

## ARTICLE

# WATER AS A PUBLIC GOOD: THE STATUS OF WATER UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE

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I. INTRODUCTION .....	291
II. DETERMINING THE STATUS OF WATER.....	293
III. THE PUBLIC-OWNERSHIP CONSENSUS .....	295
A. Overview of the Approach .....	295
B. Special Status of Water Among Natural Resources .....	296
C. Status of Water Under Municipal Law .....	297
1. Historical Development .....	298
2. Current Status.....	301
D. Status of Water Under Broader International Law.....	304
E. Status of Water Under GATT.....	307
F. Drawing Lines.....	311
IV. CONCLUSION.....	314

### I. INTRODUCTION

Is water a “product” subject to the World Trade Organization (WTO)’s General Agreement on Tariffs and Trade (GATT)? This Article argues that it is not, because the established, widespread, and consistent assertion by states of public ownership over their water resources through both municipal and international law (the “public-ownership consensus”) precludes any reading of GATT that would fundamentally alter the unique status of those resources. This Article therefore differs from others that have ad-

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dressed this issue in that it first examines the broader legal context in which the WTO exists and then considers how that context compels an interpretation of “product” that excludes water resources.<sup>1</sup>

Why does the status of water matter? If water is considered a product under GATT, it will be subject to that regime’s trade disciplines, including two that could limit a state’s ability to control the export and hence the long-term management of its water. Article I, the most-favored nation (MFN) clause, requires that a state that accords “any advantage, favour, privilege or immunity” to any product destined for one country must “immediately and unconditionally” accord that same benefit to like products destined for all WTO members.<sup>2</sup> Article XI bars the imposition of “prohibitions or restrictions other than duties, taxes or other charges” on the “exportation or sale for export of any product” absent an exception.<sup>3</sup> Additionally, if water is a product under GATT, it will be a good under the North American Free Trade Agreement (NAFTA) and subject to that regime’s more rigorous disciplines.<sup>4</sup>

There are normative arguments both for and against subjecting water to GATT’s disciplines.<sup>5</sup> On one hand, the WTO’s goal of “allowing the optimal use of the world’s resources in accordance with the objective of sustainable development”<sup>6</sup> relates as much to water as it does to any other resource. Like other resources, water has an economic value that motivates its transfer within and among countries and that can be maximized according to the principle of comparative advantage. And like other resources, water can be subjected to measures motivated by and depicted as some mixture of protectionism and environmentalism. GATT provides a framework (described below) for vindicating comparative advantage while parsing a measure’s economic and environmental elements. On the other hand, this framework is imperfect and dominated by

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<sup>1</sup> In this Article, the argument that GATT “does not apply” to water is shorthand for the argument that GATT’s trade disciplines do not apply to water. GATT can still “apply” to water by implicitly excluding water from its definition of product.

<sup>2</sup> General Agreement on Tariffs and Trade 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter GATT 1994].

<sup>3</sup> GATT 1994, art. XI(1).

<sup>4</sup> North American Free Trade Agreement, Dec. 17, 1992 [hereinafter NAFTA], art. 201; see also EDITH BROWN WEISS, *Water Transfers and International Trade Law*, in EDITH BROWN WEISS ET AL., *FRESH WATER AND INTERNATIONAL ECONOMIC LAW* 67 (2005).

<sup>5</sup> See generally WEISS, *supra* note 4, at 80-83.

<sup>6</sup> Marrakesh Agreement Establishing the World Trade Organization pmbl, Apr. 15, 1994, 1869 U.N.T.S. 14 [hereinafter WTO].

trade values and voices. The application of GATT's priorities, disciplines, and tribunals to water would reduce the flexibility and finality that states exercise in the long-term management of their waters.

As a descriptive matter, however, states could not have intended to abrogate this flexibility and finality through GATT. Before developing that argument in section three, this article first considers other analytical approaches to the question of the status of water under GATT.

## II. DETERMINING THE STATUS OF WATER

Others have asked whether and how GATT applies to water, often with an eye toward minimizing the effect of that regime on state prerogative. The most straightforward approach argues that water in its bulk state is not a product under GATT because it is not produced. The definition of product as "a substance produced during a natural, chemical, or manufacturing process" implies that "something must be done to water to make it a product, and that mere diversion, pumping, or transfer does not suffice. As long as it remains in its natural state or source, water could not be a 'product'."<sup>7</sup> This description, however, does little to distinguish water from other unrefined natural resources like crude oil.

Other approaches accept the possibility that water might fall under GATT and then contemplate different responses to the regime's disciplines: ignore them, identify an exception to them, avoid them, or adjust them. Under the "ignore" approach, members might informally decline to subject water to GATT's disciplines in a manner akin to their treatment of oil. Because many oil-exporting countries were not parties to the 1947 GATT and some are still not members of the WTO, oil has been de facto exempt from GATT's trade disciplines even though it "is considered a product in the market place."<sup>8</sup> This "provides strong precedent for not subjecting bulk transfers of water across natural borders to the trade disciplines."<sup>9</sup>

Under the "except" approach, a state might defend a measure that would otherwise violate GATT by appealing to one of the regime's exceptions. Article XI(2)(a) permits "[e]xport prohibitions

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<sup>7</sup> WEISS, *supra* note 4, at 69.

<sup>8</sup> *Id.* at 84.

<sup>9</sup> *Id.*

or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party.”<sup>10</sup> However, the restriction would need to be both “temporary” and addressed to an actual or potential “critical shortage.”

Article XX, which applies both to export restrictions under article XI and to disparate treatment under article I, offers two additional exceptions. A state may take measures “necessary to protect human, animal or plant life or health” or “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restriction on domestic production or consumption” *provided 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.”<sup>11</sup>

Under the “avoid” approach, a state could impose an export duty on water high enough to make export economically impractical, because bulk water is not yet subject to a tariff binding under GATT. Although some countries still impose export duties, the constitution of the United States prohibits that country from doing so.<sup>12</sup>

Finally, under the “adjust” approach, states could “clarify” GATT’s application in one of four ways.<sup>13</sup> First, although unlikely, they could amend GATT to explicitly exclude water or broaden the protections of article XX. Second, they could “agree to waive the application of particular obligations” of GATT to bulk transfers of water.<sup>14</sup> Third, they could adopt an interpretation of GATT that excludes bulk water, provided that such an interpretation does not “undermine” GATT’s amendment procedures.<sup>15</sup> The NAFTA parties took a similar approach in declaring that “[w]ater in its natural state . . . 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.”<sup>16</sup>

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<sup>10</sup> GATT art. XI(2)(a).

<sup>11</sup> GATT art. XX.

<sup>12</sup> WEISS, *supra* note 4, at 85.

<sup>13</sup> *Id.* at 85-88.

<sup>14</sup> *Id.* at 86.

<sup>15</sup> *Id.* at 87 (quoting GATT art. IX).

<sup>16</sup> WEISS, *supra* note 4, at 87 (quoting 1993 Statement by the Governments of Canada, Mexico, and the United States).

Fourth, assuming consensus, the parties might make an “ordinary decision” about the status of water.<sup>17</sup>

The members of the WTO could also use any of these adjustment techniques to expressly endorse the approach described in the following section. However, as the remainder of the article argues, such an endorsement is unnecessary in a legal sense, because a proper construction of GATT in the context of broader law implicitly excludes water from the definition of product.

### III. THE PUBLIC-OWNERSHIP CONSENSUS

#### A. *Overview of the Approach*

This article proposes an alternative legal rationale for precluding the application of GATT to water. Water resources are owned by the public, and one of the key rights of ownership is the privilege of use before all others. If water were a product under GATT, then “nonowners” would enjoy the same priority of use as the national “owner” in a way that would frustrate that national ownership. GATT therefore cannot apply to water unless that water has been transformed from a resource into a product, and only the state can determine as a matter of its municipal law when this conceptual transformation occurs.

Under what can be called the public-ownership consensus, states uniformly disavow private ownership of significant water resources and instead assert some form of public ownership and control. This consensus, which both influences and reflects principles of international law, militates against any extension of GATT to the water resources themselves as objects of trade beyond the absolute control of the domestic public. The text of GATT is too vague to conclude that the parties could have intended or that the text could effect such a dramatic change in both municipal and international law.

But can GATT apply to water even if it does not apply to water resources? The article further argues that it cannot. Water belongs to water resources, and water resources belong to the public. Moreover, the line between water and waters is unclear, and individuals enjoy at most a qualified right of use in either. “When we determine water rights we establish use rights—not owner-

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<sup>17</sup> *Id.* at 88.

ship”<sup>18</sup>—and mere use rights are too abstract to be a product. In short, it is for states to determine the scope of their public ownership through management of use rights.

### B. *Special Status of Water Among Natural Resources*

The danger of this argument is that, if it proves anything, it might prove too much. If GATT does not apply to water, then why should it apply to other natural resources? Or, phrased differently, why shouldn't GATT apply to water if it applies to other natural resources?

Answering this question is critical, because GATT does apply in principle to most natural resources.<sup>19</sup> If it did not, article XI's inclusion of export restrictions and article XX's exception for measures “relating to the conservation of exhaustible natural resources” would be largely unnecessary. However, many countries have also asserted “permanent sovereignty” over these resources, and the United Nations General Assembly has asserted the “inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests.”<sup>20</sup> This notion of permanent sovereignty over natural resources has since “evolved from a political claim to an accepted principle of international law.”<sup>21</sup>

Fortunately, the argument that GATT's disciplines do not apply to water need not rely on this broader principle of sovereignty over natural resources, because water is special. There are several reasons why. First, water is both necessary and non-fungible. It is a “unique source of life, comparable only with air, to which human beings need to have recourse to live.” It has at least four critical

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<sup>18</sup> ANTOINETTE HILDERING, *INTERNATIONAL LAW, SUSTAINABLE DEVELOPMENT AND WATER MANAGEMENT* 98 (2004).

<sup>19</sup> As noted above, GATT has not been applied to oil.

<sup>20</sup> Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII) (Dec. 14, 1962); *see also* Right to Exploit Freely Natural Wealth and Resources, G.A. Res. 626 (VII) (Dec. 21, 1952) (“The sovereign right of every State to dispose of its wealth and its natural resources should be respected.”). Both resolutions occurred after the initial ratification of GATT, and resolution 1803 notes that the “exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.” Although this could be read as a repudiation of GATT, the more plausible reading is as an endorsement of the trade and investment regimes.

<sup>21</sup> Emeka Duruigbo, *Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law*, 38 *GEO. WASH. INT'L L. REV.* 33, 39 (2006).

functions: health, habitat, transport, and production.<sup>22</sup> All of these functions in turn have both ecological and economic components. For example, transport encompasses the movement of sediment, nutrients, and other natural materials as well as the movement of humans and their goods. Similarly, production encompasses photosynthesis (through the use of “green water”) as well as domestic, industrial, and other societal activity (through the use of “blue water”).<sup>23</sup>

Second, water is part of a natural system—the hydrologic cycle—that facilitates its use and reuse. Possession is fleeting, and while water might be contaminated through that use, it is not destroyed. Whereas the “disposition” of other natural resources might occur prior to their use (such as upon extraction), the disposition of water occurs after its use. The public is a custodian as much as it is an owner, and water management extends beyond extraction through consumption and disposal.<sup>24</sup>

Finally, water is *sui generis* in the legal sense as well. Whereas individuals might exercise more extensive rights over other natural resources, they enjoy at most a qualified right “to use water contained in a certain area at that given moment.”<sup>25</sup> Moreover, permanent sovereignty over natural resources is a relatively recent and recently contentious notion.<sup>26</sup> In contrast, as the next subsection demonstrates, the public-ownership consensus over water is a longstanding, persistent, and global phenomenon.

### C. Status of Water Under Municipal Law

Water resources belong to the public. That sentence, and the following exposition of it, uses two necessarily ambiguous terms. First, “ownership” has many different meanings. In civil-law countries it can refer to a unitary “triad of ownership,” whereas in common-law countries it can refer rather informally to some or all of a non-unitary “bundle of sticks.”<sup>27</sup> Nonetheless, states and commentators often invoke ownership (or a non-English term of roughly

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<sup>22</sup> M. Falkenmark, *Water Scarcity—Challenges for the Future*, in *THE SCARCITY OF WATER: EMERGING LEGAL AND POLICY RESPONSES*, 26 (Edward Brans et al., eds., 1997).

<sup>23</sup> *Id.* at 26.

<sup>24</sup> See generally HILDERING, *supra* note 18, at 21-31.

<sup>25</sup> *Id.* at 98.

<sup>26</sup> See Duruigbo, *supra* note 21, at 33.

<sup>27</sup> See Encyclopaedia Britannica Online, Property Law, <http://www.britannica.com/eb/article-28515/property-law#927913.hook> (last visited Apr. 14, 2009) (discussing unitary and nonunitary concepts of ownership).

equivalent meaning) in the context of water; their declarations of public ownership are so emphatic that they need not be precise. In other words, such ownership is above all the assertion of a paramount state interest.

Second, "water resources" has disparate municipal definitions and, perhaps surprisingly, no international definition.<sup>28</sup> States may refer to their water, their waters, and/or their water resources. This variation might reflect imprecise drafting, imperfect or impossible translation, or actual substantive differences. As argued below, however, this variation does not negate the existence of the public-ownership consensus and instead implies that states enjoy the prerogative to define the extent of their water resources.

### 1. *Historical Development*

Two themes emerge from an examination of the historical development of water law. First, no system has provided for completely or even predominately private ownership of water. Significant water resources have been either incapable of ownership or owned by the state or the public. Individuals have enjoyed use of, but not title in, water from those resources. Second, despite the increasing privatization of *service*, the legal trend has been toward greater public ownership of the water itself. This subsection briefly traces five important currents in the history of water law: the law of the Roman Empire, the Napoleonic Code, English common law, Soviet law, and Islamic law.<sup>29</sup>

Ancient Roman law recognized three categories of water resources.<sup>30</sup> No one, not even the sovereign, could claim title over waters common to everybody (*res comunis omnium*), which included all flowing waters.<sup>31</sup> Municipalities and other public institutions could claim title over public waters (*res publicae*) and grant a right of use to others.<sup>32</sup> Private landowners enjoyed an absolute ownership interest in a small category called private waters, which

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<sup>28</sup> The International Commission on Irrigation and Drainage (ICID), a nongovernmental organization, defines "water resources" as "water available, or being made available, for use in sufficient quantity and quality at a location over a period of time appropriate for an identifiable demand." See Water Resources, [http://www.wca-infonet.org/cds\\_static/en/water\\_resources\\_en\\_1006\\_all\\_1.html](http://www.wca-infonet.org/cds_static/en/water_resources_en_1006_all_1.html) (last visited Apr. 14, 2009).

<sup>29</sup> See generally DANTE A. CAPONERA, PRINCIPLES OF WATER LAW AND ADMINISTRATION: NATIONAL AND INTERNATIONAL 59-132 (2d ed. 2007).

<sup>30</sup> *Id.* at 60.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

included “rainwater, groundwater and minor water bodies.”<sup>33</sup> Nonetheless, most of the Roman Empire’s viable water resources could only be used rather than owned.<sup>34</sup>

The French Napoleonic Code abolished the Roman category of common waters and distinguished between private waters (“located below, along or on privately owned land”) and public waters (considered navigable or floatable).<sup>35</sup> This distinction spread to other states in continental Europe and then to the colonies of these civil-law countries.<sup>36</sup> Many of these countries subsequently expanded the category of public waters at the expense of the category of private (or, later, non-domianial) waters. In France, public waters came to include those that are navigable and floatable, those “acquired by the state for the purpose of public works,” and those “necessary for domestic water supply, agriculture and industrial production.” A 1992 French law declared that “all water resources, whether surface or underground” were a “common asset of the nation” such that “water may only be subject to use rights.”<sup>37</sup>

Unlike the Napoleonic Code, English common law maintained the notion of waters common to everybody that existed in Roman law.<sup>38</sup> Critically, “[n]ot even the Crown can own water.”<sup>39</sup> Under the common law’s riparian doctrine, “there can be no ownership of or right of property in the running water of streams, rivers or natural channels.”<sup>40</sup> Rather, this “transient and fugitive” water is “common to all who can claim a right of access to it, and may be used in a reasonable manner by a riparian landowner.”<sup>41</sup> Private ownership of rainwater and extracted groundwater is “limited to the time of possession.”<sup>42</sup> Statutory law, particularly the permit system, has since made substantial inroads into the riparian doctrine.<sup>43</sup>

The Soviet constitution established that “waters . . . are the property of the Socialist Soviet State, that is, a matter of all peo-

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 69.

<sup>36</sup> *Id.* at 69-70.

<sup>37</sup> *Id.* at 71.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 73.

<sup>40</sup> *Id.* at 74.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 77-78.

ple.’”<sup>44</sup> Although water resources were owned exclusively by the state, individuals could appropriate water itself (as a “dynamic substance”) through lawful activities.<sup>45</sup> This communitarian conception of water has continued to influence countries within the former Soviet bloc.<sup>46</sup> While Russia and some Western-oriented states have established private ownership of water resources located entirely within private land, “in most former Soviet countries water resources continue to be considered a public good.”<sup>47</sup>

The precepts of Islam also reflect a communitarian conception of water. Mohammed is said to have declared water to be the “common entitlement of all Moslems” and to have prohibited its sale.<sup>48</sup> Islamic water law recognizes and heavily regulates the rights of thirst (*chafa*) and irrigation (*chirb*).<sup>49</sup> It also contemplates and regulates the “sale or transfer” of these rights. Although there appears to be a split within Islamic water law on the treatment of water from wells dug on private or unoccupied land, significant restrictions apply even where the owner of such a water supply can sell the water at will. Under one rule, “the purpose of the sale must be exactly known and stipulated; water cannot be sold *in globo*.”<sup>50</sup> Under another rule, water may be sold only in receptacles, and “[a]ny other sale of water is void.”<sup>51</sup>

The Ottoman Civil Code reflected this developed custom by defining “water which has not been appropriated,” “water contained in wells dug by unknown persons,” and “water of the sea and large lakes” as a “non-saleable commodity to which everyone has a right.”<sup>52</sup> Unlike ancient Roman law, the code also declared community ownership of groundwater.<sup>53</sup> The collapse of the Ottoman Empire generally resulted in a repudiation of its code and either the reassertion of Islamic law or the adoption of British and French law emphasizing the public ownership of water.<sup>54</sup> Custom has remained influential in countries that succeeded the Ottoman

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<sup>44</sup> *Id.* at 79.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 78, 84.

<sup>47</sup> *Id.* at 84.

<sup>48</sup> *Id.* at 62.

<sup>49</sup> *Id.* at 63.

<sup>50</sup> *Id.* at 64.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 65.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 68.

Empire,<sup>55</sup> and “modern codifications of water law aim at institutionalizing, in one form or another, the concept of community of interest in water resources.”<sup>56</sup>

## 2. *Current Status*

Today, water is unambiguously a public good. A survey of current domestic water laws identified forty-four countries in which significant water resources belong to the state, the nation, or the people; it identified no countries that disavowed such public ownership.<sup>57</sup>

European countries have moved “either to abolish or to restrict the concept of private ownership of water, and to extend government control over all water uses and activities.”<sup>58</sup> France declared all water resources to be a shared asset of the nation in 1992, and Italy declared all water resources to be public in 1994.<sup>59</sup> With the exception of small water bodies in Russia, Estonia, and Lithuania, all water resources in the countries of eastern European are public.<sup>60</sup>

Under the riparian doctrine dominant in the eastern half of the United States, surface waters are “a public resource, held in trust for use by the people of the state.”<sup>61</sup> In contrast, under the doctrine of appropriation dominant in the western half of the United States, “the first person to use water acquires the right to its future use as against later takers.”<sup>62</sup> At first glance this doctrine may appear merely to prescribe a rule of use that is only peripheral to the question of ownership in the more fundamental and absolute sense. However, a “water right acquired under the doctrine of appropriation is generally considered to be real property, as opposed to personal property.” To the extent it contemplates private ownership of a real property interest in water, this doctrine is therefore

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<sup>55</sup> *Id.* at 69.

<sup>56</sup> *Id.*

<sup>57</sup> Water Law and Standards, <http://www.waterlawstandards.org> (last visited Apr. 14, 2009). This searchable database of states’ water laws and water-quality standards is a joint project of the United Nations Food and Agriculture Organization and the World Health Organization. Citations to the site as a source for information about a state’s laws imply a search of the database. *See also* Waterlex, <http://waterlex.fao.org> (last visited Apr. 14, 2009).

<sup>58</sup> CAPONERA, *supra* note 29, at 110.

<sup>59</sup> *Id.* at 110-11.

<sup>60</sup> *Id.* at 111.

<sup>61</sup> *Id.* at 126.

<sup>62</sup> *Id.* at 127.

somewhat anomalous and, in the context of the global trend toward greater public ownership, possibly anachronistic.

Treatment of groundwater in the United States now roughly parallels the treatment of surface water; eastern federal states plus California tend to embrace some variant of reasonable use, while western federal states adhere to a rule of appropriation. Notably, only Texas maintains a rule of absolute ownership whereby “the landowner owns, under the ‘rule of capture,’ all the water he captures through pumping.”<sup>63</sup> Eastern federal states, in addition to the United Kingdom, have abolished this rule.<sup>64</sup>

Australia’s federal states have largely abandoned the riparian doctrine in favor of a larger role for government management.<sup>65</sup>

Latin American countries generally assert public ownership over “all water resources everywhere. In Panama, even meteoric waters are public.”<sup>66</sup> Groundwater has a more ambiguous status in some South American countries but explicitly belongs to the public domain in Argentina and Mexico, among others.<sup>67</sup> Brazil divides ownership over water resources between the union and its federal states.<sup>68</sup> Water is national property in Chile, although riparian landowners can own minor internal lakes and springs.<sup>69</sup> Ecuador’s civil code declares water to be a “good common to all,” while its water act declares all waters, whether surface or underground, to be “national property for public use.”<sup>70</sup> In the Dominican Republic, all waters without exception belong to the Republic, “and their dominion is inalienable, unlimited, and cannot be restricted. No private right to own water exists, nor any right to acquire ownership of water.”<sup>71</sup>

The Chinese state owns as public property all surface-water and groundwater resources.<sup>72</sup> However, its 2002 water law provides that “the provisions of international treaties concerning

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<sup>63</sup> *Id.* at 128.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 98.

<sup>66</sup> *Id.* at 106.

<sup>67</sup> *Id.*

<sup>68</sup> Water Law and Standards, *supra* note 57.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*; CAPONERA, *supra* note 29, at 107.

<sup>71</sup> Water Law and Standards, *supra* note 57.

<sup>72</sup> CAPONERA, *supra* note 29, at 101.

water shall prevail over those of the water law, unless express reservation has been made.”<sup>73</sup>

The water laws of other countries in Asia have been influenced by French, German, Spanish, and U.S. water law; for example, the Philippines and Taiwan incorporate some elements of the doctrine of appropriation.<sup>74</sup> Under Japanese law, “watercourses belong to the public domain”<sup>75</sup> and “the water of a river cannot be made the object of a private right.”<sup>76</sup> Cambodia, Laos, and Vietnam have declared their water resources, respectively, to be public, to belong to the state, and to belong to the national community, even though there is an abundance of water in these civil law countries.<sup>77</sup> The Indian constitution grants ownership of water to its federal states.<sup>78</sup>

Most countries in the Middle East recognize Islamic customary water law, which has also influenced Afghanistan, Bangladesh, and Pakistan.<sup>79</sup> Jordan has declared all waters to be state property.<sup>80</sup> The Indonesian constitution declares that water is “‘a gift of Almighty God, and shall be controlled by the state and utilized for the greatest welfare of the people in a just and equitable manner.’”<sup>81</sup>

The communitarian conception of water present in Islamic customary law also continues to affect the legal regimes and actual practice in many countries in Africa.<sup>82</sup> In African civil law countries, which number about 25, all waters are in the public domain.<sup>83</sup> For example, Libya considers all of its waters to be state property.<sup>84</sup> In African common law countries, which number about 15, water is common to all “unless it has specifically been brought under government control through legislation or judicial deci-

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<sup>73</sup> *Id.* at 101.

<sup>74</sup> *Id.* at 97.

<sup>75</sup> *Id.* at 101.

<sup>76</sup> Water Law and Standards, *supra* note 57.

<sup>77</sup> *Id.* at 97; Law on Water Resources of the Kingdom of Cambodia, art. 3 (entry into force June 29, 2007), available at Faolex, Faolex No. LEX-FAOC075723, <http://faolex.fao.org> (last visited Apr. 14, 2009).

<sup>78</sup> *Id.* at 99.

<sup>79</sup> CAPONERA, *supra* note 29, at 9.

<sup>80</sup> *Id.* at 7, 102.

<sup>81</sup> *Id.* at 102.

<sup>82</sup> *Id.* at 96.

<sup>83</sup> *Id.* at 93.

<sup>84</sup> *Id.* at 93-94.

sions.”<sup>85</sup> Ghana vests property rights and control of water resources in its president, “who holds them in trust for the people of Ghana.”<sup>86</sup> The Nigerian constitution places water resources under the jurisdiction of the country’s federal states.<sup>87</sup> The Ethiopian constitution establishes as government property “all resources in the water.”<sup>88</sup> Egyptian water law reflects a mixture of customary, French, and British law that emphasizes government control.<sup>89</sup> South Africa’s national government holds the country’s water as a public trustee.<sup>90</sup>

#### D. *Status of Water Under Broader International Law*

The previous subsection demonstrated the near unanimity with which states have acted on the domestic level to reject the private ownership of water in favor of a communitarian approach. This subsection explores the legal significance of this apparent international consensus that absolute private property rights do not exist in nationally significant waters and that even if water from these resources can be privately used, it cannot be privately owned. The subsection considers, first, international implications of the domestic shift and, second, similar flows on the international stage.

Article 38 of the Statute of the International Court of Justice (ICJ) enumerates three primary sources of international law: “(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations.”<sup>91</sup>

The public-ownership consensus might constitute a general principle of law that “can be derived from a comparison of the various systems of municipal law, and the extraction of such principles as appear to be shared by all, or a majority, of them.”<sup>92</sup> As the

<sup>85</sup> *Id.* at 94.

<sup>86</sup> Water Law and Standards, *supra* note 57.

<sup>87</sup> CAPONERA, *supra* note 29, at 94.

<sup>88</sup> *Id.* at 95.

<sup>89</sup> *Id.* at 96.

<sup>90</sup> Water Law and Standards, *supra* note 57.

<sup>91</sup> I.C.J. Statute, art. 38(1). The other enumerated sources, “judicial decisions and the teachings of the most highly qualified publicists of the various nations,” are “subsidiary means for the determination of rules of law.” *Id.*

<sup>92</sup> Hugh Thirlway, *The Sources of International Law*, in MALCOLM D. EVANS, *INTERNATIONAL LAW* 115, 128 (2d ed. 2006) (suggesting a competing interpretation of “general principles” that nonetheless appears to embrace this foundation).

previous subsection illustrated, a disavowal of private ownership is common to virtually all of the systems of municipal law examined. In other words, even though these systems differ in what particular status they confer to water, they are uniform in what status they do not confer.

The utility of this general principle of water resource ownership may be limited, because general principles have tended to play a limited role in international dispute settlement. On one hand, the drafters of the ICJ Statute intended that these principles be applied only in the absence of relevant treaty or customary law,<sup>93</sup> and the ICJ has never found such an application to be necessary.<sup>94</sup> On the other hand, states have referenced general principles in their submissions to the ICJ, and other arbitral bodies have invoked them.<sup>95</sup> Moreover, a snapshot of international law derived solely from the decisions of its circumscribed judicial bodies would neglect the significant interpretation carried out by other actors like states incidental to their application of and compliance with that law.

One important question, applied in the next subsection to GATT, is the extent to which a general principle might be used to fill a gap in or provide context for international law derived from treaty or custom. For example, assume that the Russian owner of certain real property in Italy uses the Russia-Italy bilateral investment treaty (BIT) to challenge Italy's declaration that all of its waters are public. Might a tribunal conclude that no expropriation occurred based in part on the unexceptional nature of Italy's declaration?

The widespread acceptance of the public-ownership consensus raises the possibility that this consensus may enjoy a legal status beyond that of a general principle. For a rule to enter international law as custom, it must reflect both "an established, widespread, and consistent practice on the part of States"<sup>96</sup> and a "belief that this practice is rendered obligatory by the existence of a rule of law requiring it" (*opinio juris*).<sup>97</sup> The special treatment of water across the globe and since the time of ancient Rome is strong evidence of state practice, but what about *opinio juris*?

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<sup>93</sup> *Id.* at 133.

<sup>94</sup> *Id.* at 128.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 122.

<sup>97</sup> *Id.* (quoting *North Sea Continental Shelf (F.R.G. v. Den.)*, 1969 I.C.J. 44 (Feb. 20)).

States might conclude that international law requires or invites them to assert public control of water for several reasons.<sup>98</sup> First, numerous treaties on shared water resources—such as the 1815 Treaty of Vienna internationalizing the rivers of Europe<sup>99</sup>—are incompatible with absolute private ownership. As the Deputy United States Trade Commissioner noted in 1999:

There is a long-standing, well-developed body of international law—reflected in thousands of international agreements over literally hundreds of years—on the non-navigational uses of watercourses. Under this body of law, water resource management rights belong to the country or countries where the watercourse flows. We are not aware of any government having challenged this principle in any forum, let alone before an international trade body such as the World Trade Organization.<sup>100</sup>

Second, public ownership of water facilitates—in theory if not in practice—the satisfaction of other state obligations. The right to water is recognized as an independent human right; as the United Nations Committee on Economic, Social and Cultural Rights noted in 2002, “the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.”<sup>101</sup> Similarly, states have both the “sovereign right to exploit their own resources” and the “responsibility to ensure” that their activities do not harm the environment of other states.<sup>102</sup>

This discussion does require a caveat. The growing internationalization of human rights and environmental law might actually undermine a state’s assertion of a paramount interest in its water for the exclusive use of its people. For example, if states cannot deny the human right of water to those outside their borders, then the disciplines of GATT might be a method of vindicating that right rather than an obstacle to its fulfillment. Nonetheless, this is

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<sup>98</sup> Attributing a state of mind to states—or proving the existence of such a mind—is a rather daunting task. *See, e.g., id.* at 123.

<sup>99</sup> CAPONERA, *supra* note 29, at 190.

<sup>100</sup> Letter from the Deputy United States Trade Representative (Nov. 24, 1999), <http://www.cglg.org/projects/water/docs/IJC2000Report.pdf> (last visited Apr. 14, 2009).

<sup>101</sup> WORLD HEALTH ORGANIZATION, *THE RIGHT TO WATER* (2003), *available at* [http://www.who.int/water\\_sanitation\\_health/rtwrev.pdf](http://www.who.int/water_sanitation_health/rtwrev.pdf).

<sup>102</sup> U.N. Conference on Environment and Development, Rio de Janeiro, June 3-14, 1992, *Rio Declaration*, UN Doc. A/CONF.151/26/Rev.1.

speculative. “It would be going too far in the current state of international law to suggest that all freshwater is *res communis*.”<sup>103</sup>

#### E. *Status of Water Under GATT*

Article 31(1) of the Vienna Convention on the Law of Treaties captures the rule for the interpretation of treaties under customary international law: “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 object and purpose.”<sup>104</sup>

Although a textual approach dominates treaty interpretation, article 31(3) provides that “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” and “any relevant rules of international law applicable in the relations between the parties” must also be taken into account “together with the context.”<sup>105</sup> Finally, according to article 31(4), a “special meaning shall be given to a term if it is established that the parties so intended.”<sup>106</sup>

This subsection makes three arguments about the status of water based on article 31. First, the public-ownership consensus establishes that parties to both the original 1947 GATT and the 1994 GATT intended that “product” be defined in a way that excludes water. Second, as a “relevant rule of international law,” the public-ownership consensus supports such a definition. Third, “subsequent practice” by the parties, particularly their widespread assertion of public ownership, also supports such a definition.

The argument is not that the parties consciously intended that “product” be defined in a way that excludes water. Rather, it is that the parties could not have intended that “product” be defined in a way that includes water, because such a definition would diminish the absolute ownership of water resources by the nation. In other words, the right of first use implied by ownership conflicts with the right of equal use implied by GATT’s MFN clause (article I) and bar on export restrictions (article XI). A government that

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<sup>103</sup> HILDERING, *supra* note 18, at 97 (quoting S.C. McCAFFREY, *THE LAW OF INTERNATIONAL WATERCOURSES: NON-NAVIGATIONAL USES* 53, 57 (2001), noting that “it is critical that states begin to conceive of the *hydrologic cycle* in this way.”).

<sup>104</sup> Vienna Convention on the Law of Treaties (V.C.L.T.), art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

<sup>105</sup> *Id.* art. 31(3).

<sup>106</sup> *Id.* art. 31(4).

holds its water resources in trust for the nation would violate its duty as trustee by diluting national control over those resources.

One might respond that the content of municipal law is irrelevant to intent for the purposes of treaty interpretation. A state might well ratify a treaty as an impetus or mechanism for changing its domestic law.<sup>107</sup> It might ratify a treaty notwithstanding obvious incompatibility with its domestic law.<sup>108</sup> And it might ratify a treaty with a misunderstanding of the obligations imposed by that treaty. According to article 27 of the Vienna Convention, “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>109</sup>

The public-ownership consensus, however, is of an entirely different magnitude. If water is a product, then every single party to the 1947 GATT would have been mistaken or insincere or poised to change an important national principle without so much as a mention of it. And then, in adopting the 1994 GATT, they along with many new states would have done it again. This seems implausible.

The more likely explanation is that states ratified a treaty that comports with the public-ownership consensus as enshrined in municipal and international law. A WTO tribunal, a WTO council, or simply a state interpreting GATT could “take into account” this consensus in giving meaning to “product”—a generalized term that the treaty does not define.

The practice of states subsequent to their ratification bears out such an interpretation. For example, France signed the original GATT in 1947. At the time, the public domain included all “navigable and floatable” waters. Seventeen years later, the public domain grew to include all waters necessary for “domestic water supply [and] agricultural and industrial production.”<sup>110</sup> France subsequently nationalized all of its waters in 1992, two years before joining the WTO.<sup>111</sup> The United States also signed GATT in 1947 and saw a reassertion and expansion of the public-trust doctrine by

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<sup>107</sup> As an example of impetus, the executive of a state might use a treaty to prompt the legislature to enact statutory changes. As an example of mechanism, a self-executing treaty becomes enforceable law in the United States.

<sup>108</sup> See, e.g., Emilie M. Hafner-Burton, Kiyoteru Tsutsui, & John W. Meyer, *International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties*, 23 *INT'L SOC.* 115, 115 (2008).

<sup>109</sup> V.C.L.T., *supra* note 104, at art. 27.

<sup>110</sup> CAPONERA, *supra* note 29, at 70.

<sup>111</sup> *Id.* at 71.

its domestic state courts in the decades that followed.<sup>112</sup> China joined the WTO in 2002, the same year that it reiterated state ownership of all of its water resources.<sup>113</sup>

Canada, Mexico, and the United States addressed the status of “water in its natural state” in a 1993 joint statement intended to “correct false impressions”:

The NAFTA creates no rights to the natural water resources of any Party to the Agreement.

Unless water, in any form, has entered into commerce and become 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*.

International rights and obligations respecting water in its natural state are contained in separate treaties and agreements negotiated for that purpose. Examples are the United States-Canada Boundary Waters Treaty of 1909 and the 1944 Boundary Waters Treaty between Mexico and the United States.<sup>114</sup>

This statement, while not authoritative to GATT, nonetheless reveals state practice. As one author observes, the statement “left as much open to question as it possibly could have” while addressing Canada’s concerns about the potential vulnerability of its water to export demands.<sup>115</sup> It is initially difficult to reconcile the claim that nothing in NAFTA would oblige a party “to begin exporting

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<sup>112</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; Mary W. Blackford, Comment, *Putting the Public’s Trust Back in Zoning: How the Implementation of the Public Trust Doctrine Will Benefit Land Use Regulation*, 43 HOUSTON L. REV 1212, 1220-24 (2006), available at [http://www.houstonlawreview.org/archive/downloads/43-4\\_pdf/Blackford.pdf](http://www.houstonlawreview.org/archive/downloads/43-4_pdf/Blackford.pdf).

<sup>113</sup> CAPONERA, *supra* note 29, at 101.

<sup>114</sup> Statement, Governments of Canada, Mexico and the United States (1993), available at [http://www.scics.gc.ca/cinfo99/83067000\\_e.html#statement](http://www.scics.gc.ca/cinfo99/83067000_e.html#statement) (emphasis added); see also WEISS, *supra* note 4, at 69.

<sup>115</sup> Howard Mann, Senior Int’l L. Advisor, Int’l Inst. for Sustainable Dev., Address Before I Seminario Latino-Americano de Políticas Publicas em Recursos Hidricos: International Economic Law: Water for Money’s Sake? 4 (Sept. 22, 2004), available at [www.howardmann.ca/pdfs/WaterandInternationaleconomiclaw.pdf](http://www.howardmann.ca/pdfs/WaterandInternationaleconomiclaw.pdf) (This paper was prepared for and presented at I Seminario Latino-Americano de Políticas Publicas em Recursos Hidricos, which was held in Brazil on September 22, 2004).

water in any form” with the implication that water is subject to that agreement if it has entered into commerce and become a good or product. That is, if Canada decides to use (i.e., convey use rights for) its water domestically, wouldn't NAFTA and GATT article XI then oblige Canada to permit the export of that water?

These two assertions can be reconciled if the first sentence is treated as tautology: Water is covered by a trade agreement only if it has *both* entered into commerce *and* become a good or product. In short, water is a product under GATT only if it has entered commerce as a product. And, as argued below, only a state can make this conceptual determination.

A 1999 submission by the Deputy United States Trade Representative to the International Joint Commission similarly argues that “the WTO simply has nothing to say regarding the basic decision by governments on whether to permit the extraction of water from lakes and rivers in their territory.”<sup>116</sup> Importantly, this extraction is exceedingly ordinary; states routinely satisfy their domestic water needs by using their water resources both commercially and non-commercially. If extraction compelled export, the WTO would have a very large say indeed.<sup>117</sup>

The 1999 submission also describes how other states have addressed water without invoking the agreements or institutions of the WTO:

Indeed, there is no indication in the negotiating history of, or over 50 years of practice in, the General Agreement on Tariffs and Trade and the WTO that governments have ever suggested that international law governing water rights and water management should be modified or superseded in any way through the application of international trade rules. This is hardly surprising given the fact that water resource management issues have been and continue to be addressed through specific water rights treaties between the countries where the watercourses are located.

Given the web of bilateral, regional, and international treaties governing water rights and obligations between WTO member governments, as well as the sovereign interest of all governments in managing the water resources in their territories, we

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<sup>116</sup> Letter from the Deputy U.S. Trade Representative to the International Joint Commission (Nov. 24, 1999), in *PROTECTION OF THE WATERS OF THE GREAT LAKES: FINAL REPORT TO THE GOVERNMENTS OF CANADA AND THE UNITED STATES* app. 8, at 65 (2000), available at <http://www.cglg.org/projects/water/docs/IJC2000Report.pdf>.

<sup>117</sup> Compare with Mann, *supra* note 115, at 6 (suggesting instead that there is no “definitive answer on this ‘tripwire’ problem”).

consider it highly improbable that any government would seek to bring international water rights issues before the WTO. Even more extraordinary would be such a claim by a country that has no territorial nexus to the watercourse at issue. Over the past 50 years, there has been no shortage of disputes between governments around the world over water rights claims. Notwithstanding that fact, no government seeking access to water resources controlled by another nation has ever sought to bring the matter before the GATT or the WTO. We do not expect that situation to change.<sup>118</sup>

This subsection has argued that water has no business in GATT, because its parties could not have intended to so diminish the public ownership they have consistently asserted over this resource. Under the rules of customary international law governing the interpretation of treaties, water cannot be a “product” for the purposes of GATT.

Nonetheless, some countries and commentators have acknowledged that water *in some forms* may be subject to the disciplines of GATT. The next subsection argues that the line between resource and product must be a national determination.

#### F. *Drawing Lines*

Under the approach explained above, water cannot be a product when it is a resource. However, water is found in many articles of commerce that *are* treated as products—from bottled water to juice to milk. Moreover, a number of agricultural and other products use a significant amount of water for their production: one ton of grain requires one thousand tons of water,<sup>119</sup> and an “automobile coming off the assembly line . . . will have used at least 120,000 litres of water—80,000 to produce its tonne of steel and 40,000 more for the actual fabrication process.”<sup>120</sup>

Water is listed in the World Custom Organization’s Harmonized Commodity Description and Coding System (HS); heading 22.01 includes “waters, including natural or artificial mineral and aerated waters, not containing added sugar or other sweetening matter or flavored; ice and snow”—to which an explanatory note

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<sup>118</sup> Letter from the Deputy U.S. Trade Rep. to the Int’l Joint Comm’n, *supra* note 116.

<sup>119</sup> LESTER R. BROWN ET AL., *THE EARTH POLICY READER* 42 (2002).

<sup>120</sup> The Management of Water: Water Use—Industrial Use, ENVIRONMENT CANADA, [http://www.ec.gc.ca/Water/en/manage/use/e\\_manuf.htm](http://www.ec.gc.ca/Water/en/manage/use/e_manuf.htm) (last visited Apr. 14, 2009).

adds "ordinary water of all kinds (other than sea water)."<sup>121</sup> However, as the Canadian Department of Foreign Affairs and International Trade stresses, the HS "does not tell us if and when water is a [product]; it only tells us that when water is classified as a [product], it falls under a particular tariff heading."<sup>122</sup>

What *does* tell us if and when water is a product? Some authors have suggested criteria relating to the quantity of water transferred, the means of transfer, the degree of human intervention, the nature of the transfer agreement, and the financial aspects of the transaction.<sup>123</sup> For example, application of GATT's trade disciplines might depend on "whether the payment is for the actual water or for the delivery of the water, in which case it constitutes a trade in services."<sup>124</sup>

The more relevant question, however, is not *what* should distinguish water as a resource from water as a product but rather *who* should make that distinction. Because of the public-ownership consensus, each state necessarily retains that prerogative. Acting as a sovereign or as a trustee, each state regulates whether, when, where, how, how much, by whom, and for what purpose the water from its water resources is used. The thrust of the public-ownership consensus is therefore that a paramount public interest exists in controlling and by implication *defining* national water resources. Much like a national-security exception,<sup>125</sup> this consensus recognizes a sphere of activity that is insulated from international economic regulation. GATT "simply has nothing to say" about a

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<sup>121</sup> WEISS, *supra* note 4, at 67 (citing World Customs Organization, Harmonized Commodity Description and Coding System: Explanatory Notes (3d ed. 2002)).

<sup>122</sup> Bulk Water Removals and International Trade Considerations: Document from the Canadian Department of Foreign Affairs and International Trade (November 16, 1999), in PROTECTION OF THE WATERS OF THE GREAT LAKES, *supra* note 116, at 67.

<sup>123</sup> See, e.g., WEISS, *supra* note 4, at 68, 69; Esther J. de Haan, *Balancing Free Trade in Water and the Protection of Water Resources in GATT*, in THE SCARCITY OF WATER: EMERGING LEGAL AND POLICY RESPONSES, *supra* note 22, at 245, 248-49; HILDERING, *supra* note 18, at 111.

<sup>124</sup> HILDERING, *supra* note 18, at 111. One author has implicitly suggested that water might not constitute a product until it has actually been traded between states. See WEISS, *supra* note 4, at 68 ("Should the diversion or pumping cross national borders, it would be subject to the trade disciplines."). This approach, which would in effect apply GATT article I but negate GATT article XI, must be premised on some differentiation between domestic and international water transfers. The public-ownership consensus could supply a basis for this differentiation: An article might not constitute a product until it enters commerce, and water might not enter commerce until it is alienated from its national public owners.

<sup>125</sup> See, e.g., GATT art. XXI.

predominately noneconomic sphere that is subject to paramount state interests.<sup>126</sup>

If states determine the scope and status of their water resources, then water is not a product unless the state in which it momentarily resides treats it as such. A state might narrowly define its water resources as encompassing only major lakes and rivers, or it might expansively define them as encompassing all water in all forms in or on its territory. GATT's disciplines apply to everything beyond but nothing within that state-defined sphere of water resources.

This is not to suggest that state discretion is without bounds. States have *explicitly* situated certain articles within the ambit of international economic law. For example, the Agreement on Agriculture reaches agricultural products even if they contain or were produced with a significant amount of water. Similarly, a state could elect to list its water sector in a schedule under the General Agreement on Trade in Services (GATS). Notably, however, no state had done so as of 2004.<sup>127</sup> Beyond the WTO, states have also explicitly assumed a number of water-related obligations grounded in international human rights law and international environmental law.<sup>128</sup> These obligations may well require states to permit the "export" of water to satisfy basic human needs or prevent damage to a downstream habitat.<sup>129</sup>

In short, states could certainly globalize or privatize their water resources as well as the management of those resources. However, the established, widespread, and consistent assertion by states of public ownership over their water resources combined with the lack of specificity in GATT strongly suggests that they have not done so through this component of international economic law.

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<sup>126</sup> Robert J. Girouard, *Water Export Restrictions: A Case Study of WTO Dispute Settlement Strategies and Outcomes*, 15 GEO. INT'L ENVTL. L. REV. 247, 260-61 (2003) (describing an "institutional approach" to determining the application of GATT to water).

<sup>127</sup> See Mann, *supra* note 115, at 10; see also WTO Services Database, WTO, <http://tsdb.wto.org> (last visited Apr. 14, 2009). A search of this database suggests that no state has bound its water services since 2004.

<sup>128</sup> See Status of Water Under Broader International Law, *supra* Part III.

<sup>129</sup> See, e.g., Roberto A. Sanchez, *Water Conflicts Between Mexico and the United States: Toward a Transboundary Regional Water Market?*, in THE SCARCITY OF WATER: EMERGING LEGAL AND POLICY RESPONSES, *supra* note 22, at 260, 260-67 (describing water conflicts between Mexico and the United States).

## IV. CONCLUSION

Water is unique. Perhaps because of its unique status in the world, water also enjoys a unique status in municipal and international law. Interpreting GATT in light of this public-ownership consensus suggests that water by itself is not a product for the purposes of that agreement. In addition, it is up to each state, acting in its role as sovereign or trustee, to determine when its water is transformed from a resource to a product. As a result, GATT should not preclude states from restricting the export of their water.

And yet it is common for GATT's trade disciplines not to apply to something that is anomalous or sensitive. The treaty provides explicit exceptions for measures "necessary to protect public morals" and "relating to the importations or exportations of gold or silver," among several others.<sup>130</sup> Nontangible commodities like currency are not generally considered products for the purposes of GATT.<sup>131</sup> The regime's application to agricultural products was limited for decades,<sup>132</sup> and oil still enjoys a *de facto* exemption. Natural air would also seem a rather unlikely candidate for trade disciplines.

The members of the WTO could agree to bring water under GATT's trade disciplines or to address it through another mechanism of international economic law; as described above, there are advantages to treating water as an economic good. They could also rely on other areas of international law concerning human rights, the environment, and sustainable development to account for the uneven global distribution of this fundamental natural resource. The public-ownership consensus may shift as states confront growing domestic, regional, and global water challenges. But regardless of whether states choose to globalize, retrench, or reassert this consensus, it is where they should begin.

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<sup>130</sup> See GATT art. XX. As discussed above, however, these exceptions do have limitations.

<sup>131</sup> See Jacob Werksman, *Greenhouse Gas Emissions Trading and the WTO*, 8 REV. EUR. COMMUNITY & INT'L ENVTL. L. 251, 255 (1999) ("WTO Members understand products to be 'tangible' goods . . . Indeed, many forms of financial instrument, including currency, have been traded internationally for decades, but none have been considered to be 'products' for GATT purposes.").

<sup>132</sup> See MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 322 (3d ed. 2005).