Why the States Have Nothing to Fear From NAFTA

by John A. Leman

Introduction

Now that the North American Free Trade Agreement (NAFTA) has been approved by Congress, it is time to examine the merits of one of the primary arguments against its passage: that NAFTA would result in the invalidation of state environmental laws which are more protective than federal law requires. An evaluation of the text and history of NAFTA shows that legitimate state environmental regulations will be left untouched under our new trade agreement. Additionally, the side agreements which have been added by the Clinton Administration will not change this result.

It must be admitted that there are at least some laws which could be passed that would be invalidated by NAFTA. After all, NAFTA contains at least two different sections which place limits on the ability of the signing countries (and their political subdivisions) to enact measures which discriminate against trade when the justification is protection of the environment. But as this article demonstrates, legitimate environmental regulations which are not simply disguised trade barriers or mindless reactions will always be upheld.

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But if NAFTA is a free trade agreement, why should NAFTA have any say about domestic environmental regulations anyway? The answer is simple. If any law which stated an environmental purpose was exempt from NAFTA, it would make the free trade agreement illusory. A state or country could enact a measure which completely banned another country's goods on allegedly environmental grounds, and the nation facing discrimination would have no remedy. A free trade agreement which does not provide a means to distinguish between true environmental regulations and camouflaged trade barriers would be meaningless.

So NAFTA would undoubtedly invalidate such "sham" environmental regulations. So the real question is how does NAFTA discriminate between legitimate and illegitimate environmental regulations,

and does that discrimination threaten state environmental laws which provide greater protection than federal law? As the analysis below demonstrates, the United States and California can both choose whatever level of environmental protection they want, and enact appropriate measures to achieve that level of protection.

I. NAFTA Provisions Which Could Affect Environmental Regulations

NAFTA divides environmental regulations into two different categories. The first is a catch-all category which includes more than simply environmental measures, and regulates all laws which have a stated purpose of protecting public health and safety. Out of this broad category, a more limited subcategory is carved for consumables, like agricultural products, beverages, etc. These two types of laws are treated somewhat differently under NAFTA, although the end result of applying these sections to California or United States environmental laws is the same.

A. NAFTA Restrictions on Measures to Protect Against Hazards in Food and Water

NAFTA allows each party to establish an appropriate level of protection based on scientific principles and a risk assessment and enact laws which are necessary to achieve that level of protection. The meaning of each of the important terms in this statement is examined below.

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1. Appropriate Level of Protection

Each country can establish its own appropriate level of protection from diseases, pests, or contaminants in foods and beverages.[1] In choosing an appropriate level of protection, the parties must consider losses of production which might occur as a result of disease or pest, the costs of controlling or eradicating the pest/disease within its territory, and the relative cost effectiveness of alternative approaches to limiting the risks of disease or pest.[2]

2. Based on Scientific Principles

Scientific principles under Chapter 7 are defined simply as reasons "based on data or information derived using scientific methods."[3]

3. Based on a Risk Assessment

A risk assessment means an evaluation of either the potential for or consequences of the introduction or spread of the disease or pest. It can also mean an evaluation of the potential for adverse effects on life arising from the presence of an additive, toxin, or organism in foodstuff.[4]

When conducting a risk assessment, each party must take into account the relevant risk assessment techniques and methodologies of international/North American standardizing organizations, relevant scientific evidence and relevant processes and production methods, relevant inspection, sampling, and testing methods, the prevalence of the disease or pest in various areas, and relevant ecological and other environmental conditions.[5]

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4. Measure Only Applied to Extent Necessary

Each party must ensure that the measures it enacts are only applied to the extent necessary to achieve the desired level of protection, taking into account technical and economic feasibility.[6] A measure which conforms with international standards will be presumed to be necessary and valid under NAFTA.[7]

Environmental groups have complained about the use of the word "necessary" because of fears that the strict interpretation of that term under General Agreements on Tariffs and Trade (GATT) would be applied under NAFTA. But a careful examination shows that NAFTA provides much more explicit protection for environmental measures than GATT does for measures dealing with food and beverages.

NAFTA provides that GATT Article XX(b), which is generally incorporated into NAFTA, does not apply to sanitary or phytosanitary measures.[8] GATT Article XX(b) simply states that nothing under GATT will be construed to limit measures necessary to protect human, animal, or plant life. Under GATT, "necessary" defines the level of protection

and the measure to be taken. This stands in sharp contrast to NAFTA which explicitly gives the parties broad power to define the level of protection and only limits by "necessary" the measures used to achieve that level of protection whatever it may be.

In practical terms, this means that if California wishes to completely eliminate the use of DDT as a pesticide, and uses scientific principles and a risk assessment to determine that level of protection, it can only take measures necessary to achieve this goal. In the case where 100% elimination is sought, an absolute ban on the chemical is necessary. But where the level of protection desired is less than a 100% ban, the country will have to choose the least trade-restrictive method of achieving its level of protection.

B. NAFTA Restrictions on Measures to Protect Against Hazards Not in Food or Water

The NAFTA regulations on laws which protect health and safety are found in Chapter 9 of the agreement. Briefly, the section allows each party to establish an appropriate level of protection and adopt any standards-related measure to pursue that level of protection. The parties must use international standards where appropriate and no party can create an unnecessary barrier to trade or arbitrarily or unjustifiably distinguish similar goods or services. In addition, parties cannot adopt a stricter procedure than is necessary to give confidence that a good or service conforms to the standard. Finally, a party may conduct an assessment of risk.[9] The vast majority of what we consider to be "environmental" regulations fall under this section of NAFTA.[10]

NAFTA Chapter 9 allows the parties to adopt any measure to enforce or implement the level of protection the country has chosen.

1. What is an "Appropriate Level of Protection" Under NAFTA?

Chapter 9 allows each nation to establish legitimate objectives for whatever level of protection it wishes for safety, protection of life or health, the environment, or consumers.[11] These legitimate objectives can take into account, where appropriate, climate and geography, scientific justification, and technological and infrastructural factors. The only factor which explicitly cannot be taken into account is protection of domestic production from competition.[12]

2. What Measures Can Be Taken to Achieve a Party's Chosen

Level of Protection?

NAFTA Chapter 9 allows the parties to adopt any measure to enforce or implement the level of protection the country has chosen.[13] There is no requirement that the party conduct a risk assessment or base the measures on scientific principles.[14] This unfettered discretion to chose how much protection from a given harm will be tolerated and how to prevent that harm from occurring, is only limited by the specific provisions listed below.

3. No Measures Can Be Enacted Which Create Unnecessary Trade Barriers

The first of the four narrow limitations on the ability of a party to enact environmental regulations is that no unnecessary trade barriers be created in achieving the level of protection the party desires. Note that this does not limit the level of protection the country can choose, only the means used to achieve it. This subsection provides that an unnecessary obstacle to trade is never created when the demonstrable purpose of the measure is to achieve a legitimate objective and the measure doesn't exclude foreign goods which meet the legitimate objective.[15]

4. In Choosing Measures to Achieve the Level of Protection Desired, International Standards Should Be Used Where Appropriate

Nothing in Chapter 9 should be construed to prevent a party from choosing any measure to pursue legitimate objectives resulting in more protection than an international standard would provide.

The second limitation on the ability of parties to implement environmental regulations under Chapter 9 is that the parties must use international standards except where international standards would be an ineffective or inappropriate means to fulfill the legitimate objective. It gives as examples of legitimate reasons not to choose an international standard, that they would not achieve the legitimate objective because of climate, geography, technology, infrastructure, scientific justification, or the level of protection the party desires.[16] The article then reiterates that nothing in it should be construed to prevent a party from choosing any measure to pursue legitimate objectives that result in a higher level of protection than an international standard would.[17] Thus this section really amounts to a preference, when all other things are equal, for uniform international standards rather than provincial eccentricities.

5. In Choosing Measures to Implement the Desired Level of Protection, No Arbitrary or Unjustifiable Distinctions Can be Made Between Similar Goods and Services

If a party conducts a risk assessment to help it choose an appropriate level of protection, the third limitation of Chapter 9 provides that the party may not make arbitrary or unjustifiable distinctions between similar goods and services. This provision by its terms does not apply if a risk assessment is never conducted. Distinctions between similar goods and services are prohibited when the distinctions result in arbitrary/unjustifiable discrimination against goods of another party, constitute a hidden restriction on trade, or discriminates against goods which provide similar benefits with the same amount of risk.[18] This is in essence a "level playing field" provision, which guarantees that however strict a party's environmental regulations are, it will apply them equally to domestic and foreign goods and services.

6. When Enforcing the Measures Chosen to Achieve the Desired Level of Protection, No Stricter Procedures Than Necessary to Give Confidence that Goods or Services Conform to the Standard Can be Used

This is in essence a "level playing field" provision, which guarantees that a party's environmental regulations will apply equally to domestic and foreign goods and services.

NAFTA also provides under Chapter 9 that the goal of the parties is to achieve greater conformity in standards-related measures to the extent practicable.[19] To achieve this goal, Article 908(3), provides that a party will not adopt a stricter procedure than is necessary to give it confidence that goods or services conform with a regulation or standard. The party must take into account the risks posed by nonconformity.[20] This necessity requirement focuses on the procedures or rules that a party enacts to ensure compliance with the measure. That might mean that a requirement for random sampling of materials is acceptable, while a requirement that each piece of material be tested might not be.

What that means in practical terms is that under Chapter 7 (food and beverage) the measure itself must be necessary to achieve the level of protection. But under Chapter 9 (non-food and beverage) a party can choose any measure it wants, no matter how trade restrictive.

7. In Determining the Level of Protection, a Party May Conduct a Risk Assessment

Finally, Chapter 9 provides that in pursuing its legitimate objectives a party can conduct an assessment of risk. A careful reading of NAFTA Chapter 9 shows that there is no language requiring such an assessment. But if a risk assessment is conducted, NAFTA requires that the party take into account the available scientific evidence, intended end uses, processes, production, operating and testing methods, and environmental conditions when it does so.[21]

The Texas Attorney General wrote to the United States Trade Representative that he feared Chapter 9 would be read to require a risk assessment in choosing the desired level of protection.[22] An examination of the two NAFTA provisions which deal with risk assessments under Chapter 9 shows this fear to be completely unfounded.

Article 904(2) allows the parties to choose any level of protection they wish as long as it is consistent with Article 907(2). Article 907(2) provides that when a party establishes the level of protection and conducts an assessment of risk, it should avoid arbitrary or unjustifiable distinctions between goods. Article 907(1) above provides that a party *may* conduct a risk assessment. This stands in sharp contrast to Chapter 7 which uses no such discretionary language in discussing risk assessments.[23]

A risk assessment is completely optional, but, if chosen, it must be chosen in a way which does not discriminate against our trading partners.

The concerns raised by the Texas Attorney General on this point are not well founded. The clear intent and meaning of Chapter 9 is that a risk assessment is completely optional, but, if that option is chosen, it must be chosen in way which does not discriminate against our trading partners.

II. Summary of NAFTA's Provisions for Environmental Regulation

On the basis of the information analyzed above, we can reach a tentative conclusion about the effects of NAFTA on state environmental regulations. Two sets of rules have been created, one for consumables and one for all other goods. State rules would be evaluated as follows:

All of the environmental provisions of California's Prop. 65 would be found valid under either NAFTA standard.

Foods/Beverages: the federal government will do everything in its power to ensure state compliance with NAFTA. States may choose whatever level of protection they wish so long as there is a scientific basis for the protection and a risk assessment is conducted. Whatever measures the state chooses to use to achieve the desired level of protection must be necessary to achieve the desired level of protection, (*i.e.*, a less restrictive alternative which would provide the same level of protection must not be available).

All Other Goods and Services: the federal government will try to ensure state compliance with NAFTA but only when appropriate. States may choose whatever level of protection they wish and employ whatever measures they wish to achieve the protection, although international standards must be used if they will achieve the same level of protection. The state must only use necessary regulations to ensure compliance with the measures it creates. If the state chooses to conduct a risk assessment in pursuing its level of protection, it must not arbitrarily distinguish similar goods and services.

III. Application: How Would NAFTA Impact California's Proposition 65?

1. Proposition 65's Requirements

California's Proposition 65 is an example of a state regulation which provides more environmental protection than the federal government requires. Proposition 65 has two components: a labeling requirement and a water quality requirement. As enacted, the law requires that businesses which expose people to chemicals known to cause cancer in specified amounts must give a clear and reasonable warning.[24] Substances which cause cancer are those which the state's experts, another authoritative body, or the federal government believe have been "clearly shown through scientifically valid testing according to generally accepted principles to cause cancer".[25] The law also prohibits the discharge of cancer causing chemicals into any source of drinking water using the same definition of "cancer causing" cited above.[26]

2. Application of NAFTA to Proposition 65

Proposition 65 would probably be analyzed under both types of

environmental standards identified above. The warning requirement as applied to foods and beverages would fall under Chapter 7, while all other goods and services would fall under Chapter 9. The clean water provisions of the act would probably also fall under Chapter 7, but as the analysis below shows, all of the provisions of Proposition 65 would be found valid under either NAFTA standard.

NAFTA's language does exactly what the drafters said it would: it creates a free trade zone while preserving the U.S. right to maintain or elevate its environmental protection standards.

3. Chapter 7 Food and Beverage Analysis

Under this section, California can choose whatever level of protection it desires so long as there is a scientific basis and a risk assessment conducted. Proposition 65 itself contains a similar requirement: a chemical listed as cancer causing must be found to do so on a scientific basis. Proposition 65 and NAFTA both require a scientific basis for the evaluation. And a risk assessment for a cancer-causing agent in foods or beverages under NAFTA Chapter 7 requires only "an evaluation of the potential for adverse effects on life arising from the presence of an additive, toxin, or organism in foodstuff."[27] That is precisely what Proposition 65 requires.

When a chemical is listed, warnings must be given to people who could be exposed to it.[28] In addition, it may not be discharged into the water supply.[29] The level of protection which California has selected would be based on scientific principles and a risk assessment. This would satisfy the level of protection requirement of NAFTA.

The final NAFTA hurdle is that the measure be necessary to achieve the desired level of protection. The requirement that persons be warned when exposed to these chemicals is much less restrictive than other alternatives the Legislature could have chosen (*i.e.*, an outright ban). The requirement that such chemicals not be placed in the water supply in detectable amounts is the least restrictive way to keep those chemicals out of the water supply.

4. Chapter 9 Non-food and Beverage Measure Analysis

Under Chapter 9, Proposition 65 would have an even easier time passing muster. California is pursuing the legitimate objective of protecting life and health and can take any measures it desires to achieve

that objective. The only regulations which could be subject to a necessity analysis are those which California agencies implement to ensure compliance with Proposition 65; Proposition 65 itself would not be subject to a necessity analysis.

California has conducted an assessment of risk, so it is subject to Chapter 9 rules on risk assessments. But clearly California has met these requirements that scientific evidence be looked at, environmental conditions be considered, etc.

Conclusion

NAFTA's language when examined carefully shows that it does exactly what the drafters said it would: creates a free trade zone while preserving the right of the United States to maintain and even elevate its environmental protection standards. NAFTA presents no threat to California environmental protection measures.

Much was made about the NAFTA side agreements, but an examination shows that in terms of what environmental regulations will or will not be invalidated, they are relatively meaningless. The side agreements primarily address the issue of making sure that whatever standards a country adopts are actually enforced. While such provisions raise many legitimate concerns about loss of sovereignty and environmental imperialism, they do no threaten to reduce the level of environmental protection a country can choose to have.

John A. Leman is a 2L and President of the Federalist Society at King Hall.

NOTES

1. NAFTA, § B, Art. 724 and 724(a).
2. NAFTA, § B, Art. 715(2).
3. NAFTA, Art. 724.
4. NAFTA, Ch. 7, § B, Art. 724(d).
5. NAFTA, Ch. 7, § B, Art. 715(1).
6. NAFTA, Ch. 7, § B, Art. 715(5).
7. NAFTA, Ch. 7, § B, Art. 713(2).
8. NAFTA, Art. 710(B).
9. Some environmental groups have read Chapter 9 to require a risk assessment. For a discussion of this interpretation *see* below.
10. Essentially any environmental regulation which does not have to do with "consumables" would be analyzed under Chapter 9. This would include, for example, the Clean Air Act, the Clean Water Act, the Endangered Species Act, etc., and the state versions or supplements to those laws.
11. NAFTA, Art. 904(2).
12. NAFTA, Art. 915(1).

13. This is one fundamental difference between Chapter 9 (general regulations) and Chapter 7 (agricultural regulations); Chapter 7 regulations are somewhat more restrictive about what measures a party can use to achieve a given level of protection. See below.
14. NAFTA, Art. 904(1).
15. NAFTA, Art. 904(4).
16. NAFTA, Art. 905(1).
17. NAFTA, Art. 905(3).
18. NAFTA, Art. 907(2).
19. NAFTA, Art. 908(1).
20. NAFTA, Art. 908(3)(a).
21. NAFTA, Art. 907(1).
22. Copy on file with author.
23. See discussion of Chapter 7 below.
24. Health & Safety Code § 25249.6.
25. Health & Safety Code § 25249.8 (incorporated by reference into § 25249.10).
26. Health & Safety Code § 25249.5.
27. NAFTA, Ch. 7, § B, Art. 724(d).
28. Health & Safety Code § 25249.6.
29. Health & Safety Code § 25249.5.