Protecting the Environment

In The Context Of The North American Free Trade Agreement

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March 30, 1993

Preface

This document is based on submissions entitled "Effects of the North American Free Trade Agreement on the Environment and Regulation of the Environment in Canada" dated February 15, 1993 made by West Coast Environmental Law Association to the British Columbia Legislative Assembly Select Standing Committee on Economic Development, Science, Labour, Training and Technology. That committee was charged with consideration of British Columbia's interest in the North American Free Trade Agreement. The document which follows clarifies and elaborates on several issues raised in the February 15, 1993 document.

EXECUTIVE SUMMARY

Unless environmental issues are adequately dealt with in trade agreements such agreements can have negative impacts on efforts to achieve sustainable development. The North American Free Trade Agreement ("NAFTA") as currently drafted fails to deal with the environmental consequences of free trade, and as a result discourages sustainable development and may stymie efforts at effective environmental regulation. This paper recommends provisions which could be included in an environmental agreement parallel to NAFTA that would encourage sustainable development and safeguard the power of Canadian governments to pass effective environmental regulation. The objective of this paper is to make constructive criticisms of NAFTA, suggesting changes acceptable within the context of a North American free trade area.

Unfortunately Canada, the United States and Mexico have so far largely ignored the environmental effects of NAFTA, burying any concerns in the sanguine assumption that trade will inevitably lead to increased wealth which will inevitably lead to a better environment. Unfortunately this sanguine assumption does not bear up to analysis. The primary objective of the Canadian government's environmental review of NAFTA is

apparently to appease concerns rather than objectively deal with the impacts of NAFTA on regulation making and the environment.

Environmental Countervailing Duties

One of the most important potential NAFTA reforms would be to allow the imposition of duties ("environmental countervailing duties") on imported products equal to costs the product manufacturer has avoided by being located in a jurisdiction with lower environmental standards. Such duties would be applied in the same way as other countervailing duties, i.e. when necessary they would protect domestic producers facing material harm from unfair competition caused by subsidization. The subsidy in this case is that the manufacturer does not pay the costs of environmental harm it causes.

Allowing nations to adopt environmental countervailing duties would free policy makers from the fear that raising environmental standards will displace industry to locales where standards are less stringent while Canada still bears the cost of the pollution. Although environmental compliance costs are not typically the most significant factor in where industry invests (indeed at times high standards may offer a long run competitive advantage) they can be a significant factor and evidence shows that they have encouraged some businesses to relocate.

Environmental countervailing duties do not protect inefficient industries but instead protect efficient policies which force producers to pay for the environmental costs of their production.

Environmental countervailing duties are not intended as a single tool for dealing with lax environmental standards amongst trading partners; however, experience shows they are a necessary tool to be used in limited circumstances and in conjunction with multilateral cooperative efforts.

Trade Sanctions

Even where domestic producers are not faced with material harm because of "ecological subsidies" offered by trading partners, any parallel environmental agreement should allow imposition of trade sanctions necessary to protect internationally shared natural resources or natural resources of global significance. Such sanctions are not a replacement for multilateral cooperation but instead should be used where multilateral cooperation proves ineffective.

Enforcement of International Agreements

International environmental protection agreements should have precedence over NAFTA and other international trade agreements. NAFTA does not ensure that Canada, the United States and Mexico are bound by their commitments pursuant to international environmental protection agreements.

Export Bans

A parallel agreement should allow export bans to prevent the depletion of natural resources if reasonably necessary to protect a natural resource without causing economic dislocation. Export bans on natural resources without a minimum amount of value added are not permitted under NAFTA, but may be the only politically feasible means of protecting endangered resources.

Product Standards

Chapters 7 and 9 of NAFTA contain extensive provisions for the elimination of "technical barriers to trade", i.e. standards for both domestic and imported products which may discourage imports. All parties are committed to moving to international standards. However, they are permitted to adopt or maintain higher standards if these are based on risk assessment , are scientifically justified, and are necessary to meet the regulating nation's generally applicable level of safety.

It is essential that the intent of these various requirements be clarified. First, it is important to define risk assessment and avoid any requirement to move to the sort of cost benefit analysis which has lead to a dropping of many standards in the United States.

Secondly, while international standards may be acceptable as minimum acceptable safety standards, any higher standard which is adopted in good faith to deal with an environmental concern should be acceptable. It is unrealistic to require any higher standards to provide a level of protection which is equal to some universally applied acceptable level of risk.

Moreover, the necessity for scientific justification of regulations should be clarified as not imposing a requirement for scientific proof of the need for the standard. Higher standards must be acceptable in light of scientific uncertainty, and a precautionary approach enshrined.

Dispute Resolution

Finally, a parallel agreement must ensure that the NAFTA dispute resolution process is open to submissions by interested parties. This is essential to ensure that panels have the benefit of the perspectives offered by non-governmental organizations and local governments.

Summary of Recommendations

In summary, a parallel agreement on environmental matters should:

A. Allow the imposition of duties ("environmental countervailing duties") on imported products equal to costs the product manufacturer has avoided by being

located in a jurisdiction with environmental standards lower than those of the importing nation.

B. Allow trade sanctions imposed for the protection of ecological or biological resources that are shared amongst nations or of global significance.

C. Permit trade sanctions in compliance with or to enforce international conservation or environmental protection agreements.

D. Provide that export bans to prevent the depletion of natural resources are permissible if reasonably necessary to protect a natural resource without causing economic dislocation.

E. Clarify Chapters 7 and 9 of NAFTA to ensure that standards adopted in good faith for valid environmental reasons are not rejected merely because there is some doubt as to their scientific justification, because they impose a higher standard than the average safety standard for the party, or because they are not based on formal risk benefit analysis.

F. Allow submission of unsolicited briefs from environmental non-governmental organizations to dispute resolution panels.

I. INTRODUCTION

This paper recommends various matters which need to be addressed in any parallel agreement to the North American Free Trade Agreement ("NAFTA"). The recommendations are aimed at minimizing negative impacts NAFTA would otherwise have on the ability of Canada's federal and provincial governments to regulate environmental matters and to move to a sustainable economy. The objective of this paper is to make constructive criticisms of NAFTA, suggesting changes acceptable within the context of a North American free trade area.

1. The Canadian Environmental Review of NAFTA

There is no certainty about what effect the North American Free Trade Agreement will have on the environment. However, it is essential to realize that the rosy picture of the environmental effects of NAFTA painted by the Canadian government is skewed.

An environmental review of NAFTA completed by the Canadian government (the "Canadian Review") recognized that quantitative analysis of the effects of NAFTA was impossible given the number of uncertainties involved. Unfortunately, the Canadian Review tends to claim as victories attributable to NAFTA things which Canadians take for granted and minimize negative effects by making convenient assumptions and comparisons.

For instance, in answer to concerns regarding greenhouse gas production the Canadian Review refers to initiatives undertaken to limit greenhouse gas production. However, none of the initiatives mentioned have anything to do with NAFTA.

Then the Canadian Review blithely, and with no clear basis, predicts no significant increase in burning of fossil fuels in Canada (apparently based on the assumption there will be no increase in economic activity). It tosses off concerns about greenhouse gases from the United States and Mexico, stating that NAFTA might contribute to conversion to cleaner technologies. This is despite the strong correlation between economic output and greenhouse gas production and the fact that, without safeguards, freer trade can encourage environmentally undesirable means of production. [(1) -- 1. See below at page 8.]

Another example of the optimistic and sometimes misleading nature of the Canadian Review is its treatment of the effects of NAFTA on production of sulfur dioxide, one of the gases which cause acid rain. A European commission task force on the environmental effects of European integration concluded that the growth impact of the European internal market is likely to cause atmosphere emissions of S02 and N0x to increase respectively by 8% to 9% and 12% to 14% by 2010. [(2) -- 2. Ortman, David E., statement before Subcommittee on Trade Committee on Ways and the Means, United States House of Representatives, February 22, 1991.]

The Canadian Review ignores the evidence relied on by the European task force and relies on a Princeton University study which predicts that, all things being equal (i.e. increased trade not being accounted for), there will be an eventual decrease in sulfur dioxide emissions as gross domestic product per capita grows. The Review refers to the turning point as being $5,000 per capita GDP. (Mexico's per capita GDP is only $2,930.) However, this is only the turning point for additional units of sulfur dioxide, i.e. this is the point where the rate of increase starts to go down. [(3) -- 3. The above analysis is based on a review of material found in the Canadian Environmental Review citing ene M. Grossman and Alan Krueger, Environmental Impacts in the North American Free Trade Agreement, Princeton, New Jersey, October 1991. The graph contained in the Canadian Environmental Review is misleading in that it deals with additional units of sulfur dioxide rather than the absolute level of discharges. Nonetheless, it would appear that there is a decrease in per capita silver dioxide emissions at about the $12,000 U.S. per capita GDP.] Absolute increases in sulfur dioxide appear to continue until about the $12,000 per capita GDP level.

The above discussion is not meant to imply that Mexico should not develop economically, merely that without changes to NAFTA the type of development fostered by free trade may not be sustainable and certainly cannot be relied on to improve environmental standards.

2. Trade, Growth and the Environment

Before commencing with a review of recommendations it is useful to deal with a fundamental issue that underlies the debate on NAFTA and the environment. The focus

of this paper on amendments to NAFTA should not be considered an acceptance of the idea, advocated by many free trade proponents, that trade necessarily leads to greater wealth which necessarily leads to an improved natural environment. [(4) -- 4. For instance, GATT Secretary General, Arthur Dunkel, in the report on trade and the environment published in the GATT Secretariat's annual review of trade issues, argued that environmental concerns are hurting efforts to protect the environment because these efforts restrict trade and reduce economic activity. Dunkel argues that trade increases wealth and increases in wealth are essential to provide the resources necessary to protect the environment. This same sort of argument has been made by the leaders of the three NAFTA partners.]

This simplistic idea at best confuses regulatory standards with the state of the environment. It also runs contrary to the simple evidence that the earth is facing an unprecedented environmental crisis after 150 years of equally unprecedented economic growth and growth in trade.

No doubt, in some contexts, environmental standards increase with economic growth. However, with many pollutants there appears to be no decrease in levels of pollution with greater economic activity. For instance, Canada and the United States, two of the world's most wealthiest countries are also the two largest per capita producers of carbon dioxide.

While economic development for underdeveloped nations is essential to sustainable development free trade does not necessarily foster the type of economic development which is sustainable. Freer trade in Mexico has caused an increase in concentration of agricultural land holdings forcing landless peasants to the cities and putting more pressure on those cities [(5) -- 5. "More Hard Times for Mexico's Poor", Globe and Mail, August 24, 1992, p.A15.] The sort of specialized, large scale, energy intensive production of export crops which occurs on the consolidated holdings is difficult to reconcile with the idea of sustainable agriculture. [(6) -- 6. Shrybman, Steven, "The Environment, Sustainable Agricultural and International Trade," address to the International Symposium on GATT, Agricultural Negotiations, Geneva, April, 1990.]

Because capital can move to the nation of greatest return whereas labour cannot, trade can cause an overall decrease in wages and an increased return on capital [(7) -- 7. Herman E. Daly and John Cobb, Junior, For the Common Good, Boston: Deacon Press, 1989, pp.209-235.] This pattern may be inimical to sustainable development.

Highly liberalized trade may also make dealing with environmental problems more difficult in the future by spreading the ecological burdens of growth globally. World Bank senior economist Herman Daly states:

"...although trade will allow some countries to live beyond the ecological carrying capacity of their borders, all countries cannot possibly do this - no matter how much world trade may expand, all countries cannot be net importers of raw materials and natural services. Thus, the experience of the Netherlands and Hong Kong cannot be generalized. Free trade allows the ecological burden to be spread more evenly across the

globe, thereby buying time before facing up to the limits (to growth), but at the cost of eventually having to face the problems simultaneously and globally rather than sequentially and nationally." [(8) -- 8. Herman E. Daly, "Free Trade, Sustainable Development and Growth: Some Serious Contradictions" Geneva: Centre for Our Common Future and the IFC, 1992.]

While recognizing these problems with unmitigated free trade, there may also be some good reasons for liberalized trade. Moreover, Canada's choices are limited by its place in the global economy. In light of this, the recommendations offered below are intended to improve NAFTA so that the benefits of trade can be realized with minimal or no compromise to sustainability in the long term.

II. RECOMMENDATIONS

1. ENVIRONMENTAL COUNTERVAILING DUTIES

Any parallel environmental agreement should allow the imposition of duties ("environmental countervailing duties") on imported products equal to costs the product manufacturer has avoided by being located in a jurisdiction with environmental standards lower than those of the importing nation.

BACKGROUND:

Section 103.1 of NAFTA provides that the parties affirm their existing rights and obligations with respect to each other under the General Agreement on Tariffs and Trade ("GATT").

Article VI of GATT permits a nation to impose "countervailing duties" on imported products equal to subsidies provided to the manufacturer of the product if the import of the subsidized product threatens to "materially injure" domestic industry.

Although lax environmental standards are a form of subsidization, [(9) -- 9. See below at pages 8-10.] it is unlikely that GATT institutions would accept the idea that lax environmental standards are a subsidy. [(10) -- 10. First, the GATT Secretariat has been generally opposed to the idea of environmental countervailing duties, viewing lax environmental standards (as long as the effects are not international) as being a "source of gainful trade": see Industrial Pollution Control and International Trade, GATT Studies No. 1, 1971, pp. 12-13 and 17-18 and GATT, "Trade and the Environment" as cited in Alex Hittle, "Trade and the Environment at an Impasse", the Environmental Forum (July/August 1992) at p. 27. Second, GATT has ruled that subsidies cannot be countervailed unless they are only available to a particular industry or region. Therefore, an environmental countervail could not be justified if environmental standards in one country were generally lax.] Section 103.1 of NAFTA would therefore effectively prohibit any use of environmental countervailing duties under NAFTA.

Nonetheless, a parallel agreement allowing environmental countervails would not breach GATT if it only allowed environmental countervailing duties no greater than the duties generally applicable under GATT (e.g. if Canada imposes an environmental countervailing duty on Mexico, Mexico would lose the benefits of NAFTA but not the benefits of GATT). [(11) -- 11. GATT Article XXIV sets conditions for a free trade area by GATT members. Amongst the conditions is that duties are eliminated on substantially all the trade between parties to a free trade agreement and free trade areas do not raise the barriers to trade of other members of GATT with the free trade area. Since environmental countervailing duties would only be used on goods which are unfairly "ecologically subsidized" and which cause material injury to domestic industry they should not run afoul of this requirement. See also Michael Barr, Robert Honeywell and Scott Stofel, "Labor and Environmental Rights in the Proposed Mexico-United States Free Trade Agreement" (1991), 14 Houston Journal of International Law 1 at p. 81.] Alternatively the NAFTA parties could, amongst themselves, waive those provisions of GATT which limit the use of environmental countervailing duties. [(12) -- 12. Article XXV of GATT permits waiver, on behalf of all GATT parties, of GATT obligations if such waivers are approved by two-thirds of GATT members. There would appear to be nothing prohibiting parties from, as between themselves, waiving GATT provisions without this approval.]

Article 1114.2 of NAFTA provides that parties should not derogate from environmental measures to encourage investment. If a party considers another is offering such encouragement the parties are obliged to consult "with a view to avoiding such encouragement."

DISCUSSION:

The World Commission on Environment and Development (the "Brundtland Commission") recommended that the activities of multilateral trade forums should

"Reflect concern with the impacts of trading patterns on the environment and the need for more effective instruments to integrate environment and development concerns with international trading arrangements". [(13) -- 13. World Commission on Environment and Development, Our Common Future: Oxford University Press, 1987, p. 84.]

One way in which trade agreements can encourage sustainable development is by allowing nations to protect themselves from competition which has an advantage due to lax environmental regulation.

The need for the countervailing duty

As stated by a senior economist with the World Bank, imposition of environmental countervailing duties "is the protection of an efficient national policy of internalization of environmental costs." [(14) -- 14. Daly, above at footnote 7.] Essentially, failure to regulate can be considered the equivalent of providing a subsidy because it allows producers to adopt processes which are both a burden on the general public and a give-away of valuable goods. [(15) -- 15. This idea of lax standards as subsidy has been

accepted by mainstream economic organizations such as the Conference Board of Canada and the OECD: Antoine St. Pierre, "Impact of Environmental Measures on International Trade" Report of the Conference Board of Canada 76-91-E, at p. 3; Joint Report of the Trade and Environment Committees of the OECD, (Paris, May 1991).]

Countries which internalize costs -- i.e. adopt policies that force businesses to invest in reducing their impact on the environment or pay for the costs of environmental degradation -- will be at a competitive disadvantage if they trade freely with countries that subsidize production through lax standards. Not only will they be at a competitive disadvantage but, without environmental countervailing duties, overall environmental problems will increase as industries migrate to areas of lax environmental regulation.

For example, it is widely recognized that the costs of fossil fuel energy come nowhere near incorporating their hidden costs in terms of health, crop losses, and the environment. [(16) -- 16. Harold Hubbard, "The Real Costs of Energy", (April 1991) 264:4 Scientific American 36 notes that the total hidden costs of energy in terms of subsidies, health, crop losses and employment are estimated at $100,000,000,000 and could be several times that amount.] Although Canadian oil is still sold at substantially less than its environmental costs, it comes closer than American or Mexican oil prices in incorporating these hidden costs.

With free trade the United States would have a significant advantage over Canada in producing products which rely heavily on energy from burning of fossil fuels. If Canada adopted a carbon tax further increasing the cost of oil, the predictable result would be a movement of production to the United States.

Not only would Canada lose industry, but it would also reap little environmental benefits since many of the environmental costs associated with the burning of fossil fuels, such as acid rain and global warming, would still affect Canada.

Article 1114.2 -- the requirement that parties not waive standards to attract investment -- offers little assurance that industry will not migrate to avoid stiff environmental laws. Article 1114.2 ignores the already existing gaps between standards.

The effect of an environmental countervailing duty

The above concerns can be partly [(17) -- 17. Environmental countervailing duties will not provide international market protection for goods which incorporate the environmental costs of production in their prices.] met by use of environmental countervailing duties. Such duties must include not only the differences in cost producers pay because of environmental regulations, but also cost differentials that reflect liability for environmental harm. A nation which makes businesses fully liable for environmental damage they cause should not be penalized for doing so.

Environmental countervailing duties would remove some of the constraints on policy makers adopting stringent environmental policies. Policy makers are sensitive to the effects environmental regulations have on industry's competitive position. A 1991 policy

statement of the Canadian Department of External Affairs and International Trade states:

"Strong environmental standards are compatible with encouraging development of a more competitive Canadian economy. However, we shall have to pay attention to adjustment costs and move in step with other major trading partners to avoid the risk of being undercut by environmentally irresponsible competitors." [(18) -- 18. "Managing Interdependence", as cited in Michelle Swenarchuk, "The Environmental Implications of the North American Free Trade Agreement" (November 1992), Canadian Environmental Law Association.]

As governments face major environmental crises they must be put in a position where the imposition of higher environmental standards is not delayed by the need to move in step with recalcitrant trading partners.

The concept of environmental countervailing duties have been criticized on a number of grounds. The following 4 pages discuss these criticisms and how they are generally either misguided or reflect problems which can be dealt with in the terms of NAFTA.

Lax Standards: A Source of Comparative Advantage?

GATT views environmental countervailing duties as "unjust because, as with different tax, savings, investment, education, immigration, science etc. policies, differing environmental standards are simply a source of comparative advantage - the basis for all trade." [(19) -- 19. Canada, Department of External Affairs and International Trade, "Summary of Trade and Environment Chapter of GATT Annual Report" (April 1992).] This misses the distinction between legitimate sources of comparative advantage (such as an efficient regulatory system and the right natural resources for producing a product) with subsidization through placing the environmental costs of a product on society at large.

Any possibility that environmental countervailing duties might protect inefficient environmental regulations (i.e. regulations which have equal effects but at greater cost) can be avoided by stipulating that the duties are not applicable to the extent the specific objectives behind the importing nation's standards are being met by the exporter.

Does industry migrate into jurisdictions with low environmental standards?

Both the Canadian and American environmental reviews of NAFTA have dismissed the need for environmental countervails partly on the basis that environmental regulations are only a minor factor affecting investment decisions. [(20) -- 20. Canada, "Canadian Environmental Review of the North American Free Trade Agreement", (October, 1992) at pp. 56 to 60; United States, Office of the United States Trade Representative, "Review of U.S. Mexico Environmental Issues" (February 1992).] Albeit some studies have indicated that domestic environmental regulations which anticipate international regulatory trends are an advantage to the industries effected, and while environmental regulation is not always the most significant determinant of investment location, there is

still a need for environmental countervailing duties to protect environmental policies that would otherwise have an impact on investment.

The Canadian Review notes that, because of present over-capacity in industries which are protected by tariffs and have heavy pollution abatement costs, there is unlikely to be an investment shift to Mexico due to lax standards. This conclusion assumes no change in demand or the products traded between parties. Industries currently immune from competition may not be immune in another decade, while differences in environmental standards may persist indefinitely.

There is ample evidence that in many cases environmental regulation will be a significant factor in investment decisions. The Conference Board of Canada has recognized that in the forestry and manufacturing sectors the competitive advantage of locating in a jurisdiction with lax environmental standards has affected investment decisions and induced the relocation of production facilities. [(21) -- 21. St. Pierre, above at footnote 15, p. 4.]

Based on a review of various studies, Malissa McKeith, a lawyer providing environmental advice to U.S. corporations operating in Mexico and Asia, similarly concluded that lax enforcement of environmental regulations lead some businesses to relocate from the U.S. to Mexico [(22) -- 22. Malissa McKeith, "The Environment and Free Trade: Meeting Halfway at the Mexican Border", 10 U.C.L.A. Pacific Basin Law Journal 183, at p. 194.] The Secretariat of the Organization for Economic Cooperation and Development (the "OECD") reports that Swedish plans to impose surcharges on the release of chlorine from pulp mills appear to be leading to the relocation of Swedish pulp processing mills abroad [(23) -- 23. Organization for Economic Cooperation and Development, Secretariat, "Trade and the Environment: Issues arising with respect to the International Trading System", (July, 1990, Paris) at p. 17.] A number of other studies back up these findings. [(24) -- 24. A United States government study on the effect of California air pollution control standards found a significant number of manufacturers relocated, citing higher labour costs and more stringent air pollution control standards as the reasons for moving: see Canada, above at footnote 20, at p. 60. Also there is evidence that investment patterns have been distorted by companies taking advantage of different levels of environmental protections in the European Community: see A. Winter, et al., Europe without Frontiers: A Lawyer's Guide (1989), at p. 136, as cited in Barr, above at footnote 11, at p. 55.]

Environmental Countervailing Duties and Harmonization of Standards

Some trade proponents have argued that the need for environmental countervailing duties will be short lived because economic growth will allow all nations to impose higher standards. NAFTA does not provide for harmonization of environmental regulations other than product standards (e.g. regulations as to acceptable characteristics of imported products), and history indicates that harmonization of standards in a upward direction is at best slow and often non-existent. In the European Community where the EC has powers to promulgate strict environmental standards, lax enforcement and regulation remains a large problem. [(25) -- 25. Barr, above at footnote

11, at p. 61; St. Pierre above at footnote 15, p. 8; "The Dirty Dozen", The Economist, July 20, 1991, at p. 52.] Even within Canada, harmonization of environmental regulations is difficult.

Environmental Countervailing Duties and Sovereignty

The Canadian Review states that "an environmental countervailing duty could be used as a tool for a large country to impose its environmental policies on a smaller party". This is misleading. The whole idea of an environmental countervailing duty is to protect a nation's ability to effectively implement environmental regulation. Countervailing duties need not be based on any mandatory continental standards.

Differing Standards

The Canadian Review also states that standards appropriate for one NAFTA party may be inappropriate for another because of different socioeconomic preferences. The alternative is that countries with socioeconomic preferences which do not favour the environment will be able to effectively derail efforts amongst their trading partners to improve or maintain high environmental standards.

Moreover, it should be noted that GATT and NAFTA have not been so respectful of "socioeconomic preferences" in other circumstances. For instance, Canada's preference for regional stability through subsidization of industries in economically depressed areas or certain U.S. states' preferential treatment of small businesses have been considered countervailable under GATT. [(26) -- 26. GATT has for instance ruled that state laws giving preferential treatment to small local breweries over large ones are "GATT illegal" if they have any effect on trade: Hittle, above at footnote 10, at p. 26.]

Preferability of Multilateral Mechanisms and Positive Incentives

Free trade proponents have argued that positive incentives and multilateral negotiation are a more effective means of assuring international cooperation on environmental issues. The problems associated with multilateral negotiations are discussed below at pages 13 to 14.

There is no doubt that both positive incentives and multilateral negotiation can be effective tools in ensuring cooperation on environmental issues; however, more than one tool is necessary. Trade sanctions have been used as a means of effecting national behavior in many non-environmental instances presumably because "positive incentives" were seen as ineffective.

Moreover, environmental countervailing duties need not be a purely negative incentive. The World Wildlife Fund has suggested repatriation of duties to the exporting country to fund sustainable development projects. [(27) -- 27. World Wildlife Fund, "South - North Terms of Trade, Environmental Protection and Sustainable Development" (February, 1992) at pp. 7 to 8.] So that repatriation of duties does not encourage poor

environmental behavior amongst producers, duties collected would not be targeted back to the producer of the products on which they were collected.

Use of environmental countervailing duties for Commercially Motivated Reasons Can Be Avoided

Those decrying environmental countervailing duties have consistently argued that such duties could be a cover for commercially motivated protectionism. While this potential exists, it is no more true with regard to environmental countervailing duties than with regards to other types of countervailing and anti-dumping duties. Imposition of environmental countervailing duties would still be subject to the requirement that domestic producers show material injury from the ecologically subsidized product.

It is expected that environmental countervails would be used in exceptional circumstances, not as standard policy. Moreover, imposition of environmental countervailing duties can be appealed to international panels.

Detailed Recommendations for Environmental Countervailing Duties:

1.1 Provide for the imposition of countervailing duties on imported products equal to costs the product manufacturer has avoided by being located in a jurisdiction with environmental standards lower than those of the importing nation.

1.2 The cost avoidance which could be "countervailed" by this duty should include cost differentials caused by a producer's liability for causing environmental harm.

1.3 Consider using funds from environmental countervailing duties to sponsor sustainable development in the countries whose exports have been subject to the duties.

1.4 Environmental countervailing duties should not be allowed where the specific objectives of the importing nation's environmental regulations are met by the exporting nation's producers.

1.5 Similar changes should be sought within the terms of GATT.

2. SANCTIONS TO PROTECT SHARED RESOURCES

Provide in any parallel agreement that trade sanctions may be imposed for the protection of ecological or biological resources that are shared amongst nations or of global significance.

BACKGROUND:

This recommendation is similar to the environmental countervail except that it is not restricted to imposition of duties necessary to protect domestic producers from unfair

foreign competition. The provision would allow trade sanctions, such as import bans, where internationally shared environmental resources or resources of global significance are effected.

GATT Article XI, "General Elimination of Quantitative Restrictions" prohibits import bans, subject to certain exceptions. GATT Article XX contains various exceptions to this prohibition. Paragraph XX(b) allows import bans necessary for the "protection of human, animal or plant life or health", and paragraph XX(g) allows bans "relating to the conservation of exhaustible natural resources". Nonetheless, a recent GATT decision on United States restrictions on tuna imports [(28) -- 28. United States -- Restrictions on Imports of Tuna, GATT Doc. DS21R/R (September 3, 1991) as cited in Eric Christensen, S. Griffen, "GATT sets its net on Environmental Regulation: the GATT Panel Ruling on Mexican Yellowfin Tuna Imports and the Need for Reform of the International Trading System" (1992), 23:2 The Univ. of Miami Inter American Law Rev. 569, at p. 570.] ruled that import bans which relate to the method by which a product is produced, are "GATT illegal" even if that method is banned in the importing nation because of its environmental destructiveness. [(29) -- 29. Christensen, above at footnote 28, at p. 578.]

DISCUSSION:

GATT, and the drafters of NAFTA have rejected both environmental countervailing duties and unilateral trade sanctions on the basis that problems associated with lax environmental standards in some nations are better resolved through bilateral and multilateral negotiation. Undoubtedly, multilateral negotiation, if equally effective, may be preferable to enforcing environment standards through trade sanctions. However, multilateral negotiations have tended to be ineffective:

"Parties often have a economic incentive not to cooperate with others to preserve common resources such as fisheries. Diplomatic considerations can stand in the way of mutual cooperation. The sheer number of parties involved can make progress slow or impossible. Finally, the long delays incident to creating the necessary consensus for multilateral cooperation may prevent an effective response to a rapidly developing environmental crises." [(30) -- 30. Christensen, above at footnote 28, at page 594.]

It would often seem that countries respond more to economic pressure than the "goodwill" of international agreements, and the imposition of trade sanctions or the threat of such sanctions has often been necessary to motivate any agreement. [(31) -- 31. Christensen, above at footnote 28.]

Canada should recognize the truth of these statements given its history of frustration in negotiations over, and its recent threats to use trade sanctions to protect the North Atlantic cod fishery. Renouncing unilateral action in these circumstances encourages free riding nations -- i.e. one nation taking the benefit of another's conservation efforts without making similar efforts -- to take advantage of Canada's attempts to deal with a pressing problem.

The history of negotiations over the effects on dolphins of purse seining for tuna exemplifies the need for taking unilateral action in some circumstances. From 1976 to 1990, the Inter-American Tropical Tuna Commission ("ITTC") mainly at the behest of the United States tried through multilateral means to address the problems of dolphins killed in the tuna fishery.

It took ten years to get agreement of all ITTC members to place ITTC observers on tuna seiners [(32) -- 32. Christensen, above at footnote 28, at page 595.] The observers found that previous estimates of dolphins killed were a third the actual numbers killed [(33) -- 33. Ibid] It nevertheless took an additional four years to get substantial agreement on steps to reduce mortality. Eventually, Mexico only changed its practices after a U.S. import ban on Mexican tuna and threats that NAFTA might not pass through the American congress if Mexico did not change its practices.

3. ENFORCEMENT OF INTERNATIONAL AGREEMENTS

Provide that trade sanctions in compliance with or to enforce international conservation or environmental protection agreements are permissible.

BACKGROUND:

The GATT decision on the legality of the United States' ban on tuna imports from Mexico suggests that the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* ("CITES"), the *Montreal Protocol on Substances that Deplete the Ozone Layer* (the "Montreal Protocol") and the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (the "Basel Convention") may be GATT illegal because they involve bans on imports or exports to or from non-parties. Under the reasoning of the GATT tribunal these measures would be illegal because they are implemented to save natural resources which are either shared or lie outside the boundaries of the party implementing the ban. There does not appear to be any basis for asserting that these restrictions have greater GATT blessing than unilateral trade restrictions. [(34) -- 34. Steve Charnovitz, "Exploring the Environmental Exceptions in GATT Article XX", (1991) 25 Journal of World Trade 37 at p. 55.]

Article 104 of NAFTA provides that if there is any inconsistency between NAFTA and the obligations contained in the Montreal Protocol, CITES and the Basel Convention (once it is in force between the NAFTA members) the obligations in the three conservation agreements will prevail to the extent of the inconsistency.

DISCUSSION:

Despite initial appearances Article 104.1 does nothing to assuage the concerns of environmentalists. It is window dressing with little legal effect.

Article 104.1 only provides that the Montreal Protocol, CITES and Basel Convention will prevail over NAFTA. However, these agreements contain provisions which appear to be contrary to GATT as recently interpreted. The three NAFTA parties are still bound by their GATT obligations.

Moreover, the trade embargoes imposed by CITES, the Basel Convention, and the Montreal Protocol are all imposed against non-parties. [(35) -- 35. Basel Convention, Article 4.5; Montreal Protocol, Article 4.1 and 4.2. See also discussion of CITES in Christensen, above at footnote 26, at page 589.] Since, Canada, United States and Mexico are signatories to all three agreements the provisions of Article 104.1 are largely meaningless. They would only come into play if a party challenged the need for the manifests and permits required by the three agreements. These provisions are unlikely to be challenged by a party to the agreements.

If the three NAFTA parties truly wish to ensure that they would remain effective parties to the Basel Convention, CITES and the Montreal Protocol the appropriate provision in NAFTA should state that the three parties as between themselves waive their obligations under GATT if those obligations conflict with CITES, the Basel Convention and the Montreal Protocol.

Given the importance that the three governments have placed on resolving environmental matters through multilateral agreements (at least when rejecting arguments for environmental countervailing duties) it is unfortunate that they have not automatically made NAFTA subject to all future environmental agreements that represent a modicum of international agreement. The parties could also have provided that, as between themselves, such future agreements would override conflicting provisions in GATT.

While NAFTA Article 104.2 allows the parties to add new environmental agreements to the list that overrides the NAFTA, such an amendment would required trilateral agreement. Given the history of United States and Mexico in subscribing to international agreements, including the Earth Charter and agreements to avoid mortality to dolphins by tuna seine fisheries, it is unacceptable that NAFTA allow one party to block the application of new environmental agreements.

Detailed Recommendations:

3.1 Provide that if there is inconsistency between the agreements listed in Article 104 and either NAFTA or GATT, the obligations contained in the listed agreements shall prevail.

3.2 Provide that any international environmental or conservation agreement with a certain number of signatories or the support of two NAFTA parties should prevail over NAFTA.

3.3 Seek similar amendments to GATT and specifically waive GATT obligations where they conflict with CITES, the Montreal Protocol and the Basel Convention.

4. EXPORT BANS

Provide that export bans to prevent the depletion of natural resources are permissible if reasonably necessary to protect a natural resource without causing economic dislocation.

BACKGROUND:

Under GATT Article XI export bans are generally prohibited. An exception is made in Article XX (g) for bans "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

NAFTA Article 309 specifically states that "except as otherwise provided in this Agreement" no Party may adopt export restrictions, except in accordance with GATT Article XI. Article 309 does not apply to raw log exports from Canada or unprocessed fish from the east coast whose export is currently restricted by statute. [(36) -- 36. NAFTA Annex 301.3, Section A.]

NAFTA Article 315 provides that any restrictions justified under Article XX(g) of GATT must not reduce the proportion of exports to other parties relative to the total supply of the good restricted.

Thus Article 309 generally removes Canada's ability to apply export bans for the conservation of natural resources, but still allows export bans for conservation of trees and Atlantic fisheries. However, any permitted restrictions on fish exports or raw log exports must be applied proportionately, i.e. a ban on raw log exports to encourage value added processing would require a ban on logging.

GATT also likely rejects restrictions on the export of unprocessed natural goods in order to encourage domestic value added processing and reduce demand for depletion of natural resources. [(37) -- 37. Charles Arden Clark, The General Agreement on Tariff and Trade, Environmental Protection and Sustainable Development, at p. 14-15, cited in Christensen, above at footnote 28, at p. 610.] unless such restrictions are equally restrictive domestically. [(38) -- 38. See discussion on the implications of "Thailand -- Restrictions on Importation and Internal Taxes on Cigarettes" (1990), GATT Doc. DS10/R in Charnovitz, above at footnote 33.]

DISCUSSION:

Often the only politically feasible means of reducing the depletion of a critical resource is to ban export of the unprocessed resource. For instance, in Washington and Oregon a raw log export ban was arrived at as a solution between the timber industry and environmentalists trying to preserve old growth forests. The export ban both limited the rate of logging in old growth forests to save the endangered spotted owl's habitat and ensured that jobs lost due to the reduction of falling jobs would be replaced by work in

processing. [(39) -- 39. Public Citizen's Congress Watch, November 1991, "Everything You always Wanted to Know about GATT but were Afraid to Ask."] Japan has threatened to challenge this export ban.

Several tropical countries such as Indonesia and the Philippines have similarly imposed bans or quotas on the export of raw logs to preserve their dwindling forest resources and maintain employment. New Zealand has banned exports of wood chips, logs or sawn timber not obtained from areas managed under a sustained yield management plan. [(40) -- 40. OECD, above at footnote 23, at p.6.]

Refusing to allow export bans or export quotas to preserve endangered sources unless similar bans are placed on domestic utilization of the resource fails to recognize the political constraints of resource dependent economies. Export bans attempt to ensure that one segment of society (e.g. forest workers) do not pay the brunt of moving to a conserver society.

Banning non-value added exports does not protect inefficient industries as the products produced with the protected natural resource must still be competitive against imported products.

Classic economists would state that forest workers displaced by reductions in logging would be better off specializing in an industry where they enjoy a comparative advantage. However, the theory of comparative advantage assumes that capital is immobile. This assumption is not true today. An export ban may be the only means of maintaining domestic employment.

Detailed Recommendations:

4.1 Provide that export bans or quotas to prevent the depletion of natural resources are permissible within a jurisdiction, without a ban on use of that resource in that jurisdiction, if the ban or quota is reasonably necessary to protect a natural resource without causing economic dislocation. Economic dislocation should be suitably defined in this context.

4.2 Provided that as between themselves the NAFTA parties waive any obligations under GATT that run contrary to export bans permissible under NAFTA.

4.2 Seek amendments to GATT that would allow export bans in the above circumstances.

5. RECOMMENDATIONS: PRODUCT STANDARDS

Clarify the content of chapters 7 and 9 of NAFTA to ensure that standards adopted in good faith for valid environmental reasons are not rejected merely because there is some doubt as to their scientific justification, because they impose a higher standard than the

average safety standard for the party, or because they are not based on formal risk benefit analysis.

BACKGROUND:

Product standards, such as acceptable pesticide residues on foods, prohibitions against products that contain hazardous materials or requirements that products use minimal or recyclable packaging, can -- if they vary from jurisdiction to jurisdiction -- inhibit trade. It will be harder for producers selling to more than one jurisdiction to meet these differing standards. NAFTA has extensive provisions for reduction of these "technical barriers to trade".

The objective of these provisions is to harmonize the product standards of the three NAFTA parties. The most relevant NAFTA provisions are located in two chapters: chapter 7 which deals with sanitary and phytosanitary standards ("SPS"), i.e. health standards relating to the quality of food including permissible pesticide levels; and chapter 9 which deals with all other product standards. The NAFTA provisions most applicable to the following discussion are extensive and are repeated in full in Appendix 1.

DISCUSSION:

While the negotiators of NAFTA have provided that parties retain their rights to establish levels of protection higher than international standards, they have created a number of bases on which environmental standards made in good faith can be challenged. [(41) -- 41. A number of trade oriented organizations had recommended the harmonization of national standards to international standards, only allowing higher standards in cases where they are warranted by particular local problems: see Business and Industry Advisory Committee to the OECD, "BIAC Statement on International Trade and the Environment", (Paris, 1992) at p. 4; Canadian Council For International Trade, "Reconciling Conflicts between Trade and Environmental Policy", (Ottawa, September 18, 1992). This was rejected.]

Commitment to Risk Assessment

Parties are committed (by both NAFTA and the Canada-United States Free Trade Agreement) to moving to SPS and other standards measures based on risk assessment; with regard to pesticides the risk assessment is to include consideration of certain benefits of the pesticide. [(42) -- 42. See article 715.1 and 715.2.] Risk assessment is not defined in either agreement.

In Canada pesticides may not be registered for use if, in the opinion of the Minister of Agriculture, doing so would "lead to an unacceptable risk of harm to ... the environment". [(43) -- 43. Pesticide Control Products Regulation, C.R.C. 1978, c. 1253, s. 18(d).] Under this vague standard twenty percent less pesticides have been registered for use in Canada than in the United States. [(44) -- 44. To a certain extent this may reflect more applications for registration.]

Environmentalists fear that the NAFTA commitment to risk assessment is a commitment to the sort of formal risk/benefit applied in the United States. In the U.S. pesticides must be registered for a use unless risks of that use outweigh benefits. United States Congressional committees have found that in applying this approach the U.S. Environmental Protection Agency has become decidedly slanted towards less stringent regulation of suspected carcinogens. [(45) -- 45. J.F. Castrilli and T. Vigod, Pesticides in Canada: An Examination of Federal Law and Policy, Ottawa: Law Reform Commission of Canada, 1987, at p. 58.]

While the American approach of risk benefit analysis sounds rational it has several problems which strike at its legitimacy. First, both the scientific uncertainty surrounding the quantification of risk associated with a product and the essentially political nature of determining what risks are acceptable in light of certain benefits cast doubt on the validity of risk benefit analysis. [(46) -- 46. Castrilli, above at footnote 45, at p. 56.]

Moreover, the easily quantifiable figures in risk benefit analysis tend to be the benefits: increased crop yields and lower consumer prices. The less quantifiable and far off costs to human health and long term sustainability are more easily dismissed in a quantitative -- number crunching -- analysis. This may be especially true under NAFTA pesticide provisions as interim measures established where scientific information is insufficient to assess risk must be based on "available relevant information". [(47) -- 47. Article 715.4]

In order to ameliorate the concerns that NAFTA and the Canada-U.S. FTA will commit Canada to a formal weighing of benefits and costs it is essential that the a parallel agreement not only reiterate that parties may set their own levels of safety, but also specify that parties

a) are not bound to apply formal cost benefit analysis;

b) can set safety levels which must be met regardless of economic benefits that may accrue from waiving them;

c) can take into account the limitations of science to predict adverse impacts;

d) can reject standards where the costs of the standard are borne disproportionately by certain sectors of society; and

e) can take a precautionary approach and apply strict restrictions despite lack of available information.

International Standards

The commitment of parties to move towards international standards has a number of associated problems. First, as international standards are set through a process of multilateral consultation they tend be extremely low in many cases. For instance, pesticide residue standards set by the obscure Codex Alimentarius Commission (a

United Nations body) are often less stringent than Canadian standards, and allow up to 50 times the residue levels for some pesticides. [(48) -- 48. Ritchie, Mark, "GATT, Agriculture and the Environment" (1990), 20 The Ecologist 214 at p.216. At pages 25-26 the Canadian Review notes that many Codex standards are often the same or more stringent than Canadian standards; however, a greater number are less stringent than more stringent.]

A more fundamental concern with relying on international standards is the degree to which the public is locked out from the standard setting process. The only parties able to make submissions to Codex are delegations invited by government, and Codex delegations are generally dominated by industry representatives. [(49) -- 49. Eric Christensen, "Food Fight: How GATT Undermines Food Safety Regulations" November 1990, Multinational Monitor p. 13.]

The Canadian Review attempts to discredit this concern by stating that interested environmental organizations may attend meetings of Codex with the Canadian delegation. However, this firstly requires the cooperation of the Canadian government in extending invitations to environmental organizations (the writer is not aware of any such invitations having been made). Moreover, the attendance of a single Canadian environmental NGO representative will hardly alter the industry dominated nature of Codex proceedings.

The commitment to international standards is more than a commitment to international standards as being the minimum acceptable standards. Under Article 905, higher standards must be justified by a nation on the basis that the international standards are an "ineffective or inappropriate means" to achieve the generally applicable levels of protection of that nation or on the basis that the higher standards are scientifically justified. As is discussed below, many standards made in good faith and necessary for environmental protection could be challenged on the basis that they are not justifiable under Article 905.

Conformity with Acceptable Levels of Risk

Article 712.5, and Articles 907.2 and 905.1 of NAFTA reject standards which are more stringent than international standards unless they are necessary to achieve the level of environmental protection generally adopted by a party. The idea behind these provisions is that nations should apply consistent standards as to acceptable environmental risks.

However, the reality is that neither the politics nor the science of regulation setting are so perfect or consistent, and improvements in standards are made on a piecemeal basis with the level of protection set by each standard varying through a broad range. By stating that one standard is not acceptable because it imposes a higher safety factor than another standard, the pursuit of higher standards will undoubtedly be stymied, and existing standards opened up to challenges based on conflicting scientific reports.

To avoid this problem a parallel agreement should clarify articles 712.5, 905.1 and 907.2. It should specify that standards will not be considered to involve arbitrary distinctions if they are adopted in good faith.

Scientific Justification

The requirement that standards higher than international standards be scientifically justified must be clarified to provide that a standard will not be rejected merely because there is doubt with regard to its scientific justification. To prove that something will cause environmental harm means there is a much greater chance that a needed environmental protection measure will be rejected than an unneeded environmental protection measure adopted. [(50) -- 50. See T.F. Schreker, The Political Economy of Environmental Hazards, Law Reform Commission of Canada Study Paper.] It is essential that government be able to act in the face of uncertain scientific evidence.

There are a number of examples indicating that parties to free trade agreements have tried to use lack of scientific justification as an argument against legitimate environmental regulations. For instance, in one case Canada intervened in a petition for review of the United States Environmental Protection Agency's asbestos ban, arguing that since other nations had rejected a complete ban on asbestos the United States ban was invalid. [(51) -- 51. See Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir., 1991). The court decided the case on other grounds.]

6. DISPUTE RESOLUTION

Provide for public input into NAFTA dispute resolution hearings through notice and opportunity to comment, as well as access to other submissions and transcripts of hearings and deliberations.

BACKGROUND:

Under Article 2012 of NAFTA the hearings, deliberations and reports of dispute resolution panels and submissions to dispute resolution panels (including scientific review board reports) are kept confidential. Only the final report of the panel is published.

DISCUSSION:

Despite the improvements in the NAFTA dispute resolution process over processes established by other trade agreements [(52) -- 52. There are several improvements in the NAFTA dispute resolution process. Article 914.4 provides that a party asserting a standards-related measure is inconsistent will have the burden of establishing the inconsistency. NAFTA dispute resolution panels may seek technical advice from experts and, as long as at least one party agrees, panels may request a written report of a scientific review board.] the total secrecy of dispute resolution panel processes and the

inability of interested parties to be heard strikes at the very legitimacy of the dispute resolution process.

Panels will be ruling on a number of matters which involve inherently subjective judgments as well as matters in which the scientific evidence may be conflicting. For instance, a Canada-U.S. FTA panel looking into requirements passed under the Canadian Fisheries Act determined that the requirements were improper because the Canadian government would not have passed the regulations if Canadians had to pay the associated costs. [(53) -- 53. In the matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring, Canada - United States Trade Commission Panel, October 16, 1989, p. 31.] This essentially involved the panel guessing what measures government might adopt in certain circumstances. Sequestered from the organizations which have pushed for a certain measure, trade panels are more likely to assume a measure has an underlying illicit trade motivation.

In this sort of closed process there is no assurance that the perspective of environmental groups will be heard. The orientation of dispute panels towards trade as an overriding end [(54) -- 54. For instance one GATT panel ruled that the Polluter Pays Principle is not a relevant GATT rule which the panel could take into account: OECD, above at footnote 23, p. 19.] cannot be overcome so long as the process is closed. Especially where an environmental standard of a provincial government is challenged and it is not fully endorsed by the federal government there is little assurance that the federal government will whole-heartedly support the standard.

The closed process, where everything but the final report is unavailable to the public, will inevitably make the public more cynical and distrustful of the process. Opening the process will not only allow meaningful and useful public input, but also make the process more democratic.

Detailed Recommendation:

6.1 Provide that notice shall be given of all dispute resolution hearings to interested parties.

6.2 Provide for public access to submissions to dispute resolution panels and to transcripts of hearings.

6.3 Allow non-governmental organizations and local government which have a substantial interest in a dispute to make written or oral submissions. Canadian rules for standing in domestic legal disputes could be used to ensure that panels are not overburdened with submissions.

APPENDIX I

NAFTA PRODUCT STANDARDS PROVISIONS

Article 906.2 provides:

Article 906.2: Compatibility and Equivalence

2. Without reducing the level of safety or of protection of human, animal or plant life or health, the environment or consumers, without prejudice to the rights of any Party under this Chapter, and taking into account international standardization activities, the Parties shall, to the greatest extent practicable, make compatible their respect standards-related measures, so as to facilitate trade in a good or service between the Parties.

Article 904.4 provides:

Article 904: Basic Rights and Obligations

Unnecessary Obstacles

4. No Party may prepare, adopt, maintain or apply any standards-related measure with a view to or 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.

Article 905.1 provides:

Article 905: Use of International Standards

1. Each Party shall use, as a basis for its standards-related measures, relevant international standards or international standards whose completion is imminent, except where such standards would be an ineffective or inappropriate means to fulfill its legitimate objectives, for example because of fundamental climatic, geographical, technological or infrastructural factors, scientific justification or the level of protection that the Party considers appropriate.

Article 907.2 provides:

Article 907: Assessment of Risk

2. Where pursuant to Article 904(2) a Party establishes a level of protection that it considers appropriate and conducts an assessment or risk, it should avoid arbitrary or unjustifiable distinctions between similar goods and services in the level of protection it considers appropriate, where the distinctions:

(a) result in arbitrary or unjustifiable discrimination against goods or service providers of another Party;

(b) constitute a disguised restriction on trade between the Parties; or

(c) discriminate between similar goods or services for the same use under the same conditions that pose the same level of risk and provide similar benefits.

Article 902.2 provides:

Article 902: Extent of Obligations

2. Each Party shall seek, through appropriate measures, to ensure observance of Articles 904 through 908 by state or provincial governments and by non-governmental standardizing bodies in its territory.

These provisions apply to all standard-related measures of the NAFTA parties other then sanitary and phytosanitary measures, i.e. measures dealing with cleanliness of food stuffs and pesticide residues.

Chapter 7 deals with sanitary and phytosanitary measures. Applicable provisions in Chapter 7 include the following:

Article 712: Basic Rights and Obligations

Right to Take Sanitary and Phytosanitary Measures

1. Each party may, in accordance with this Section, adopt, maintain or apply any sanitary or phytosanitary measure necessary for the protection of human, animal or plant life or health in its territory, including a measure more stringent than an international standard, guideline or recommendation.

Right to Establish Level of Protection

2. Notwithstanding any other provision of this Section, each Party may, in protecting human, animal or plant life or health, establish its appropriate levels of protection in accordance with Article 715.

Scientific Principles

3. Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains or applies is:

(a) based on scientific principles, taking into account relevant factors including, where appropriate, different geographic conditions;

(b) not maintained where there is no longer a scientific basis for it; and

(c) based on a risk assessment, as appropriate to the circumstances.

Non-Discriminatory Treatment

5. Each Party shall ensure that a sanitary or phytosanitary measure that it adopts, maintains or applies does not arbitrarily or unjustifiably discriminate between its goods and like goods of another Party, or between goods of another Party and like goods of any other country, where identical or similar conditions prevail.

Article 713: International Standards and Standardizing Organizations

1. Without reducing the level of protection of human, animal or plant life or health, each Party shall use, as a basis for its sanitary and phytosanitary measures, relevant international standards, guidelines or recommendations with the objective, among others, of making its sanitary and phytosanitary measures equivalent or, where appropriate, identical to those of the other parties.

Article 714: Equivalence

Without reducing the level of protection of human, animal or plant life or health, the Parties shall, to the greatest extent practicable and in accordance with this Section, pursue equivalence of their respective sanitary and phytosanitary measures.