3-1-2001

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Available at: https://digitalrepository.unm.edu/usmexlj/vol9/iss1/3
NAFTA STANDARDS REGULATION: THE U.S. PERSPECTIVE

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I. INTRODUCTION

The purpose of this paper is to raise awareness about the North American Free Trade Agreement's ("NAFTA") standards-related measures,¹ and to give you a flavor for U.S.-Mexico trade relations and tell you how the International Trade Administration (ITA) at the Department of Commerce (DOC), fits into all of this.²

The ITA monitors trade agreements, as well as countries' compliance with trade agreements. The ITA makes sure that U.S. firms have market access to other countries, including Mexico and Canada under NAFTA. The ITA works with foreign governments bilaterally, and in the case of NAFTA, trilaterally, to resolve clarifications, problems, interpretations of the agreement, as well as implementation issues.

II. NAFTA BACKGROUND INFORMATION

NAFTA was signed in 1992 by President Bush and President Salinas in Mexico. It went into effect January 1, 1994 under the presidency of Bill Clinton. NAFTA encompasses 400 million consumers with a combined gross domestic product of $9.5 trillion.³ Since NAFTA took effect, we have seen an explosion in trade. Trade between NAFTA partners grew from 293 billion dollars in 1993 to 561 billion dollars in 1999.⁴ That was when Mexico displaced Japan as the United States' second largest trading partner, Canada being our first.⁵ We are truly witnessing some interesting times. On December 1, 2000, Vicente Fox led a new ruling party into office after over 70 years of rule by the Partido Revolucionario Institucional...
The United States also has a new administration under President George W. Bush.

We have witnessed the importance that Mexico has placed in opening and diversifying its market and strategically placing itself as an international hub. Mexico has initiated trade talks with Brazil, Korea, Japan and Singapore. Mexico has also concluded trade agreements with six Latin America countries including Costa Rica, Columbia, Venezuela, Bolivia, Nicaragua and Chile, as well as Israel and the European Union. These agreements will provide Mexico with global market access to world regions while reducing barriers to trade and insuring a stronger, more independent Mexico.

In reviewing the EU-Mexico agreement, the ITA identified over 300 U.S. products that would be disadvantaged by the agreement, due to the EU-Mexico tariff arrangement. In some of those areas, the United States did not have trade, so the agreement really did not disadvantage those categories. The ITA noted that in most cases, the United States grants Mexico duty free treatment to similarly classified Mexican goods. While Mexico is not obligated to grant the United States parity, the United States was able to request duty free treatment for 52 of the most disadvantaged products through the NAFTA tariff acceleration exercise. In this situation, NAFTA enabled the United States to seek equality for its disadvantaged products because of the EU-Mexico agreement. A Federal Register notice was published identifying those products. The exercise involving these products is near an end and the United States hopes it will be receiving parity soon.

III. PRODUCT STANDARDS

With the opening of markets and reduction of tariffs, countries see a proliferation of non-tariff barriers, often in the form of standards. The term standard-related measures ("SRMs") is used in the NAFTA and covers standards, technical regulations and conformity assessment procedures. Mandatory standards are called technical regulations and are established by the government. An industry could actually develop a standard but once the government adopts it, it becomes a technical regulation. Conformity assessment is any procedure that is used to assure that a product meets the requirements contained in the standard or technical regulation. Conformity assessment procedures include sampling, testing, facility inspections, verifications, lab accreditation and other means used to determine that products comply with standards or technical regulations.

There are numerous legitimate reasons for setting standards. For example, to protect public health, safety and the environment, as well as to guard against

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8. See NAFTA, supra note 1, art. 915, 32 I.L.M. 605.
10. See id.
11. See NAFTA, supra note 1, art. 915, 32 I.L.M. 605.
deceptive practices such as misleading labeling and to protect national security. However, there are also unacceptable reasons for setting standards. These can include disguised restrictions on trade or just plain protectionism.

While many countries rely on mandatory government regulations, the United States primarily relies on product standards that are market driven and voluntary. The Department of Energy's Energy Star Program is one such voluntary product standard. The Energy Star Program involves computers, copy machines and the like, which turn off after a certain time period if they are not being used in order to conserve energy. Imports coming in from other countries do not have to have the Department of Energy's "star". However, because people are becoming more aware of the environment and conservation, they want equipment which utilizes the Energy Star Program. It is cheaper for them in terms of electricity costs because it conserves energy.

Underwriters Laboratories (UL) is a private sector testing laboratory which certifies that products with the UL seal of approval have met voluntary safety standards. A product, such as a toaster, for instance, will have the UL mark on it, the application of which is a voluntary standard. However, consumers find a sort of comfort knowing that a laboratory has tested this appliance. Consumers tend to look at all of the different marks appliances carry, and they get some sort of consumer confidence if they see the UL symbol or the International Testing Services (ITS) or some other type of symbol. Wal-Mart, Kmart, and other corporations can actually buy products without the UL or other symbol of testing. However, there are product liability laws and other reasons the vendors want some sort of symbol or mark from a testing laboratory.

However, even if a product has a UL mark showing that it has been tested in the United States, that may not be good enough to enter that product into Mexico. If there is a technical regulation in Mexico, the product has to be tested for that technical regulation because it may differ from the United States product standards. There are other obligations that have come into play under NAFTA that would allow laboratories to be unilaterally recognized by the Standards General Director ("DGN") in Mexico.12 But until the United States has labs that are unilaterally recognized, that product will have to be sent to Mexico and tested to the Mexican standard. There was a NAFTA obligation that went into effect in January 1998, to accredit or otherwise recognize the U.S. and Canadian laboratories.13 But the UL or other such laboratories would have to go through all of the channels to get accredited. It is not just an automatic green light, and it necessarily should not be because Mexico may have different specifications for the Mexican standard.

When governments establish technical regulations, there are certain disciplines that must be adhered to pursuant to trade obligations. One such obligation is national treatment.14 National treatment prohibits parties from preparing, adopting or

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12. The Directorate General of Standards ("DGN") is under Secretaría de Comercio y Fomento Industrial (SECOFI), The Secretariat of Trade and Industrial Development, which is Mexico's organization which manages standardization activities.
14. See NAFTA, supra note 1, art. 904, 32 L.M. 605.
maintaining SRMs in a discriminatory manner.15 Additionally, foreign and domestic measures must be treated the same and applied equally.

Parties must insure that SRMs do not create an unnecessary obstacle to trade and are not more trade restrictive than necessary to achieve a legitimate objective. Parties must publish draft regulations for comment, publish the regulations in final form and establish and provide an inquiry point so that members can find information on standards. The United States’ inquiry point is housed under the Department of Commerce’s National Institute for Standards and Technology (NIST). Members from different countries can call NIST to find out what the applicable standards or regulations are in the United States for a particular product.

If an organization has a problem or if there is a perceived barrier which falls under the rubric of commerce and deals with a NAFTA country, the ITA usually gets the call through various channels. Many times the problem is just a misunderstanding or matter of clarification. However, if there is a bonafide problem, the ITA is able to address the issue with its counterparts in other countries. There are also more formal channels such as the mechanisms set up through the working groups under NAFTA or the bilateral forum. The working group created to address SRMs meets quarterly to discuss trade irritants and work being undertaken in different international forums such as the Asia Pacific Economic Cooperation (“APEC”), the Organization of Economic Cooperation and Development (“OECD”) and the World Trade Organization (“WTO”). The private sector also plays a huge role in meeting with foreign government officials and coordinating efforts with industry in other countries. Many times if there are problems they do not affect just the exporter, but the importer as well. Industries are beginning to strategize more and coordinate efforts to address problems. The industry can lobby their government to get involved and address or resolve the issue in a win-win manner for both the importer and the exporter.

One area in which such efforts paid off involved water meter standards. Mexico had utilized U.S. water meter standards for several years. However, when Mexico published the draft regulation it only took into account the International Organization for Standardization (“ISO”) standard and not the United States’ standard. This measure would have shut out U.S. exports and impacted the Mexican consumer because the consumer could no longer use the U.S. water meters that they had been using for years. They would have had to replace the U.S. water meters as well as all the pipes. Basically, the whole system would have to be replaced, which would be very costly and burdensome. Through the involvement of both the working group mechanism and industry, the issue was resolved. When Mexico did publish the final regulation, it incorporated the U.S. standard.

IV. INTERNATIONAL STANDARDS

There is much misinformation about what an international standard body or organization is. Many countries, especially European countries, only recognize the international standards that are developed or drafted by the ISO, specifically, the International Telecommunication Union (“ITU”) for telecommunication standards.

15. See id.
and the International Electrotechnical Commission ("IEC") for electrical standards. There is a move in the WTO right now to change countries' ideas about what an international standard is. The United States' viewpoint is that as long as the standards body has open and transparent features and if the standard is recognized internationally, it should be considered to be an international standard or an international standards body.

Another timely issue involves nutritional supplements in Mexico. In February 2000, Mexican health regulations went into effect that essentially blocked the exportation to Mexico of various U.S. nutritional products including some vitamins. Mexico reclassified certain vitamins as pharmaceuticals. In order to import pharmaceuticals into Mexico, a manufacturer must have a sanitary license. In order to get that sanitary license, the manufacturer must have its facility inspected by the Mexican Ministry of Health. However, Mexico is basically refusing to inspect U.S.-based facilities, reasoning that Mexican law does not allow it. The ITA is working with Mexico right now to be able to import these products in the interim while they change their laws. Such changes would enable Mexico to recognize the foreign manufacturing facilities, thus fulfilling the obligation in NAFTA to provide national treatment. The ITA raised this issue trilaterally through the working group. Mexico is receptive and responsive, so hopefully the United States will be able to start exporting those products again.

V. NAFTA AND ENVIRONMENTAL STANDARDS

A strengthening of environmental protection is seen in NAFTA. Unlike other trade agreements, NAFTA has side agreements on both the environment and labor. The Commission for Environmental Cooperation, created under one of these side agreements, has begun work on a host of projects under its cooperative work program. These projects include an agreement on the conservation of North American birds, the implementation of regional international coral reef initiative, the creation of a biodiversity information network and the creation of the North American pollutant release inventory. The Border Environment Cooperation Commission ("BECC"), and the North American Development Bank ("NADBANK") have teamed up to certify and finance 14 projects involving a total of $408 million, including the first wastewater treatment plant in both Juarez and Tijuana. Over 400 million people on both sides of the border will benefit from these projects.

VI. NAFTA AND LABOR STANDARDS

NAFTA is also involved in improving labor conditions and standards. The 1994 path-breaking North American Agreement on Labor Cooperation ("NAALC") has established an important base from which to advance workers' rights objectives
while recognizing the right to establish domestic labor standards.\textsuperscript{18} NAALC requires the protection, enhancement and enforcement of labor laws in the three participating countries: the United States, Mexico and Canada. This does not mean the creation of new labor laws; it simply means the enforcement of the laws presently on the books. NAALC has generated the largest cooperative effort on labor matters that the United States has with any other country in the world. It covers occupational safety and health, employment and training, industrial relations, workers rights, child labor and gender issues.

NAFTA has supported the United States' efforts in the standards community, be it product standards, environmental standards, or labor standards. NAFTA is knocking down barriers to commerce and trade between the United States, Mexico and Canada, encouraging environmental protection and workers' rights and building a stronger, more cooperative North America. NAFTA has encouraged trade, stimulated growth and provided a forum to address barriers and other issues that arise.