

**WHO OWNS YOUR WATER?
IMPACTS OF TRADE AND FOREIGN
INVESTMENT AGREEMENTS ON WATER
MANAGEMENT**

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AGENDA

- Emergence of debate on water management and trade and investment agreements
- Scope of coverage of water by trade and investment agreements
- Some details on what is covered
- Some suggestions on how to address potential trade and investment agreement impacts

Emergence of the debate

- **IT'S OK: WATER IS NOT IN NAFTA!**

(North American Free Trade Agreement)

- 1993 Statement by the Governments of Canada, Mexico and United States
- Water in its natural state is not a good or product and is not covered by NAFTA

Scope of coverage

- **OOPS, SORRY, WATER IS IN NAFTA!
AND WTO and BITs**
 - Water sold as a product in packages is covered
 - Rights to use water are covered
 - The provision of water-related services can be covered
 - Measures to control water pollution are covered
 - COMES FROM A COMBINATION OF INTERNATIONAL TRADE AND INTERNATIONAL INVESTMENT AGREEMENTS (BITs = Bilateral Investment Treaties)

IMPORTANCE TO DEVELOPING COUNTRIES

- Water is critical to agriculture, industrial development, urban infrastructure
- Trade and Investment agreements impact on water rights and management
- E.G. IN NILE BASIN:
 - No of basin countries with BITs: ~ 8
 - Total number: ~ 125
 - Forum shopping for “home state” advantage
- High risk of agreements being relevant in all developing country regions today

WATER AS A GOOD IN TRADE

TRADE RULES:

- Water in a package is a good in commerce
 - Trade rules on import and export apply
- What about water in its natural flows?
 - Not a good
 - Unless it is diverted and sold
- Bulk transfers (ships, tankers)
- Tripwire problem: once you sell once, is all water in the country/state a good in commerce?

INVESTMENT RULES:

- Right to export is a protected and enforceable right for foreign investors whose business is selling water, if you let them start

INVESTMENT RULES (BITs, NAFTA)

1. National treatment

2. Most-favoured nation treatment

3. Minimum international standards

4. Expropriation

5. Performance requirements

- Significant uncertainty for scope of all of these
- 2, 3, 4, all look outside national laws to international standards; more than national treatment
- All biased to commercial rights, not public rights

Investment Rules

- Investor-state arbitration
 - Private, often secret process for foreign investors to sue host state to enforce rights, compensation
 - Process inherently biased towards commercial rights of investors

RIGHTS TO USE, ACCESS WATER

- Foreign investors have rights to access water on non-discriminatory basis
- Once have established use levels for a facility, have a right to continue with them
- Can displace local farm, indigenous, traditional uses and rights because separately enforceable
- Can distort/displace traditional water apportionment processes
- Increase in water costs may also be a breach of rights if significant economic impact
 - Higher rates for domestic users as a subsidy for foreign users

PROVIDING WATER-RELATED SERVICES

- No issues as long as water services are government, public services
- If change to private sector services, NAFTA and other agreements apply (privatization or service contracts)
 - NAFTA/WTO do not require this in existing obligations
 - Some states calling for this now in Doha Round
- If /when go to private sector:
 - Foreign service provider; foreign investor rights apply
 - Foreign investors may use investor-state mechanism
 - Investor-state dispute resolution applies to enforce international law rights AND contracts

WATER POLLUTION CONTROLS

- New measures to control water pollution can be seen as an expropriation
- Extreme reading of rules on expropriation??
- But not foreclosed to date in investment cases
- “Polluter pays” → “Pay the Polluter”
- Creates barriers to improving domestic environmental management

INVESTMENT RULES: Two Nile Basin scenarios

1. Electricity development,
 - Role for foreign investors?
 - What rights will they have?
 - Rights to access water
 - To maintain needed water supply
 - To sell electricity where they want to sell it
 - How will those rights play against other international agreements, domestic laws?
 - Unless otherwise specified, they will take priority in disputes initiated by investors under the investment agreements

INVESTMENT RULES: Two Nile Basin scenarios

2. Large agriculture investor

- Investment =
 - Purchase of water rights?
 - Annual levels of water rights?
 - Purchase of regulatory standstill – right to pollute?
- Prevail over other users, community-bases rights, indigenous farmers
- Unless otherwise specified

CAN “OWNERSHIP” BE REGAINED? SUGGESTIONS FOR A WAY FORWARD

- Clearer rules in all trade and investment agreements (multilateral and bilateral)
- Focus on the details: definitions, scope, right to regulate, local rights
- Trade and investment agreements do not necessarily create bad domestic laws or water management processes, but magnify their impact significantly
 - Risk “LOCKING IN” bad or inadequate regimes due to high compensation costs
- Address relation to privatization processes

CAN “OWNERSHIP” BE REGAINED? SUGGESTIONS FOR A WAY FORWARD

- Deal expressly with relationship to International Water Management Agreements, other water agreements
- Deal expressly with relation to national law
 - Be clear on which prevails in water-related contexts

CAN “OWNERSHIP” BE REGAINED? SUGGESTIONS FOR A WAY FORWARD

- Clearer national, state laws and regulations
 - Balance of interests
 - Time periods for any permits, licenses
 - Environmental assessments (traditional uses)
- **Before you privatize, liberalize, etc.**
- **Transparency:** domestic level
- **Transparency:** international level
- **Transparency:** corporate level