

## NAFTA's Threat to Domestic Health and Environmental Laws

by Devin Odell

Free trade has never been easy. It requires more than simply tearing down barriers. Rather, free trade can exist only within a structure of rules and procedures designed to insulate it from protectionism, the ever-present tendency of governments to favor local producers. A free trade agreement must balance the elimination of such protectionism, even if disguised as laws aimed at protecting health or the environment, with the right of citizens to exercise control over their affairs. As the history of the Commerce Clause shows, achieving this balance is difficult even within the United States. Expanding free trade beyond our borders under the North American Free Trade Agreement (NAFTA) will undoubtedly make the balance even trickier to attain, especially in the area of environmental and health regulation.

NAFTA's approach to this inevitable conflict shows improvement over that taken by the General Agreement on Trade and Tariffs (GATT).<sup>1</sup> As U.S. Trade Representative Mickey Kantor said, NAFTA shows increasing awareness of both the need to keep governments from imposing protectionist technical

standards and the need to protect "legitimate health and environmental measures."<sup>2</sup> At the same time, however, it cannot be seen as the best possible solution to the problem. Despite significant progress, NAFTA still does not meet the Bush administration's promise that the U.S. would agree to trade disciplines only if they fully protect domestic environmental laws.<sup>3</sup> The treaty's language and dispute resolution procedures may still leave some types of environmental law vulnerable to challenge.

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NAFTA addresses food safety and environmental laws primarily in three places -- Chapters 7, 9 and 20. I will first critique the relatively tough provisions in Chapter 7 that deal with "sanitary or phytosanitary,"<sup>4</sup> standards. I will then turn to the more flexible provisions of Chapter 9, which addresses all other environmental, consumer and safety laws. Finally, I will examine the dispute resolution procedures established by NAFTA, focusing on how these procedures may magnify the textual weaknesses of Chapters 7 and 9. In discussing each section, I will point out how the treaty's language could have been modified to lower the risk

that the NAFTA will erode domestic environmental protection.

### Chapter 7 - Food Safety Standards

NAFTA protects the right of each Party to adopt "any sanitary or phytosanitary measure necessary for the protection of human, animal or plant life or health in its territory..."<sup>5</sup> To paraphrase, this provision qualifies the right to adopt food safety measures by requiring that they be "necessary" and that they protect life in a Party's "territory." Both of these qualifications raise questions about NAFTA's relationship with domestic law.

Although the word "necessary" may appear innocuous, it comes to NAFTA with a lengthy history under GATT dispute settlement panels. These panels, convened to adjudicate trade disputes, interpret the terms of GATT much as judges construe laws. GATT panels have interpreted "necessary" to require a "least GATT-inconsistent" or "least trade-restrictive test."<sup>6</sup> This interpretation, according to some

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commentators, has given GATT "dispute settlement panels a roving commission to second-guess domestic measures and to substitute their own judgment as to the desirability of a particular regulatory measure..."<sup>7</sup> In other words, the panel may essentially substitute their own judgment for that of voters or a legislature as to the best way to achieve food safety goals. NAFTA negotiators, by choosing to use the word "necessary" with knowledge of its

meaning under GATT, created the risk that NAFTA dispute panels will have too much power to overrule domestic legislation. To avoid this possibility, NAFTA should contain a definition of "necessary" that insures that trade panels will defer to legislative or voter judgments. Alternatively, "necessary for the protection of" could be replaced with "related to the protection of", building a deferential standard into the language of the treaty.

The phrase "in its territory" prevents the U.S. from enacting environmental laws to protect both itself and foreign countries. It appears to codify the finding of the infamous "Tuna-Dolphin Report"<sup>8</sup> that environmental laws having "extrajurisdictional" application are not protected from trade challenges. The adoption of this rule by NAFTA is

unfortunate for two reasons. First, it does not allow the U.S. (or Mexico or Canada) from passing legislation to stop some activities outside its territory even if those activities, poisoning of anadromous fish or migratory birds with pesticide residue for example, have effects within its territories.<sup>9</sup> Second, it "fails to recognize the obligation of a nation to prevent the activities of its nationals from harming citizens in other nations."<sup>10</sup> A U.S. or state law banning the export of dangerous pesticides, for example, potentially could be struck down under this provision. For these reasons, the phrase "in its territory" should be eliminated from NAFTA or clarified so that it allows the regulation both of activities affecting a NAFTA Party's territory and of the activities of nationals even outside a Party's borders.

The right to adopt food safety measures under NAFTA is also qualified by the requirement that each Party ensure that its measures are "(a) based on scientific principles...; (b) not maintained where there is no longer a scientific basis...and; (c) based on a risk assessment..."<sup>11</sup> Again, this provision raises serious questions concerning the level of deference trade dispute panels will show to domestic regulation. In particular, NAFTA leaves the meanings of "scientific principles" and "risk assessment" uncertain and creates the possibility that domestic laws genuinely concerned with food safety will be challenged successfully.

First, the provision requires that measures be "based on" scientific principles and risk assessments. But "based on," like "necessary," could be interpreted to require a "tight fit" between a statute or regulation and the science or risk analysis underlying it. This requirement might not allow sufficient leeway for political judgments and social values. While science and risk analysis can provide a factual underpinning for regulation, they cannot and should not determine the choices citizens, elected representatives or government officials make. Such decisions may rely, for instance, on the "precautionary principle," the purposeful inclusion of a large safety margin in environmental laws.<sup>12</sup>

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In addition, the NAFTA provision allowing dispute panels to call on scientific experts to analyze challenged laws indicates that these panels may second-guess the scientific findings underlying a particular law.<sup>13</sup> Again, given the inherent uncertainty of scientific results, this provision could provide a loophole for trade panels to call for the elimination of a law. This is particularly troublesome with regard to local laws, since

small governmental entities may not have the budget or expertise to provide a full-scaled scientific justification for their legislation. The phrase "based on" should be changed to "accompanied by" so as to ensure deference by the trade panels to the risk assessments and scientific conclusions used by legislators. In addition, the use of the "precautionary principle" could be explicitly permitted.

Finally, Chapter 7 states that "[e]ach Party shall ensure that any sanitary or phytosanitary measure that it adopts...is applied only to the extent necessary to achieve its appropriate level of protection, taking into

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account technical and economic feasibility."<sup>14</sup> Again, the word "necessary" presents the same potential problems discussed above. This provision also appears to mean that "an otherwise appropriate and necessary protection may be found unnecessary because a trade dispute panel believes it is too

costly, or technically infeasible."<sup>15</sup> At the very least, the provision is not clear and should be more carefully defined.

In summary, Chapter 7 provides limited protection to each Party's right to adopt laws dealing with food safety. But NAFTA's language makes this right at best ambiguous and at worst illusory. The muddled text, based on a distorted view of the role of science in regulation, offers many opportunities for an ingenious trade panel to rule that a legitimate regulation is an illegal trade barrier.

## II. Chapter 9 -- Environmental and Consumer Laws

Chapter 9, like Chapter 7, gives each Party the basic right to "adopt...any such measure relating to safety, the protection of human, animal or plant life or health, the environment or consumers...."<sup>16</sup> But, unlike Chapter 7, Chapter 9 does not insist on risk assessments or scientific principles. Instead, it qualifies this right with the provision that:

"No Party may...adopt...any...measure with the effect of creating an unnecessary obstacle to trade between the Parties. An unnecessary obstacle to trade shall not be deemed to be created where: (a) the demonstrable purpose of the measure is to achieve a legitimate objective; and (b) the measure does not operate to exclude goods of another Party that meet that legitimate objective."<sup>17</sup>

"Legitimate objectives" may include safety, sustainable development and the protection of human, animal or plant life or health, along with, the protection of the environment and consumers.<sup>18</sup>

While this basic framework does not appear to be irrational, it is sloppily drafted. For example, the use of the word "unnecessary" again risks bringing the overly restrictive GATT standard into NAFTA. It should be replaced with "unfair" or similar language. The phrase "demonstrable purpose," in the view of one commentator, "virtually invites a Party who feels aggrieved to accuse its trading partner of enacting standards that restrict NAFTA's free trade provision."<sup>19</sup> It should be eliminated from the treaty.

Finally, part (b) of the provision focuses on whether the product meets the legitimate objective, not the measure designed to further the objective. This raises the possibility that a dispute panel would find that, even though a foreign product does not meet the standards set forth by a domestic measure, it still must be allowed entry because it meets the measure's "objective." Such a finding would again place the trade dispute panel's judgment over that of domestic regulators or legislators in determining a product's compliance with a measure. Therefore, part (b) should be removed from Article 904(4).

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### III. Dispute Resolution Procedure

Perhaps the most troubling part of NAFTA is Chapter 20, containing the agreement's dispute resolution procedures. These procedures, lacking safeguards we take for granted in domestic adjudication, may magnify the ambiguities and loopholes in NAFTA's text and undermine the ostensible intent of the Parties to provide protection for legitimate domestic law.

Under NAFTA, a Party that believes its trade rights have been violated may first seek a consultation in an attempt to resolve the problem.<sup>20</sup> If these informal consultations and other reconciliation attempts break down, the Party may then request the establishment of a trade dispute panel.<sup>21</sup> These panels may be convened under either GATT or NAFTA at the choice of the challenging Party.<sup>22</sup> The responding Party may demand a NAFTA panel for disputes involving disagreements arising under food safety, environmental, consumer or health laws covered

by chapters 7 and 9. Disputing Parties pick a chair from a roster of trade, legal and other experts agreed upon by all three NAFTA Parties. After a chair is chosen, each side picks two panelists from the other side's roster, to make a panel of five. The panelists then hear the dispute, following procedures allowing each Party to make written submissions and rebuttals and requiring at least one oral hearing. The panel then issues its ruling in a report. If the report concludes that the responding Party has acted inconsistently with NAFTA and no resolution is agreed upon within thirty days, the challenging Party may impose sanctions in retaliation.

The primary problem with these panels is that they will operate in secrecy. The public will have no way to monitor or participate directly in the panel's decision-making process. Arguments and briefs submitted to the court will be confidential and no entity aside from officials at the

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national level can participate in the proceeding. The panel is not even required to publish its final report. This means that if state and local laws are challenged, citizens will have no way to ensure that the federal government is adequately representing their interests. (This may be an especially severe problem if the federal government is hostile to the particular local law).<sup>23</sup> Given the complex

interests required in the balancing of environmental law and trade and the far-reaching consequences of decisions in this area, secret deliberations seem markedly out of place. In addition, trade panels will rely largely on the plain language of NAFTA in making their decisions. Unlike the use of legislative history in the interpretation of domestic statutes, negotiating history is "of considerably less significance" in treaty interpretation.<sup>24</sup> This increases the risk that inconsistencies in the text will be exploited to challenge domestic laws as trade barriers despite the reassuring statements by federal officials concerning the text's "true meaning."

In one much-touted change from GATT dispute resolution procedures, the burden of proof that a law is inconsistent with NAFTA explicitly lies with the challenging rather than the responding Party. But, as one commentator points out, dispute panels "are not courts" and "there is no reason to believe that the result in any particular panel proceeding turned on questions of burden or presumption."<sup>25</sup> In other words, trade experts on panels may not apply these legal tools in the same way judges do. Furthermore, the extent of the burden is not spelled out in the treaty. As a result, it is not clear whether the challenging Party may satisfy the

burden by merely stating a prima facie case or if it must prove all elements of the alleged inconsistency with a preponderance of the evidence. If the former, the burden of proof in reality remains largely on the responding Party. Thus, these provisions do not offset the concerns about the dispute resolution process.

At a minimum, NAFTA should provide for an open process with opportunity for broad participation in trade dispute procedures. Perhaps the best solution, as the Sierra Club suggests, is to remove responsibility for resolving disputes from NAFTA altogether and vest it in an independent international body that allows for open proceedings and public participation. This would mirror our domestic system of separation of powers and help insure impartial and open resolution of trade disputes.

### Conclusion

Free trade between the states, protected in part by the Commerce Clause, has played a large part in the economic development of the United States. NAFTA takes a step towards expanding this trade beyond our borders. But in doing so, it also introduces new problems in reconciling domestic sovereignty with the requirements of free markets. While the text of NAFTA contains some ambiguities and potential loopholes, the crucial problem is the agreement's secretive and anti-democratic procedures for resolving disputes. Developing a process for resolving trade disputes openly and fairly should be a top priority for U.S. trade policy as we open our markets to our neighbors.

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### NOTES

1. The General Agreement on Trade and Tariffs sets the trade rules for 105 countries and is the dominant structure in international trade. It is currently being renegotiated in the so-called "Uruguay Round."
2. Office of the United States Trade Representative, Review of U.S.-Mexico Environmental Issues 192, 194 (Feb. 1992) (quoted in The Role of Science in Adjudicating Trade Disputes Under the North American Free Trade Agreement: Hearing Before the House Committee on Science, Space and Technology, 102d Cong., 2d Sess. 41 (1992) (hereinafter The Role of Science).
3. Id.
4. "Sanitary or phytosanitary measure" is defined by Art. 724 as "a measure that a Party adopts, maintains or applies to: (a) protect animal or plant life or health in its territory from risks arising from...a pest or disease...(b)...additive, contaminant, toxin or disease-causing organism in a food, beverage or feedstuff...(c)...disease-causing organism or pest carried by an animal or plant...."
5. NAFTA, Art. 712(1).

6. The Role of Science at 48 (statement of David E. Wirth, Asst. Professor, Washington and Lee University).
7. Id.; accord The Role of Science at 22 (statement of Robert F. Housman, Attorney, Center for International Environmental Law).
8. See Allison Arieas, The Gatt: Tuna, Dolphins and You, *Environs*, Dec. 1992 at 8 (discussing history and resolution of the Tuna-Dolphin dispute).
9. Role of Science at 53 (Wirth).
10. Id. at 25 (Housman).
11. NAFTA, Art. 712(3)
12. Environmental Aspects of the North American Free Trade Agreement: Hearing Before the Senate Committee on Environment and Public Works, 103d Cong., 1st Sess. 73 (1993) (statement of J. Michael McCloskey, Chairman, Sierra Club).
13. NAFTA, Art. 2015.
14. NAFTA, Art. 712(5).
15. Role of Science, at 26 (Housman).
16. NAFTA, Art. 904(1).
17. Id., Art. 904(4).
18. NAFTA, Art. 915 (definitions).
19. The Role of Science, at 29 (Housman).
20. NAFTA, Art. 2006.
21. Id., Art. 2008.
22. Id., Art. 2005.
23. See Kurt C. Hofgard, Note, Is This Land Really Our Land?: Impacts of Free Trade Agreements on U.S. Environmental Protection, 26 *Environmental Law* 635, 658 (1993) (Department of Commerce was "forced" by environmental group to enforce provisions in the Marine Mammal Protection Act later challenged by Mexico under GATT in the Tuna/Dolphin case).
24. The Role of Science, at 61 (Wirth).
25. Id.