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

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

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

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

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
**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**

- 1982 – trade remedy - Lumber I
- 1986 – trade remedy - Lumber II
- 1986 to 1991 – managed trade – 15% export tax
- 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**

- **NAFTA Regime**
  - Prohibits export charges
  - Export restrictions must be GATT consistent
  - Proportionality based on actual market share and sets minimum export limit
  - Regime intended to level playing field between Canadian and U.S. consumers of Canadian goods

- **Softwood 2006**
  - Imposes export charges
  - GATT irrelevant – regions free to choose
  - Proportionality arbitrary and sets maximum export limit
  - Regime benefits U.S. producers by imposing disadvantage on U.S. consumers of Canadian softwood

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**Softwood and Sustainable Development**

- 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**

- 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**

- **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
Chapter Eleven Track Record

- **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

Conclusion

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