Canada-US-Mexico Trade Agreement Recognizes Indigenous Interests

By Julie Abouchar, Partner and Certified Specialist in Environmental Law and in Indigenous Legal Issues, Raeya Jackiw, Associate with the assistance of Matthew Lakatos-Hayward, Student-at-Law.

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On November 30, 2018, Canada, the United States, and Mexico (collectively, the "Parties") signed the Canada-United States-Mexico Agreement ("CUSMA").[1] The CUSMA's text can be found here.

The CUSMA replaces the North American Free Trade Agreement ("NAFTA"). Both agreements regulate international trade and investment between the Parties. NAFTA and the CUSMA create sanctions against a Party who restricts trade or investment in a manner inconsistent with either agreement.

One of the differences between the CUSMA and NAFTA is that the CUSMA's text recognizes the importance of Indigenous peoples within the Parties' respective territories. The agreement includes a provision that shields a Party against liability under the CUSMA for actions that the Party considers necessary to fulfill its legal obligations to Indigenous peoples.[2]

This exception would protect the Crown's duty to consult, but also put Canada's implementation of its Indigenous commitments under international scrutiny.

The General Exception to Fulfill Legal Obligations to Indigenous Peoples

Article 32.5 states that the CUSMA does not prevent a Party from protecting its legal obligations to Indigenous peoples ("Exception"):[3]

> Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, services, and investment, this Agreement does not preclude a Party from adopting or maintaining a measure it deems necessary to fulfill its legal obligations to indigenous peoples. (Emphasis added)

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1 *Agreement between Canada, the United States of America, and the United Mexican States*, 30 November 2018 [CUSMA].

2 CUSMA at Chapter 32, Art 32.5; The CUSMA also includes several other provisions affirming Indigenous rights; see USMCA at Chapter 6, Art 6.2, Chapter 14, Art 14.17, Chapter 24, Arts 24.2(4), 24.15(3), Reservation II-C-1, Annex IV, Explanatory Note 1.

3 CUSMA at Chapter 32, Art 32.5.

The Exception raises several questions:

1 What constitutes a measure under the Exception?

2 What constitutes a legal obligation under the Exception?

3 What measures would not fall under the Exception?

What Constitutes a Measure Under the Exception?

The Government of Canada could use the Exception to cover a broad range of actions. Under international law, the following actions have been found to be "measures adopted or maintained by a party":

- legislation enacted by the federal[4] and provincial[5] governments
- federal or provincial regulations, departmental policies, decisions, or rules[6]
- the report of an independent panel empowered to conduct an environmental assessment.[7] This could include environmental assessment review panel reports. However, discussions arising from a working group or committee are likely not protected by the Exception.[8]
- a final court decision. To qualify as a "measure", Canada must either accept the decision as binding[9] or obtain a decision from the highest court possible. This includes where a court denies leave to appeal.[10]

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4 *Ethyl Corporation v Government of Canada* (1998), Award on Jurisdiction (NAFTA, under UNCITRAL Arbitration Rules) at para 68 [*Ethyl Corporation*].

5 For example, see *AbitibiBowater Inc v Government of Canada*, (2010) "Foreign Affairs and International Trade Canada Issues Statement on AbitibiBowater Statement": The company initiated arbitration under NAFTA Chapter 11 after the Government of Newfoundland passed legislation to expropriate assets.

6 See *S.D. Myers v Canada* (2001), Partial Award (NAFTA Chapter 11 under the UNCITRAL Arbitration Rules) [*S.D. Myers*] Canada adopted an Interim Order and passed regulations to ban the export of PCBs; see also *Bilcon of Delaware v Government of Canada*, Award on Jurisdiction and Liability (2015), PCA Case 2009-04 [*Bilcon*]. At para 283, Canada conceded that it was responsible under international law for the acts of federal and provincial departments, as well as for the actions of Ministers acting in that capacity.

7 *Bilcon* at paras 308-13, 320-21.

8 *Fireman's Fund Insurance Company v the United Mexican States*, Award, ICSID Case No ARB(AF)/02/01 at paras 149-50, 154.

9 International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, United Nations General Assembly Res 56/83, 53rd session, UN Doc A/56/83 (2001), Art 11.

10 *Canada (Attorney General) v Clayton*, 2018 FC 436 at paras 191-92; see also *The Loewen Group, Inc and Raymond Loewen v United States of America*, Award, ICSID Case No. ARB(AF)/98/3, 26 June 2003 at paras 142-57; *Apotex Inc v United States of America*, Award on Jurisdiction and Admissibility, ICSID Case No. UNCT/10/2 (2013); see also *Eli Lilly and Company v Government of Canada*, Final Award, Case No. UNCT/14/2 (2017) at paras 221-26 for when a decision that denies leave to appeal becomes a measure adopted or maintained by a party.

For example, in August 2018, the Federal Court of Appeal quashed Canada's approval of the Trans-Mountain pipeline, in part, because the federal government failed to adequately consult with impacted Indigenous communities. See our article on the Court's decision here. On October 3, 2018, the Government of Canada announced it would not appeal the Federal Court of Appeal's ruling. At that point, the federal government arguably adopted the Federal Court of Appeal's ruling as a measure. If the federal government sought leave to appeal from the Supreme Court of Canada, then it would only adopt the Court decision as a measure once the Supreme Court rendered a decision or denied leave to appeal.

What Constitutes a Legal Obligation Under the Exception?

Canada can use the Exception to implement its constitutional obligations under section 35 of the *Constitution Act, 1982* or obligations arising from agreements with Indigenous peoples. The legal obligations protected under the Exception include the following:

- the Crown's duty to consult Indigenous peoples where contemplated Crown conduct may adversely affect an established or asserted right
- rights protected under s. 35 of the *Constitution Act, 1982*, including Aboriginal rights, treaty rights, and Aboriginal title, and
- rights protected in comprehensive land claim agreements or self-government agreements, such as the Nunavut Land Claims Agreement.[11]

What Measures Would Not Fall Under the Exception?

The Exception cannot be relied on where Canada's measures are "used as a means of arbitrary or unjustified discrimination against persons of other Parties or as a disguised restriction on trade in goods, services, and investment" ("Limit").[12]

The Exception's Limit is similar to the limits to the General Exceptions in the World Trade Organisation's ("WTO") General Agreement on Tariffs and Trade. Those exceptions allow a member nation to justify its actions on a number of grounds, such as the conservation of non-renewable resources.[13]

Canadian courts could rely on WTO dispute panel reports to interpret the CUSMA Exception. In particular, courts could adopt the following interpretive tools from WTO dispute panels to determine whether Canada uses a measure as a means of "arbitrary and unjustifiable discrimination" or a "disguised restriction on trade":

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11 CUSMA, Chapter 32, Art 32.5, Footnote 7.

12 CUSMA, Chapter 32, Art 32.5.

13 *General Agreement on Tariffs and Trade, 1994*, July 1986 (entered into force 1 January 1995) [GATT]; *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187 (entered into force 1 January 1948).Art XX.

- WTO dispute panels interpret the General Exceptions using the *Vienna Convention on the Law of Treaties*. The *Vienna Convention* states that international treaties must be interpreted in good faith in accordance with a term's ordinary meaning, as well as in line with the context and purpose of the treaty.[14]

- WTO dispute panels interpret the purpose of "arbitrary and unjustifiable discrimination" and a "disguised restriction on trade" to prevent member nations from relying on the General Exceptions as a means to circumvent one member's obligations" under the General Agreement on Tariffs and Trade.[15]

Significance

The significance of these new trade provisions is that good faith actions by Canada to fulfill its legal obligations to Indigenous people cannot give rise to a claim by foreign entities that Canada has unjustifiably restricted trade and investment.

Canada's actions would survive a trade dispute as long as it acts in a way which is not arbitrary or discriminatory or a disguised restriction on international trade obligations.

This calls for transparency and consistency in the federal, provincial and territorial governments' implementation of constitutional, treaty and modern land claim obligations owed to Indigenous peoples. This should result in a more uniform approach to Indigenous consultation across governments and Ministries within governments.

Julie Abouchar is a partner at Willms & Shier Environmental Lawyers LLP in Toronto and certified as a Specialist in Environmental Law and in Indigenous Legal Issues by the Law Society of Ontario. Julie may be reached at 416-862-4836 or by e-mail at jabouchar@willmsshier.com.

Raeya Jackiw is an associate lawyer at Willms & Shier Environmental Lawyers LLP in Toronto. Raeya may be reached at 416-862-4827 or by e-mail at rjackiw@willmsshier.com.

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14 *Vienna Convention on the Law of Treaties*, 23 May 1969, RTNU 18232 (came into force on 27 January 1980, ratified in Canada on 14 October 1970), Art 31(1).

15 *Brazil – Measures Affecting Imports of Retreaded Tyres* (2007), WTO Doc WT/DS332/AB/Rat at para 215 (Appellate Body Report) [*Brazil-Retreaded Tyres*];*United States of America – Standards for Reformulated and Conventional Gasoline* (1996) WTO Doc WT/DS2/AB/R at 22 (Apellate Body Report) [*US-Gasoline*]; see also *United States of America-Import Prohibition of Certain Shrimp and Shrimp Products*, (1998) WTO Doc WT/DS58/R at para 158 (Appellate Body Report) [*US-Shrimp*].