

Sack
Goldblatt
Mitchell
Barristers
& Solicitors

312 Cooper St.
Ottawa, Ontario
K2P 0G7

Tel: (613) 233-4897
Fax: (613) 237-3359
E-mail: stevenshrybman@sgmlaw.com

20 Dundas St. West, Suite 1130
P.O. Box 180
Toronto, Ontario
M5G 2G8

Tel: (416) 977-6070
Fax: (416) 591-7333

April 18, 2005

Dr. Martha Spiess
7 Tidal Brook Road
Freeport, Me
04032

Dear Dr. Spiess:

Re: Spring Water Use Agreement and License

You have asked us to comment on the potential application of international trade law to a contract between the State of Maine and a private company to take water from the Range Pond State Park.

While poorly understood, US obligations under the *North American Free Trade Agreement* ("NAFTA") and other international trade, investment and services treaties have direct application to the actions of state and municipal governments. Moreover, under NAFTA investment rules (and those of similar treaties), a foreign investor has the right to claim damages before an international tribunal where it alleges that a government has acted in breach of those rules.

These claims may relate to government measures that are entirely lawful under US and state laws, such as those relating to the management of state natural resources, including water. In exercising its lawful authority, it is not possible for a government to contract out of, or otherwise foreclose the right of foreign investors to make such trade agreement based claims.

Allowing such rights of private enforcement is a relatively recent development, but recourse to these extraordinary dispute procedures is now becoming an increasingly common phenomenon. Over 35 claims have now been brought under NAFTA investment rules, including several against the United States. One dispute, which is now ongoing, involves a challenge to California groundwater protection measures.¹

¹ IISD publication

We have reviewed a copy of the Spring Water Use Agreement and License (the "Agreement") entered into between the State of Maine and Great Spring Waters of America Inc., dated August 2, 1999. As we understand it, under this Agreement the company, which operates under the business name of Poland Springs, is authorized to take water from certain facilities and sites in the State Park. It may do so for the entire term of the Agreement, which is to continue for a period of 30 years and may be renewed for two further periods of ten years each. The Agreement establishes the fees payable by Poland Springs and deals with various matters, including the resolution of disputes arising under the Agreement.

There are two fundamental points to appreciate about this Agreement when considered in light of US obligations under NAFTA investment rules and similar investment treaties.

The first is that the Agreement is subject to the requirements of these international agreements. There is no question whatsoever that under NAFTA, the Agreement at issue would be considered a government "measure" and therefore subject to the provisions of this treaty. Moreover, we are aware of no exception or reservation that would moderate the full application of NAFTA investment rules to Maine's agreement with Poland Springs.

The second is that if a conflict arises between the provisions of the Agreement and those of international trade law, the latter would prevail. Moreover, the State has no authority to alter the rights of foreign investors under international law, either by law, regulation or contract.

To illustrate this point, consider section 10.7 of the Agreement, that requires any disputes arising under the Agreement to be resolved in accordance with the laws of Maine and in the State courts. However, it is clear that this provision would not prevent a foreign investor from making a claim relating to its investment in the water-taking enterprise before an international arbitral tribunal, even where it might otherwise have a claim under the contract, and neither the State nor the federal government would have any power to prevent it from asserting this right. Moreover, if such a claim were brought, it would be decided in accordance with international, not US law.

A recent decision by an appellate body operating under the auspices of the International Center for the Settlement of Investment Disputes, and concerning a water privatization project in Argentina, resolves any doubt about the priority of international investment law in such a case. In that case, which also involved an international water conglomerate, similar contract provisions had been negotiated, but when a dispute arose, the foreign investor ignored the local courts in favour of making a claim under an international investment treaty similar to those which bind the United States.


It is possible to foresee disputes arising between Maine and Poland Springs in several ways. For example, the State may decide to cancel the license because of non-performance by Poland Springs, or may regret the open-ended nature of the license it has given and seek to impose stricter limits on water takings because of competing demands upon the State's water resources or for conservation reasons. In either case, Poland Springs may have a claim for damages arising under the contract. But it may also have a claim under international investment law quite independent of its contract rights, including a claim that the State has effectively expropriated its investment.

Poland Springs may also expect that an international tribunal will be more sympathetic to such a claim than would a state court, or that its interests are better protected under international law. For either or both reasons, it may decide to proceed in an international rather than domestic forum.

It is not, of course, possible to predict the likelihood of such a claim arising, and the right to initiate such a claim would depend upon Poland Springs being able to claim the status of being a foreign investor, resident in a jurisdiction with which the US had negotiated an investment treaty. In this regard, we understand that Great Springs of America Inc. is in fact a subsidiary of Nestle Inc., and could readily qualify as an investor under NAFTA or one of several other like treaties the US has negotiated over recent years.

There is much more that might be said about the nature of the risks posed by the new generation of international trade agreements for state and local governments. We trust, however, that this broad overview will make the point that it is best for these risks to be thoroughly assessed before commitments are made that may expose governments to the onerous claims that private investors may now assert under these regimes.

Yours very truly,


Steven Shrybman *puller*

SS/lbr

F:\DOCS\SHRYBMAN\NYO\00033743.DOC