FRESH WATER EXPORTS: THE PHANTOM MENACE REVISITED*

Milos Barutciski[†]

INTRODUCTION

Thank you. First of all, I would like to thank Henry for having me stand in for Don McRae. There are very few people that would be happier to stand in for Don. Actually, he was instrumental in arranging my first involvement on the environment and trade when he asked me to assist him in the very first Canadian/U.S. bilateral dispute settlement case.

Most recently – and more germane to the topic here – I should put my cards on the table. On June 18, 2001, the governors of the Great Lakes states and the two premiers of Ontario and Quebec signed a document called the Annex 2001 to the Great Lakes Charter.¹ That instrument (of which I will speak about later in my presentation) was the product of a study commissioned by the Great Lakes governors and completed by a team of Canadian and U.S. lawyers, of which I was the lead Canadian member.

If any of you are familiar with the issue, there are obviously different approaches to dealing with the water exports issue. I will give you some indication of where I stand, and it is not necessarily where either the government of Canada comes from or where other parties stand.

What I hope to do today is give you an overview of the trade rules and trade issues, including some of the issues that have arisen in the context of the fresh water export debate, which goes back many years. We will also look at some of the trade cases that deal with environmental and related matters, to dispel a myth that international trade law, the WTO and NAFTA systems, is a threat to responsible management of our resources. Then, I am

* Much of this lecture is taken from a paper, Milos Barutciski & Anita Banicevic, *Water Conservation and International Trade Law: The Phantom Menace*, in CLE INTERNATIONAL, GREAT LAKES WATER LAW (2000) (proceedings of a conference held in Milwaukee, Wisconsin, Feb. 24-25, 2000, of the same name).

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¹ Annex 2001 to the Great Lakes Charter (June 18, 2001), available at <http://www.cglg.org/projects/water/annex2001.pdf> [hereinafter Annex 2001].

going to talk more generally about some of the issues that arise in the context of water exports.

Water As a Good

The question of whether or not fresh water or water in its natural state is a *good* and thus is subject to trade agreements is hardly simple; it is much more complex than one might believe. What is frustrating is that the governments themselves are compounding the confusion by looking for a simple, political fix in the context of NAFTA.

On the eve of NAFTA's adoption, the three governments signed a joint statement that says that, for the purposes of NAFTA, water in its natural state is *not* a good and is not the subject of any trade agreements, including NAFTA.² The authors of NAFTA are certainly entitled to speak on NAFTA; for the purposes of treaty negotiations, the statement does carry some authoritative weight. However, the Joint Statement carries no weight whatsoever with respect to the parallel treaties of the WTO. Indeed, the very provisions in NAFTA that are derived from the WTO law on export and import restrictions – Articles XI³ and XX(b) and (g)⁴ on exceptions for health and safety and conservation – are at issue here. I think the Statement is more pernicious than just being irrelevant, because it is really a complete “slight of hand” and it misses the whole point. It is a little bit like someone who has

² Statement of Representatives from Canada, the United States, and Mexico Concerning NAFTA and Water (1993) [hereinafter Joint Statement]:

Unless water, in any form, has entered into commerce and becomes a good or product, it is not covered by the provisions of any trade agreement, including the NAFTA. And nothing in the NAFTA would oblige any NAFTA Party to either exploit its water for commercial use, or to begin exporting 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, is not traded, and therefore is not and never has been subject to the terms of any trade agreement.

³ General Agreement on Tariffs and Trade, Oct. 30, 1947 [hereinafter GATT 1947], art. XI, 61 Stat. A-11, A-32-34, 55 U.N.T.S. 194 (relating to general elimination on quantitative restrictions).

⁴ GATT art. XX(1), 61 Stat. at A-60-61, 55 U.N.T.S. at 262:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . .

(b) necessary to protect human, animal or plant life or health; [or]

* * *

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . .

studied conflict of laws and knows the whole theory of the characterization of a problem pointing you to the appropriate conflict rule, and you obtain your solution that way. For example, in Canadian constitutional law, we have the notion of “pith and substance” (Australian constitutional law works in a very similar way): in determining which head of jurisdiction, or under which federal provincial power, a piece of multifaceted legislation falls into, you look at its “pith and substance,”⁵ and that points you in a certain direction. You would then look under Sections 91(2) or (3) for federal powers or Section 92 for provincial powers under our Constitutional Act, 1867.⁶ In individual cases, the analysis can be very complex, but you generally follow a fairly mechanical decision-tree.

Unfortunately, this pattern of thinking is also both fundamentally wrong when dealing with WTO trade law and misleading because it distracts from the real issue. The Joint Statement attempted to manage a growing intersection between trade law and other economic regulatory instruments and the issue of environmental management or protection by simply defining a certain problem out of existence. As I will explain in a moment, you will see it is really a mere slight of hand.

Second, the Joint Statement is fundamentally flawed from a legal perspective because it goes completely against the trend of WTO jurisprudence as articulated by the Appellate Body. As implied by its decision in the leading case on bananas,⁷ one must use a much more

⁵ For a further explanation of the concept of “pith and substance” for those who are not Canadian attorneys:

The classical and modern paradigms represent different judicial approaches to defining “exclusivity” of federal and provincial powers, and thus of preserving provincial autonomy. The classical paradigm is premised on a “strong” understanding of exclusivity: there shall be no overlap or interplay between federal and provincial heads of power. . . . The modern paradigm, on the other hand, is premised on a weaker understanding of exclusivity. Instead of seeking to prohibit as much overlap as possible between provincial and federal powers, the modern approach to exclusivity simply prohibits each level of government from enacting laws whose dominant characteristic (“pith and substance”) is the regulation of a subject matter within the other level of government’s jurisdiction. Exclusivity, on this approach, means the exclusive ability to pass laws that deal predominantly with a subject matter within the enacting government’s catalogue of powers. If a law is in pith and substance within the enacting legislature’s jurisdiction, it will be upheld notwithstanding that it might have spillover effects on the other level of government’s jurisdiction.

Bruce Ryder, *The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations*, 36 MCGILL L.J. 308, 312 (1991). The U.S. equivalent is the notion of “reserved powers” in U.S. CONST. amend. X.

⁶ Constitution Act, 1867, 30 & 31 Vict. ch.3 (U.K.), available at http://laws.justice.gc.ca/en/const/c1867_e.html.

⁷ WTO Dispute Panel Report on European Communities – Regime for the Importation, Sale and Distribution of Bananas, Doc. No. WT/DS27/ARB/ECU, available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/27ARB/ECU.DOC>, 2000 WL 313525 (March 24, 2000).

integrated approach in interpreting trade laws.⁸ In many cases, it is not an issue of characterization nor simply an issue of categorizing a particular case as dealing with goods, thus falling under the GATT, a services issue that falls under the GATS,⁹ or an intellectual property issue under TRIPS,¹⁰ and so on. In other words, all of the agreements may very well apply to different facets of a single aspect of a particular measure or legislation. This complexity cannot be disposed of by simply adopting a system of simplistic categories by saying, "it is good, therefore it is this" or "it is not good, therefore it is not this."

Now, with that introduction, I will say that this has been the consistent position of the Government of Canada in recent years.

THE GENESIS OF THE FRESH-WATER EXPORT DEBATE

Allow me to backtrack a little and to position us where the fresh water export debate is now.

Its most current manifestation was provoked in 1996 or 1997 by a proposal in Ontario by Nova Group,¹¹ a company that was a complete unknown. They floated a very big idea: let us see if we can charter, through a "wet" lease, a large tanker that used to be used for oil. We would then take the oil out of it, fill it with water from the center of Lake Superior, and then take it wherever.¹² After a certain NGO had branded it as a large, nefarious multinational corporation, Nova was revealed to be a shell company that had been put together by a professor at a community college in Northern Ontario and some of his friends. It was hardly a multinational threat; it gets more comical because Nova Group filed its application for a water withdrawal permit with a local office the Ministry of Natural Resources in Ontario, as they were perfectly entitled and authorized to do. But it was pretty far from the center at Queen's Park, filing it with the local director who simply looks at it to see if appeared to meet the conditions, stamps it "approved," and off it goes. The next thing you know, a story shows up on the front page of the *Globe & Mail* saying that the Government of Ontario has approved massive

⁸ See generally *id.*

⁹ That is, the General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1167(1994).

¹⁰ That is, the Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 81 (1994).

¹¹ John Urquhart, *Proposal to Export Great Lakes Water Raises Concerns*, WALL ST. J., May 7, 1998, available at 1998 WL-WSJ 3493030.

¹² *Id.*

bulk exports of water from the Great Lakes to points around the world.¹³ I am not sure what the gentleman who stamped the approval is doing today, but I suspect he is not managing water exports in any event.

This event triggered a whole set of movement and debate within governments. The first reaction was that the governments of both Canada and the U.S. made a joint recommendation to the International Joint Commission to study the withdrawal issue along with the broader issue of water management in the Great Lakes. The final report came out in 2000; there is a short section on the trade law aspects of water in it.¹⁴

Another thing that occurred was that the Government of Ontario adopted a regulation that prohibited bulk water withdrawals for export.¹⁵ Also, the Canadian Federal Government adopted a three-point plan which involved, among other things: (1) introducing amendments to the International Boundary Waters Treaty Act¹⁶ – the Canadian legislation implementing the Boundary Waters Treaty¹⁷ – that prohibits the bulk removal of boundary water from the water basins and out-of-basin export¹⁸ (there is a built-in exception to this rule: the minister of foreign affairs may approve certain removals.¹⁹); (2) enacting tough sanctions and penalties for unauthorized withdrawals;²⁰ and (3) negotiating a federal-provincial pact on out-of-basin removals.²¹

This reactionary policy was quite misguided. It attempted to solve the issue of bulk withdrawals and out-of-basin exports in a way that was narrowly focused on the immediate political problem (the reaction to the export of water) rather than by using a much more sensible approach, one that is starting to be understood by trade bodies and panels. We can do better if the government enacts a more integrated approach. We need to look at the issue in terms of responsible management of exhaustible resources and its interaction with economic interests.

¹³ See Heather Scofield, *Water, Water Everywhere, Not a Drop To Sell?*, GLOBE & MAIL, May 11, 1998, at A1.

¹⁴ See INTERNATIONAL JOINT COMMISSION, PROTECTION OF THE WATERS OF THE GREAT LAKES: FINAL REPORT TO THE GOVERNMENTS OF CANADA AND THE UNITED STATES 66-69 (2000), available at <http://www.ijc.org/boards/cde/finalreport/finalreport.pdf> [hereinafter IJC].

¹⁵ Water Taking and Transfer Regulation, R.O. 285/99 (Can.).

¹⁶ Bill C-6, An Act to Amend the International Boundary Waters Treaty Act, 1st Sess, 37th Parl. (2001), amending the International Boundary Waters Treaty Act, R.S.C. 1985, ch. I-17 (Can.) [hereinafter IBWTA].

¹⁷ Treaty Relating to Boundary Waters, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448.

¹⁸ IBWTA, *supra* note 16, ss. 11(1), 13(1).

¹⁹ *Id.*, ss. 16-17.

²⁰ *Id.*, ss. 22-25.

²¹ See Heather Scofield, *Pact Would Stop Water Exports*, GLOBE & MAIL, Feb. 11, 1999, at A14.

So, that was the Canadian approach and, unfortunately, in its final report, the IJC itself reiterated the view that water is not a good, so, therefore, we do not have any problem under NAFTA or other trade laws.²² I will get back to this notion towards the end of my presentation.

RELEVANT GATT AND NAFTA PROVISIONS AND JURISPRUDENCE

GATT Article XX and NAFTA Chapter 11

The main provisions in both NAFTA and the WTO agreements that might have a bearing on this issue are the GATT Article XI prohibition on quantitative restrictions on exports or imports. (Article XX of the GATT, which was subsequently incorporated in the WTO agreements as GATT 1994,²³ is also incorporated by reference in NAFTA.) I will quote the relevant parts:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures shall be instituted or maintained by any contracting party on the importation . . . or on the exportation for sale for export of any product destined for the territory of another contracting party.²⁴

This is an outright prohibition on quotas for both imports on exports. On its face, this appears to be a straightforward prohibition on any outright export ban. There are several exceptions under Article XI, which, other than the exception to relieve critical shortages²⁵ – which we are not facing in the Great Lakes today – do not apply. To find environmental protection measures under the WTO system and NAFTA, we must turn to Article XX of the GATT,²⁶ which was subsequently incorporated by reference in NAFTA as well.

²² IJC, *supra* note 14, at 32.

²³ General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND 23, 33 I.L.M. 1154 (1994).

²⁴ GATT 1947 art. XI(1).

²⁵ *Id.*, art. XI(2)(a).

²⁶ *See supra* note 4.

Article XX Cases

I will give you a quick overview of the record of Article XX cases, paying particular attention to cases under XX(g) – the exception for measures relating to the protection of exhaustible natural resources, provided that they are implemented with restrictions on domestic production. A government cannot simply prohibit exports to protect so as to protect the environment; it must also restrict domestic consumption. Otherwise, the rule is transparently not an environmental measure; rather, it is simply a protection or preference for your own nationals.

About three or four years ago, I was at a conference in Milwaukee on Great Lakes water issues. The head of one of the largest U.S. environmental NGOs made the statement that, basically, this is what NAFTA and the WTO have done to us; every single case has led to the environmental measure being struck down. He was not happy when I compared his account to General Westmoreland, during Vietnam, giving the body count. Indeed, his negative account had about as much relevance to what was actually happening on the ground as did any of General Westmoreland's body counts.

Cases Pertaining to GATT Article XX(g): Environmental

The first case to address GATT Article XX(g) was the U.S.-Canada Tuna dispute in 1982.²⁷ Here, the U.S. government adopted an import ban on Canadian tuna, allegedly for environmental reasons.²⁸ The Panel ruled that this ban did not meet the conditions under which Article XX(g) could be invoked.²⁹ We had absolutely no domestic measures implemented concurrently to prevent American fishermen from catching the same tuna and bringing to the United States. Was the U.S. ban an environmental measure? Probably not; it was rather transparent.³⁰

In 1987, Canada adopted a measure that prohibited the export of unprocessed fresh salmon and herring from the west coast.³¹ A GATT panel looked at this, saying that this measure appears as if it had nothing to do with

²⁷ United States – Prohibition of Imports of Tuna and Tuna Products from Canada, GATT B.I.S.D. (29th Supp.) at 91 (1982), available at 1981 WL 189166.

²⁸ See *id.*, ¶¶ 3.7-3.20.

²⁹ *Id.*, ¶ 4.15.

³⁰ The panel noted that similar restrictions had been placed the imports of tuna from other nations, including Costa Rica, Ecuador, Mexico and Peru, but only subsequent to the restrictions placed on Canada; thus, the discrimination was probably not unjustifiable. *Id.*, ¶ 4.8. However, if this were truly an environmental measure, the U.S. would have placed domestic limits on its own consumption of tuna, which it did not. *Id.*, ¶ 4.11.

³¹ See Canada – Measures Affecting Exports of Unprocessed Herring and Salmon, GATT B.I.S.D. (35th Supp.) at 98 (1988), available at 1987 WL 421961 [hereinafter Salmon-Herring case], <http://65.123.204.61/reports/gattpanels/canadaherring.pdf>.

environment and more to do with protecting processing jobs in British Columbia.³² It did not make the Canadian lawyer's task any easier when a minister in British Columbia stood up in the B.C. Legislature and said that this measure was going to save British Columbia processing jobs, making the purpose of the ban quite evident to all.

That case actually was important, because it was the first case where the GATT panels adopted a doctrine for determining whether or not a measure is truly environmental- or conservation-based: one must look at the *objective* and find out whether the measure is primarily aimed at environmental or conservation purposes, or if its aims are something else entirely.

A couple years after the Salmon-Herring case, Canada asked itself, we lost that one, so what we are going to do? We are not going to have an export ban; we will implement a landing requirement; every single salmon and herring caught off the west coast of B.C. must be landed at a designated station in British Columbia (by the way, most of those stations are at fish processing plant) to be counted and weighed.³³ The Panel that your original speaker Professor McRae chaired saw through that one fairly easily. The Panel did make a few interesting comments: "The panel recognized that Article XX(g) exists to ensure that the provisions of the GATT do not prevent governments from pursuing their conservation policies."³⁴ It goes on to say, "It was not the intention of Article XX(g) to allow the trade interests of one state to override the legitimate environmental concerns of another."³⁵

In other Panel opinions, additional language of that sort appears. It is more than just talk; GATT Panels are starting to increasingly recognize legitimate environmental concerns.

However, environmentalists have had legitimate concerns when a GATT panel goes off the rails. In the U.S.-Mexico Tuna-Dolphin dispute,³⁶ Mexico challenged the Marine Mammals Protection Act in 1981.³⁷ The panel struck down the Act for what, in my view, was an entirely specious reason: the United States, or by inference any other country, cannot regulate extraterritorially.³⁸ The United States attempted to protect dolphin "bi-

³² See *id.*, ¶ 3.11.

³³ See Free Trade Agreement Panel Decision In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring (U.S. v. Can.), Case No. CDA-89-1807-01, ¶ 2.03, 2 C.T.C.T.C. (CCH) 7162 (1989), available at <http://www.sice.oas.org/DISPUTE/uscanfta/Cc89010e.asp>.

³⁴ *Id.*, ¶ 7.05.

³⁵ *Id.*

³⁶ GATT Dispute Panel Report, United States – Restrictions on Imports of Tuna ("Tuna I"), WTO Doc. No. WT/DS21/R (Aug. 16, 1991), 30 I.L.M. 1594 (1991). This Panel Report was never adopted by the parties.

³⁷ *Id.*, ¶ 2.3, 30 I.L.M. at 1599.

³⁸ Indeed, the Panel found that

catch”³⁹ in the high seas, which was not within U.S. jurisdiction. Therefore, the U.S. could not use either XX(b) (the animal, plant life or health provisions) or XX(g) (the environment), so the law was struck down. That was reversed in 1994, by another Tuna-Dolphin case,⁴⁰ this one at the complaint of the European Economic Community (EEC), which struck down another U.S. measure, finding it to be inconsistent with GATT for slightly different reasons. The Panel, more importantly, made the following remark: “The panel could see no valid reason supporting the conclusion that the provisions of Article XX(g) conservation exception apply only to policies related to the conservation of exhaustible natural resources located within the territory of the contracting party invoking the provision.”⁴¹ In other words, a country can adopt environmental or conservation measures that have extraterritorial effect that are consistent with GATT, so long as they are intended to protect the species in the high seas or outside national boundaries.

In another WTO case, the Reformulated Gasoline Case,⁴² Venezuela and Brazil challenged the U.S. Clean Air Act provisions that required refiners of gasoline to meet certain baseline criteria as to various pollutants and contaminants. Venezuela and Brazil argued that U.S.-based refineries could invoke all kinds of exceptions to the regulations that foreign refineries – those located in Venezuela and Brazil – could not. Both the Panel and the Appellate Body took a very similar approach and recognized that, since this was a conservation-based environmental measure, it was therefore legitimate.⁴³ The panel said that the U.S. could legislate environmentally,

if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.

Id., ¶ 5.27, 30 I.L.M. at 1620.

³⁹ A “bi-catch” occurs when unwanted marine species are caught the nets (i.e., dolphins caught with tuna).

⁴⁰ GATT Dispute Panel Report, United States – Restrictions on Imports of Tuna (“Tuna II”), WTO Doc. No. WT/DS29/R (June 16, 1994), 33 I.L.M. 839 (1994).

⁴¹ *Id.*, ¶ 5.20, 33 I.L.M. at 893.

⁴² United States – Standards for Reformulated and Conventional Gasoline, WTO Doc. No. WT/DS2/R (Jan. 29, 1996), 35 I.L.M. 274 (1996) [hereinafter Panel Report on Gasoline].

⁴³ The Panel ruled that “clean air” was an “exhaustible resource” within the ambit of Article XX(g), and thus, the U.S. could regulate gasoline products, *id.*, ¶¶ 6.36, 6.37, 35 I.L.M. at 299; however, the U.S. policy of giving its domestic producers a wider berth when it came to the cleanliness of their gasoline (so as to ensure that they were not saddled with large costs) was not acceptable. While perhaps sensible domestic policy according to the EPA and U.S. producers, the lack of consideration for foreign producers was fatal to the U.S. counterclaim.

even extraterritorially, by regulating the imports of Venezuelan and Brazilian petroleum by looking at how they are made. The Panel did *not* say, however, that the treatment of foreign entities had to necessarily be the *identical*. We recognize that there are enforcement and regulatory difficulties in obtaining the information and doing it overseas as compared to doing it at home. Rather, the treatment must be *evenhanded*, at least in terms of its impact and effect.⁴⁴

The Shrimp-Turtle case,⁴⁵ a well-known case wherein a U.S. measure, designed to limit the bi-catch of sea turtles in the shrimp fisheries overseas, was struck down by a WTO panel.⁴⁶ However, it is interesting to note what the Appellate Body said: the statutory measure in the U.S. was provisionally *upheld*.⁴⁷ In other words, the requirement that foreign fishermen or governments of foreign fisheries adopt measures equivalent to those adopted in the United States in terms of ensuring that sea turtles were not caught in shrimp nets was *per se* permissible. The panel ruled against the U.S. because the statute was applied in a discriminatory and arbitrary manner.⁴⁸ In other words, the U.S. government was happy to sit down with certain allies in the Caribbean or Latin America and negotiate mutual arrangements as to which alternative fishing methods might be acceptable, but the Malaysians did not even get their phone calls answered.

So, once again, the panels have ruled that countries may use regulatory measures or trade measures or to protect the environment, but they must do it in a reasonable, transparent, and in a non-discriminatory manner in order for those measures to be consistent with the WTO. Moreover, nations must ensure that they are pursuing environmental protection in the interest of conservation, and are not using the regulation for some protectionist purpose. Whether you are a conservationist, an environmentalist, or a trade person, this is a positive development.

See WTO Appellate Body Report on United States – Standards for Reformulated Gasoline, WTO Doc. No. WT/DS2/AB/R (Apr. 29, 1996), at 27, available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/2ABR.WPF>.

⁴⁴ See Panel Report on Gasoline, *supra* note 42, ¶¶ 6.8-6.11.

⁴⁵ WTO Dispute Panel Report on United States – Import Prohibition of Certain Shrimp and Shrimp Products [hereinafter Shrimp-Turtle case], WTO Doc. No. WT/DS58/R/Corr.1 (May 15, 1998), 37 I.L.M. 832 (1998).

⁴⁶ *Id.*, ¶ 8.1, 37 I.L.M. at 857.

⁴⁷ WTO Appellate Panel Report on United States – Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. No. WT/DS58/AB/R, ¶ 186 (Oct. 12, 1998), 38 I.L.M. 121, 174-175 (1999).

⁴⁸ *Id.*

Pertaining to Article XX(b): Health and Safety

This next and final case I want to talk about is not an environment, or Article XX(g), case; it is an Article XX(b) case pertaining to health and safety issues. In the Asbestos Case,⁴⁹ a complaint by Canada against the French government, the Appellate Body ultimately ruled that France's ban on the use of asbestos, particularly in building materials and cement, was permissible. You can adopt a zero-tolerance criterion, as the French government did: it banned the use of asbestos in *any* products.⁵⁰ Although the issues in this case were health- and safety-related, they are very closely tied, for obvious reasons, to a government's ability to make environmental policy. The Appellate Body's decision underscored the concept of a government's flexibility to adopt its own level of protection for its citizens.

CONCLUSION: WHERE TO GO FROM HERE?

I will close by going back to the issue of goods very briefly. One approach is to not consider water a "good" at all. There are many problems with that approach, which I deal with in my "Phantom Menace" paper. Another approach is by doing what the federal government in Canada has already tried to do: to simply ban out-of-basin withdrawals on the basis that such a rule is conservation based. I would say, no, this would not work, because Canada does not have a comparable resource- or environmental-based restriction on domestic consumption or withdrawal.

The Great Lakes governors and premiers took a slightly different perspective in Annex 2001, wherein they said one of the criteria they will look for is that any withdrawal must be met and matched with a corresponding contribution to the water and water based ecosystem of the Great Lakes.⁵¹ In other words, if you were to take 50 million liters or gallons out of the middle of Lake Superior, it is not going to make much of an impact. Take 50 million liters or gallons out of a wetland abutting Lake Superior, and it will make a big difference. You have to look at impacts on a case-by-case basis, and then, under the Annex (which leads to something that will be developed over the next couple years), you have to show you are going to give something back to the ecosystem. It does not necessarily mean more water; it could mean eliminating chemical toxins, restoring ground water or remediating exotic species infestations, but the system must be left better off

⁴⁹ WTO Appellate Body Report on European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WTO Doc. No. WT/DS135/AB/R (Mar. 12, 2001), 40 I.L.M. 1193 (2001).

⁵⁰ *Id.*, ¶ 72, 40 I.L.M. at 1209.

⁵¹ See Annex 2001, *supra* note 1, Directive 3.

than it was before your intervention. This is clearly a resource management and resource-based approach. In terms of international trade law, this requirement would clearly withstand any NAFTA or GATT scrutiny.

Thank you very much.