NAFTA's Dispute Settlement Provisions: An Analysis

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The National Wildlife Federation says it would. Ralph Nader's Public Citizen says it wouldn't. The question is: would NAFTA establish new democratic rights in international dispute settlement -- or not?

Back in 1990 when then President George Bush first proposed negotiating NAFTA, the North American Free Trade Agreement, environmentalists reacted with alarm. Experience with other trade agreements had shown them that international standard-setting and dispute settlement frequently resulted in weaker rules than those achieved through state and federal legislation.

Bush promised that NAFTA would resolve these problems and appointed five environmental leaders to an advisory board. But the negotiations proceeded entirely in secret -- even the advisory board pledged confidentiality -- and when the nearly-completed text was leaked to the public in August 1992, most environmentalists felt their trust betrayed. By this time, organized labor, too, was concerned that NAFTA would threaten jobs, wage levels, and the right to organize and bargain collectively. Consumers feared that NAFTA would lower food and other product safety standards while eliminating border inspections. Family farmers found that NAFTA would lower prices, making it impossible for them to stay in business. Each of these groups discovered that many of their counterparts in Canada and Mexico were just as worried.

In studying the NAFTA text, advocates for these organizations also saw that access to national democratic systems could be eroded by the international institutions that NAFTA would create. And, looking a little closer, they saw the dispute resolution mechanism as key to either weakening or strengthening public participation in international decisions affecting transnational conditions.

GATT Rules Form the Basis

It all goes back to the GATT, the General Agreement on Tariffs and Trade, which since 1948 has guided participating nations -- now numbering 111 -- in their trade policies and practices according to the principle of non-discrimination. Critics complain, however, that this principle has eroded over the years as powerful nations and powerful trading companies have sought commercial advantages. Furthermore, the GATT rules were written at a time when the environment was not a major issue; therefore, the rules prioritize increased commercial activity regardless of the environmental impact. As a result, GATT dispute panels have obliged Indonesia to lift its ban on the export of raw logs and obliged Thailand to lift its ban on the import of tobacco on grounds that these laws were "disguised" barriers to trade.

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 although, as Zen Makuch of the Canadian Environmental Law Foundation has pointed out, "the onus of proof only plays a determinative role in legal cases that are evenly balanced, and trade disputes have not, to date, demonstrated such a fine balancing of evidence

and law." In the GATT, a nation is considered guilty unless proven innocent; that is, in a dispute it is the defendant which must prove that its trade practice does not discriminate or otherwise violate the rules. In NAFTA, the complainant must prove its case.

Switching the burden of proof could give some protection to nations legislating environmental, health and other social regulations -- like those of Indonesia and Thailand -- that have trade effects. In the case of the controversial Marine Mammal Protection Act, for example, which says the U.S. will not import tunafish from countries using purse seine nets which also catch dolphins, a GATT dispute panel ruled that the U.S. law unfairly discriminates against the Mexican fishing industry. Under a NAFTA panel, Mexico would have to prove that this national law is not primarily a conservation measure.

However, this rule is convoluted with exceptions. Because the U.S., Mexico and Canada are all members of GATT, most of their disputes would also be eligible for resolution under the GATT. The NAFTA text affirms that, in such cases, the complainant may choose either set of rules; logic suggests most complainants would choose the GATT rules, thus switching the burden of proof back to the accused. Then again, NAFTA says that the defendant can insist upon a NAFTA dispute resolution panel if the case involves facts regarding certain environmental, health and safety standards and certain international environmental agreements.

But what are "facts?" In order to defend a national, state or local environmental, health or safety law stonger than the international standard, the defendant must prove to a NAFTA dispute resolution panel that its domestic law is "necessary," "scientifically justifiable," and "the least trade-restrictive." A few years ago, Canada charged that a U.S. law banning asbestos imports was a barrier to trade on just these grounds. Currently, the Delaney Clause, a U.S. law prohibiting food additives known to cause cancer in laboratory mice, is subject to revocation for these reasons. Both U.S. and Canadian limits on pesticide residues in imported food could be overruled on this basis. Future bans on tropical timber imports or rainforest beef could fail this test. Law professor David Wirth of Washington and Lee University summarized this convolution with a warning, "what is given with one hand ... will be taken away with the other."

Otherwise, 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 -- although consulting this expertise is not obligatory. If both of the disputing parties agree, NAFTA would allow special scientific review boards to advise a panel on questions of fact. Separate provisions govern disputes over financial matters, intellectual property, agriculture, anti-dumping cases, and all other cases brought to a NAFTA dispute proceeding. But just like GATT, NAFTA panels would be subject to strict confidentiality with no provision requiring public input.

Clinton Acknowledges Concerns

Acknowledging the public's concern at a campaign rally on October 4, 1992, presidential contender Bill Clinton nonetheless endorsed the NAFTA text negotiated by Bush. But the endorsement was conditional, dependent upon Clinton's ability to negotiate "supplemental agreements" with Mexico and Canada to fix a number of the problems pointed out by environmentalists, labor leaders, consumers and farmers. Among numerous other specific pledges, Clinton promised to negotiate trinational labor and environmental commissions that

would "educate, train, develop minimum standards, and have [substantial] dispute resolution powers and remedies." He added, "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."

On August 12, 1993, Clinton and his counterparts in Mexico and Canada, President Carlos Salinas and Prime Minister Kim Campbell, concluded their supplemental negotiations -- but chose not to publish the results. Instead, they released a "summary" for public review. And the reviews have not been good. The next day, House Majority Leader Richard Gephardt said they "fall short in important respects... I cannot support the agreement as it stands." House Speaker Thomas Foley estimated that "a significant majority" of congressional Democrats were leaning against approval. In early September, a new *Wall Street Journal*/NBC poll found lower approval rates among the American population than ever: 36 percent of those surveyed opposed NAFTA while 25 percent approved. A similar lack of popular support plagues Salinas in Mexico and Campbell in Canada.

Side Agreements Are Weak

Some critics point out that the supplemental agreements do not begin to fix major problems in the original text such as the emphasis on agricultural concentration or guarantees of undiminished energy exports. Others remember the shorter list of promises made by Clinton during his campaign such as financing to clean-up border pollution, adjustment for displaced workers, and protection for state laws setting higher standards than those of the federal government and NAFTA. Of all the Clinton promises, the three new agreements address only the creation of trinational labor and environmental commissions and reiterate the original NAFTA terms regarding sudden gluts of imports, called "surges."

Still other critics would have been satisfied with the supplemental agreements if they were ensured a dispute settlement mechanism with "teeth." But the teeth are missing. Indeed, according to the *Journal of Commerce*, Mexico's chief NAFTA negotiator Jaime Serra Puche told the Mexican Senate not to worry about the threat of fines and trade sanctions resulting from the supplemental agreements. The trilateral commissions' powers are limited, he said on August 17, and the "exceedingly long" dispute resolution process "makes it very improbable that the stage of sanctions could be reached." Furthermore, the maximum penalty would be a fine or suspension of benefits worth $20 million -- peanuts to any of the three governments. And the Canadians resisted "teeth" altogether. For their part, the side agreements stipulate that any fines recommended by a NAFTA dispute panel would be enforced in the Canadian courts with no suspension of trade benefits.

Not until September 14, did President Clinton actually release the final text of the supplemental agreements -- amid much fanfare and the support of prior Presidents Ford, Carter and Bush. And Serra Puche's dismissal of the supplemental agreements appears justified.

In the environmental and labor supplemental agreements, 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 found. The definitions of a "persistent" violation and "effective" enforcement give wide latitude for interpretation. First, at the stage of expert review, a complainant must show that a "pattern of practice of non-enforcement" has occurred starting after the date NAFTA and its side deals are implemented.

Then, to convene a dispute resolution panel, the complainant must show a "persistent pattern of non-enforcement," defined in the text as a "sustained or recurring pattern of practice." So, in effect, notes Scott Sinclair, a political economist working for the Canadian Center for Policy Alternatives, a complainant must prove that there is a "pattern of patterns -- something that is disconcertingly vague."

The text also carefully circumscribes which laws are subject to the jurisdiction of the trilateral commissions. Only those environmental laws affecting the production of tradeable goods and services are at stake; laws whose "primary purpose" is natural resource management are explicitly excluded. Likewise, labor laws guaranteeing the right to freely associate and organize, to bargain collectively, and to strike are excluded; only "mutually recognized" laws and regulations addressing workplace health and safety, a minimum wage, and child labor would be subject to expert review and dispute resolution. And 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 there is unfinished business. The three governments' official summary of the environmental agreement states, "although negotiators have not yet begun work on the language of a text, basic agreement was reached on a new institutional structure to promote effective coordination of infrastructure projects."

Transparency and Citizen Access

Surely, none of this represents "teeth." A careful reading shows that the three supplemental agreements altogether create ten new bureaucracies with responsibilities that are largely informational. Words like "consider," "consult," "report," "recommend," "promote," and "work towards" proliferate. And the entire supplemental agreement on surges is, according to the three governments' official summary, merely an "Understanding" that "confirms the ... effective use of Chapter Eight of the NAFTA" by establishing a Working Group on Emergency Action which "may make recommendations" to the governing bodies created by the NAFTA text itself.

On the other hand, an argument can be made that the side agreements enable a degree of greater transparency. Working groups, advisory boards and other channels of communication are established. Individual citizens may bring complaints to the environmental commission -- although not to the labor commission where only national governments have standing. If a dispute panel is convened, panelists may have expertise in fields other than trade policy and a panel may, if all parties agree, summon environmental, labor, and other expertise.

But are these few changes enough? The supplemental agreements address only a small segment of the public's concern, are riddled with limitations, and some of the substance is yet to be negotiated. Next, Clinton must submit to Congress an anticipated 8,000 pages or so of proposed "enabling legislation" stipulating the many changes required in existing U.S. law to implement NAFTA; it is notable that the supplemental agreements do not require any changes to U.S. law. When Clinton does take this step, the Congress will have only 60 days to review this massive document and decide whether to approve or disapprove the package as a whole.

In the context of transparency, it is also noteable that the Clinton Administration chose to appeal a federal judge's ruling that the National Environmental Policy Act requires an Environmental

Impact Statement to be conducted on NAFTA. Following this cue, a Mexican coalition of labor, peasant and environmental groups filed its own request for an evaluation of the environmental impact NAFTA on Mexico, citing their Constitutional guarantees to "the right to health, the conservation of productive resources and the care of ecosystems and natural resources" and other national law.

As of September 15, the environmental community in the U.S. was split on its overall verdict. Jay Hair, President of the National Wildlife Federation, announced the support of six major environmental organizations. "The benefits of the NAFTA package stand in stark contrast to the status quo, where environmental concerns are largely ignored in commerce between nations. NAFTA sets a precedent," he said. Ralph Nader disagrees. In a memo to the national grassroots coalition joined by the Sierra Club, Friends of the Earth and Green Peace, Public Citizen said the package "does not begin to remedy the fundamental flaws of the North American Free Trade Agreement concerning the environment, conservation and consumer health... Approval of this NAFTA [would be] a step backwards from the status quo."

Meanwhile, 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 earlier endorsement, President Clinton has been stuck with a very hot political potato.