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COMMONALITY OF STANDARDS – IMPLICATIONS FOR SOVEREIGNTY – A U.S. PERSPECTIVE

*Shirley Coffield**

The relationship between the United States and Canada covers everything from meat to nuts. What I am going to talk about are the nuts. Attacks on the NAFTA, the WTO, or trade agreements in general is nuts, especially if you are saying that it is a sovereignty issue. We are probably all sick to death of people's definitions of sovereignty. But excessive reference, I believe, to intrusions on sovereignty in connection with trade agreements brings out the extremes: the extreme interventionists who want other countries to do exactly what we do, the isolationists who do not want us to conform to anybody else's rules, and all of the special interest groups, "nuts" in the American vernacular, which tend then to lobby against these agreements based upon misinformation and emotion rather than serious, meaty issues as to whether or not our sovereignty is in fact implicated by these agreements.

Having said that, the issue of standards and their impact on international trade is an impossibly broad topic. Much of what now traverses the world in the form of goods, services, and investments is affected by standards. Many of the topics being covered in this conference involve standards: federal/state NAFTA issues, culture and the information revolution, environmental issues, investment issues, food safety regulations, and, as you will hear in just a few minutes, professional services.

I want to confine myself to the issues of product trade and technical barriers found in the Standards Related Measures (SRM) provisions of Chapter 9 of the NAFTA. However, I do feel that I have to say something about sovereignty. Serious issues of sovereignty can be much overused when discussing international trade agreements signed by sovereign countries pursuant to their internal procedures of approval and ratification as ceded to them by the electorate in a representative government. By definition, a trade agreement is not a dictation by another country on the sovereignty of another. It is a use of sovereignty by countries to reach agreement on subjects that are of concern to all involved. If the definition we have all learned is that sovereignty is the independent right of a country to regulate its internal affairs without foreign

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dictation, then I submit that much, if not all, of what is included in the NAFTA, is not the result of foreign dictation, but of recent agreement among sovereign countries. Therefore, what I am talking about, I would term in my own definition, is shared sovereignty, rather than the usual definition of sovereignty which has been discussed by others.

The question of sovereignty can arise, of course, in an agreement, primarily in the field of dispute resolution. There are those who say that external judges of a sovereign's compliance with international rule might, in fact, involve an issue of sovereignty. However, I would submit that what happens in international trade agreements is not in dispute. Settlement, in fact, is not foreign dictation, nor is it coercion, as has always been the case. There is no invading army that enforces any ruling of a panel or of any international organization in trade agreements. There are consequences to disobeying the rules, and sovereigns have got to be willing to follow the rules. However, I cannot think of any major country that has always followed every ruling against an international trade agreement. There are mutually agreed-upon rules. There are consequences if you do not follow them, but nobody "nukes" you, and it is hardly a question of an intrusion on your sovereignty. However, recognizing that this issue of sovereignty is of great sensitivity, I hope to demonstrate that the product standards provisions in the NAFTA consist of, at most, shared sovereignty, which does not intrude on the right of countries to use the standards, but rather enhances their ability to develop new standards in a way that encourages compatibility and increases trade. Thus, they not only protect their own citizens internally, which is a major role of a sovereign, but they also give their citizens an equal opportunity to compete in other sovereign countries.

The tension in the standards area is between that right of a country to regulate in the area of safety and the health of its animals, plants, and humans against their commitment to minimize barriers to trade. That great tension is what leads to agreements to find a mutual accommodation of those two goals. In the NAFTA SRM agreement, the explicit issue of sovereignty is addressed at the beginning in Article 904, which establishes the right of each Party to adopt, maintain, or apply any SRM related to the protection of human, animal, or plant life or health, the environment, or consumers, and any measure to ensure its enforcement and implementation, including the right to prohibit imports.¹ I would maintain that, on the face of it, that dispenses with the issue of sovereignty as we know it in the case of a trade agreement. That Article also provides that each Party may, in pursuing its legitimate objectives of safety in the protection of human, animal, or plant life, establish the

¹ NAFTA, North American Free Trade Agreement, Dec. 8, 1992, Canada/Mexico/United States, 32 I.L.M. 289, at art. 904(1).

levels of the protection that it considers appropriate, so long as it is nondiscriminatory, provides national treatment, and is on an MFN basis.

One concern which arose involving internal federal/state/provincial separation of powers, which is a very sensitive issue as we all know, was also addressed in Article 901. Article 901 makes it clear that the federal government can always mandate compliance by sub-federal governments and non-governmental organizations (NGOs).² Thus, the Parties themselves, all subject to the overall obligations to comply, would only seek through appropriate measures to ensure observance of Articles of this agreement by states, provinces, or NGOs. Each one of those words was painfully negotiated. They seek, through appropriate measures, to ensure observance. In order to exactly protect the sensitivities of that particular concern, I cite these provisions affecting internal jurisdiction, not as questions of sovereignty, but to demonstrate that, in the context of the SRM agreement, the Parties had to be sensitive to even more delicate issues than was the case in most other aspects of the NAFTA. As regards SRMs, however, the concern over sovereignty has arisen essentially, as in the case of most trade agreements, and how people interpret the details, concerning the interpretation of this agreement is played in the media as having potential intrusions on sovereignty.

Do any of these provisions really affect sovereignty? Product standards, certifications, labeling requirements, and similar requirements by individual countries are increasingly becoming a main source of trade disputes and are a potential and a real obstacle to trade. As tariffs continue downward worldwide, and as trade thus increases, products are faced with a growing array of regulatory requirements when entering export markets. We may ask, why did this not happen twenty years ago? It is not as though the standards were not there twenty years ago. It is because a lot of trade did not move due to tariff barriers; the standards were really never implemented. You could not get into the market because the tariff was twenty or thirty percent. Now you find that there are other things in that market that may affect your trade even more than a barrier, because they are not price-related. They are related to a physical obstacle in terms of the standards with which the product must comply. As a private practitioner, I found that my own practice has shifted in the last seven or eight years. It now consists of dealing with regulatory issues for the most part, primarily those involving food or product standards. Obviously, it is in the private sector where we know that issues are real issues. If that has happened in my practice, I assume it has happened in a lot of other people's practices as well.

² *Id.*, art. 902(2).

Product standards are necessary. They need not be trade barriers. They can be fully justified in many instances. However, with growing globalization and the increasing number of markets, confusion in setting standards, and in enforcing them has increased. In the international trade establishment, the goal has been to prevent standards from operating as unnecessary obstacles to trade. The standards-related measures in Chapter 9 cover three different kinds of measures, including what the parties term as standards, technical regulations, and conformity assessment procedures. Standards, under Chapter 9, are defined as providing:

[F]or common and repeated use, rules, guidelines, or characteristics for products, or related processes and production methods, or for services or related operating methods with which compliance is not mandatory . . . [including] terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process, or production or operating method.”³

This is the important part of the term “standards.” Under the NAFTA, standards by definition are not mandatory, and are most frequently set by private standardizing bodies.⁴

An example would be the standards developed by the American Society of Testing, which has issued over eight thousand five hundred voluntary standards. Governments can also set voluntary standards. An example in the United States would be the Consumer Products Safety Commission (CPSC). There is, in the United States, a proliferation of private standard-setting organizations. According to a study by the Organization for Economic Cooperation and Development (OECD), in 1991, the number of standards set in the United States by private organizations numbered thirty-five thousand. The U.S. government frequently relies on these private voluntary standards. It is especially important, therefore, that both the GATT agreement and the NAFTA cover this particular area. This is one part of the NAFTA that covers a private action, not a government action. To the extent that a country can ensure that its voluntary standards do not operate as trade barriers, it would have to have a great deal of control over these non-governmental standard-setting bodies.

Once again, as noted earlier, the obligation in the NAFTA is that the governmental Parties to the agreement seek to ensure that these private standard-setting bodies conform to the obligations in the agreement. This is a lesser obligation than in other parts of the NAFTA, simply because it is dealing

³ *Id.*, art. 915(1).

⁴ *Id.*, art. 915(1).

with a private entity, rather than something over which the government has direct control through its regulatory process. However, it is important to note that the consequence of violating the agreement is the same for a private body as it is for a government. If a government undertakes the obligation, if there is a private standard-setting organization that has, in fact, impeded trade through the way it set its standard or because the standard is unreasonable, the government pays for that.

That is not unusual in the case of a federal, provincial, or a federal/state relationship both in the WTO and NAFTA, as well. The agreement does not require the federal government to do what they cannot do, which is mandate certain things. It does require the government to be responsible in terms of their "payment" if their entities have not complied. Technical regulations under the NAFTA cover the mandatory government product standards. These include the same definitions of standards as the voluntary ones, except that these are mandatory. They may first have been developed by a private standard-setting body and then have been adopted and been made mandatory by the government, which is frequently the case.

The U.S. government, for example, increasingly relies on the private sector to develop standards which are adopted. One example that I can give you is in the area of government procurement. This can be positive, in that it relieves the government from a long process of having to set the standard. It lets the industry that is most knowledgeable about the product or the process set the standards. It also, however, can be a problem. I just give one example in the case of government procurement, when the company bidding on the contract sets the standard. There is something to be said here about fairness. And in that particular case, I looked very closely at the standard, and it was very hard for anybody else to meet that standard except for the company that had been bidding on it. The U.S. Department of Defense thought that it was a good standard, so they adopted it. That contract went out for bid, and, frankly, nobody else could meet that standard. So there does need to be some checks and balances on this issue of voluntary standards, particularly when they are set by a particular company, rather than being set industry-wide.

Conformity of assessment procedure is any procedure used directly or indirectly to determine that a technical regulation or standard is fulfilled, including sampling, testing, inspection, evaluation, verification, monitoring, auditing, assurance of conformity, accreditation of registration, or approval, et cetera. But on the strong lobbying of the Food & Drug Administration during the course of these negotiations, the United States has interpreted this to mean that issues that are country-sensitive, such as registration or approval of a pharmaceutical, would not be a conformity assessment procedure. One of the success stories in the NAFTA is the mutual recognition of the Under-

writers' Laboratories and the Canadian Testing Standards. These bodies have now become competitors in North America because a manufacturer can go to either one of them and get a stamp of approval which is good in either country. It is what is most convenient, what is most cost-effective. It is what I would call one of the confirmations that these kinds of agreements can positively increase trade, not just be an obstacle.

In determining how best to police or enforce agreements, it is necessary to look at voluntary and mandatory standards and conformity assessment procedures together. This is not always easy to do, as internal compliance as to how these are treated may vary. However, to the extent that each can be used as an obstacle to trade, they must be addressed similarly as involves the commitments of the governments to minimize trade barriers.

The basic obligation in the NAFTA is that SRMs are to be nondiscriminatory, and that no Party may prepare, adopt, or apply any SRM with a view to, or with the effect of, creating an unnecessary obstacle to trade. This obligation basically reflects the GATT-WTO technical barriers to trade agreement principles. The critical detail in the obligation is that Parties may have SRMs that restrict trade, so long as a demonstrable purpose of the measure is to achieve a legitimate objective, and the measure does not operate to exclude goods that meet the objective. The legitimate object activities are further described, not exclusively, as those involving safety, protection of human, animal, or plant life or health, and the environment, including matters involving quality and identifiability of goods and services and parenthetical sustainable development, considering a number of factors in sustainable development, such as climate, but not including the protection of domestic production. So, once again, you have a series of attempts to define what is legitimate. But still, you put in the caveat that, if somebody can prove that this is a protection of domestic production, it is not, in fact, within that discretion.

These obligations contain a fairly broad opt-out provision for those concerned about the sovereignty of the Parties to develop social goal standards, especially when, ultimately, the Parties initially determine which SRMs that Party considers appropriate. If the Parties do set SRMs which would otherwise be inconsistent, for example, mandating a stricter standard than that promulgated by an international body, then under the provisions of the code, they can do a risk assessment to justify the legitimacy of the standard. Risk assessments are otherwise voluntary. However, if a Party does use a risk assessment in determining the legitimacy of its objectives, the agreement requires that certain conditions be met; most importantly, that the higher standard is not a disguised restriction on trade and does not discriminate or result in an arbitrary or unjustifiable distinction between similar goods with similar risk levels in the degree of the restriction.

An important part of this agreement, which is also the case in the GATT-WTO agreement, is a commitment to use, to the extent possible, international standards, both those in existence and those whose completion is imminent. I will get to this problem of international harmonization. I will note here that the progress for agreement and approval of international standards through the Codex,⁵ International Standards Organization, and similar organizations frequently takes several years, and the standard may be obsolete by the time it is published. Therefore, that can be something of a limiting objective. Likewise, SRMs that comply with an international standard are deemed to be consistent with the agreement.

However, once again, there is an out. Parties may, if pursuing their legitimate objectives, adopt, maintain, or apply a standard with a higher level of protection than that of the international standard. Once again, this provision was intended to answer critics who said that the agreement would result in downward harmonization; something that, by the way, has not happened. I think that, by highlighting certain issues such as sovereignty, you attract disputes rather than help solve them.

The NAFTA does go beyond the GATT Technical Barriers to Trade (TBT) agreement,⁶ in that it commits the Parties, to the extent practicable, to make their respective SRMs compatible, so as to facilitate trade between the Parties. The idea of the compatibility of the standard can be addressed in a regional agreement far more readily than it can in a multilateral agreement. In addition, each Party must treat technical regulations adopted or maintained by the other Party as equivalent to its own, when the exporting Party in cooperation with the importing Party demonstrates to the satisfaction of the importing Party that its technical regulations adequately fulfill the important Party's legitimate objectives.

This was written by lawyers, and what it means is that, if you can convince the other guy that what you have done is to make your products basically equivalent, they are going to let it in. Sometimes, your tongue kind of trips over this language. What it really represents is a very practical approach to setting and enforcing standards in the NAFTA countries.

Under the agreement, the Parties also agree to accept the results of a conformity assessment procedure of another Party whenever possible. That is, once again, if you can convince the other guy that this has been done in a

⁵ Codex Alimentarius is the food safety organization for GATT and NAFTA. Countries must base their SPS measures on Codex standards unless a scientific basis exists for a higher level of protection. The WTO is using Codex as their reference organization for food safety in implementing GATT. See <<http://www.tasinc.com/tas-code.html>> (visited on July 7, 1998).

⁶ General Agreement on Tariffs and Trade: Agreement on Technical Barriers to Trade, Dec. 15, 1993.

way that, in fact, meets your legitimate objectives. Unfortunately, despite the passage of several years, there are still a lot of potential disputes, ambiguity, and language of compatibility in North America. All sides seem to be determined not to change one iota of their own regulations and to assume that any change they would have to make would be a step downward.

One example dealing with food is nutrition labeling. I use this example because it is something in which, to my great frustration, I get involved in quite a bit between the United States and Canada. The United States has made its own determination as to what it considers necessary on a food label, and that is mandatory. If you pick up a head of lettuce which is in shrink wrap, it has something on the back. Canada, on the other hand, has determined that, if you label, you have to include things which are different than the things included on the U.S. label, and it has to be in both English and French. Therefore, you have a natural trade barrier determined by market size for selling these products in both markets. You defeat economies of scale, which the agreement was supposed to encourage. I have always felt that we can put the information in English and French, and we could have one nutrition label. Surely we ought to be able to come up with something on which both Parties can agree. This has been going on for years, and I am told that, until a certain person in the Canadian government retires, it is unlikely that it will be resolved.

This brings me back to our main issue. If one is calling that a sovereignty issue, one has a very, very broad definition of sovereignty. That is what you find both in our Food & Drug Administration and in Canadian Health. There are pockets of extreme views which state that we do not change whatsoever. Our idea of harmonization is forcing someone else to change to meet our standard. Frankly, that is not going to work, even in the context of our similar systems. And no way is it going to work in a multilateral globalized system. Which, of all these provisions in the SRM agreement, have a nexus to sovereignty as we defined it earlier? In which of these provisions have the Parties been dictated to by an outside power about their own internal standards and regulations? The agreement does not require any Party to even adopt a standard of any kind. It commits Parties by agreement to be non-discriminatory if they do adopt a standard, and provides for the mutual recognition of certain procedures and standards, but only if they meet the need of the legitimate objectives of the importing country.

I do not see serious sovereignty issues here. The operation of the agreement thus far does not appear to have confirmed any of the worst fears of those who see intrusions on sovereignty in every paragraph of every trade agreement. The enforcement and monitoring of the obligations in the area of standards has been going on internationally in the GATT since the Tokyo

Round. The enforcement mechanisms in the NAFTA do not threaten the objectives of national regulations, but only the means by which they are arrived at and implemented. It is a very minimal effect on the sovereignty of the Parties. It can instead be viewed as an enhancement of sovereignty. The Parties can agree among themselves to have some input on how standards are viewed by other Parties.

Looking at the present and the past, we see how far we have come. It seems to me we should now look at how countries can avoid standards-related barriers and enforce agreements while recognizing and accepting the necessary legitimate positive roles that product standards have in achieving each individual country's policy objectives. Countries may have different policy objectives. There is nothing wrong with having a standard that meets an objective. In this respect, I recommend to you a publication from the Brookings Institute by Alan Sykes, titled *Product Standards for Internationally Integrated Goods Markets*.⁷ It is an excellent analysis of the issues, and along with the views expressed by commentators and the comments also included in that study, it expresses a really good, broad discussion of all of the issues.

In the context of future agreements, bilateral, regional, or multilateral, we have several models from which we can borrow to achieve our stated objective. The E.U. system is frequently cited as a potential model for future internationalization. However, that presupposes a union, which is not realistic as an international approach. Some of its more useful and important features can be adapted, including its heavy reliance on mutual acceptance of standards. It has been suggested that the concept of least-restrictive-means, which is in the GATT and TBT has a usefulness over time. The least-restrictive-means obligation commits parties to ensure that TBTs be no more trade-restrictive than necessary to fulfill the legitimate objective. I consider this standard to be like flypaper for disputes. Is it legitimate? Is it reasonable? All of these questions just make lawyers glow, because it leaves the Parties with so much arguing and wiggle room that it encourages clever ways to avoid getting caught by the flypaper in a trade restrictive action, and can lead to politically correct, but inconsistent rulings.

The standards can only be optimally beneficial if they are coupled with a strong emphasis on plurilateral negotiations on a sectoral basis, which can result in some elements of harmonization, some elements of mutual acceptance of conformity assessment regimes, and some of mutual recognition of standards. There must be elements in any kind of agreement that allow countries to reasonably set standards that will not intrude on sovereignty. At the

⁷ ALAN SYKES, *PRODUCT STANDARDS FOR INTERNATIONALLY INTEGRATED GOODS MARKETS* (Brookings Inst. 1995).

same time, you are minimizing barriers to trade, and I believe there are models out there that prove that this can be accomplished.