

Abstract

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Assessing the Impact of NAFTA on Environmental Law and Management Processes
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Through the combination of its substantive provisions, adjudicative processes and enforcement mechanisms, trade law has a significant impact on how governments can take environmental decisions and enact environmental measures.

This paper undertakes a survey of the application of trade law rules to environmental management and decision-making by governments. It correlates five generic stages of environmental management against seven major trade law disciplines that are particularly relevant to measures for the protection of the national environment.

The initial assessment that results from this analysis suggests that most existing and many future environmental measures would not survive trade law challenges since the increase in independent disciplines under NAFTA and the 1994 WTO Agreements. For older measures, the risks of an environmental measure being found inconsistent with trade law in the event of a challenge are high, as most trade requirements simply appear not to have been considered in the course of environmental law-making in the 1970s to the early 1990s. However, the risks of a challenge coming about are not high, based on current levels of challenges and the politically constraining fact they must be initiated by governments. In addition, in the event a measure is found inconsistent with trade law, at least under the World Trade Organization process, there is an opportunity to rectify whatever specific failures may be found, and to revise the measure as appropriate.

For new measures, the primary concern is the human and technical capacity to meet the trade requirements in a manner that is also consistent with environmental management requirements. If the interpretations of the trade disciplines set forth in the paper are accurate, there are no inherent inconsistencies between them and environmental law-making to protect one's own environment. However, meeting all the requirements does require significant expertise sensitive to both the environmental and trade issues. This capacity is currently often lacking. This in turn poses risks of new measures falling afoul of trade disciplines, as well as of proposed measures being stalled in the policy making process due to either a lack of sensitivity to the environmental dimensions of the issues being raised or addressed by trade experts, or a related fear of trade challenges down the road. This dynamic creates a "hidden" risk to environmental protection. In addition, there

is a risk that trade disciplines will not respond well to new developments in environmental policy, in particular new approaches to implementing pollution prevention strategies at the product source.

The risks in relation to the investment obligations in Chapter 11 of NAFTA are of a different order. The disciplines are broader and have now been given a wide meaning by the first arbitral panels to consider them. The dispute resolution process is also initiated by private corporations, without regard for other national perspectives or constraints. Consequently, Chapter 11, if current interpretations continue in future cases, poses significant risks to environmental law-making across North America. The NAFTA Parties, do, however, have mechanisms other than amendments to NAFTA available to address these risks, if they choose to exercise them.