

International Law Affecting Canada's Jurisdiction Over Water

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July 2018

Canada's jurisdiction over water is impacted by its international legal obligations arising from multilateral and bilateral agreements as well as customary international law. Four interrelated fields of international law are most relevant in this context: (1) international watercourse law, which governs the use and protection of transboundary water resources that Canada shares, mostly with the United States; (2) international environmental law related to the protection of biodiversity and ecosystems, mitigation of climate change, and protection and regulation of marine and fisheries; (3) international human rights law, and in particular the right to water; and (4) international trade law, regulating water-related international trade and investment. This information note sets out Canada's main obligations in these four areas of international law that affect its jurisdiction over water, with a particular focus on Indigenous water rights and interests where relevant.¹

¹ It is important to note that while Canada's ratification or accession to an international treaty obligates it to adhere to the norms and obligations contained in that treaty as a matter of international law (subject to any reservations), according to Canadian constitutional law there must be legislative action in order to incorporate Canada's international commitments into its domestic law. Such implementation may need to take place both at the federal and provincial levels. That said, even if an international treaty does not become part of domestic law it may still have interpretive authority in domestic courts. More information regarding the dualist system separating international treaties and domestic law in Canada is available on the Department of Justice Website (<https://www.unece.org/env/eia/eia.html>)

1. International Watercourse Law

1.1 Multilateral

Canada is a party to the 1991 *Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)*, which applies to certain inland waterways and ports for inland-waterway, certain groundwater abstraction activities or artificial groundwater recharge schemes, and certain works for the transfer of water resources between river basins.²

The *Convention* provides that each party shall, with respect to certain proposed activities that are likely to cause significant adverse transboundary impact, establish an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation.³ The *Convention* currently has limited application in Canada since the only neighbouring countries that are parties to it are Denmark (Greenland) and France (St. Pierre and Miquelon).⁴

Canada also signed, but has not yet ratified, the 1992 *Convention on the Transboundary Effects of Industrial Accidents*, which applies to the adverse effects of industrial accidents on water.⁵

Although Canada is not a party to the *Convention*, according to the Canadian government its objectives are consistent with the *Canadian Environmental Protection Act (CEPA)* and the *Environmental Emergency Regulations*. Moreover, Environment and Climate Change Canada

² United Nations Economic Commission for Europe, “Convention on Environmental impact Assessment in a Transboundary Context” Appendix I, Arts. 9, 12, 18. Full text of the convention at: https://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo_Convention_authentic_ENG.pdf

³ *Ibid* at Article 2(2).

⁴ “Transboundary environmental impact assessments: Espoo Convention” Government of Canada online, last modified August 10, 2017. <https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/transboundary-environmental-impact-assessments.html>.

⁵ UNECE *supra* note 2 at Art. 1(c)(2).

implements a pollution incident notification system concerning spills of hazardous substances in contravention of *CEPA* or the *Fisheries Act* and requires hazardous operations within Canada to maintain environmental emergency plans and to notify the public.⁶

There are also several international law principles governing the non-navigational uses of transboundary water resources that have acquired customary law status, and would therefore be binding on Canada as a matter of international law. These principles include the ‘equitable and reasonable utilization’ and ‘no significant harm’ principles and the ‘duty to cooperate’. The ‘equitable and reasonable utilization’ principle entitles each basin state to a reasonable and equitable share of a shared watercourse while taking into account the interests of other states sharing it. The ‘no significant harm’ principle prohibits states from using water resources in such a way as to cause harm to another state. The ‘duty to cooperate’ requires states sharing water resources to cooperate in the management and use of the resource.⁷

1.2 Bilateral

There are 79 treaties between Canada and the United States governing the use of transboundary water resources. These address such issues as navigation, diversions, dams,

⁶ “Convention on the Transboundary Effects of Industrial Accidents” Government of Canada online, last modified August 10, 2017. <https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/transboundary-effects-industrial-accidents.html>

⁷ These principles are set out in several prominent, yet non-binding, international instruments such as the 1966 *Helsinki Rules on the Uses of the Waters of International River*, the 2004 *Berlin Rules on Water Resources*, and the 2008 *Draft Articles on Transboundary Aquifers*, as well as in the binding 1997 *Convention on the Law of the Non-Navigational Uses of International Watercourses* and the 1992 *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*. However, Canada is not a signatory to these conventions.

pollution, irrigation, fisheries, and power.⁸ One of the main bilateral agreements is the *Boundary Waters Treaty*,⁹ which has been implemented in Canada through the *International Boundary Waters Treaty Act*.¹⁰ While the *Treaty* is silent on the issue of Indigenous water rights, the *Act* provides that “...nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of these rights in section 35 of the Constitution Act, 1982”.¹¹

In addition, the United States and Canada were reportedly scheduled to begin renegotiations of the *Columbia River Treaty* in early 2018,¹² following a treaty review process in the two countries. The Canadian review process included government-to-government consultations with First Nations, and both Canada and British Columbia have signed a Memorandum of Understanding to coordinate such consultations.¹³ The *Pacific Salmon Treaty* also provides that it “shall not be

⁸ Examples include the *Convention and Protocol Agreement Between Canada and the United States of America to Regulate the Level of Lake of the Woods*, Signed February 24, 1925, <http://www.treaty-accord.gc.ca/text-texte.aspx?id=100416>; *Treaty Between Canada and the United States of America Concerning the Diversion of the Niagara River*, Signed October 10, 1950, <http://www.treaty-accord.gc.ca/text-texte.aspx?id=100418>; *Agreement between the Government of Canada and the Government of the United States of America for Water Supply and Flood Control in the Souris River Basin*, Signed October 26, 1989, <http://www.treaty-accord.gc.ca/text-texte.aspx?id=100475&Lang=eng>; *Treaty Between Canada and the United States of America Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D’oreille River*, Signed April 2, 1984, <http://www.treaty-accord.gc.ca/text-texte.aspx?id=100403>; *Treaty between Canada and the United States of America Relating to Cooperative Development of the Water Resources of the Columbia River Basin*, Signed January 17, 1961, <http://engage.gov.bc.ca/columbiarivertreaty/resources/>.

⁹ “Treaty between the United States and Great Britain Relating to Boundary Waters, and Questions Arising between the United States and Canada” International Joint Commission online, signed May 5, 1910. http://ijc.org/en/_BWT.

¹⁰ “International Boundary Waters Treaty Act R.S.C., 1985, c. I-17” Government of Canada online, last modified June 28, 2018. <http://laws-lois.justice.gc.ca/eng/acts/i-17/index.html>.

¹¹ *Ibid* at Article 21.1.

¹² “Modernizing the Columbia River Treaty Regime”. US Department of State online, media note December 7, 2017. <https://www.state.gov/r/pa/prs/ps/2017/12/276354.htm>.

¹³ “Columbia River Treaty FAQ” Province of British Columbia online, accessed July 9, 2018 <http://engage.gov.bc.ca/columbiarivertreaty/faq/>.

interpreted or applied so as to affect or modify existing aboriginal rights or rights established in existing Indian treaties and other existing federal laws”.¹⁴ With respect to the Yukon River, the *Treaty* provides that “aboriginal fisheries in Yukon have priority over other fisheries in Yukon”.¹⁵ The 2012 *Great Lakes Water Quality Agreement* sets out “coordination” as a “guiding principle and approach”, which it defines as “developing and implementing coordinated planning processes and best management practices by the Parties, as well as among State and Provincial Governments, Tribal Governments, First Nations, Métis, Municipal Governments, watershed management agencies, and local public agencies”.¹⁶ The *Agreement* further provides that “the Parties commit themselves, in the implementation of this Agreement, to seek...the cooperation of State and Provincial Governments, Tribal Governments, First Nations, Métis, Municipal Governments, watershed management agencies, and other local public agencies in all pertinent matters”,¹⁷ for instance by inviting representatives to participate in the activities of the Great Lakes Executive Committee and the Great Lakes Water Quality Board.¹⁸

Finally, in 2000 Environment Canada (EA) and the United States Environmental Protection Agency (EPA) issued a *Joint Statement of Cooperation on the Georgia Basin and Puget Sound Ecosystem*.

While the *Joint Statement* is not legally binding, it outlines common goals and objectives and

¹⁴ “Treaty Between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon” Article XI. Pacific Salmon Commission online, accessed July 9, 2018, <http://www.psc.org/about-us/history-purpose/pacific-salmon-treaty/>.

¹⁵ *Ibid* at Annex IV, Chapter 8, Attachment B, Article 1(c).

¹⁶ “Protocol Amending the Agreement Between Canada and the United States of America on Great Lakes Water Quality 1978, as Amended on October 16, 1983 and on November 18, 1987” Article 4(e). International Joint Commission online, accessed July 9, 2018. http://www.ijc.org/en/_/Great_Lakes_Water_Quality.

¹⁷ *Ibid* at Article 4(3)(d).

¹⁸ *Ibid* at Articles 5(2) and 8(2).

provides context for federal agency collaboration on transboundary management of the Salish Sea ecosystem. Among other goals, the *Joint Statement* serves to recognize the special interests of First Nations and Tribes in this ecosystem.¹⁹

2. International Environmental Law²⁰

2.1 Biodiversity and Ecosystems

In 1993, Canada became a party to the *Convention on Biological Diversity (CBD)*, which defines “biological diversity” as “the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part”.²¹ The *CBD* requires each Party, subject to its national legislation, to

*...respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.*²²

¹⁹ The *Joint Statement of Cooperation* states that: “The Aboriginal people of the Georgia Basin and the indigenous inhabitants of Puget Sound have been stewards of the lands and resources in the Georgia Basin/Puget Sound region since time immemorial. And their knowledge, talents and energy should be part of the region’s future. To preserve and protect the region, we should work closely with representatives of the Aboriginal people of the Georgia Basin and the indigenous inhabitants of Puget Sound in an atmosphere of mutual respect so that their special knowledge and unique perspective can contribute to our common efforts”. “Joint Statement of Cooperation on the Georgia Basin and Puget Sound Ecosystem” Minister of Environment Canada and the Administrator of the United States Environmental Protection Agency, signed on January 19, 2000. For full text of the Joint Statement visit: https://www.epa.gov/sites/production/files/2015-09/documents/salish_sea_us-canada_soc_jan2000.pdf

²⁰ This section includes international legal instruments that directly relate to Canada’s water governance. Other international environmental law instruments that Canada is a party to but that do not explicitly address water include, for example, the 1948 *Canada-US Bilateral Agreement on Shellfish Sanitation* and the 1993 *North American Agreement on Environmental Cooperation*.

²¹“Convention on Biological Diversity” Article 2. United Nations, signed on December 29, 1993. <https://www.cbd.int/convention/text/>.

²² *Ibid* at Article 8(j).

Pursuant to its obligations under the *CBD*, Canada has developed its 2020 Biodiversity Goals and Targets, which rely on “meaningful, full and effective participation of Indigenous peoples, including First Nations, Inuit and Métis peoples”.²³ Target 15 provides that “[b]y 2020, Aboriginal traditional knowledge is respected, promoted and, where made available by Aboriginal peoples, regularly, meaningfully and effectively informing biodiversity conservation and management decision-making”.²⁴

Related to the *CBD* is the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol)*, which aims to help Indigenous and local communities to benefit from the use of their knowledge, innovations and practices.²⁵ Canada is not a party to the *Nagoya Protocol*, although it may become a party at any time through accession. There are currently laws and regulations at the federal, provincial, and territorial levels that cover some of the elements of access and benefit-sharing (ABS) for various genetic resources in Canada, but there is no single,

²³“Convention on Biological Diversity” Government of Canada online, last modified on August 10, 2017. <https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/biological-diversity-convention.html>.

²⁴“2020 Biodiversity Goals and Targets for Canada” Government of Canada online, last modified November 29, 2017. http://biodivcanada.ca/default.asp?lang=En&n=9B5793F6-1&offset=3#target_15.

²⁵ The objective of the *Nagoya Protocol* is: “the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.” “Nagoya Protocol on access to genetic resources and the fair and equitable sharing of benefits arising from their utilization to the Convention on Biological Diversity”. Secretariat of the Convention on Biological Diversity United Nations Environmental Programme (2011): 4. Full text of the Convention at: <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

comprehensive ABS system in place to govern access to genetic resources and associated traditional knowledge or to facilitate the sharing of benefits arising from their use.²⁶

Canada also ratified the 1971 *Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat*, which applies to “areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six meters”.²⁷ The 4th Strategic Plan 2016–2024 adopted by the 12th Meeting of the Conference of the Parties in June 2015 sets out as a priority area of focus for the *Convention* to “[s]trengthen and support the full and effective participation and the collective actions of stakeholders, including indigenous peoples and local communities, for the existence of sustainable, comprehensive and wise use of wetlands”.²⁸ To achieve this goal, the Strategic Plan sets out as a target:

*The traditional knowledge, innovations and practices of indigenous peoples and local communities relevant for the wise use of wetlands and their customary use of wetland resources are documented, respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention, with a full and effective participation of indigenous peoples and local communities at all relevant levels.*²⁹

²⁶ “Nagoya Protocol on access to genetic resources and benefit sharing” Government of Canada online, last modified August 10, 2017. <https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/nagoya-protocol-access-genetic-resources.html>.

²⁷ “Convention on Wetlands of International Importance especially as Waterfowl Habitat” Article 1. United Nations Scientific and Cultural Organization, Ramsar, 2.2.1971 as amended by the Protocol of 3.12.1982 and the Amendments of 28.7.1987. Full text of the Convention at: https://www.ramsar.org/sites/default/files/documents/library/scan_certified_e.pdf.

²⁸ “The 4th Strategic Plan 2016-2024” Adopted by the 12th Meeting of the Conference of the Parties at Punta del Este, Uruguay, 1-9 June 2015 through Resolution XII.2. (2015): 6, para. 31. Full text of the Strategic Plan, at: https://www.ramsar.org/sites/default/files/documents/library/4th_strategic_plan_2016_2024_e.pdf

²⁹ *Ibid* at Goal 3, Target 10, *Ibid*, p. 10.

In the Arctic context, Canada is a member of the Arctic Council, an intergovernmental forum that includes Indigenous Permanent Participants and works to promote sustainable development in the Arctic region, including economic and social development, improved health conditions and cultural well-being for Arctic peoples. The Council’s initiative to promote the traditional ways of life of Arctic Indigenous peoples includes a compendium of initiatives, programs, and polices considered by Arctic states and Indigenous Permanent Participant organizations to be a sampling of best practices.³⁰

2.2 Climate change

Canada ratified the *United Nations Framework Convention on Climate Change (UNFCCC)* in 1992, and the *Paris Agreement* in 2016. The *UNFCCC* requires parties to “[c]ooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture...”.³¹ The *Paris Agreement* calls on parties, when taking action to address climate change, to “respect, promote and consider their respective obligations on human rights”, including “the rights of indigenous peoples”,³² and acknowledges that adaptation action should be “based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems...”.³³

³⁰ “Keeping our traditions alive. Compendium of best practices in promoting the traditional ways of life of Arctic Indigenous peoples” (2015) Arctic Council. <https://oaarchive.arctic-council.org/handle/11374/435>.

³¹ “United Nations Framework Convention on Climate Change” (1992) Article 4(1)(e). United Nations. Full text of the Convention at: <https://unfccc.int/sites/default/files/conveng.pdf>

³² *Ibid* at Preamble.

³³ *Ibid* at Article 7(5).

2.3 Marine and Fisheries

In 2003, Canada ratified the 1982 *United Nations Convention on the Law of the Sea (UNCLOS)*, which requires parties to ensure the long-term sustainability of fish resources, contains rules for the protection and preservation of the marine environment, and imposes duties on states to protect the oceans from all sources of pollution.³⁴ Canada is also a party to the *UN Fish Stocks Agreement*, one of the implementing agreements of *UNCLOS*.³⁵ The *Agreement* recognizes “the need to avoid adverse impacts on, and ensure access to fisheries by, subsistence, small-scale and artisanal fishers and women fishworkers, as well as indigenous people in developing States, particularly small island developing States”, however this is set out as a “special requirement of developing states”.³⁶ Canada is also a party to the 2013 *Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic*,³⁷ and the 1972 *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*.³⁸ It is currently working with nine other nations towards the development of an international *Agreement on the Prevention of Unregulated Fishing in the High Seas of the Central Arctic Ocean*.³⁹

³⁴ “Law of the Sea: United Nations Convention”. Government of Canada online, last modified on August 10, 2017. <https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/law-sea-united-nations-convention.html>. Full text of the Convention at: <https://unfccc.int/sites/default/files/conveng.pdf>

³⁵ “The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks”. United Nations Division for Ocean Affairs and the Law of the Sea. Full text of the Agreement at: http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm.

³⁶ *Ibid* at Article 24(2)(b).

³⁷ Full text of the Convention at: https://oaarchive.arctic-council.org/bitstream/handle/11374/529/EDOCS-2068-v1-ACMMSE08_KIRUNA_2013_agreement_on_oil_pollution_preparedness_and_response_signedAppendices_Original_130510.PDF?sequence=6&isAllowed=y.

³⁸ Full text of the Agreement at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201046/volume-1046-I-15749-English.pdf>.

³⁹ “International Treaties and Agreements”. Fisheries and Oceans Canada online, last modified on July 13, 2016. <http://www.dfo-mpo.gc.ca/international/dip-trt-eng.htm>.

There are also non-binding international instruments that may provide guidance to Canada in its fisheries management activities. For instance, the United Nations Food and Agriculture Organization has developed a *Code of Conduct for Responsible Fisheries*, which provides that

*When deciding on the use, conservation and management of fisheries resources, due recognition should be given, as appropriate, in accordance with national laws and regulations, to the traditional practices, needs and interests of indigenous people and local fishing communities which are highly dependent on fishery resources for their livelihood.*⁴⁰

Canada adopted the *Code* in 1995,⁴¹ and in 1998 developed its own Code of Conduct for Responsible Fisheries based on the international version, but it did not include the above-mentioned provision.⁴²

3. International Human Rights Law

The human right to water has been recognized in many international instruments,⁴³ and has been viewed as complimentary to the right to life and human dignity enshrined in the non-binding yet influential *International Bill of Human Rights*.⁴⁴ Following are the main legally binding

⁴⁰ “Code of Conduct for Responsible Fisheries” (1995) Article 7.6.6. Food and Agriculture Organization. <http://www.fao.org/docrep/005/v9878e/v9878e00.htm>

⁴¹ “Code of Conduct for Responsible Fisheries” Fisheries and Oceans Canada online, last modified on February 3, 2009. <http://www.dfo-mpo.gc.ca/international/dip-cdcon-eng.htm>.

⁴² “Canadian Code of Conduct for Responsible Fishing Operations” Fisheries and Oceans Canada online, last modified on December 31, 1998. <http://www.dfo-mpo.gc.ca/fm-gp/policies-politiques/cccrfo-cccpr-eng.htm>.

⁴³ See, for example, Preamble, *Mar Del Plata Declaration of the United Nations Water Conference* (1977); Paragraph 18.47, *Agenda 21*, Report of the United Nations Conference on Environment and Development (1992); Principle No. 3, *The Dublin Statement on Water and Sustainable Development*, International Conference on Water and the Environment (1992); Principle No. 2, *Programme of Action of The United Nations International Conference On Population & Development*; UN Human Rights Council Resolution on Human Rights and Access to Safe Drinking Water and Sanitation, A/HRC/15/L.1 (24 September 2010); UNGA Resolution on the Human Right to Water and Sanitation, A/64/L.63/Rev.1 (26 July 2010); UNGA Resolution on The Future We Want, A/RES/66/288 (11 September 2012).

⁴⁴ For full text of the Bill at: <http://www.ohchr.org/Documents/Publications/Compilation1.1en.pdf>.

international human rights treaties to which Canada is a party and that address or give rise to the human right to water.

In 1970, Canada ratified the *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*.⁴⁵ While the *CERD* does not explicitly mention the human right to water, in its 2012 Concluding Observations, the Committee on the Elimination of Racial Discrimination⁴⁶ recommended that Canada, “in consultation with Aboriginal peoples, implement and reinforce its existing programmes and policies to better realize the economic, social and cultural rights of Aboriginal peoples, in particular through: (a) Speeding up the provision of safe drinking water to Aboriginal communities on reserves”.⁴⁷

In 1976, Canada became a party to the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. While the *ICESCR* also does not explicitly mention the human right to water, it requires parties to “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”,⁴⁸ and to “recognize the right of everyone to the enjoyment of

⁴⁵ For full text of the Convention at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

⁴⁶ The Committee on the Elimination of Racial Discrimination is a body of independent experts that monitors implementation of the *Convention on the Elimination of All Forms of Racial Discrimination* by its State parties. The Committee addresses its concerns and recommendations to the State parties in the form of “Concluding Observations”.

⁴⁷ “Concluding Observations of the Committee on the Elimination of Racial Discrimination” (CERD/C/CAN/CO/19-20) para. 19 (a). United Nations, Committee on the Elimination of Racial Discrimination. Eightieth session, February-March 2012
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fCAN%2fCO%2f19-20&Lang=en.

⁴⁸ “International Covenant on Economic, Social and Cultural Rights” (1966) Article 11(1). United Nations Human Rights Office of the High Commissioner. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>,

the highest attainable standard of physical and mental health”.⁴⁹ In 2002, the Committee on Economic, Social and Cultural Rights⁵⁰ issued General Comment No. 15,⁵¹ which provides that “[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”.⁵² The General Comment further states that this right “clearly falls within the category of guarantees essential for securing an adequate standard of living” under Article 11 of the *ICESCR*, and is “inextricably related to the right to the highest attainable standard of health” under Article 12 and to “the rights to adequate housing and adequate food” under Article 11.⁵³

Three international human rights treaties to which Canada is a party explicitly refer to water. The *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* provides that

*States parties shall take all appropriate measures to eliminate discrimination against women in rural areas...and, in particular, shall ensure to such women the right...[t]o enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication.*⁵⁴

The *Convention on the Rights of the Child* provides that

States Parties...shall take appropriate measures...[t]o combat disease and malnutrition...through, inter alia,...the provision of adequate nutritious foods and

⁴⁹ *Ibid* at Article 12(1).

⁵⁰ The Committee on Economic, Social and Cultural Rights is a body of 18 independent experts that monitors implementation of the *International Covenant on Economic, Social and Cultural Rights* by its States parties. The Committee also publishes its interpretation of the provisions of the *Covenant*, known as “General Comments”.

⁵¹ “Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights” General Comment No.15 (2002) The Right to Water. United Nations Economic and Social Council, E/C.12/2002/11. https://www.internationalwaterlaw.org/documents/intldocs/UNCECSR-General-Comment-right_to_water.pdf.

⁵² *Ibid* at Article 2.

⁵³ *Ibid* at Article 3.

⁵⁴ “Convention on the Elimination of all Forms of Discrimination Against Women” (1979). Article 14(2)(h). United Nations Entity for Gender Equality and the Empowerment of Women. Full text of the Convention at: <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

*clean drinking-water, taking into consideration the dangers and risks of environmental pollution.*⁵⁵

The *Convention on the Rights of Persons with Disabilities* provides that

*States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures: (a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs.*⁵⁶

Finally, while Canada originally voted against the non-binding *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, it endorsed the *Declaration* in 2010 by way of a Statement of Support.⁵⁷ In May 2016, the Minister of Indigenous and Northern Affairs announced Canada is now a full supporter, without qualification, of *UNDRIP*,⁵⁸ which provides that

*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*⁵⁹

⁵⁵ “Convention on the Rights of the Child” (1990). Article 24(2)(c). United Nations Human Rights Office of the High Commissioner. Full text of the Convention at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

⁵⁶ “Convention on the Rights of persons with Disabilities” (2006). Article 28(2)(a). United Nations Department of Economic and Social Affairs, division for Inclusive Development. Full text of the Convention at: http://www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf.

⁵⁷ “ARCHIVED: Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples” Indigenous and Northern Affairs Canada online, last modified on July 30 2012. <https://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>.

⁵⁸ “United Nations Declaration on the Rights of Indigenous Peoples”. Indigenous and Northern Affairs Canada online, last modified on August 8, 2017. <https://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958>.

⁵⁹ “United Nations Declaration on the Rights of Indigenous Peoples” (2008). Article 32(2). United Nations (March 2008). Full text of the Declaration at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

4. International Trade Law

Canada is a party to free trade agreements (FTAs), foreign investment promotion and protection agreements (FIPAs), plurilateral agreements, and World Trade Organization (WTO) agreements.⁶⁰

These agreements may give rise to legal obligations in relation to water trade, investment, and services, and thereby impact Canada’s jurisdiction over its water resources.⁶¹

Canada’s obligations under the WTO rules and trade agreements such as the *North American Free Trade Agreement (NAFTA)* and the *Canada-EU Comprehensive Economic and Trade Agreement (CETA)* may limit its ability to protect water resources and impose restrictions on its import and export. These obligations apply to bottled water exports, while trade in bulk water has yet to be accepted in Canada.⁶² Nonetheless, attempts to introduce export bans on Canada’s water could be challenged under the WTO and *NAFTA*.⁶³ There is also no protection of Indigenous land or water rights in *NAFTA* or other trade and investment agreements Canada is a party to.⁶⁴ Moreover, while *NAFTA* includes a general exceptions clause for the protection of natural resources and public health in relation to trade in goods and technical barriers to trade, there is no such general exception for Chapter 11, which applies to investments.⁶⁵ Chapter 11, as well as

⁶⁰ “Trace and investment agreements” Government of Canada online, last modified on May 29, 2018. <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng>.

⁶¹ A detailed analysis of Canada’s obligations under these various agreements is beyond the scope of this Note.

⁶² Maude Barlow, “Water for Sale: How Free Trade and Investment Agreements Threaten Environmental Protection of Water and Promote the Commodification of the World’s Water” *The Council of Canadians*. (2017): 9. <https://canadians.org/sites/default/files/publications/waterforsale.pdf>

⁶³ *Ibid* at 10.

⁶⁴ *Ibid* at 7.

⁶⁵ Nathalie Bernasconi-Osterwalder & Edith Brown Weiss, “International Investment Rules and Water: Learning from the NAFTA Experience” in Edith Brown Weiss, Laurence Boisson de Chazournes, and Nathalie Bernasconi-Osterwalder, eds, *Fresh Water and International Economic Law* (OUP, 2005): 265.

other investment agreements, also grant rights to investors to directly sue the Canadian government in Investor-State Dispute Settlement processes for violation of their rights. In the water context, investors have challenged Canada under *NAFTA* for provincial water protection legislation and prohibition on bulk water exports, as well as for violating an investor’s “water and timber rights”.⁶⁶ Some trade and investment agreements also apply to services, including private water services, which may affect Canada’s governance and regulation of water. While Canada and the European Union exempted the collection, purification and distribution of drinking water in *CETA*, this exemption applies only to market access and national treatment, and not to investment.⁶⁷

Conclusion

Canada’s jurisdiction over water is affected by its international environmental, human rights, and trade obligations. Some of these obligations, such as those arising in the international watercourses context to prevent transboundary harm and conduct environmental impact assessments of activities that might cause such harm, or in the marine context to prevent pollution, are of a general nature and do not specifically address Indigenous water issues. Other more specific obligations under bilateral agreements with the United States or multilateral

⁶⁶ *Sun Belt Water Inc. v Government of Canada*, filed in 1998, in which a US investor is challenging British Columbia water protection legislation and prohibition on bulk water exports from the province, claiming \$10.5 billion (pending); *AbitibiBowater v Government of Canada*, filed in 2009, in which a US investor sued the provincial government of Newfoundland and Labrador over legislation to return the company’s water use and timber rights to the crown and to expropriate certain AbitibiBowater lands and assets associated with the water and hydroelectricity rights (the Canadian government paid AbitibiBowater \$131 million in settlement), Canadian Centre for Policy Alternatives, “NAFTA Chapter 11 Investor-State Disputes (to January 1, 2015)”, https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2015/01/NAFTA_Chapter11_Investor_State_Disputes_2015.pdf.

⁶⁷ Barlow, *supra* note 79 at 19.



environmental treaties do take into account, and provide some protection of, Indigenous interests, as do some of the international human rights treaties Canada is a party to. Some gaps remain, however, such as Canada's reluctance to join the *Nagoya Protocol*, its failure to include the rights and interests of Indigenous peoples in its *Code of Conduct for Responsible Fisheries*, the absence of explicit reference to Indigenous peoples in some human rights instruments protecting the right to water, and the lack of protection for water in general, and Indigenous water rights in particular, in Canada's trade and investment agreements.