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NAFTA'S ENVIRONMENTAL PROVISIONS: ARE THEY WORKING AS INTENDED? ARE THEY ADEQUATE?-ANOTHER VIEW FROM CANADA

André Beaulieu*

I feel that I have been given a fairly difficult job today, not only because the trade and environment issue has receded to the backwaters of the trade policy debate and is not as highly argued as it once was, but also because the previous speakers yesterday and today that say NAFTA still should do this; NAFTA should be fixed that way; there is a mistake in NAFTA; and they could be confident they would not offend anybody because there was nobody in the room from NAFTA. I think it is somewhat symbolic that Greg is here today representing the institution that was borne out of the side agreement and represents the difference between this type of agreement, what it purports to do in the trade agreement itself.

I feel the only way I could make an original contribution in the few minutes left would be to speak very slowly, but I will spare you that. I will make a few comments about trade, a few comments about the institution itself, and a few comments about a very peculiar dispute settlement process that is in the side agreement, which you can look at in your briefing book, and how that may or may not be a useful instrument in the future when we start tackling those issues that Richard Cunningham was talking about. That is, the whole social agenda of trade and how integration in the Americas or integration over the Pacific will force the governments to tackle problems other than those closely related to trade.

I will pick up where John left off with Article 1114, which says that you should not lower your environmental standards. That is the environmental provision in NAFTA. You should not lower your environmental standards to attract investment. The interesting thing is that this article, as much as anything, is soft law, but it is also an admission.

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because earlier in the debate the position of any experts and of governments was that the environment was not really a serious or a major factor in the competitiveness of firms and industries. Of course, the answer is it is industry-specific. Whether it is pulp and paper or chemical manufacturing or legal services, there is a very large difference. But by putting Article 1114 in the NAFTA, that was saying in the trade treaty that the environment is a competitiveness issue. Liberally, out of this article and this admission, is born the side agreement on the environment with its focus on the economic level playing field and the issue of the environment as it relates to trade.

Most of the academic research and serious inquiry as to whether environmental policy affects competitiveness in a serious fashion for industry or for countries as a whole, I think, is only beginning, and there are no firm conclusions. In a way, we have made a policy choice already about that, and it has certainly colored what is in the side agreement. And we may find in the future that the link is not quite as strong as it is affirmed. Yet here, we are stuck with that choice. There are a lot of reasons to protect the environment and to conserve resources to keep your firms competitive, more or less so, and adjusting policy accordingly is one. But it is also a major element of the architecture here, and this is something that affects everything else, both in the side agreement and in many of the activities of the work program of the Commission for Environmental Cooperation.

Back to the trade agreement itself, I would like to say just a few words about how the debate prior to NAFTA and the negotiations themselves left a mark on some provisions of NAFTA. Following the tuna/dolphin case, before they got environmentalists marching the streets with signs saying “GATT-zilla is Coming to Crush Your Environmental Laws,” I think it is fair to say that the big fear that countries were going to start going after each other’s environmental laws to provide better market access using trade disciplines on technical barriers to trade and S and P measures was probably exaggerated. Both the process and the relevant legal elements of NAFTA and the political climate do not lend themselves too well to the United States, Canada, or Mexico going after one of their trading partners’ important environmental laws and saying that it should be removed or modified because it is somewhat discriminatory or an unnecessary obstacle to trade. There are other threats to environmental laws and regulations, and there are other mechanisms at work here, but I find it interesting that a lot of the debate from four or five years ago looks very dated today.

As far as the specific provisions in Chapter 7 and Chapter 9 of NAFTA, I think that it is fair to say that, as far as Chapter 7 is con-
cerned, the language is a little different between the WTO and the NAFTA, but, on the whole, the same equilibriums between robust trade disciplines and national sovereignty in drafting legislation have been respected.

As far as the area where most environmental laws and regulations were at fault, that is, Chapter 9, the technical barriers to trade, I would carefully say that Chapter 9 of NAFTA is more hospitable and more respectful of national sovereignty in terms of environmental laws and regulations and the protection of human health.

The other thing that has not been mentioned about the main treaty is Article 104. At the very beginning of NAFTA there is a provision that says that measures either taken as in the implementation of certain named international environmental treaties or trade restrictions, trade sanctions taken pursuant to the application of such treaties, for example, the Montreal protocol on CFCs, supersede NAFTA to the extent that the government of the country has chosen a reasonably available and equally effective method.

I also think that it was written in a time when people were envisioning a number of international environmental treaties on forestry and protocols, too, for example, the Climate Change Convention and a number of new international instruments that affected trade and that were pursuing environmental goals. This particular policy choice here is to say, provided it is done reasonably, you can give those instruments preeminence over NAFTA. And I would suggest that it is probably an elegant way of doing it. There has been other work in the WTO about how to reconcile multilateral environmental agreements and GATT rules, and a number of solutions have been proposed. I personally think this is one of the more elegant ones.

It has been said that the side agreement is a bit divorced from NAFTA. That is true. At the same time, again on the trade side, there is a possibility for a very useful contribution. There are a couple of attachment points between the side agreement and NAFTA, even though everybody had decided they were not going to redraft NAFTA, which would have been a very complicated thing to do, indeed.

But NAFTA provides, under certain parts of Chapter 20 and the relevant parts of Chapter 7 and Chapter 9, for the panels to use ad hoc working groups, special expert advice, and other mechanisms. The Commission for Environmental Cooperation can, if invited to do so, make suggestions about individuals and try to make a contribution at that stage, which could be very useful if you think trade dispute resolution is basically functioning as it should. But when it involves an important environmental issue, it is important to have the technical knowledge
integrated into the decision making to prevent an absolutely dry assessment of whether there is been discrimination or not without a bit of a broader context.

Secondly, going back to Article 1114, if a country eventually asks for consultations claiming that a NAFTA partner has lowered their standards to attract investment, the secretariat can provide assistance in those consultations. And eventually, even though Article 1114 is soft law, it may be a useful form for the discussion if there is a major controversy between two of the partners about what we perceived as an unfair way to attract investment.

As far as the Commission itself is concerned, I think Greg Mastel gave you an excellent tour of what it does and what it is. I would second that emotion, and, frankly, I would have to say that when I was listening yesterday to people who were lamenting the lack of the ethereal nature of NAFTA and the lack of institutional personality and the fact that NAFTA, in a sense, does not exist and neither does the trade commission, the Commission for Environmental Cooperation very much exists.

The administrator and the two ministers are meeting regularly. Senior officials in alternative positions meet even more often. And there is constant consultation between the three countries who are steering the work of the secretariat, a secretariat that has about forty people working now, with an annual budget of nine million dollars. It exists. You can do some of that work. For example, we were talking earlier about this peculiar dispute settlement procedure, which may never be used. But, if there were panels that were meeting, and there was process set in place to do some of that dispute settlement, at least you would have an institutional infrastructure around it to provide some kind of memory, some kind of gathering of information, and some of the problems evoked yesterday about panels in the arbitral process could be alleviated.

There are two things I would like to mention about the side agreement on the level of principles. I think some of the most important work that will come is that three-year program on NAFTA, the impacts of NAFTA on the environment. There is a lot of work that has been done already under the supervision of Sara Richardson, one of the officers of the Commission, and there is some more work to be done. I think this is still a very inconclusive debate, and some of the most concrete useful data ever, I think, could come out of some of those studies. Clearly, the Commission for Environmental Cooperation must make it so that in ten years we are not still arguing about how and to what extent free trade affects the environment in the Americas.

The second thing I would like to mention is that the side agreement
respects the same principle that was elaborated in NAFTA and the same principle that made me say earlier that, on the whole, trade disciplines have not proven to be a great threat to environmental policies in the three countries. That is, preeminence is given to national sovereignty. This is not a supranational instrument. Clearly, the choice that was made was that, if countries had responsibility for stewardship of their own environment and their regional environment, at the same time, they were sovereign in designing and choosing their environmental policies. That is why, as we will see and as it has been mentioned before, there is such a focus in the agreement on the effective enforcement of environmental laws. If your environmental laws are both fairly adequate and very much your sovereign decision, the international body must act at another level, and the one that was chosen was the effectiveness of enforcement.

About the Article 14 and Article 15 provisions that Greg outlined, I think he said most of the major points about this particular procedure. I would just like to add that this is a procedure that provides individuals and non-governmental organizations (NGOs) direct access to an international institution. This is also a novelty. It is important, and it is probably something that we will not be able to avoid when we tackle the social agenda of trade in general. At the same time, Greg referred to the inherent tension that exists between the investigative functions of the Commission and the cooperative agenda. It is possible that salvation is in the more precise guidelines that take a bit of discretion away from you. But, as long as the same people one week can be calling the environment minister or the deputy minister saying, we are not satisfied with your explanation of what happened in following this complaint and we are going to investigate you because there might be some seriousness to the claim that you are not enforcing your environmental laws, if the very same people are calling the following week and are saying, remember that meeting about migratory birds? Well, these will be relationships that will be difficult to manage.

I submit that the future may lie in putting more distance between the investigative function and add maybe a bit more formality. We may not be able to get away as far as regional institutions are concerned with a somewhat informal process for private submissions and the much more formal and much more seemingly independent process and actually, of course, really independent process of the panels for trade issues. And I do not think that council members and ministers would easily relinquish the control that is not actually exercised but control that is legally theirs over the secretariat and the decision it made concluding on investigative matters. But eventually it might have to come to that, and I do not know if it can be done in an incremental matter. I am not sure
we should wait until a minister, unfortunately, tries to use political influence to effect an investigation or the decision to undertake an investigation.

About dispute settlement, I just want to say a couple of things. John said it is never going to be used, so maybe we should not talk about it. But as a lawyer, I find it a very interesting field trip because there is stuff in there that is certainly completely new and unpredictable. Unfortunately, to say that the council must approve a decision by a two-thirds vote in order to allow a panel to be formed is going to guarantee the dynamics of either in the large NAFTA or in a different political climate might convince Canada and the United States, for example, to say to Mexico, I think we have to take you to some kind of more formal arbitration because this is a very serious case. You are not enforcing your environmental laws.

I think it is worth looking at the dispute settlement process because it has been designed as a model to deal with the social agenda of trade. What it does, essentially, is say, we will pick an area and we will set a minimum standard. Now we are stuck with this little sovereignty problem, so we will make it a legal standard of diligent enforcement. It is not an environmental standard, but what you should do. And in those instances where the standard is breached and there is a trade connection — the trade connection just means that in the area where there is no enforcement, goods are produced that either compete domestically with imports from another NAFTA country or are exported to another NAFTA country — you do not need to show much. It has nothing to do with injury. It is a formal test. But, if it is a trade situation, and there is a faint trade connection, then we will have some kind of arbitration about whether this was an acceptable behavior on the part of the NAFTA country, of the party complained against.

There are a lot more peculiarities in the dispute settlement process. In a way, it would be curious to see how it would work. But in another way, I also think that it is seriously flawed in some respects, like some of the definitions of what is an environmental law. There is a bit of a shell game going on there if you look at the legal design of the thing. At the same time, maybe because North Americans never had forty years of economic integration and institution-building, we are a little clumsy at designing those things. We are going to have to keep trying.

One more element that is a little peculiar is the highly unusual federalism clause, which states that Canada is a very limited party until the provinces decide to sign on. This holds not for the rest of the side agreement, but for the dispute settlement process. There are formulas there, the GDP, and there are tests about who can complain against
whom. I am not sure how it would work, but, again, it was an attempt to deal with this other complicated issue of federalism and international treaties and, even more, the complex Canadian situation.

I think the Commission is still fragile and has somewhat of an uncertain future. I think that, if there is to be NAFTA expansion, and we have heard in the last couple of days that free trade in the Americas may take a different route, it would be important to have contiguity. Someone was talking earlier about illegal patchwork. I do not see really how, if the side agreement on the environmental cooperation area is not contiguous with the Free Trade Agreement area, where this would take us.

Secondly, I think that it is really an institution worth fighting for, and, in a sense, this is our only lab for tackling the other aspects of economic integration and the social agenda in North America. It is the only regional institution that has that kind of permanency and resources. It is the only place where cabinet-level representatives meet regularly to discuss the substantive issues that are not directly related to the international diplomatic aspect of the relationship. And it has these built-in channels for public consultation and transparency, which as long as you venture in those areas that Mr. Cunningham was referring to, you need to have if you have to have a critical integration process. On the whole, I think there might be more in the side agreement to emulate than to discard.