Sustainability in the Mining and Forest Sectors – A NAFTA Perspective

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Introduction

The topic of this section of the program is Sustainability in the Mining and Forest Sectors. Later in the program a panel of international trade experts will discuss Sustainability and International Trade. The purpose of this paper is not to pre-empt this later panel, but rather, to identify some of the anomalies that have been created by provisions that are unique to the *North American Free Trade Agreement*[1] as they relate to the mining and forestry sectors.

NAFTA is a trade agreement, a trilateral investment treaty and an intellectual property convention all rolled into a single treaty. Trade agreements and investment treaties exist primarily to promote trade and investment by reducing trade barriers, imposing non-discrimination requirements and, in the case of investment treaties, protecting property rights. Intellectual property conventions also protect property rights by requiring member states to enshrine intellectual property protection in their domestic law.

The NAFTA Preamble states that the NAFTA Parties, namely Canada, the United States and Mexico, resolve to promote sustainable development. While this is not without significance, the primary purpose of NAFTA is to promote trade and investment by imposing limits on the measures that governments can adopt to pursue policy objectives. If sustainable development is an objective of the federal or a provincial government, the question raised by NAFTA is not what NAFTA does to promote sustainability, but rather, what constraints does NAFTA impose on the measures that a government, whether federal or provincial, may adopt to fulfil the objective of sustainable development.

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1 *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

It must be emphasized that NAFTA only has relevance to measures (i.e. laws, regulations, rules, guidelines and the like) that governments adopt. NAFTA does not govern the actions of private parties such as individual forestry or mining companies. Actions of such companies, whether consistent or inconsistent with the objective of the sustainable development and exploitation of a resource, fall wholly outside the purview of NAFTA.

This paper will begin by briefly discussing the significance of the resolution of the Parties contained in the NAFTA Preamble to promote sustainable development. The paper will then address the substantive NAFTA trade-in-goods provisions that have an impact on the ability of Canadian governments to adopt measures to promote sustainable development in the mining and forestry sector. The paper will address the anomalous situation of softwood lumber that have arisen from the long and acrimonious relationship between the United States and Canada in trade in softwood lumber products. The paper will conclude with a brief examination of the provisions of the investment chapter on the ability to maintain measures promoting sustainable development.

I. Sustainable Development in the NAFTA Preamble

The single direct reference to sustainable development in NAFTA is in the Preamble, which includes the following statement:

> The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to:
>
> PROMOTE sustainable development…

Statements in the preambles to treaties have meaning because they provide context that must be taken into account when interpreting treaty provisions.[2] By itself, the inclusion of "PROMOTE sustainable

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[2] The article 31(1) of the *Vienna Convention on the Law of Treaties*, 23 May, 1969, 1115 U.N.T.S. 331, 8 I.L.M. 679 (entered into force 27 January 1980) reads: "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" [emphasis added]. Article 31(2) expressly states that the "context" includes the preamble of the treaty. The articles 31 and 32 of the *Vienna Convention on the Law of Treaties* have been consistently used by WTO panels and the Appellate Body, as well as by NAFTA panels and tribunals, as the basis for treaty interpretation. The

development" in the Preamble means nothing. However, the inclusion of promoting sustainable development as a resolution of the NAFTA Parties could influence the manner in which a substantive NAFTA provision is interpreted. This is particularly significant as regards the substantive provisions of NAFTA's controversial investment chapter discussed below.

II. Effect of NAFTA Trade in Goods Provisions on Measures to Promote Sustainable Development in the Mining and Forestry Sector

The only effect that the NAFTA provisions respecting Trade in Goods has on the ability of Canadian Governments to adopt measures to promote sustainable development in the mining and forestry sectors is that NAFTA imposes a somewhat more restrictive regime as regards export measures than otherwise exists under international trading rules.

While the *General Agreement on Tariffs and Trade*[3] permits export charges and does not impose limits upon them, NAFTA prohibits export charges on exports to another NAFTA Party unless similar charges are imposed on exports to all NAFTA Parties as well as on goods destined for domestic consumption.[4]

NAFTA also imposes conditions on the use of certain exceptions under GATT 1994 that may be used to justify export restrictions that would otherwise be prohibited.[5] The most significant exception for the purposes of sustainable development is the exception in Article XX(g) of GATT 1994 that permits measures relating to the conservation of exhaustible natural resources provided that they are enacted in conjunction with restrictions on domestic production or consumption. NAFTA Article 315 imposes three conditions on the use of this exception

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inclusion of a resolution to promote sustainable development could also be considered as relevant to the "object and purpose" of NAFTA.

3 *General Agreement on Tariffs and Trade 1994*, 15 April 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 [*GATT 1994*].

4 NAFTA, art. 314. This provision is repeated for energy goods in NAFTA, art. 604.

5 Art. XI:1, GATT 1994 prohibits import and export restrictions. However, there are several exceptions set out in art. XI:2, GATT 1994 and further exceptions set out in art. XX, GATT 1994.

to justify an export restriction.[6] First, shipments of the good in question for domestic production must be reduced proportionally to shipments of the good to other NAFTA Parties. Second, higher prices cannot be imposed on exports than the price charged domestically. Third, normal channels of supply cannot be disrupted.

These provisions were carried forward into NAFTA from the *Canada-United States Free Trade Agreement* ("CUFTA"), with Mexico opting out of NAFTA Article 315. The provisions were subject to great criticism at the time the CUFTA was adopted, with opponents characterizing them as a sell-out of Canada's resources.

A. The Origin of the NAFTA Conditions

The origin of these NAFTA conditions that apply to export restrictions is rooted in U.S. objections to the policy pursued by the Canadian Government between 1973 and 1984 in response to the oil crises of 1978–1974 and 1979–1980. As an initial response to the first oil crisis in 1973–1974, the Canadian Government opted for a two-price policy, with a world price for exports and a lower made-in-Canada price for domestic consumption. In order to prevent domestic oil producers from exporting all their production to secure the higher world price, the Canadian Government imposed an export tax equal to the difference between the made-in-Canada price and the world price. The proceeds of export tax, together with proceeds from an excise tax on gasoline were used to establish an Oil Import Compensation Fund to ensure that users in Eastern Canada, who relied on Venezuelan oil, paid the made-in-Canada price rather than the world price. During the late 1970s, the National Energy Board sharply curtailed shipments of light crude to the United States.

The objective of the U.S. negotiators of the CUFTA, who were supported by Canadian oil producers, was to ensure that the program just described would never be repeated. While the prohibition of export charges and the conditions imposed on the use or export restrictions was directed at a specific program respecting a specific product, the application of the export charge prohibition and the conditions were extended to all goods, including those of the mining and forestry sectors.

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[6] These conditions are repeated specifically for energy goods in NAFTA, art. 605.

Canada's oil policy during the 1973–1984 period, while motivated by the two oil crises, was hardly a model of sustainable development. The imposed made-in-Canada price, which was the result of a political decision to shield Canadians from escalating world prices, encouraged consumption and discouraged exploration and development. The Oil Import Compensation Fund subsidized the use of oil. The question relevant to the issue of sustainability that arises is whether the CUFTA and NAFTA provisions that were adopted to prevent the reimposition of these measures themselves impede Canada's ability to adopt measures that promote sustainable development.

B. Export Charges and Promoting Sustainable Development

Except with oil and softwood lumber, export taxes and export charges are little used policy instruments by Canadian Governments. Export taxes and export charges have never been used as policy instruments to promote sustainable development. In my view, the surrender under NAFTA of the ability to use export charges has minimal effect on the ability of Canadian Governments to promote sustainable development.

The export charge on oil described above was a one-off program that responded to rapidly escalating world oil prices and, for the reasons described above, was not motivated by a desire to promote sustainable development.

The only other significant use of export charges by Canadian Governments has been by the federal government on softwood lumber exports. There have been two instances of export charges being imposed in the last twenty years and a third is pending. As will be described more fully below, in each case, the export charges have been imposed not for the purpose of promoting sustainable development but, rather, as part of a settlement package arising from trade actions initiated by the United States.

C. Export Restrictions and Promoting Sustainable Development

Canada maintains a wide range of export restrictions, which include restrictions on the export of logs, pulpwood, red cedar, and softwood lumber products. However, none of the export restrictions that

Canada maintains are for the purpose of promoting sustainable development.

The goods subject to export controls are set out on Canada's Export Control List.[7] The reason for control of the export of most of the items on the list is related to issues such as nuclear proliferation, control of munitions, protection of endangered species and health issues. Some items, such as sugar and sugar containing products and U.S. origin products, are to fulfil NAFTA obligations to the U.S.[8]

NAFTA Annex 301.3 specifically permits the three NAFTA Parties to maintain restrictions on the export of logs.[9] While log export restrictions may ostensibly promote sustainable development of forest products by restricting harvesting, the prime motivation for log export restrictions is to ensure that value-added processes such as converting logs into lumber products, pulp, newsprint or other forest products occurs domestically.[10]

As discussed above, restrictions have been maintained in the past on oil exports as part of a scheme for maintaining a two-price policy. Canada does not impose export controls on any product of the mining industry.[11] Export controls are not policy instruments that Canadian

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[7] S.O.R./89-202, enacted pursuant to the *Export and Import Permits Act*, R.S.C. 1985, c. E-19.

[8] For sugar-containing products (item 5204 on the Export Control List), see CUFTA, art. 707, which is incorporated into NAFTA. The inclusion of U.S. Origin Goods (item 5400 on the Export Control List) is to prevent circumvention of U.S. export restrictions through transshipment. See NAFTA, art. 309(3).

[9] Such restrictions would otherwise be prohibited under art. XI:1 of GATT 1994, which has been incorporated by reference into NAFTA by NAFTA, art. 309(1), unless the measure could be justified under one of the GATT exceptions, such as the exception in art. XX(g) of GATT 1994 respecting measures relating to the conservation of exhaustible natural resources.

[10] This conclusion is supported by the fact that the removal of log export restrictions is routinely resisted on the basis that the removal of export restrictions would mean that jobs will be exported. There is no exception in GATT 1994 that justifies export restrictions for the purpose of ensuring that value added operations occur domestically.

[11] Except for products that are related to Canada's obligations to prevent nuclear proliferation.

governments use to promote sustainable development in the mining industry.[12]

D. Future Impact of NAFTA Provisions Respecting Export Charges and Export Controls

The NAFTA export charge and export control regime has had minimal impact on the ability of Canadian Governments to adopt measures promoting sustainable development. The single situation that could change this would be a major oil crisis that could result from a full scale war or other catastrophe in the Middle East. Canada is now the biggest single supplier of oil to the United States, and the proportion of Canadian shipments of oil to the United States relative to shipments for domestic consumption has increased significantly. Canada would not be able to conserve its own supplies of oil by cutting back on shipments to the United States without significantly curtailing domestic consumption. While Canada could do this, it would make the task of conserving oil much less palatable to the Canadian public.

This situation does not apply either with the mining or forestry sectors. The Canadian economy has benefited significantly from exports of products of the mining industry, particularly in recent years with the increase in mineral prices. Unlike Canadian oil exports, which are almost entirely to the U.S. market, products of the Canadian mining industry are exported to many export markets. Oil is also a unique product in that so much of it is concentrated in a highly volatile part of the world and that our current energy system is so dependant upon it. There is no product of the mining industry that has these characteristics. Supplies can be depleted and prices can be volatile but Canadian governments are probably best off simply letting markets allocate these resources.

The economics of the forestry sector are different from those of the mining sector but, with the exception of softwood lumber, the foregoing observations apply. Imposing export charges or export restrictions on newsprint or wood pulp as a means of promoting

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[12] Provincial governments, who own the resources in Canada, certainly take steps to try to secure that mineral products extracted from the province are processed to the greatest extent possible within the province. However, these policies are motivated by a desire to create jobs rather than to promote sustainable development of the resource.

sustainable development would make no sense whatsoever, so any constraints that NAFTA imposes on Canada's ability to do so are irrelevant.

III. The Softwood Subset of the Forestry Industry

The softwood lumber industry, as a subset of the forestry industry, is in a unique position. This is not because the constraints imposed by NAFTA on the ability of NAFTA parties to impose export charges and export restrictions have any particular relevance to softwood lumber. Rather, because of extreme deference that the U.S. Government pays to the wishes of its softwood lumber lobby, namely the Coalition for Fair Trade in Lumber ("Coalition"), the normal trading rules that would otherwise apply have been turned on their head.[13]

As described above, the U.S. negotiators of the CUFTA demanded that export charges be prohibited. Just as import duties put imported goods at a disadvantage as against competing domestic goods, export charges put foreign consumers of the exported goods of a country at a disadvantage vis-à-vis that country's domestic consumers of those goods. The Canadian export tax on oil that had been in effect before the CUFTA negotiations commenced put U.S. consumers of Canadian oil at a significant disadvantage vis-à-vis Canadian consumers of Canadian oil, a situation that the U.S. negotiators did not want repeated.

However, at the time that the CUFTA was negotiated, the sole export tax maintained by Canada was a 15% export tax on softwood lumber exports to the United States. The Coalition had filed a countervailing duty petition in 1986 and the U.S. Department of Commerce ("Commerce") made a preliminary determination that Canadian imports were subsidized.[14] Rather than fighting this decision,

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[13] The U.S. would argue that the reason for the unique situation for softwood is because the provincial governments in the major producing provinces (B.C., Alberta, Ontario and Quebec) own almost all of the timber lands and charge stumpage fees that are so low as to amount to a subsidy. This position is belied by the fact that there never has been a U.S. trade action against Canadian exports of pulp or newsprint to the U.S., which come from the same allegedly subsidized logs as does softwood lumber.

[14] The Coalition had filed an earlier countervailing duty petition in 1982 against imports of softwood lumber from Canada alleging that stumpage fees constituted a subsidy. Commerce dismissed the petition on the grounds that the subsidy was not specific to a particular industry. The U.S. position on specificity changed between 1982 and 1986.

Canada entered into a *Memorandum of Understanding* ("MOU") with the United States and agreed to impose a 15% export charge on softwood lumber exports to the United States. This 15% tax significantly disadvantaged U.S. consumers of Canadian softwood lumber products. However, the objective of the U.S. Government was not to protect its consumers but, rather, to protect its softwood lumber producers at the expense of its consumers. Consequently, while demanding a general prohibition of export charges, the U.S. CUFTA negotiators secured a specific exemption for rights under the MOU in CUFTA Article 2009 which imposed the 15% export tax.[15]

In 1991, Canada unilaterally terminated the MOU and Commerce self-initiated a new countervailing action ("Lumber III"). Lumber III resulted in countervailing duties being imposed on imports of softwood lumber but the Canadian producers were successful in having the Commerce decision reversed by a CUFTA bi-national panel. The U.S. Government refunded about $800 million in duty deposits but on the condition that the Canadian Government enters into negotiations. The negotiations ultimately resulted in the *Softwood Lumber Agreement* ("SLA") between Canada the United States that entered into effect for a five-year term, commencing April 1, 1996. The SLA imposed export quotas through export charges over certain annual volumes.[16] Like all quota schemes, the five-year span of the SLA was replete with quota allocation issues and caused distortion in lumber pricing throughout the United States and Canada. When it expired on March 31, 2001, there was no desire on either side to renew it.

The Coalition immediately filed petitions alleging both subsidization and dumping. Commerce made affirmative determinations of subsidy and dumping and the U.S. International Trade Commission ("USITC") made an affirmative threat of injury determination, which meant that antidumping and countervailing duties could be collected on a going-forward basis. Duty collection commenced on May 2002. The Canadian Government and the Canadian producers initiated a variety of

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[15] This exemption merely exempted the MOU from the provisions of the CUFTA. It did not exempt softwood lumber from CUFTA disciplines.

[16] While the SLA did not impose quotas as such, the upper base rate fee charged on exports over certain volumes that made exporting above those volumes uneconomic.

legal challenges, both under NAFTA Chapter Nineteen and through the WTO dispute settlement process.[17]

Canada won two clear victories through the Chapter Nineteen process. A NAFTA bi-national panel found that the USITC threat of injury determination was without foundation and the panel's finding was upheld by an extraordinary challenge committee. As bi-national panel decisions are supposed to be binding under U.S. law, the U.S. Government should have revoked the antidumping and countervailing duty orders and refunded the deposits. However, the U.S. Government chose to renege on its NAFTA obligations, thereby forcing the Canadian Government and the Canadian producers to sue the U.S. Government in the U.S. Courts.[18] The Canadian parties also won a clear victory before the bi-national panel reviewing Commerce's subsidy determination. The panel found that the subsidy rate was below 1%, which meant that the

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[17] NAFTA, c. 19, which was carried forward from the CUFTA, establishes a procedure whereby certain agency determinations in antidumping and countervailing duty actions, such as final determinations of dumping or subsidization or injury or threat of injury may, at the request of an interested party, be reviewed, in lieu of domestic judicial review, by a bi-national panel comprised, in the case of a U.S. action affecting Canadian goods, of two U.S. experts, two Canadian experts, and a chairman being Canadian or U.S. The bi-national panel applies the domestic law of the Party whose agency made the determination. The decision of the bi-national panel is supposed to be binding upon Party whose agency's determination is challenged. For this reason, the bi-national panel process has, at least until the present, proven to be highly effective. As described in the next footnote, the United States has reneged on its obligations and NAFTA Chapter Nineteen.

[18] The U.S. Government in effect challenged its own legislation implementing its obligations under NAFTA Chapter Nineteen, arguing in clear violation of NAFTA, art. 1904(15)(a) that, unlike under U.S. domestic review procedures, NAFTA bi-national panel decisions have prospective effect only, meaning that deposits collected up until the final panel decision is rendered, will not be refunded. The U.S. Government also used its domestic procedures for implementing WTO decisions that the U.S. loses to permit the USITC to render a new affirmative threat of injury determination which, being subsequent to its negative determination rendered in response to a decision on remand of the bi-national panel, the U.S. Government maintained prevailed over the negative determination. Aside from the fact that the implementation of determinations arising from these domestic procedures is completely discretionary (unlike the implementation of the results of bi-national panels which are supposed to be mandatory under NAFTA, art. 1904(a)), the WTO Appellate Body decided that the new affirmative determination by the USITC did not comply with WTO requirements. See Appellate Body Report, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, 13 April 2006, online: WTO < http://docsonline.wto.org>.

countervailing duty order should have been revoked and deposits refunded. The U.S. Government initiated an extraordinary challenge of this panel's determination. At this point in time in April 2006, the Canadian Government chose to settle.

Over the late spring and summer of 2006, Canada and the United States negotiated a definitive form of a new softwood lumber agreement, which had not at the time of writing come into effect. However, the likelihood is that the agreement will take effect in October 2006 and that the trade in softwood lumber will be subject to a managed trade regime for the duration of the new agreement, which could be as little as 23 months or as long as 9 years. Under the new agreement, a province can elect to have its exports of softwood lumber be subject to an export charge, or to a lower export charge plus an export quota.[19] The export charge will vary with the monthly price of framing lumber set out in an industry publication, with no export charge being levied if the monthly price exceeds $US 355 and the maximum export charge (15% or 5% if combined with a quota) if the monthly price falls below $US 315. There are various other provisions dealing with surges in imports, third country imports and other issues, as well as providing for some exemptions. One of the conditions to the agreement coming into effect is that litigation be discontinued.

If the new agreement does come into effect, the NAFTA rules respecting export charges and export restrictions will have been turned on their head, with implications for sustainable development:

- NAFTA prohibits export charges in order that consumers in one NAFTA Party of goods of another NAFTA Party be as favourably treated as the domestic consumers of that good in the other NAFTA Party. With softwood, the U.S. Government is demanding that the Canadian Government impose export charges so that U.S. consumers will be disadvantaged in their ability to consume Canadian softwood lumber products and will be forced to pay higher prices for softwood lumber products produced by U.S. producers.
- NAFTA only permits export restrictions that are consistent with GATT rules and, in addition, imposes proportionality requirements

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[19] The agreement refers to "regions," but each region corresponds to a "province," except in the case of British Columbia, which comprises two separate regions, namely the coast and the interior.

and prohibitions of price discrimination to ensure that consumers in a NAFTA Party of goods exported by another NAFTA Party are fairly treated. Under the new softwood lumber agreement, Canadian provinces are invited by the U.S. Government to impose quotas in lieu of higher export charges that will ensure that U.S. consumers of softwood lumber products are unfairly treated.

From a sustainability standpoint:

- On the U.S. side, in response to the demands of the Coalition, the U.S. Government is entering an arrangement that encourages increased consumption of timber, a resource of which the United States has limited supply relative to its domestic demand and that limits imports of softwood products from Canada, the sole U.S. trading partner that has sufficient timber to satisfy U.S. demand.
- On the Canadian side, the export charges and quotas imposed by the softwood lumber agreement will disrupt market forces which will lead to a less efficient allocation of resources in the softwood lumber sector than would otherwise be the case, which will work against the objective of sustainable development.

By removing softwood lumber from NAFTA disciplines (as well as from WTO disciplines) the objective of achieving sustainable development in the softwood lumber subset of the forestry industry will, in my view, be impeded.

IV. Sustainable Development and the NAFTA Investment Chapter

The NAFTA Investment Chapter (NAFTA Chapter Eleven) has been the target of much criticism from environmentalists and other public interest groups since it first came into effect on January 1, 1994. The investment chapter sets out rules which require non-discriminatory treatment and fair and equitable treatment of investors of other NAFTA Parties, and their investments. The non-discrimination provisions are comprised of a national treatment requirement in Article 1102 that requires that investors of other NAFTA Parties and their investments be treated no less favourably than domestic investors and their investments, and a most-favoured-nation requirement in Article 1103. Article 1105 establishes a requirement that investments of investors of other NAFTA Parties receive fair and equitable treatment. While originally somewhat open-ended, Article 1105 has been circumscribed by an agreed

interpretation of the NAFTA Parties issued on July 31, 2001 that states that the obligation under Article 1105 prescribes the minimum standard of treatment under international law.

Article 1110 of the investment chapter also prohibits expropriation or measures tantamount to the expropriation of an investment of an investor of another Party unless certain conditions are satisfied, including the payment of compensation to the investor at fair market value. This prohibition applies even though domestic investments are subjected to the same treatment.

Article 1110 was viewed with grave concern by environmental groups because the concept of expropriation was not defined in the NAFTA text and is somewhat ill-defined in international jurisprudence. Environmental laws, which could include laws that limit the use of a resource to ensure its continued viability, clearly can have an adverse effect on business interests. Chapter Eleven has the added complication of permitting investors to initiate claims for damages against the governments of NAFTA Parties without having to involve their own governments.

A. Track Record Under Chapter Eleven

The concerns over Chapter Eleven as providing an effective weapon in the hands of business to block socially responsible legislation have not materialized. There has only been one instance in which an investor has succeeded in making a successful claim under Article 1110. In *Metalclad Corporation v. The United Mexican States* a U.S. investor initiated a claim against the Mexican Government on the basis that various actions by municipal and state authorities had rendered a waste disposal facility that the investor had constructed unusable.[20] The investor succeeded in its claim and received an award of damages. The measures complained of had an ostensible connection with environmental protection, such as an ecological decree to protect a rare form of cactus, but the result of the measures was that the value of the investment was completely obliterated.

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[20] Pleadings and tribunal awards for all the Chapter Eleven cases cited in this paper can all be found online at <http://www.naftaclaims.com/>.

The case of *Ethyl Corporation v. Government of Canada* involved a claim based on a Canadian measure that banned the importation of and the interprovincial trade in MMT, a manganese-based gasoline additive.[21] The U.S. producer of MMT initiated a claim against the Government of Canada based on a number of provisions of Chapter Eleven, including Article 1110. The Canadian Government chose to settle so the matter was never decided under Chapter Eleven.

In *S.D. Myers, Inc. v. Government of Canada*, the U.S. investor made a successful claim against Canada respecting a ban by Canada on the export of PCBs. The investor was in the business of destroying PCBs, as were several Canadian companies. The investor won on the basis of a failure on the part of Canada to comply with the national treatment obligation in NAFTA Article 1102 and the fair and equitable treatment provision in NAFTA Article 1105, although the investor did lose its claim based on expropriation. The outcome in this case has caused concern because the ban was ostensibly connected to the environment. However, the real motivation behind the ban, which was clear from the evidence, was to favour Canadian businesses destroying PCBs over their U.S. counterparts.

The case of *Methanex Corporation and the United States* involved a challenge by Methanex, a Canadian producer of methanol, of a California law that banned the used of methyl tertiary-butyl ether or MTBE, a gasoline additive that used methanol as an input. MTBE was seeping into lakes and streams and did not naturally decompose, which caused significant environmental concerns. Methanex lost the case because the Tribunal decided that it did not have jurisdiction to hear the case because the connection between the ban of MTBE and the producer of one of the inputs of MTBE was too remote. Environmentalists would have been more satisfied perhaps if the claim had been rejected on the basis that laws like the MTBE ban to protect the environment are not covered by NAFTA Chapter Eleven. However, the fact of the matter is that Methanex lost and also was forced by the Tribunal to pay a very large sum by way of legal costs which should make future claimants think

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[21] There were two possible reasons for the ban. First, there was a concern about the health effects of airborne manganese. Second, the automotive industry complained that MMT caused problems with catalytic converters that were designed to improve automobile emissions. There never seems to have been hard evidence supporting either of these claims. However, there does not appear to have been any nefarious motive for the ban.

twice before launching claims based on bona fide environmental legislation. The Tribunal's report supports the view that laws enacted to protect the environment are legitimate and should not be subject to claims under Chapter Eleven.

The case of *Pope & Talbot Inc. v. The Government of Canada* had direct relevance to softwood lumber in that the U.S. investor made a number of claims based on damages allegedly sustained by reason of the 1996 Softwood Lumber Agreement. The decision is significant only because the investor lost virtually all of its claims, and ended up winning a small award based on an isolated instance of unfair treatment in the administration of its quota allocation. The somewhat expansive application of Article 1105 that was adopted by the Tribunal to make this finding in favour of the investor has effectively been negated by the subsequent agreed interpretation of the NAFTA parties referred to above.

B. Chapter Eleven and the NAFTA Preamble

As noted at the beginning of this paper, the resolution of the NAFTA Parties in the Preamble to promote sustainable development is not without significance. Suppose that a U.S. investor challenged a Canadian law that had as its purpose the objective of promoting sustainability in the mining or forestry sector, such as a law limiting the rate of resource extraction or timber harvesting that adversely affected the value of an investment owned by the U.S. investor. As noted above, Article 1110 requires that compensation be paid to a U.S. investor if the federal or a provincial government in Canada expropriates the investor's investment or adopts a measure that is "tantamount" to an expropriation. If the U.S. investor initiated a claim under NAFTA Chapter Eleven to the effect that the law constituted an expropriation of the investor's investment under Article 1110, the Canadian Government would raise in its defence the statement in the Preamble. Unless the Canadian law constituted a clear taking of property, which would not be the case in this example, the statement to the effect that the NAFTA Parties had resolved to promote sustainable development would provide context that the NAFTA tribunal would have to take into account in interpreting the meaning of the expression "tantamount to an expropriation" in Article 1110. A persuasive argument could be made that a finding that a measure intended to promote sustainable development was a measure tantamount to an expropriation would frustrate the intention of the NAFTA Parties as evidenced by their explicit resolution to promote sustainable

development. The only finding that would be consistent with the intention of the NAFTA Parties would be a finding that the measure was not "tantamount" to an expropriation and that the U.S. investor should be denied compensation.

C. Concluding Remarks on Chapter Eleven and Sustainability

Chapter Eleven should not impede Canadian Governments from enacting measures that promote sustainable development. The national treatment provision in Article 1102 merely requires that investments in Canada owned by Americans or Mexicans be treated no less favourable that investments in like circumstances owned by Canadians. As noted above, the "fair and equitable" requirement in Article 1105 has been severely circumscribed by an agreed interpretation of the NAFTA Parties that has been consistently upheld by all tribunals who have been called upon to consider it. Based on jurisprudence to date, there is no basis for believing that a measure enacted for the legitimate purpose of protecting the environment or promoting sustainable development would form the basis for a successful challenge or claim under Chapter Eleven.

Conclusion

While the NAFTA Parties may have resolved in the NAFTA Preamble to promote sustainable development and while the inclusion of that provision is helpful, NAFTA is first and foremost an agreement that has the objective of promoting trade and investment. This objective is achieved primarily through the establishment of limitations upon measures that may be adopted by the Governments of the three NAFTA countries. In my view, none of these limitations imposes any significant impediment to the governments of the NAFTA countries in pursuing sustainable development objectives in the mining and forestry industries.

Softwood lumber, which is a subset of the forestry industry, stands in a category by itself. This is because two of the NAFTA Parties, Canada and the United States, are in the process of removing this forestry industry subset from what might be termed as normal trade rule, which favour market disciplines, and establishing a managed-trade structure for this subset which impedes market disciplines and will produce market distortions. The misallocation of resources that will inevitably result will,

in my view, be counterproductive to the objective of achieving sustainable development.