COMMENT

CHOPPING AWAY AT CHAPTER 11: THE SOFTWOOD LUMBER AGREEMENT'S EFFECT ON THE NAFTA INVESTOR-STATE DISPUTE RESOLUTION MECHANISM

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On September 12, 2006, the governments of Canada and the United States signed the Softwood Lumber Agreement 2006 ("SLA 2006"), hoping to end the longstanding dispute between the two countries on the issue of softwood lumber. Fearing liability for measures taken to give effect to the agreement, the Parties included a provision in Article XI(2) of the SLA 2006, limiting the availability of the North American Free Trade Agreement ("NAFTA") Chapter 11 dispute resolution.

This comment argues that in limiting the availability of NAFTA Chapter 11 dispute resolution, Article XI(2) of SLA 2006 effects the application of NAFTA Chapter 11 in a way that is inconsistent with customary international law. Specifically, Article XI(2) impermissibly affects the applicability of NAFTA Chapter 11 in one

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of two ways: (a) it separates provisions of Chapter 11 that are inseparable, were critical to the consent of Canada and the United States in signing NAFTA, and renders the continued performance of NAFTA unjust; or (b) it modifies Chapter 11 in a prohibited manner that limits the effective execution of the object and purpose of NAFTA.

Regardless of which interpretation of the SLA 2006's effect on NAFTA is more accurate, both are inconsistent with the Vienna Convention on the Law of Treaties ("Vienna Convention"). In recognition of these inconsistencies, this comment recommends a litigation strategy for Canadian and American lumber producers that challenges the validity of SLA 2006 Article XI(2). This comment also recommends a series of measures for the Canadian and U.S. governments designed to bring the SLA 2006 in line with customary international law, while still insulating them from liability for measures taken to implement the SLA 2006.

I. INTRODUCTION

On September 12, 2006, the governments of Canada and the United States signed the Softwood Lumber Agreement 2006 ("SLA 2006").[1] Designed to provide temporary relief from the legal and

1. The Softwood Lumber Agreement 2006, U.S.-Can., Sept. 12, 2006, (amended Oct. 12, 2006) [hereinafter SLA 2006], *available at* http://www.ustr.gov/assets/world_regions/americas/canada/asset_upload_file847_9896.pdf; *see* Press Release, Dep't of Foreign Affairs and Int'l Trade Can., Minister Emerson and United States Trade Representative Schwab Sign Softwood Lumber Agreement (Sept. 12, 2006), http://w01.international.gc.ca/minpub/Publication.aspx?isRedirect=True&publication_id=384359&language=E&docnumber=99 [hereinafter Emerson & Schwab Press Release] (highlighting the broad support for the SLA 2006, including both Canadian and U.S. national governments, the Canadian provinces that are major

political battles that raged for decades over softwood lumber,[2] the SLA 2006 regulates Canadian exports and limits existing and future litigation on matters related to the dispute for a seven-year period.[3] The primary means of accomplishing this limitation is Annex 2A of the SLA 2006, the Settlement of Claims Agreement.[4] In addition to Annex 2A, however, Article XI(2) of the SLA 2006 also suspends

soft-wood producers, and an "overwhelming" majority of Canadian softwood lumber producers); Press Release, Office of the United States Trade Representative, U.S. Trade Representative Susan C. Schwab Announces Entry into Force of United States-Canada Softwood Lumber Agreement (Oct. 12, 2006), http://ustr.gov/Document_Library/Press_Releases/2006/October/United States_Trade_Representative_Susan_C_Schwab_Announces_Entry_into_Force_of _United States-Canada_Softwood_Lumber_Agreement.html (touting U.S. Trade Representative Susan Schwab's comments that the SLA 2006 will limit the uncertainties in the softwood lumber market that result from intense litigation and benefit both consumers and producers of softwood lumber). The SLA 2006 was amended October 12, 2006 by Amendments to the Softwood Lumber Agreement Between the Government of the United States and the Government of Canada, *available at* http://www.ustr.gov/assets/world_regions/americas/canada/asset_upload_file667_9897.pdf. However, those amendments do not affect the arguments and analysis of this article.

2. *See* Mary Y. Pierson, *Recent Developments in United States - Canada Softwood Lumber*, 25 LAW & POL'Y INT'L BUS. 1187, 1187–91 (1994) (describing the events that shaped and defined the first thirty years of the softwood lumber dispute); Dep't of Foreign Affairs and Int'l Trade Can., Softwood Lumber: Canada-United States Softwood Lumber Trade Relations (1982–2006), http://www.dfait-maeci.gc.ca/trade/eicb/softwood/chrono-en.asp (last visited Oct. 27, 2006) (reviewing the most recent twenty-four years of the softwood lumber dispute chronologically, including the outcomes of the primary investigations and NAFTA claims); Kimberly Noble, *An Industry at War*, GLOBE & MAIL (Toronto), Nov. 16, 1991, at B18 (referring to comments of Patricia Carney, former Canadian Minister of International Trade, that the softwood lumber dispute "is the longest and messiest trade war Canada and the United States have ever had").

3. *See* SLA 2006, *supra* note 1, art. XVIII (providing for a seven-year duration of the SLA 2006 with the option of extending for an additional two years); *see also* Emerson & Schwab Press Release, *supra* note 1 (espousing the virtues, from the Canadian perspective, of the SLA 2006, including predictable market access, guaranteed repayment of more than 4.4 billion dollars in duties, flexibility for provincial and regional forestry policies, and the end of costly litigation); *U.S., Can. Ink Softwood Lumber Agreement*, CAL TRADE REPORT, Sept. 13, 2006, at Front Page, http://www.caltradereport.com/eWebPages/front-page-1158201865.html (noting the agreement of both the United States and Canada to suspend all litigation relating to the softwood lumber dispute).

4. *See* SLA 2006, *supra* note 1, Annex 2A (mandating that the United States and Canada suspend litigation in all covered actions, preventing their resurrection, and limiting the filing of new claims).

access to the North American Free Trade Agreement ("NAFTA") Chapter 11 dispute resolution mechanism for any claim related to a government measure that is necessary to give effect to or implement the SLA 2006.[5]

In limiting the availability of NAFTA Chapter 11, SLA 2006 Article XI(2) effects the application of NAFTA in one of two ways. First, Article XI(2) effectively separates the provisions of Chapter 11 from the remainder of NAFTA. This comment argues that such a separation and the resulting effect on the application of NAFTA is inconsistent with the norms of customary international law, specifically Article 44 of the Vienna Convention on the Law of Treaties ("Vienna Convention"). Second, Article XI(2) effectively modifies NAFTA Chapter 11 and its applicability to certain investors. This comment argues that such a modification to the application of NAFTA is also inconsistent with the norms of customary international law, specifically Article 41(1) of the Vienna Convention.

Part II(A) of this comment highlights investors' right to access NAFTA Chapter 11 dispute resolution, and a NAFTA Party's limited ability to deny such access. Part II(B) addresses the SLA 2006, providing background information on the agreement and Article XI(2). Part II(C) discusses the Vienna Convention and its standards governing the permissibility of international treaty provision separation and modification. Part III then assesses the effect of the SLA 2006 on the application of NAFTA Chapter 11. First, Part III(A) justifies the use of the Vienna Convention as the proper instrument for assessing this effect. Next, Part III(B) addresses the first interpretation of that effect, that Article XI(2) separates elements of Chapter 11 from the remainder of NAFTA. Part III(B) then highlights the inconsistencies between this separation and customary international law standards for the separation of a provision from a multilateral treaty, as set forth in Article 44 of the Vienna Convention. Finally, Part III(C) addresses the second interpretation, that Article XI(2) effectively modifies the application of NAFTA,

5. *See id.* art. XI(2) (preventing any claim under Section B of NAFTA Chapter 11 against either Canada or the United States, by investors of the United States or Canada, in respect of any matter or measure relating to the SLA 2006, and obliging the governments of Canada and the United States to notify their respective NAFTA Secretariats of this limitation).

and highlights the inconsistencies between this modification and customary international law standards for the modification of a multilateral treaty, as set forth in Article 41(1) of the Vienna Convention. In light of these inconsistencies, Part IV lists a series of recommendations directed to both the Parties of the SLA 2006 and the investors it affects.

II. BACKGROUND

Before assessing the SLA 2006's effect on the application of NAFTA Chapter 11, it is necessary to consider the unique obligations imposed on NAFTA Parties through the establishment of investor-state dispute resolution in NAFTA Chapter 11.

A. NAFTA CHAPTER 11

Investor-to-state dispute resolution mechanisms are relatively rare in multilateral agreements,[6] with NAFTA Chapter 11 as the pioneer

6. In addition to NAFTA, only three other multilateral agreements contain some degree of investor-to-state dispute resolution. First, The Energy Charter Treaty ("ECT") has an investor-to-state mechanism procedurally similar to Chapter 11, but substantively limited to certain areas of investment. *See* The Energy Charter Treaty, art. 26, Dec. 17, 1994, 2080 U.N.T.S. 100, 121; *see also* Jan Linehan, *Investment, Trade and Transit: Dispute Settlement under the Energy Charter Treaty*, 15 ICSID NEWS 1, 4 (1998), *available at* http://worldbank.com/icsid/news/n-15-2-4.htm (giving an overview of The Energy Charter Treaty and the available mechanisms of investor-to-state dispute resolution); A.F.M. Maniruzzaman, *Energy Charter Treaty Arbitration (Investor State) in the Asia-Pacific Context: An Overview*, 4 INT'L ENERGY L. & TAXATION REV. 101, 101 (2004) (noting that Parties to the ECT must abide by the process if an investor initiates arbitration for an alleged breach of any of the Charter's Part III obligations of The Energy Charter Treaty); Craig S. Bamberger et. al, *Energy Charter Treaty in 2000: in a New Phase*, 18 J. ENERGY NAT. RESOURCES L. 331, 334 (2000) (discussing the compulsory nature of The Energy Charter Treaty's Article 26 investor-to-state dispute resolution mechanism). The ECT Parties, however, do not consent to the submission of a dispute already dealt with in another forum, or measures related to the fulfillment of the treaty. *See* Lawrence L. Herman, *NAFTA and the ECT: Divergent Approaches with a Core of Harmony*, 15 J. ENERGY NAT. RESOURCES L. 129, 149 (1997) (suggesting that Article 26 appears to prevent Parties from "side-tracking" the dispute from the courts to international arbitration once the domestic proceeding begins). Other than any "previously agreed upon dispute settlement procedure," each contracting party "unconditional[ly] consent[s] to the submission of an investment dispute to international arbitration or conciliation in accordance with the provisions of this

in the field.[7] NAFTA negotiators designed Chapter 11 as a mechanism to encourage a stable and predictable environment for investment. Towards this end, Chapter 11 includes substantial protections for investors and private-party access to fair and

Article." The Energy Charter Treaty, *supra*, art. 26 ¶¶ 2(b), 3(a), 2080 U.N.T.S at 121.

The second instance of an investor-state dispute resolution mechanism in a multilateral agreement is the Association of Southeast Asian Nations ("ASEAN") Agreement. The ASEAN Agreement includes a protocol that, like The Energy Charter Treaty, is less exhaustive than NAFTA Chapter 11. *See* Agreement For the Promotion And Protection of Investments, Brunei-Indon.-Malay.-Phil.-Sing.-Thail., art. X, Dec. 15 1987, 27 I.L.M 612, 614 (1988). Though it makes national treatment voluntary, requiring the consent of two of the Contracting Parties, as in NAFTA Chapter 11 and The Energy Charter Treaty, investors are guaranteed the right of access to dispute resolution, aside from the enumerated exceptions. *Id.* arts. 4(4), 5, 27 I.L.M. at 613.

The third instance of an investor-state mechanism in a multilateral agreement is the Protocol of Colonia, which attaches an investor-to-state dispute mechanism to the Southern Common Market (Mercado Común del Sur, or "Mercosur"), but as of yet remains unratified. *See* Protocol of Colonia for the Promotion and Reciprocal Protection of Investments in Mercosur (Investment within Member Countries), Arg.-Braz.-Para.-Uru., art. 9, Jan. 17, 1994, *available at* http://www.cvm.gov.br/ingl/inter/mercosul/coloni-e.asp (last visited Oct. 27, 2006) [hereinafter Protocol of Colonia]; Thomas Andrew O'Keefe, *Dispute Resolution in Mercosur*, http://www.sice.oas.org/geograph/south/okifdis.doc (last visited Jan. 21, 2007) (noting that the Protocol of Colonia is not in effect pending the ratification of Brazil, Paraguay, and Uruguay). Article 9, Section 2 of the Protocol of Colonia provides an investor-to-state dispute resolution mechanism addressing issues of expropriation and national treatment. Protocol of Colonia, *supra*, art. 9 § 2.

7. *See* Donald M. McRae, *Introduction*, *in* WHOSE RIGHTS? THE NAFTA CHAPTER 11 DEBATE 1 (Laura Ritchie Dawson ed., 2002) (highlighting that although many of the provisions of NAFTA Chapter 11 existed elsewhere in investment regimes, NAFTA was the first to bring each together within a single multilateral agreement); *see also* Todd Weiler, *The Ethyl Arbitration: First of its Kind and a Harbinger of Things to Come*, 11 AM. REV. INT'L ARB. 187, 188 (2000) (observing that NAFTA Chapter 11 was the first investment agreement concluded between both developed and less-developed countries); David R. Haigh, *The Management and Resolution of Cross Border Disputes As Canada/U.S. Enter The 21st Century: Chapter 11 – Private Party vs. Governments, Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 CAN.-U.S. L.J. 115, 130 (2000) (providing a historical analysis of NAFTA Chapter 11 as the first time Canada or the United States agreed to investor-to-state arbitration between themselves).

equitable dispute resolution for breach of Party obligations.[8] As such, Section A of Chapter 11 imposes obligations on NAFTA Parties,[9] including assuring the investor's right to receive "treatment no less favorable" than that accorded to domestic investors or investors of any other party,[10] a minimum standard of treatment in accordance with international law,[11] and protection from direct or indirect expropriation or nationalization.[12] Section B of Chapter 11 then provides the mechanism for fair and equitable dispute settlement

8. *See generally* McRae, *supra* note 7, at 1 (discussing the content of NAFTA Chapter 11 and the relationship of the Parties' obligations to the dispute settlement mechanism).

9. *See id.* (presenting the "obligations" undertaken by the NAFTA Parties and the resulting protections for investors). Many observers suggest that NAFTA Chapter 11 affords protections of such a substantial and inalienable character that they are justifiably labeled rights. *See infra* note 24 (providing several examples of the argument that NAFTA Chapter 11 protections are rights). Others, however, argue that the protections are not in fact vested rights, but rather impermanent protections NAFTA Parties afford at their discretion. *See* McRae, *supra* note 7, at 1–2 (discussing the controversy over the amount of protection the provisions of NAFTA Chapter 11 give investors). To the latter group, NAFTA is a treaty between sovereign States and as such, private parties undertake no obligations, nor do they acquire rights under Chapter 11. It is only the Parties that must comply with the obligations in Chapter 11 Section A, and only the Parties that are liable to damage awards under Section B. The investment protections in Chapter 11 are thus not rights, but protections that the NAFTA Parties afford at their discretion, capable of being rescinded at any time. Regardless of which argument is more compelling, the analysis that follows does not turn on the permanency of the protection or characterization of the affected clause. Rather, the tests for Vienna Convention Articles 41 and 44 require an independent analysis of the nature of the clause in question, its relationship to the treaty as a whole, and its importance at the time of signing. Whether the clause conveys to investors "temporary protection," afforded at the discretion of the NAFTA Parties, or more permanent, inalienable "rights" of protection is thus not dispositive for the present analysis.

10. *See* North American Free Trade Agreement, U.S.-Can.-Mex., art. 1102, Dec. 17, 1992, 32 I.L.M. 296, 639 (1993) [hereinafter NAFTA]; *see also id.* art. 1103, 32 I.L.M. at 639 (providing investors of another NAFTA Party with a right to "treatment no less than favorable than" the treatment the host country affords to investors of a non-NAFTA state).

11. *See id.* art. 1105, 32 I.L.M. at 639–40 (requiring that investors receive fair and equitable treatment, full protection and security, and treatment in accordance with international law).

12. *See id.* art. 1110, 32 I.L.M. at 641–42 (protecting investors and their investments from expropriation or nationalization, except when the expropriation is for a public purpose, is non-discriminatory, affords the investor fair and equitable treatment in accordance with due process of law, and includes compensation for the investor's loss).

should a NAFTA Party violate its Section A obligations.[13] NAFTA negotiators thus designed Chapter 11 as a powerful protection for investors exposed to potentially variable and hostile judicial and economic environments throughout North America.[14]

1. Guaranteed Access to Fair and Equitable Dispute Resolution

Section B of NAFTA Chapter 11 guarantees investors equal access to fair and equitable resolution of claims arising from a violation of their Section A protections.[15] Within Section B, Article

13. *See id.* art. 1115, 32 I.L.M. at 642 (establishing "a mechanism for the settlement of investment disputes that assures both equal treatment among investors" and "due process before an impartial tribunal"); *see also id.* arts. 1120–38, 32 I.L.M. at 643–47 (defining the right of investors to bring a claim, the technical requirements of the claim, the procedural process of the submission and consideration of the claim, and the finality and enforcement of the claim).

14. *See* discussion *infra* Part III(B)(2) (discussing the importance of NAFTA Chapter 11 to the consent of the United States and Canada to sign NAFTA).

15. *See* NAFTA, *supra* note 10, art. 1120, 32 I.L.M. at 643 (providing investors with the opportunity to arbitrate claims arising from an alleged violation of NAFTA Chapter 11 Section A); *see also id.* arts. 1102, 1103, 1105, 1110, 32 I.L.M. at 639–40 (declaring the protections afforded to investors and their investments, notably, the right to fair and equitable treatment). *See* Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 148 (2002) (discussing critics' characterization of NAFTA Chapter 11 as a "Bill of Rights for transnational corporations," that confers on corporations the right to sue governments for "enacting bona fide, non-discriminatory" regulations). Though not a positive characterization of NAFTA Chapter 11, Tollefson's comments nonetheless highlight the view that NAFTA Chapter 11 conveys broad and powerful rights to investors. *See id.* Frederick M. Abbott, *The Political Economy of NAFTA Chapter Eleven: Equality Before the Law and the Boundaries of North American Integration*, 23 HASTINGS INT'L & COMP. L. REV. 303, 305 (2000) (highlighting the right of private parties to seek recourse through arbitration and noting that investors may bring a claim under either of three arbitration frameworks including the International Centre for the Settlement of Investment Disputes ("ICSID"), the ICSID Additional Facility, and the United Nations Commission on International Trade Law ("UNCITRAL")); Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 247 (2006) (highlighting the proliferation of investment arbitration agreements generally, NAFTA Chapter 11 specifically, and the broad rights they convey to foreign investors (referencing Daphne Eviatar, *A Toxic Trade-off*, WASH. POST, Aug. 14, 2005, at B01)); *see also* The Sierra Club, *The Problem with NAFTA's Chapter 11 Investor Suit Rules Has Not Been Fixed in CAFTA*, http://www.sierraclub.org/trade/cafta/chapter_11_rules.pdf (last visited Dec. 26, 2006) (arguing against the incorporation of broad NAFTA Chapter 11 rights into

1121 declares the Parties' unequivocal consent to arbitration and Articles 1135 and 1136 provide available remedies and enforcement mechanisms.[16]

The protection of a fair and equitable investor-state dispute resolution mechanism is paramount for three reasons. First, it protects the investor's interest in their investment through the enforcement of the rights provided to them in NAFTA.[17] Second, the dispute resolution process depoliticizes the investment dispute and reduces investment risk, thereby encouraging cross-border investment.[18] Finally, the right to arbitrate a claim empowers investors, making them an active constraint on government action.[19] The right to fair and equitable arbitration of investment disputes is thus essential to accomplishing the NAFTA goal of creating a stable

the Central American Free Trade Agreement); Letter from the Participating Organizations in the International POPs Elimination Network (IPEN), to Pierre Pettigrew, Minister of Int'l Trade, Gov't of Canada, et al., (Jan. 22, 2002), *available at* http://www.ciel.org/Chemicals/IPEN_Canada_Govt.html (protesting the use of the broad Chapter 11 rights to subvert environmental regulation of toxic substances). *But see* McRae, *supra* note 7, at 1–2 (suggesting there is lack of clarity over the extended scope of protections that NAFTA Chapter 11 conveys to investors).

16. *See* NAFTA, *supra* note 10, art. 1121, 32 I.L.M. at 643; *see also id.* art. 1135, 32 I.L.M. at 646 (permitting the tribunal to award monetary and restitution damages, as well as costs, at their discretion); *id.* art. 1136, 32 I.L.M. at 646 (calling for the enforcement of a tribunal's award and providing measures for compliance, such as the establishment of an enforcement panel under Article 2008).

17. *See* Nigel Blackaby, *Public Interest and Investment Treaty Arbitration*, 1 TRANSNAT'L DISP. MGMT. 1, (Feb. 2004) http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_56.htm (suggesting that investor-to-state dispute resolution is essential to all modern investment treaties, providing investors with a right to trigger international arbitration unilaterally without the espousal of the claim by their home state).

18. *See id.*

19. *See* J. Anthony VanDuzer, *NAFTA Chapter 11 to Date: The Progress of a Work in Progress*, *in* WHOSE RIGHTS? THE NAFTA CHAPTER 11 DEBATE, *supra* note 7, at 50 (noting that the ability of investors to directly enforce Chapter 11 obligations makes them important constraints on government actions that are arbitrary and unfair, explicitly protectionist, or egregious). *But see* Azinian v. United Mexican States, Award, ICSID Case No. ARB(AF)/97/2, ¶ 83 (Nov. 1, 1999), 39 I.L.M. 537, 549 (arguing that NAFTA does not provide investors with exhaustive "blanket protection" from every disappointment they have with government measures).

and predictable investment climate for North American investors.[20] The only way a NAFTA party may modify the operation or applicability of NAFTA Chapter 11 dispute resolution is through an amendment of the agreement, requiring the consent of all three Parties.[21]

2. The Ability to Deny Access to NAFTA Chapter 11 Dispute Resolution

NAFTA Chapter 11 protection extends to all government measures relating to "(a) investors of another Party; (b) investments of an investor of another Party in territory of the Party; (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party."[22] The only measures not subject to Chapter 11 are those relating to investors or investments that fall within the denial of benefits clause of NAFTA Article 1113, NAFTA Chapter 14 restrictions on Financial Services, or the reservations of NAFTA Annexes I-IV or Annex 1138.2.[23]

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20. *See* NAFTA, *supra* note 10, Pmbl., 32 I.L.M. at 297; *see also id.* arts. 102(1)(b),(c),(e), 32 I.L.M. at 297 (declaring the objective of NAFTA to include the promotion of "conditions of fair competition," the increase of investment opportunities in the region, and the creation of effective procedures for the resolution of disputes).

21. *See* NAFTA, *supra* note 10, art. 2202, 32 I.L.M. at 702 (indicating that amendments, when the parties agree, "constitute an integral part" of NAFTA); Michael Wallace Gordon, *The Conflict of United States Sanctions Laws with Obligations Under the North American Free Trade Agreement*, 27 STETSON L. REV. 1259, 1293 (1998) (noting that Parties to NAFTA cannot unilaterally modify their obligations).

22. NAFTA, *supra* note 10, art. 1101, ¶ 1, 32 I.L.M. at 639.

23. *See id.* art. 1113 (1), 32 I.L.M. at 642 (permitting Parties to deny benefits to investors or investments not sufficiently connected to a NAFTA party); *id.* art. 1101(3), 32 I.L.M. at 639 (identifying an exception to the scope of NAFTA Chapter 11 relating to those measures dealing with the financial services sector identified in NAFTA Chapter 14); *id.* art. 1410, 32 I.L.M at 659 (allowing NAFTA Parties, without concern for NAFTA Chapter 11 liability, to adopt measures that protect investors, depositors, and other types of market actors, maintain the safety and soundness of financial institutions, and ensure the integrity and stability of their financial system); *id.* Annexes I–IV, 32 I.L.M. at 704–61 (providing for the limitation of Chapter 11 investment protections with respect to the listed sectors, sub-sectors, or activities for which the party desires to maintain existing measures, or adopt new or more restrictive measures that do not conform with Chapter 11); *id.* Annex 1138.2, 32 I.L.M. at 649 (limiting the availability of Chapter 11 dispute resolution to certain measures relating to a review of the Investment Canada Act).

NAFTA Article 1113 provides for the denial of access to Chapter 11 dispute resolution for investors only tangentially connected to a Party.[24] Shell or subsidiary companies thus do not have Chapter 11 rights if they lack significant business operations or activities within the NAFTA member country.[25] Two NAFTA tribunals have discussed the applicability of Article 1113 generally, but as of yet, no government has sought its enforcement.[26]

A NAFTA Party may also deny access to Chapter 11 dispute resolution to any investor bringing a claim related to one of the specific reservations listed in the NAFTA Annexes.[27] When

But see VanDuzer, *supra* note 19, at 59 (noting that technically a NAFTA Party may also terminate a Chapter 11 arbitration, and therefore deny the benefits of Chapter 11 investment protection, if it wins a jurisdictional challenge as a respondent, but that tribunals are reluctant to terminate arbitration proceedings on jurisdictional grounds).

24. *See* NAFTA, *supra* note 10, art. 1113(1), 32 I.L.M. at 642 (providing that a Party can deny Chapter 11 investment protections if a non-Party owns or controls the investment and if the Party denying the protections "does not maintain diplomatic relations with the non-Party," or "adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of [Chapter 11] were accorded to the enterprise or to its investments"); *see also id.* art. 1113(2), 32 I.L.M. at 642 (providing that a Party may deny Chapter 11 investment protection to investor enterprises organized under the laws of a NAFTA Party if a non-Party has majority ownership in that enterprise and if the enterprise "has no substantial business activities in the territory" of the member Party). *Cf.* Antonella Troia, *The Helms-Burton Controversy: An Examination of the Arguments that the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 Violates U.S. Obligations Under NAFTA*, 23 BROOKLYN J. INT'L L. 603, 616 (1997) (hypothesizing that the United States could use Article 1113 to refuse to grant Canadian and Mexican investors' benefits because the investors or investments "thrive in Cuba and are thus subject to Cuban control").

25. *See* S. Benton Cantey, Comment, *International Arbitration to Resolve Disputes under NAFTA Chapter 11: Investment*, 9 TULSA J. COMP. & INT'L L. 285, 290 (2001) (discussing the denial of benefits provision and the procedure required of Parties to exercise this right).

26. *See* Waste Mgmt., Inc. v. United Mexican States, Arbitral Award, ICSID Case No. ARB(AF)/98/2 (June 2, 2000), 40 I.L.M. 56 (discussing the full range of investment possibilities incorporated into Chapter 11, including an Article 1113 situation where the investment lacks substantial business activities in North America); Metalclad Corp. v. United Mexican States, Award, ICSID Case No. ARB(AF)/0011 (Aug. 30, 2006), 40 I.L.M. 36 (discussing Metalclad's argument regarding the amendment of a claim and the requirements to satisfy both NAFTA Articles 1113 and 1120).

27. *See* NAFTA, *supra* note 10, Annexes II–III, 32 I.L.M. at 748–61 (listing the reservations of all three Parties related to existing and future measures,

negotiating NAFTA, the Parties each included several reservations for denying access to Chapter 11 protection for specified groups or in certain circumstances.[28] Modification of the Annexes is permissible only through the amendment of NAFTA, requiring the consent of the three Parties.[29] Thus, in order for Parties to deny access to Chapter 11 dispute resolution, they must either show that the investor is only tangentially related to their territory,[30] is within a specified group or sector mentioned in the Party's reservations,[31] or the Parties must amend the reservations to include the investor.[32]

B. THE SOFTWOOD LUMBER AGREEMENT 2006

Canada and the United States signed the Softwood Lumber Agreement 2006 on September 12, 2006, and it came into force October 12, 2006.[33] The SLA 2006 calls for a seven-year break in the long-standing dispute between the two countries over the Canadian export of softwood lumber,[34] typically defined as easy-to-saw wood,

including reservations on the access to Chapter 11 dispute resolution in telecommunications, water transportation, and the ownership of oceanfront land).

28. *See* GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES 202–03 (2005) (highlighting the concerns of each Party by dividing their reservations into three categories: sectoral, reciprocal, and investment review).

29. *See* NAFTA, *supra* note 10, art. 2202, 32 I.L.M. at 702 ("The Parties may agree on any modification of or addition to this Agreement.").

30. *See id.* art. 1113(2), 32 I.L.M. at 642.

31. *See id.* Annexes II–III, 32 I.L.M. at 748–61.

32. *See id.* art. 2202, 32 I.L.M. at 702 (allowing the Parties to modify or add to NAFTA so long as the change is "in accordance with the applicable legal procedures of each Party").

33. *See* Emerson & Schwab Press Release, *supra* note 1; Softwood Lumber Products Export Charge Act, 2006 S.C., ch. 13 (Can.) (implementing the SLA 2006 in Canada through amendment of Canadian export controls on softwood lumber).

34. *See* SLA 2006, *supra* note 1, art. XVIII (declaring that the SLA 2006 shall remain in force for seven years following its effective date, and granting an option to extend the agreement for an additional two years if both Parties consent); *see also* Letter from Susan Schwab, U.S. Trade Representative, Executive Office of the President, to The Honorable David L. Emerson, Minister for Int'l Trade Dep't of Foreign Affairs and Int'l Trade, Gov't of Can., (Sept. 12, 2006), *available at* http://www.dfait-maeci.gc.ca/trade/eicb/softwood/pdfs/SchwabtoEmerson-en.pdf (declaring the United States' desire to maintain the effectiveness of the SLA 2006 for the duration of the agreement). *But see* SLA 2006, *supra* note 1, art. XX (providing specific conditions for early termination of the SLA 2006, including a general provision permitting either Party to terminate for any reason after the

such as pine and spruce, used in home-building.[35] Under the agreement, American obligations include refunding over four billion dollars of countervailing duties ("CVD") and antidumping ("AD") cash deposits to Canadian lumber producers,[36] and retroactively revoking CVD and AD orders.[37] In return, Canada agreed to impose export measures of softwood lumber products traveling to the United States,[38] and to settle on-going claims relating to the dispute.[39] Both Parties also acted to reduce their liability should a Canadian or American investor claim that a measure taken to give effect to the SLA 2006 violated NAFTA Chapter 11.[40] To this end, they included

agreement has been in force for eighteen months, with six-month written notice).

35. *Softwood Lumber Dispute*, CBC NEWS ONLINE, Aug. 23, 2006, http://www.cbc.ca/news/background/softwood_lumber/.

36. *See* SLA 2006, *supra* note 1, art. IV(2) (detailing the United States' return schedule of the deposits); *Softwood Lumber Dispute*, *supra* note 35 (indicating that the SLA 2006 "would require the United States to return about eighty percent of the five billion dollars in duties it had collected on lumber imports").

37. *See* SLA 2006, *supra* note 1, art. III(1)(a) (announcing the United States' obligation to revoke the anti-dumping and countervailing duty orders retroactively to May 22, 2002, without the possibility of reinstatement).

38. *See id.* art. VI (providing a detailed account of the rates and procedures for collection of the export measures). *But see id.* Annex 10 (listing the Canadian lumber companies excluded from the export measures).

39. *See id.* Annex 2A (providing a detailed settlement of claims agreement, listing the covered actions subject to its requirements, and the obligations of both Parties to ensure the enforcement of the suspension).

40. *See id.* art. XI(2) (precluding the availability of Chapter 11 dispute resolution for all measures relating to the implementation of the SLA 2006). The desire of the Canadian and U.S. governments to insulate themselves from litigation relating to the implementation of the SLA 2006 may stem from the Canadian experience with the implementation of The Softwood Lumber Agreement, U.S.-Can., (1996), *available at* http://www.dfait-maeci.gc.ca/trade/eicb/softwood/pdfs/treaty-e.pdf [hereinafter SLA 1996]. In 2000, a NAFTA Chapter 11 tribunal decided the case of Pope & Talbot Inc. v. Canada, 41 I.L.M. 1347 (UNCITRAL, Nov. 26, 2002). As part of the SLA 1996, the Canadian government imposed an export quota system on softwood lumber exported from certain provinces within Canada, requiring export permits for all lumber exporters in Ontario, Quebec, British Columbia, and Alberta. SLA 1996, *supra* note 1, art. II. In Pope & Talbot Inc., an American-owned lumber producer operating in British Columbia alleged that quota requirements allocated among producers favored lumber producers in other provinces, including Quebec. *See* Statement of Claim of Pope & Talbot Inc. at 16–17, Pope & Talbot, Inc. v. Canada, (UNCITRAL, Nov. 26, 2002), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/pubdoc3.pdf (illustrating how differently British Columbia and Quebec softwood lumber exports were treated under SLA 1996); Todd Weiler, *Saving Oscar Chin: Non-Discrimination in International Investment*

Article XI(2) in the SLA 2006, which limits the availability of Chapter 11 dispute resolution for Canadian and American investors with potential claims against either Party for a measure taken to give effect to the SLA 2006.[41]

C. THE VIENNA CONVENTION ON THE LAW OF TREATIES

Traditionally, international treaties were indivisible entities such that the separation or modification of one provision weakened the integrity of the whole.[42] In the 1960's, however, the Vienna Convention on the Law of Treaties changed this paradigm.[43] In doing so, it established a series of interpretive customs for agreements that

Law, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 566–67 (Todd Weiler ed., 2005) (synthesizing the arguments in the claim to a simple national treatment analysis). In its decision, the tribunal noted the existence of a difference in treatment, as Pope & Talbot's competitors in Canada shipped their product to the United States paying lower, or no export fees, while Pope & Talbot paid substantial fees. *See* Order re: Motion to Dismiss on Grounds of Article 1101, January 26, 2000, *available at* http://www.appletonlaw.com (follow "cases" hyperlink; then follow "Pope & Talbot" hyperlink; then follow "page 2"; then follow "Award on Canada's Preliminary Motion to Dismiss Claim on Measures Relating to Investment" hyperlink); Weiler, *supra*, at 570–72 (placing the difference of treatment in Pope & Talbot in the context of other Chapter 11 cases). Thus, fear that Canadian or U.S. lumber producers might bring a similar claim under the SLA 2006 may have provided impetus for the inclusion of Article XI(2)(2) protection in the SLA 2006.

41. *See* SLA 2006, *supra* note 1, art. XI(2) (providing that Canadian and American investors cannot bring a claim under Section B of Chapter 11 of NAFTA in respect to any matter or measure relating to the SLA 2006).

42. *See, e.g.*, ALBERICO GENTILI, DE JURE BELLI LIBRI TRES 703 (John C. Rolfe trans., Oceana Publications 1933) (1612) (arguing that the failure to keep part of an agreement invalidates the whole agreement, because all parts of an agreement are made in the context of the others, and all contracts are indivisible); *see also* IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 166 (2d ed. 1984) (explaining that separation of an element or provision of a treaty was only traditionally permissible in the event of a breach of the treaty by another party).

43. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; Aerial Incident of 10 August 1999 (Pak. v. India), 2000 I.C.J. 12, 57 (June 21) (dissenting opinion of Judge Al-Khasawneh) (noting that the Vienna Convention "opened the door for the principle of separability of treaty provisions, albeit in suitably guarded terms and subject to cumulative conditions"); SINCLAIR, *supra* note 42, at 166 (observing that Article 44 of the Vienna Convention arguably extends the separability of a provision beyond the limited situation of a breach of the treaty).

amend multilateral treaties and provide for the separability of provisions from a treaty.[44]

1. Article 44: Separability of Treaty Provisions

The Vienna Convention permits the separation of provisions of a treaty in response to a fundamental change of circumstances.[45] Signatories cannot, however, "pick and choose" remedies, but must act in accordance with Article 44(3) requirements.[46] Article 44(3) limits the separability of provisions from the remainder of the treaty to only those situations that satisfy three conditions.[47] To separate a provision from a treaty the Party must show that: (1) the provision is in fact "separable from the remainder of the treaty;"[48] (2) acceptance of the provision did not provide "an essential basis of the consent of a Party" to bind itself to the obligations of the treaty;[49] and (3) "continued performance of the remainder of the treaty would not be

44. *See* Vienna Convention, *supra* note 43, art. 44, 1155 U.N.T.S. at 343 (establishing a series of requirements for the permissible separation of a provision of a treaty); *id.* art. 41, 1155 U.N.T.S. at 342 (establishing a series of requirements for the permissible modification of a treaty through an agreement between less than all of the Parties to the treaty); discussion *infra* note 60 (describing the authority of the Vienna Convention as the preeminent authority for treaty interpretation in both Canada and the United States).

45. *See* Elisabeth Zoller, *The "Corporate Will" of the United Nations and the Rights of the Minority*, 81 AM. J. INT'L L. 610, 628 (1987) (noting that signatories to treaties may suspend in part a treaty if a change in conditions affects only a particular set of provisions).

46. *See* Vienna Convention, *supra* note 43, art. 44(3), 1155 U.N.T.S. at 343 (providing a series of requirements for the separability of provisions from a treaty); *see also* Zoller, *supra* note 45, at 628 (referencing Francesco Capotorti, *L'extinction et la Suspension des Traites*, 134 RECUEIL DES COURS 417, 548 (1971 III) (suggesting that Article 44 does not convey a total right to separability)); *id.* at 629 (referencing IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 166 (1984) (cautioning that despite opening the door for the possibility of the separation of provisions, the principle of the integrity of the treaty still overwhelmingly prevails)).

47. *See* Vienna Convention, *supra* note 43 , art. 44(3), 1155 U.N.T.S. at 343.

48. *See id.* art. 44(3)(a), 1155 U.N.T.S. at 343; *see also* Ronald B. Hurdle & Walter J. Champion Jr., *The Life and Times of Napoleon Beazley: The Effect (If Any) of the International Covenant on Civil and Political Rights on Texas' 17 & Up Execution Standard*, 28 T. MARSHALL L. REV. 1, 22 (2002) (noting, in another context, that separability implies the ability to disassociate an element of a treaty or provision from the remainder, and can include the disassociation of two elements within the same provision, such as specific reservations listed within a provision).

49. *See* Vienna Convention, *supra* note 43, art. 44(3)(b), 1155 U.N.T.S. at 343.

unjust."[50] The three requirements are cumulative, and failure to satisfy one invalidates the separation.[51]

2. Article 41: Agreements to Modify Multilateral Treaties Between Certain of the Parties Only

The Vienna Convention permits two or more Parties to a multilateral treaty to conclude an agreement to modify the treaty between only themselves, if the treaty provides for such modification, or does not disallow such modification.[52] If such a modification is not expressly provided for, Parties also may conclude an agreement to modify a treaty if: the treaty does not prohibit the modification;[53] the modification does not interfere with the other Parties' enjoyment of the agreement or the performance of their obligations;[54] and if the modification does not limit "the effective execution of the object and purpose of the treaty as a whole."[55] Again, the requirements are cumulative, and failure to satisfy one invalidates the modification.[56]

III. ANALYSIS

In limiting the availability of NAFTA Chapter 11, the SLA 2006 effects the application of NAFTA. Two interpretations are possible for the nature of this effect. First, Article XI(2), by limiting the availability of Chapter 11 dispute resolution and distinguishing between different investors and investments, separates provisions of NAFTA Chapter 11 from each other and the treaty as a whole.[57] Second, the SLA 2006, due to Article XI(2) limitations on Chapter 11 dispute resolution, is an agreement that effectively modifies

50. *See id.* art. 44(3)(c), 1155 U.N.T.S. at 343.

51. *See id.* art. 44(3), 1155 U.N.T.S. at 343 (using the conjunction "and" to convey the "if and only if" nature of the proposition).

52. *See id.* art. 41(1)(a), 1155 U.N.T.S. at 342.

53. *See id.*, art. 41(1)(b), 1155 U.N.T.S. at 342.

54. *See id.* art. 41(1)(b)(i), 1155 U.N.T.S. at 342; *see also id.* art. 41(2), 1155 U.N.T.S. at 342 (requiring the Parties amending the treaty to notify the other Parties to the treaty of the intention to conclude the modifying agreement).

55. *See id.* art. 41(1)(b)(ii), 1155 U.N.T.S. at 342.

56. *See id.* art. 41(1)(b), 1155 U.N.T.S. at 342 (using the conjunction "and" to convey the "if and only if" nature of the proposition).

57. *See* discussion *infra* Part III(B) (arguing the separation of provisions called for in the SLA 2006 is impermissible under the Vienna Convention).