Submissions to the Special Legislative Committee on the Multilateral Agreement on Investment (MAI) Regarding the Constitutionality of the Investment Provisions of NAFTA

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Thank you for providing us with another opportunity to appear before this Committee to express our concerns about the establishment of investor-rights as part of Canada's international treaty obligations. While the Multilateral Agreement on Investment is now unlikely to proceed further under the auspices of the OECD, as this Committee will know, the prototypes upon which the MAI was based are currently in place in NAFTA and several bilateral investment treaties Canada has negotiated and is currently bound by. Moreover Canada has declared its intentions to use these precedents as a platform upon which further international investment agreements will be negotiated. For these reasons we believe that the subject of international investment treaties remains as important today as it did before the demise of the MAI as an OECD project, and we applaud this Committee's decision to continue with its enquiry.

On an earlier appearance before this Committee we participated on a panel addressing the dispute resolution provisions of the MAI, which are virtually identical to those found in Chapter 11 of NAFTA, under the heading *Investment*. On that occasion we had an opportunity to consider the implications of one of the first cases to invoke investor-state dispute resolution under Chapter 11 — the Ethyl Corporation challenge to federal regulation effectively banning the use of a toxic fuel additive, MMT.

Since that time, there have been at least three additional suits that have been brought against the Government of Canada that have invoked the extra-judicial remedies provided by this unprecedented dispute resolution regime. As this Committee will likely know, two of those cases relate to investment activity that is taking place in or was planned for British Columbia.[1] We believe that these cases raise important constitutional issues beyond those described in our earlier submissions. For this reason we decided to take advantage of this opportunity to add to the concerns that we have already expressed to this Committee.

The Need for a Constitutional Review of Chapter 11 of NAFTA

We believe that there are several substantial grounds upon which to doubt the constitutional validity of those NAFTA provisions dealing with the subject of investment. For present purposes it is erosion of provincial constitutional authority in

the areas of natural resources management that is the primary focus of our submissions.[2] By purporting to negotiate an international treaty that effectively limits the exercise of provincial powers within areas of exclusive provincial constitutional competence, we believe the federal government has overstepped its own authority and acted without jurisdiction.

Moreover we believe that it is now incumbent upon this province and others to ask our courts to consider and resolve the constitutional validity of these international commitments for at least two important reasons. The first concerns the broad constitutional implications of international treaty obligations that appear in several ways to represent a *de facto* amendment of Canada's constitutional arrangements, without either agreement by the provinces or any public or parliamentary debate. In our view, a constitutional review to the courts now remains the only opportunity to invoke an impartial assessment of the competence of the federal government to enter into such agreements.

The second reason for urging a constitutional review concerns the costs, uncertainty and inherent inequity of allowing foreign investors the right to sue Canadian governments by way of extra-judicial and secretive arbitration processes that exist entirely outside the context of Canadian legal institutions and judicial traditions. As the Committee will know, pursuant to Article 1122 of NAFTA, Canada has unilaterally consented to binding international arbitration in every case that a foreign investor properly invokes these extra-ordinary judicial processes. It is simply unacceptable, in our view, to leave the determination of these critical constitutional and public policy issues to tribunals that are neither qualified nor competent to resolve them.

The following submissions present these arguments in greater detail.

Provincial Powers with respect to Water and Other Natural Resources

The application of NAFTA provisions to Canadian natural resources as tradable goods or commodities is still the subject of considerable uncertainty and debate in Canada. This is particularly true in the case of water. As this Committee will know, a recent claim by a US investor under the investor-state suit provisions of NAFTA has revived this debate and prompted the federal government to initiate various actions to address the concerns this litigation has prompted. It is clear however, that whatever steps have, and may yet be taken to clarify the status of water under NAFTA, the final word on the subject will rest with the non-elected members of the trade dispute panel that may one day be convened to resolve the matter.

If such a panel were to conclude that water was indeed a "tradable good," the result would represent a significant erosion of provincial constitutional authority to manage natural resources. The prohibition against minimum or differential export pricing set out by Article 315 of NAFTA, as well as the general prohibition against the use of export controls under Articles 309 and 316, represent significant incursions on provincial powers.

However, whatever the status of water under the provisions of NAFTA dealing with trade in goods, the recent case invoking the investment provisions of Chapter 11 reveals that there is more than one way to tap Canadian water resources under NAFTA.[3] Thus, even should water not be considered subject to the general provisions of NAFTA dealing with the trade of goods, the investor rights provisions of Chapter 11 can clearly be invoked to protect investments in Canadian water resources. This is the case because "investment" is not defined in NAFTA to restrict or in any other way confine its application to investments in tradable goods (Chapter 11 Section "C").

The Sun Belt Case

The case that has recently brought these issues to the fore involves a claim by Sun Belt Water Inc. of Santa Barbara, California against the Canadian government for damages which according to the company's estimate range from $105.2 to $219.5 million US.[4] In its claim the company alleges that certain actions by the BC government and its Ministers offend various investor-rights established by NAFTA, notably the right to National Treatment (Article 1102), Most Favoured Nation Treatment (Article 1103) and Minimum Standard of Treatment (Article 1105).

At the heart of this claim are actions taken by the BC government to regulate inter-basin transfers and bulk water exports from the province — something it first accomplished by declaring a moratorium on bulk water exports in March of 1991, and then subsequently formalized by enacting the *Water Protection Act* S.B.C. 1995, c.34. The company also takes issue with the way in which the province has responded to its a civil claim for damages against the provincial government. It asserts that it has been treated by the province in a discriminatory and less favourable manner than was accorded its partner in the water export venture, a Canadian company, Sno Cap Water Ltd.[5]

Without commenting on the merits of the Sun Belt claim, the more fundamental issue that arises here concerns the right of a foreign investor to invoke the investor-state suit provisions of NAFTA to challenge the actions of a provincial government that exist entirely within the four corners of its exclusive constitutional authority. As members of Committee may know, under Canadian constitutional arrangements jurisdiction with respect to Canadian water resources is shared. However, with the exception of certain northern waters, the ownership of Canadian water rests with the provinces under Section 109 of the *Constitution Act*. These proprietary rights are further supplemented by two other heads of provincial constitutional authority concerning the management and sale of public lands under s. 92(5), and property and civil rights within the province under s. 92(13).

While provinces have a clear proprietary interest in provincial water resources, it is also clear that they must exercise the prerogatives of ownership subject to constraints imposed by the federal government in the exercise of its constitutional authority. This federal jurisdiction includes the fisheries power under s. 91(12), the navigation power under s. 91(10), and the trade and commerce power under s. 91(2) of the *Constitution Act*, respectively. Thus, on the subject of water exports, it is quite clear that the federal government has broad authority to regulate international and inter-provincial trade of

water. Thus, provincial governments would not have the power to negotiate international water sales agreements or issue water export licences in the face of federal law prohibiting such export sales.

However, while the federal government has certain authority to constrain the exercise of provincial proprietary rights to manage, use or sell provincial water resources, it does not follow that the federal government has any constitutional authority to compel the provinces to exercise its ownership prerogatives in a particular way. Yet we believe that this is precisely the effect of the investor rights created under the Investment Chapter of NAFTA.

Thus, pursuant to the provisions of Chapter 11, Canada purports to guarantee foreign investors certain rights that directly infringe on provincial management and ownership prerogatives. This, we believe, is quite clear with respect to the disposition of provincial Crown resources, a matter we dealt with in detail in previous submissions to this Committee which cited numerous examples of provincial statutes and regulations concerning the allocation of forest and fisheries resources that are not compatible with the investor rights created by Chapter 11.

Thus foreign investors may assert claims under NAFTA to challenge measures adopted by the provinces that are entirely within their constitutional prerogatives. Examples of investor rights that intrude on provincial jurisdiction include the obligations imposed on provincial governments under NAFTA to:

- provide foreign companies with the same access to public natural resources that is made available to Canadian citizens, communities and companies (1102 and 1103);
- compensate foreign investors for a broad, but ill-defined, variety of government initiatives that may limit the profitability of their investments in the natural resources sector, even where no such compensation would be payable under Canadian law (1110); and,
- refrain from imposing certain conditions, such as domestic content, local purchase, or export quota requirements as conditions of licensing agreements that provide access to public natural resources (1106).

Moreover, by allowing foreign investors a unilateral prerogative to invoke extra-judicial dispute resolution, the federal government has exposed itself to precisely the type of litigation that Sun Belt has initiated.

The Need to Review Federal Authority to Provide Investor Protection

In our view, the federal government simply does not have the authority to enter into an international treaty that binds the provinces in the exercise of their constitutional powers, without their agreement, and a consequent formal amendment to the *Constitution Act*. Were this to be otherwise, the federal government would be free to unilaterally amend Canadian constitutional arrangements by simply negotiating

international agreements that ignore the division of powers, and other guarantees written into our Constitution.

In the wake of several investor-state suits that impinge directly or indirectly on heads of provincial constitutional authority, we believe that it is critical that these issues now be resolved by the Canadian courts.

The constitutional validity of Canada's international trade commitments have been the subject of considerable speculation and debate since the advent of free trade negotiations approximately 15 years ago. While the provinces have been willing to live with a certain degree of uncertainty and unease, we believe that the recent spate of claims arising under the investor-state suit provisions of NAFTA creates a compelling case for a constitutional reference to the Canadian courts. It is not responsible, in our view, to continue to allow this high degree of uncertainty to cloud issues of such public policy and constitutional importance.

Moreover, the apparent determination of the federal government to extend the arrangement it has committed Canada to in other multilateral and bilateral investment agreements adds further urgency to the matter. Nor would it be reasonable, in our view, to take a wait and see approach. To do so ignores the very real costs associated with the type of litigation that Sun Belt has initiated. These costs include the constraint that uncertainty imposes on the development of Canadian public policy and law concerning water resources.

We also feel strongly that matters of such public importance not be left to the vicissitudes of international commercial arbitration. As we have addressed in earlier submissions, dispute panels convened pursuant to Chapter 11 procedures are neither qualified nor competent to determine Canadian constitutional arrangements. In fact, for purposes of determining Canada's commitments under NAFTA, Canadian constitutional arrangements are not even relevant. Even should the panel take a more expansive view of its mandate, it is unthinkable, in our view, that matters of this importance be addressed in secretive judicial processes that exist entirely outside of the Canadian legal context.[6]

In other words, the international arbitration is neither an appropriate nor a competent forum for resolving these critical issues. We believe the very character of investment-state litigation itself raises vital constitutional questions that Canadian courts must now resolve. It would be reckless, in our view, to build an edifice of international investment and trade agreements on such a dubious constitutional foundation.

For this reason we urge this Committee to recommend that the Province initiate legal proceedings to facilitate a constitutional review of the provisions of Chapter 11 of NAFTA. It might do this by either bringing a constitutional action against the federal government or by way of stating a constitutional question to the British Columbia Court of Appeal under the *Constitutional Questions Act*, RSBC 1996, c.68.

Thank you for the opportunity to appear before you today.

Endnotes

1. These cases are respectively a suit by Sun Belt Water Inc. claiming damages in consequence of water export controls established by the Province of British Columbia, and a claim by Pope and Talbot, a US based forest sector corporation claiming damages in consequence of the export quotas imposed pursuant to the Softwood Lumber Agreement Canada has negotiated with the US.

2. There are several other constitutional issues that Chapter 11 provokes including the extent of federal authority to regulate investment which has traditionally been a matter reserved to the Provinces under the heading of property and civil rights.

3. The other provisions of NAFTA that would apply to water, even should it not be considered a tradable good, can be found under the heading "trade in services".

4. The details of the Sun Belt claim are taken from its Notice of Intent to Submit a Claim to Arbitration which it submitted on Nov. 30, 1998.

5. The BC government agreed to settle the Sno Cap Water Ltd. Claim, which had actually been granted a license for bulk water export, for $335,000.

6. Under Article 1130 tribunals are to apply international, as opposed to Canadian law in adjudicating investor-state disputes.