

# Sustainability in the Mining and Forest Sectors – A NAFTA Perspective

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## Relevance of NAFTA



- **Sustainable Development in NAFTA Preamble**
- **NAFTA Export Tax and Export Restriction Regime**
- **NAFTA Chapter Eleven**

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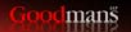
## NAFTA Export Tax and Export Restriction Regime



- **Tougher than GATT 1994 in restricting measures to curtail exports**
- **Genesis in Canadian oil policy from 1973 – 1984**
  - Two price system with made in Canada price
  - Export tax
  - Restrictions on Exports
  - Subsidy to importers in Eastern Canada

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## Canada – U.S. FTA Negotiations



- **Prohibited export taxes (GATT does not)**
- **Requirements additional to GATT requirements for valid export restrictions**
  - Proportionality requirement
  - No mandated two-price system
  - No disruption of normal channels of supply
- **Target was oil, but extended to all goods**
- **Carried forward into NAFTA**

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## Mining and Forest Sectors



- **Mining Sector – all products subject to NAFTA export regime**
- **Forest Products**
  - Forest products other than softwood lumber – pulp, newsprint, hardwood – subject to NAFTA export regime
  - Softwood Lumber – subject to its own regime that turns NAFTA export regime on its head

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## NAFTA Export Regime and Sustainable Development



- **Proportionality requirement could be significant for oil and gas in an “energy crisis”**
- **NAFTA restrictions unlikely relevant for sustainable development in mining sector or non-softwood lumber forest sector**
  - No analogue to an “energy crisis”
  - Export taxes and export restrictions not useful policy instruments for these products

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## Softwood Lumber

Goodman's

- **Log export restrictions permitted and imposed**
- **Principal market for Canadian softwood lumber is U.S.**
- **Objective of U.S. industry and, by extension, U.S. Government is to restrict Canadian market share through**
  - Trade remedy actions
  - Managed trade deals

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## History of Softwood

Goodman's

- **1982 – trade remedy - Lumber I**
- **1986 – trade remedy - Lumber II**
- **1986 to 1991 – managed trade – 15% export tax**
- **1991 to 1996 – trade remedy - Lumber III**
- **1996 to 2001 – managed trade – export charges over agreed export quota**
- **2001 to 2006 – trade remedy – Lumber IV**
- **2006 onward – managed trade – export charges and quotas under Softwood 2006**

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## NAFTA Regime/Softwood 2006

Goodman's

- |   |  |
|---|--|
| <ul style="list-style-type: none"><li>■ <b>NAFTA Regime</b><ul style="list-style-type: none"><li>• Prohibits export charges</li><li>• Export restrictions must be GATT consistent</li><li>• Proportionality based on actual market share and sets minimum export limit</li><li>• Regime intended to level playing field between Canadian and U.S. consumers of Canadian goods</li></ul></li></ul> | <ul style="list-style-type: none"><li>■ <b>Softwood 2006</b><ul style="list-style-type: none"><li>• Imposes export charges</li><li>• GATT irrelevant – regions free to choose</li><li>• Proportionality arbitrary and sets maximum export limit</li><li>• Regime benefits U.S. producers by imposing disadvantage on U.S. consumers of Canadian softwood</li></ul></li></ul> |
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## Softwood and Sustainable Development

Goodman's

- **Log export restrictions – motivated by job creation rather than conservation**
- **Softwood 2006**
  - On U.S. side – encourages use of a limited domestic resource through restricting access to imports
  - On Canadian side – any benefit through reduced U.S. market offset by market distortion

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## NAFTA Chapter Eleven

Goodman's

- **Protects U.S. investors and their investments**
  - National treatment and most-favoured-nation treatment
  - Fair and equitable treatment
  - Expropriation compensated at fair value
  - Prohibits certain performance requirements
- **Investor/state procedures**

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## Chapter Eleven Track Record

Goodman's

- **Softwood Lumber Case – Pope & Talbot**
  - Concerned administration of 1996 softwood lumber agreement
  - Investor lost all claims but one minor claim based on “fair and equitable” treatment
  - Tribunal’s interpretation superseded by agreed interpretation
  - No sustainable development implications

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■ **Chapter Eleven “environmental” cases**

- *Ethyl Corporation* – ban on MMT – case never decided
- *S.D. Myers* – ban on PCB exports – investor won, but measure clearly protectionist
- *Metalclad* – only finding of expropriation – measure ostensibly “environmental but value of investment obliterated
- *Methanex* – investor lost challenge of MBTE ban and forced to pay significant costs

- **Reference to promoting sustainable development in NAFTA preamble could affect interpretation of Chapter Eleven provisions**

- **NAFTA does not promote sustainable development but does not impede it**
- **Effect of the Softwood 2006 managed trade regime on sustainable development likely negative**