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NAFTA's Dispute Settlement Provisions: An Overview

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The next few months may be decisive for NAFTA, the North American Free Trade Agreement, as Congress decides whether to vote "yea" or "nay" on the package as a whole. Pro-NAFTA lobbyists are spending unprecedented amounts of money in Washington D.C. while a groundswell of opposition bubbles in congressional districts throughout the country. Backed into a corner by his endorsement, President Clinton has been stuck with a very hot political potato.

Back in 1990 when then President George Bush first proposed negotiating NAFTA, environmentalists and other public interest activists reacted with alarm. Experience with other trade agreements had shown them that international standard-setting and dispute settlement can pre-empt democratic processes and result in weaker rules than those of federal, state and local laws.

Analysts from the State Senate of Minnesota, for example, identified "a sampling" of 30 state laws that could be challenged as "trade barriers" under NAFTA. These range from tourism promotion and technology development to recycling labeling and toxic materials prohibitions, from workplace health and safety standards to subsidies for sustainable agriculture and the "Buy Minnesota" program.

GATT Rules Form the Basis

It all goes back to the GATT, the General Agreement on Tariffs and Trade, which since 1948 has written the rules of international trade based on the principle of non-discrimination. In a nutshell, these laws do discriminate.

The NAFTA text explicitly states that its rules would be "consistent" with the GATT although there are various differences. The most significant, probably, is a reversal of the burden of proof in a dispute. In a GATT dispute, the defendant must prove that its trade practice does not discriminate or otherwise violate the rules. In NAFTA, the complainant must prove its case. This switch could give some protection to national, state and local laws governing environmental, health and other social regulations.

However, NAFTA also says that in such cases a defendant must nonetheless prove that its laws are "necessary," "scientifically justifiable," and "the least trade-restrictive" -- phrases subject to diverse interpretation. Can Minnesota prove that labeling recycled materials is "necessary?" That promoting sustainable agriculture is "scientifically justifiable?" That prohibiting certain toxic materials in packaging is "the least trade-restrictive" approach?

Broader Expertise "May" Be Possible

A NAFTA dispute settlement panel would consist of five members, not three as is traditional in the GATT. Also unlike GATT , a NAFTA panel "may" include experts specializing in fields other than trade; thus a nation may nominate environmentalists, lawyers, and "other" experts to the roster of potential panelists. If both of the disputing parties agree, the panels may consult special scientific review boards for advice on questions of fact.

The problem, however, is with the word "may" -- consulting this expertise is not obligatory. And just like GATT, NAFTA panels would be subject to strict confidentiality with no provision requiring public input. Nor would the new trilateral labor and environmental commissions created under the "supplemental agreements" negotiated by President Clinton have subpoena power or access to documents not otherwise publicly available.

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Side Agreements Are Weak

At a campaign rally on October 4, 1992, presidential contender Bill Clinton conditionally endorsed the NAFTA text negotiated by Bush. But, he said, as president he would negotiate supplemental agreements to fix a number of specific problems -- among them financing to clean-up border pollution, adjustment for displaced workers, and protection for state and municipal laws setting higher standards than those of the federal government and NAFTA. Clinton also said, "I think the new Congress should pass legislation to provide for public participation in crafting our position in ongoing disputes, and to give citizens the right to challenge objectionable environmental practices by the Mexicans or the Canadians."

Not until September 14, 1993, did President Clinton finally release the text of the supplemental agreements. Many are disappointed. Some critics point out that they don't address fundamental flaws in the original NAFTA text. Others note that they don't even address most of President Clinton's campaign promises. Still others comment on the lack of "teeth." Indeed, the texts are full of words like "consider," "consult," "report," "recommend," and "promote."

Of all the Clinton promises, the new agreements reiterate various good intentions but really address only the creation of trinational environmental and labor commissions. Yet the actual authority of the new trilateral commissions would be limited to cases in which a "persistent pattern of failure to effectively enforce" certain existing domestic laws can be shown. The texts explicitly exclude environmental laws whose "primary purpose" is natural resource management and labor laws guaranteeing the right to freely associate and to bargain collectively. Neither commission would be able to refer complaints -- even those meeting all criteria -- to a dispute resolution panel unless two of the three countries' governments agreed. And the maximum penalty would be fines or sanctions worth $20 million -- peanuts to any of the three governments.

As of September 15, the environmental community in the U.S. was split on its overall verdict. The National Wildlife Federation says yes: "The benefits of the NAFTA package stand in stark contrast to the status quo, where environmental concerns are largely ignored in commerce between nations." Ralph Nader disagrees: a Public Citizen memo says the package "does not begin to remedy the fundamental flaws of the North American Free Trade Agreement... Approval of this NAFTA [would be] a step backwards from the status quo."

Ultimately, Congress will decide.