

Enhanced Corporate Meddling Opportunities New NAFTA/USMCA: Chapter 28 “Good Regulatory Practices” & Chapter 12 TBT Sectoral Annexes

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What are we worried about?

New opportunities for corporate meddling...

Chapter 28 (GRP) and the TBT Sectoral Annexes 12A-12F together advance:

- **Paralysis by analysis** - Locking in and expanding obstructionist practices that already cause unconscionable delays
- **Red tape for regulators** - Nitpicking and burdensome procedures that impose costs on underfunded government agencies, diverting resources and impacting priorities
- **Trade uber alles** - Prioritizing trade and commercial considerations over the public interest - criteria such as “no more burdensome than necessary,” avoiding “unnecessary restrictions on competition in the marketplace” and “unnecessary regulatory differences”

.... that will undermine public protections.

- **Secret science** - Risking public and worker health by keeping industry studies secret and restricting access to “confidential business information” (CBI)
- **What you don’t know will hurt you** – Discouraging, restricting and even prohibiting informative labeling of food and consumer products
- **Wait for the dead bodies to pile up** – “Science-based” or “risk-based” regulations versus precautionary principle/hazard-based: evidence of “serious or irreversible harm” before acting
- **Back-door corporate influence** - Promoting decision-making through nontransparent “regulatory cooperation” activities and international standards organizations, both dominated by corporate interests
- **Laying the groundwork for appeals** – Including domestic legal attacks

Chapter 28, GRP Overview

- Applies broadly across all government
- “Specific obligations” apply to all phases of regulating: “planning, design, issuance, implementation, and review”
- Virtually all mandatory regulations affected
- Bears almost no resemblance to original NAFTA
- **Subject to dispute settlement** where “sustained or recurring course of action or inaction that is inconsistent with a provision” of the chapter, and enforceable through trade sanctions – a first
- The text is much stronger than parallel CPTPP provisions (which also aren’t subject to dispute settlement). **The NAFTA 2.0 GRP chapter is similar to leaked text that the US was unable to get into TPP.**

GRP Chapter Highlights

- **Requires central coordination of rulemaking** – parties “shall adopt or maintain”. This locks in and exports to Canada and Mexico the obstructionist OIRA internal review process.
 - What is OIRA? “slow, opaque, chaotic, lawless and powergrabbing” – GU Law Prof. Lisa Henzerling
 - An end-run around the transparency provisions of the APA, where regulations are delayed, studied to death, sent back to agencies for corporate-friendly revisions
 - **Compare TPP:** parties “should consider” ; not mandatory

- **Regulatory impact assessment**
 - Each party “should encourage use” of RIA when developing proposed regulations with anticipated costs or impacts above a threshold
 - Each party “**shall maintain procedures** to promote consideration” of enumerated factors including **non-regulatory alternatives and the alternative of not regulating**, and conduct cost-benefit analysis of all alternatives
 - “Should consider” impacts on substantial number of small enterprises
 - **Compare:** TPP does not include any mandatory language concerning RIA

- **Rolling back regulations at the request of the regulated**
 - Parties “**shall adopt or maintain procedures** or mechanisms to determine whether modification or repeal is appropriate”
 - “Should consider” factors including “**new opportunities to eliminate unnecessary regulatory burdens**” and “ways to address unnecessary regulatory differences that may adversely affect trade”
 - “Shall provide” opportunity for interested persons (corporations) to recommend modification or repeal including when regulation “**has become more burdensome than necessary to achieve its objective**”
 - **Compare: This is new – nothing similar in TPP**

- **Information quality** –
 - Parties “should adopt guidance” to encourage use of best reasonably available information
 - If regulatory authority “systematically collects information” in surveys each Party “shall provide that the authority should” use sound statistical methodologies and “**avoid unnecessary duplication and otherwise minimize unnecessary burdens**” on those surveyed
 - **Compare to TPP- statistics restrictions are new**
- **Regulatory Cooperation Provisions** – encouraged in 2 pages of possible activities (link to RCC – run by OIRA)
- **Expert advisory groups** – sets out transparency and balance requirements
- **APA-style “notice & comment”** – Common practice in the US, but **special rules here where “significant impact on trade”** – earlier notice of proposed rule, longer time to comment

Chapter 12 TBT Sectoral Annexes

- Establishes **specific requirements** for governments seeking to regulate Chemical Substances (12-A), Cosmetic Products (12-B), Information & Communication Technology (12-C), Energy Performance Standards (12-D), Medical Devices (12-E), and Pharmaceuticals (12-F).
- These are **in addition to** the requirements of the GRP Chapter 28 and the main TBT Chapter.
- In general, the language is stronger/more mandatory than the GRP text.
- The TBT chapter and its annexes are enforceable through dispute settlement (as is the GRP Chapter).

Key Takeaways for Sectoral Annexes

- Several annexes **discourage and restrict labeling** (there is additional anti-labeling text in the main TBT chapter)
- **Mandatory effort to harmonize rules** including workplace chemicals and medical device regulation
- **Keep industry information secret**
- **No delay** getting products to market!!

Chemical Substances Annex

- **Coverage:** Central level governments' preparation, adoption & application of regulations, standards, conformity assessments, labeling, hazard communication, import/export permits that **may significantly affect trade** between the parties
- The parties “shall endeavor” to **use a risk-based approach** to regulating chemical substances and mixtures (rather than precautionary approach) and to align their risk assessment methodologies & management measures
- Not supposed to prevent party from “determining and achieving its respective level of protection” and each “shall strive to continue to improve respective levels of protection”

Chemical Substances Potential Impacts

- **Mandatory:** The parties “shall strengthen their cooperation” on chemicals regulation and specifically **“shall cooperate with a view to minimizing the differences in the use of safety data and safety data sheets”**. Special mention of reducing differences in presenting information “protected as CBI”
- The **safety data provision** could have significant consequences for workers as well as emergency responders unless the harmonization is upwards to the stronger standard
 - **Canadian safety data sheets are substantially more comprehensive and informative than U.S. requirements.**
 - **The focus on CBI seems intended to keep more information hidden from workers**
- Potential to impact hazard communication standards at the sub-federal level, if stronger state-level protections in California and other states were to be challenged as restraints on trade?

Cosmetic Products Annex

Applies to central level governments' preparation, adoption & application of regulations, standards, conformity assessments, and notification procedures that **may affect trade** between parties [missing "significant"].

Extremely strong and mandatory language; parties shall

- Avoid unnecessarily duplicative requirements
- Use relevant international manufacturing standards
- Minimize marketing delays
- Apply risk-based approach to regulating safety” and *“take into account that cosmetic products generally pose a lower risk to human health or safety” than medical devices or drugs* **[not necessarily a true statement!]**

Cosmetic Products Annex Continued

- **Market first, regulate later:** Marketing authorizations of cosmetic products only allowed for health and safety concerns where “**no less trade restrictive alternative reasonably available**” such as notifications and post-market surveillance
- *At same time, makes such notifications and post-market surveillance ineffective because **not allowed to label products with notification number***
- Can't test or retest shade/fragrance variants
- Shall ensure no less favorable regulatory treatment of products imported from another party
- Appendix on enhancing regulatory compatibility for products “at the interface of cosmetics and drugs” including acne products **[children!]**, sunscreens, deodorants in order to standardize (1) package labeling of ingredients and (2) tamper-evident packaging

Medical Devices Annex

- Each party “**shall avoid** imposing or maintaining unnecessarily duplicative regulatory requirements”
- Parties “**shall seek to improve their cooperation** on inspections of medical device manufacturers” quality management systems
- Shall ensure no less favorable regulatory treatment of products imported from another party
- Must use risk based system to evaluate safety
- Must “**minimize likelihood of implementing requirements that could lead to substantial delays**” in marketing products
- Shall administer marketing authorizations “reasonably” meaning “**avoiding duplicative requests for unnecessary information from the applicant**” and making decisions within a “reasonable time”
- Party “**shall allow**” device to remain on market during periodic reauthorization unless “significant” safety, effectiveness or quality concern

Don't these provisions just reflect US law?

- **Some reflect US law, others do not.**
 - For example, “**more burdensome than necessary**”, a standard used in the GRP retrospective review article, is absolutely not the legal standard for repealing public health regulations.
 - The Sectoral Annexes in particular impose requirements that are not mandated by law, and **would preclude future laws and regulations to better protect and inform workers and consumers.**
- Some of what's in the GRP, such as regulatory impact statements and OIRA activities, have been extremely detrimental to the public and delayed and weakened needed protections. **Once included in an international agreement, its nearly impossible to get rid of bad law or address changing circumstances. Why make these bad practices permanent?**
- **Some of the GRP reflects Executive Orders, locking in Reagan and Trump-era deregulatory measures for future presidents.**
- **Promoting legal challenges:** These provisions are enforceable through the dispute settlement provisions. Additionally, failure to comply with all of them could provide **additional grounds for domestic challenges by corporate interests.**
- Even if the US is stuck with some of these practices, **why should we impose them on other countries such as Mexico, making it harder for that country to reform its agriculture and food systems, or protect its citizens from harm?**

The chemical industry likes it – maybe we should worry

Report of the ITAC on Standards and TBT (which includes the American Chemistry Council):

The new NAFTA's **GRP provisions are “novel and strengthened” and “a new high-water mark for such commitments in trade agreements.”**

They see the GRP Chapter beefing up the enforceability of the sectoral chapters “by codifying the systematic practices that enable more full implementation of other chapter provisions such as those on TBT...”

Final takeaway

Transnational corporations pushed hard for the GRP and regulatory cooperation provisions in the new NAFTA. Why?

Because these provisions taken together do indeed limit regulators and will lead to the delay, weakening and repeal of public protections.

Moreover, as significant reform or even elimination of ISDS becomes an increasingly realistic goal corporations are seeing the writing on the wall. **Better to prevent regulations right from the start, than place all their bets on beating them back through ISDS.**

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