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Technical Barriers to Trade under the NAFTA System: A Call for Legitimate Protection;Note

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TECHNICAL BARRIERS TO TRADE UNDER THE NAFTA SYSTEM: A CALL FOR LEGITIMATE PROTECTION

I. INTRODUCTION

On January 1, 1994, the continent of North America embarked on a new age of trade and commerce with the activation of the North American Free Trade Agreement (NAFTA).[1] The governments of Canada, Mexico, and the United States officially joined together to reduce and/or eliminate virtually all barriers to trade between the triumvirate, based upon the agreement reached by the leadership of each of the three countries. Toward this end, the agreement deals significantly with the more obvious barriers of tariffs and quota systems which clearly limit the entry of foreign goods into each country.[2] In addition, the agreement seeks to preclude regulations and standards, known as Technical Barriers to Trade (TBTs),[3] which unjustly treat foreign goods in an unequal or protectionist manner. While much of the agreement's language is merely hortatory in nature, only urging changes in the domestic laws of the member states, there are also more substantial clauses that impose mandatory compliance by those states.[4]

This mandatory nature of the statutory language may allow NAFTA to interfere with a member state's right to establish standards and measures which are intended to serve and protect the citizens of that member state. The degree of interference is determined by two elements: 1) the scope of the language of Chapter 9, and 2) the developing jurisprudence of North American trade law, which provides meaning and emphasis to the specific language of the agreement when applied to specific trade disputes.

Although NAFTA remains in its infancy, and to date there are no official complaints filed under the NAFTA provisions which deal with these TBTs, an assessment of Chapter 9 is possible. By examining Chapter 9 through the lenses of both the US-Canada Free Trade Agreement[5] and the Treaty of Rome,[6] one can measure the untested textual provisions of NAFTA against two established trade agreements for potential over-interference in the regulatory protection allowed to member states. Further, the FTA also provides insight as to the developing theories of trade in North America.

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1. The North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 296 (1993) [hereinafter NAFTA].

2. *Id.* at Preamble, which states in part: "REDUCE disruptions to trade; ESTABLISH clear and mutually advantageous rules governing their trade; ENSURE a predictable commercial framework for business planning and investment."

3. *Id.* art. 901.

4. Boundary Supremacy for Businesses and Sovereigns, THE RECORDER, July 8, 1994.

5. United States-Canada Free Trade Agreement, January 1, 1988, 27 I.L.M. 293 [hereinafter FTA].

6. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

II. BACKGROUND AND HISTORY

Given the nature of any trade agreement, a state gives up a portion of its own sovereignty, however small that portion may be, when that state accepts the provisions of an agreement. Of course, by accepting the terms of the given agreement, the state makes this sacrifice willingly. However, this willingness extends only to the limit of the state's understanding of the agreement. Herein lies the major stumbling block of limitation clauses and restrictions on state action: what exactly is prohibited by an agreement, and under what standards are those prohibitions defined?

Through the NAFTA, the member states recognized a need to limit those standards and other TBTs that may be erected by a member state which serve to interfere with the precepts of free trade and are without legitimate basis.[7] The problem arises in determining which TBTs are legitimate and which are merely disguised attempts of unequal treatment for economic advantage.

Articles 904(1) and (2) of NAFTA Chapter 9 clearly authorize a member state to establish both standards-related measures and other levels of protection that relate to safety; the protection of human, animal or plant life or health; the environment; or consumers. However, Chapter 9 also limits the establishment of technical barriers if those barriers are adopted, maintained or applied as an unnecessary obstacle to trade between the parties.[8] If the measure has a demonstrable purpose to a legitimate objective, a term which embodies the categories of Article 904[9] and it does not exclude goods that comply with that objective, the barrier will not be classified as an unnecessary obstacle.

Thus, the crux of NAFTA's standards and regulation provisions lies with the determination of whether the stated objective of a regulation is, in fact, legitimately based in one of the protected categories listed, or is merely a facade for a protectionist stance. If the objective is legitimate, a secondary question arises concerning whether the goods in question, in fact, comply with that legitimate objective. Pursuant to Article 913(2)(c), the Committee on Standards-Related Measures provides the forum addressing such issues and making determinations of legitimacy.

As previously stated, there have been no hearings, or otherwise, to demonstrate the full capacity of the Committee's scope and authority. However, the use of the FTA and the Treaty of Rome can provide the necessary insight.

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7. No party may prepare, adopt, maintain or apply any standards-related measure with a view to or with the effect of creating an unnecessary obstacle to trade between the Parties. An unnecessary obstacle to trade shall not be deemed to be created where: (a) the demonstrable purpose of the measure is to achieve a legitimate objective; and (b) the measure does not operate to exclude goods of another Party that meet that legitimate objective.

NAFTA, *supra* note 1, art. 904(4).

8. *Id.*

9. [L]egitimate objective includes an objective such as: (a) safety, (b) protection of human, animal or plant life or health, the environment or consumers, including matters relating to quality and identifiability of goods or services, and (c) sustainable development, considering, among other things, where appropriate, fundamental climatic or other geographical factors, technological or infrastructural factors, or scientific justification but does not include the protection of domestic production.

Id. art. 915.

A. The Canada-U.S. Free Trade Agreement

As an acknowledged model and predecessor[10] of the current NAFTA agreement, the FTA and its workings can be used to shed light on the future TBT problems that may face NAFTA. Because the FTA involved two of the three NAFTA member states, many of the same specific concerns have been addressed in both documents.[11] As does NAFTA,[12] the FTA adopted both the theory of national treatment,[13] embodied in Article III of the General Agreement on Tariffs and Trade (GATT), and the concept of limiting technical standards between member states.[14]

National treatment requires that a state not discriminate or otherwise impede foreign products to a greater degree than they do domestic products. This policy precludes an unfair favoritism of the domestic products, which would effectively establish a market barrier. As a compliment to this, limited technical standards attempt to facilitate trade among states by simplifying the trade system through a reduction in the number of various technical barriers in existence. By promoting and developing a universal set of standards to which all participating states adhere, simplification is achieved.

Concerning the propriety of TBTs under a free trade agreement, the FTA covers national treatment of goods under Chapter 5 and defines "legitimate objectives"[15] which allows the establishment of TBTs in Chapter 6. Each of these chapters clearly adopts the respective GATT provisions as part of the FTA.[16]

Related to technical barriers and their application, the Canada-United States Free Trade Commission[17] has sent three main TBT cases before separate panels for determination: *Canada's Landing Requirement for Pacific Coast Salmon and Herring*,[18] *Lobster from Canada*,[19] and *Puerto Rico Regulations on the Import and Sale of UHT Milk from Quebec*.[20] In each of these cases, the panel has attempted to give full and fair meaning to the FTA and the GATT agreements, as established by the FTA. However, as seen below, there are points in each case that demonstrate that those two agreements are not foolproof in their protection of the reserved rights of the member state to erect legitimate TBTs.

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10. Charles R. Johnson, et al., *Summary of the North American Free Trade Agreement, in NAFTA: North American Free-Trade Agreements*, Treaty Materials 1 (1993).
11. *Id.*
12. NAFTA, *supra* note 1, ch. 9.
13. FTA, *supra* note 5, art. 501.
14. *Id.* ch. 6.
15. *Supra* note 9.
16. FTA, *supra* notes 13 and 14.
17. *Id.* art. 1802. The Free Trade Commission is the enforcement body which deals with TBT violation complaints under the FTA.
18. *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*; NAFTA: North American Free Trade Agreements, Dispute Resolution; CDA 89-1807-01; October 16, 1989 [hereinafter *Pacific Coast Salmon*].
19. *In the Matter of Lobsters from Canada*; NAFTA: North American Free Trade Agreements, Dispute Resolution; USA 89-1807-01; May 21, 1990 [hereinafter *Lobsters from Canada*].
20. *In the Matter of Puerto Rico Regulations on the Import, Distribution and Sale of U.H.T. Milk from Quebec*; NAFTA: North American Free Trade Agreements, Dispute Resolution; USA 93-1807-01; June 3, 1993 [hereinafter *UHT Milk from Quebec*].

B. The Treaty of Rome

The Treaty of Rome[21] is the basic document of the European Union (EU),[22] the modern world's first major common market. While different in total scope and ultimate goal[23] than the free trade agreement between Canada and the United States, the EU has some significant similarities that make it useful in examining NAFTA.

Principally, in reference to TBTs, Article 30 of the Treaty of Rome prohibits both quantitative restrictions as well as measures of equivalent effect to quantitative restrictions.[24] The European Court of Justice interpreted quantitative restrictions as measures which amount to a total or partial restraint on imports, exports, or goods in transit.[25] By definition, measures of equivalent effect are much broader in scope than the quantitative restriction classification, and have been deemed to include both measures that apply solely to foreign goods (distinctly applicable) and measures that do not distinguish between domestic and foreign goods (indistinctly applicable).[26]

These two elements of Article 30 have been developed through European case law. In what has become known as the Dassonville formula,[27] the European Court of Justice established the concept that trading rules implemented by member states that serve to hinder intra-community trade, directly or indirectly, are to be considered as measures having equivalent effect. Coupled with this is the Rule of Reason,[28] which finds that measures falling within the Dassonville formula may nonetheless be permitted under Article 30, provided they are "necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."[29]

Thus, it appears that the stage is set for Article 30 to be applied only in cases where reason dictated that the interests of the Common Market were being unduly sacrificed by import restrictions. Despite this, European case law has demonstrated that even the most logical of agreements and principals are in danger of over-zealous interpretation.

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21. Treaty of Rome, *supra* note 6.

22. Originally, the Treaty of Rome established what was known as the European Economic Community (EEC). As the trade union progressed, the states involved became a more tightly knit group and developed into what was known as the European Community (EC) under the Single European Act 1986. In 1993, a further step toward a federal Europe was taken with the passage of the European Communities (Amendment) Act 1993, known as the Maastricht Treaty, which established the European Union (EU). However, the relevant trade provisions of the Treaty of Rome remain intact.

23. The scope and ultimate goal of the Treaty of Rome was to unify Europe into a dependant coalition of states, in order to avoid the hostilities that gave rise to World War II.

24. Eric L. White, *In Search of the Limits to Article 30 of the EEC Treaty*, 26 COMMON MKT. L. REV. 235, 241 (1989).

25. Josephine Steiner, *Textbook on EEC Law* 82 (1992).

26. White, *supra* note 24.

27. Stemming from *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837, 2 C.M.L.R. 436 (1974).

28. Developed in *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein*, 1979 E.C.R. 649, 3 C.M.L.R. 494 (1979) [hereinafter *Rewe-Zentral*].

29. Josephine Steiner, *Drawing the Line: Uses and Abuses of Article 30 EEC*, 29 COMMON MKT. L. REV. 749, 752 (1992).

III. NAFTA ARTICLE NINE AND TWO HAZARDS OF THE FREE TRADE CONCEPT

Despite the many lauded benefits and high points of a free trade system, there are some dangerous pitfalls that must be examined in light of the TBT provisions included in NAFTA. While some of these pitfalls must be accepted as necessary evils toward a greater benefit, others can be satisfactorily answered without sacrificing the end goal of increased fair trade.

A. Rejection of Legitimate Concerns

Just as in NAFTA, both the Treaty of Rome and the FTA define what is an acceptable legitimate objective for a TBT. The FTA specifically covers this definition in Article 609,[30] while the Treaty of Rome has a definition that has evolved from case law and directives into what is now known as the Rule of Reason. While not mirror images of each other, both of those definitions include, among other things, the defense of the public health and consumer protection. However, despite the seeming clarity of the terms, each agreement has seen its legitimate objective provisions overridden in the name of free trade.

1. Pacific Coast Salmon

Under the FTA, three major cases concerning TBTs have been brought before a binational panel. In two of the three cases, the binational panel called into question the validity of the barrier and, at least, to some degree called for reduction of the barrier. In *Canada's Landing Requirement for Pacific Coast Salmon and Herring*,[31] the panel considered Canadian regulations which forced all catches of pacific coast salmon and herring from Canadian waters to be landed on Canadian soil prior to processing for verification and data collection.[32] The government of Canada justified the regulations as environmental conservation measures necessary to insure that the target species were not subject to over-fishing and to maintain current data on the bio-diversity of the species.[33] Further, because the regulations applied to catches that were to remain in Canada, as well as, those that would be exported to the United States, Canada maintained that the provisions that met the national treatment requirements were not discriminatory to foreign trade.[34]

The United States objected to the provisions, stating that they were discriminatory in that they forced a raise in price of affected fish exported to the United States.[35] In addition, the regulations were argued to be unnecessarily intrusive on free trade and that results similar to those intended could be achieved through other less intrusive means.[36]

The panel, in a typical example of soft diplomatic compromise, found that the

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30. The article states, in pertinent part "[l]egitimate domestic objective means an objective whose purpose is to protect health, safety, essential security, the environment or consumer interests[,]" FTA, *supra* note 5, art. 609.

31. *Pacific Coast Salmon*, CDA 89-1807-01.

32. *Id.* at para. 2.03.

33. *Id.*

34. *Id.* at para. 5.02.

35. *Id.* at para. 5.01.

36. *Id.* at para. 5.03.

conservation interest of Canada did justify a landing regulation to verify and collect the necessary data; however, the panel also determined that a 100% landing requirement was not necessary.[37] Instead, data sufficient for conservation purposes could be achieved by examining the current landed volume from a given fishery, which made up 80-90% of the total catch. The panal recognized this on the provisional basis that the unlanded export catch not excede the current level of 10-20% of the total catch volume of the species in question.[38] Because the situation at the time of complaint did not require active intervention, the panel determined that the Canadian regulation was not within the realm of a legitimate objective as defined under the FTA. Such an interpretation of the FTA is patently dangerous.

The entire purpose of allowing certain TBTs to exist under a free trade arrangement is to allow member states to maintain some sovereign control in appropriate situations of a legitimate domestic objective. If that control is effectively emasculated by precluding domestic policy in the name of free trade, that state, as well as other states, with intertwining interests, may well be injured by its lack of power to protect those legitimate interests. Pursuant to the definitions set out in Article 609, the FTA includes the protection of both the environment and consumer interests, each of which would be impacted by over-fishing. If the salmon stock is effectively wiped out as a result of over-fishing, it is the Canadians who stand to lose the most. Therefore, such a pro-active measure should be allowed in order to protect a member state's recognized interest from destruction.

2. UHT Milk from Quebec

These same types of concerns were revisited most recently in *UHT Milk from Quebec*.[39] The territory of Puerto Rico, in revamping its regulations to improve the quality of milk production, joined the National Conference on Interstate Milk Shipments (NCIMS)[40] in 1987. As a part of membership to NCIMS, Puerto Rico was obligated to adopt the Pasteurized Milk Ordinance (PMO). The purpose of this American program was to enforce strict sanitation standards to preclude the sale of contaminated milk in complying areas. Prior to the adoption of the PMO, ultra-high temperature milk (UHT milk) from Quebec had been sold in Puerto Rico for fourteen years.

Upon the adoption of the new PMO, the UHT milk imported into Puerto Rico no longer complied with import regulations. The Quebec production facilities were neither quality-graded upon an accepted scale, nor had they been inspected by NCIMS.[41] Based on lack of verifiable PMO compliance within the established grace-period, Puerto Rico closed itself to imports of Quebec UHT milk.

The Canadian Government protested this closure as unfair and coercive, in that NCIMS refused to complete an inspection without Canadian membership in NCIMS.[42] In the alternative, Canada maintained that the principle of national treatment had been violated in requiring that Canadian milk production standards be "substantially similar"

37. *Id.* at para. 7.34.
38. *Id.*
39. *UHT Milk from Quebec*, USA 93-1807-01.
40. *Id.* at para. 3.9.
41. *Id.* at para. 3.27.
42. *Id.* at para. 3.31.

to the PMO, rather than "equivalent" as required by Article 711 of the FTA.[43] Further, Canada argued that a de facto discrimination against imports is set up by the Puerto Rican regulations by basing the regulations on requirements which are routinely met by U.S. producers, but which are foreign to Canadian producers.[44] Finally, Canada argued that even if the Puerto Rican measures were found to comply with the obligations under the FTA, the application of those measures serves to nullify and impair the benefits of the FTA reasonably expected by Canada, as protected by FTA Article 2011.[45]

In response, the United States maintained that Puerto Rico, as a member of NCIMS, had every right to implement and exercise technical regulations that protect human life, pursuant to FTA Article 708(1).[46] Since the implemented regulations applied to both foreign and domestic milk, they also did not run afoul with the national treatment policy of the FTA.[47] The intent of the regulations was to increase the health protection surrounding the production of milk, regardless of its origins. Because Canada was unable to demonstrate that its UHT milk met those health protections, the United States maintained that Puerto Rico correctly denied admission of the UHT milk.[48] Canada did not demonstrate equivalence during the grace-period provided before closure of the market; therefore, the importation of UHT milk was denied.

In evaluating the case, the panel determined in favor of the Puerto Rican restrictions on every point, except with regard to the impairment of the Canadian expectations under the FTA.[49] Despite a lack of violation on every other account, the panel determined that the PMO application to UHT milk from Quebec effectively eliminated the benefits of the FTA which Canada could reasonably expect.[50] The panel found a reasonable expectation that the UHT milk would not be excluded based both upon its historical use and acceptance of that milk in the Puerto Rican market. Further, the panel found that the nature of the FTA urges a cooperative attitude which was violated by the closure of the milk market before a test of equivalency between the PMO and the Canadian standards was conducted.

Again, the power of a member state, with the objective to protect its legitimate interests, was precluded in the name of free trade. While Canada may or may not have had some benefits of the FTA disturbed by the PMO application, they were clearly on notice that either of the member states retained the right to establish reasonable standards to protect the life and health of humans. No evidence demonstrated that Puerto Rico adopted the milk standards maliciously or with a protectionist attitude cloaked in the guise of practicality; instead, the standards were adopted from an established United States milk-quality system with the intent of further reducing the risk of contaminated milk in Puerto Rico.

Further, the milk market was not immediately closed to the Canadians upon the adoption of the PMO. A grace period granted Canada a reasonable length of time between the of adoption of the PMO and the time of market closure in which to dem-

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43. *Id.* at para. 4.6.
44. *Id.* at para. 4.7.
45. *Id.* at para. 4.18.
46. *Id.* at para. 4.20.
47. *Id.* at para. 4.24. *See also* FTA, *supra* note 5, arts. 501, 502.
48. *UHT Milk from Quebec*, USA 93-1807-01, at paras. 4.26-4.27, 4.37.
49. *Id.* at para. 6.
50. *Id.* at para. 5.58.

onstrate compliance. Thus, to characterize the Puerto Rican actions as contrary to the FTA is to ignore the basic provisions which allow reasonable TBTs.

3. The German Bier Case

Under Article 30 of the Treaty of Rome and the subsequent related European case law concerning TBTs, there have been a number of cases that appear to circumvent a state's legitimate objective, including *Commission v. Ireland*[51] (dealing with the labelling of foreign-made souvenirs) and *Walter Rau Lebensmittelwerke v. De Smedt Pvba*[52] (dealing with misleading packaging of margarine). In one particular case, *Commission v. Germany*,[53] an action was brought against Germany based on the provisions of the *Biersteuergesetz*. These provisions required that all products sold as "bier" must be made of malted barley, hops, yeast and water alone. No product so labeled as "bier" could contain maize, rice, or additives. This did not preclude the sale of such products within the State of Germany, it only precluded the sale of such products as "bier".

The German government defended its prohibitions on two levels. Initially, Germany extended a public health argument. This challenge hinged upon potential health hazards posed by the special additives needed in the foreign manufacturer's brewing process which are not allowed under the *Biersteuergesetz*. The European Court of Justice refused to accept this health hazard theory because other member states allowed such additives with no ill effect on public health.[54]

Germany's second, and far more persuasive, argument rested on the state's interest in protecting consumers from being misled by a non-complying product. The German consumer has been guaranteed by the *Biersteuergesetz* that when they buy "bier," they get a product that conforms with certain standards. Those standards have become synonymous with the product and inherently require a certain quality which the consumer is likely to expect and rely upon when making a purchase.[55] To allow a non-complying product to utilize the "bier" label is to allow foreign producers the opportunity to take advantage of the German consumer.

The court rejected this consumer protection argument as well. While national rules may have been applicable to domestic and imported products without distinction in order to satisfy mandatory requirements regarding consumer protection, the court found that such rules must be proportionate to the desired aim. Further, when two possible measures exist to achieve the desired goal, the member state must select the least restrictive measure available.[56]

The court found neither of these requirements satisfied by the German rules, although this is exactly what those rules sought to accomplish. Germany did not intend to prevent the non-complying beverages from being sold in the German market. Instead, the *Biersteuergesetz* would deny the categorization and subsequent labelling of those beverages as "bier." In that way, consumers would be allowed to make a valid and informed decision based on knowledge of the product purchases. Rather than being

51. 1981 E.C.R. 1625, 1 C.M.L.R 706 (1982).
52. 2 C.M.L.R 496 (1983).
53. 1987 E.C.R. 1227, 1 C.M.L.R. 780 (1988).
54. *Id.* at para. 38.
55. *Id.* at para. 26.
56. *Id.* at para. 28.

restrictive, it seems that this is as open a position as possible for the government, while still protecting its consumers.

In fact, this is the very stance sought by the court in the *Cassis* case.[57] Because of a lower alcohol content of French cassis, Germany sought to ban French cassis from their markets on principles of public health and consumer protection. The court rejected such a general ban of the product on those justifications because there was a less-restrictive measure available to protect the public health and consumers—displaying suitable information on the labeling of the product.[58]

Further, in the "bier case," the court held that there was not a valid basis for application of the discriminatory rules just because the German consumer defined the product "bier" in accord with the German rules.

> [C]onsumers' conceptions which vary from one member-state to the other are also likely to evolve in the course of time within a member-state . . . . [T]he legislation of a member-state must not "crystallise given consumer habits so as to consolidate an advantage acquired by national industries concerned . . . ."[59]

The court even went so far as to say that, because other member states hold the term "bier" as a generic designation, the German designation should also be so generic.[60] The court maintained its stance despite the fact that it was *German* consumers that the legislation sought to protect from being misled, and therefore it should have been a German mindset that the court considered.

The danger of such a biased reading of Article 30 is painfully obvious. There is the initial threat to the consumers of the importing state of being duped by products and goods that the consumers are led to believe, by labelling, to be something they are not. But further, states themselves are precluded from fulfilling their obligation to properly protect their citizens.

Thus, despite what appears to be a very clear provision for a member state to protect its legitimate interests through TBTs, both the EU and the FTA have seen instances where the legitimate objectives of member states have been ignored in the name of free trade. Article 904(4) of NAFTA has a similar potential for overriding legitimate objectives of member states.[61] The determination of whether a given TBT is targeted at a legitimate objective under the NAFTA requirements is subjective and fuzzy at best.

A NAFTA panel would be required to weigh the intent and purpose of the TBT against the result of application of that TBT. If the panel were to focus too heavily on the free trade purpose of the NAFTA, and lose sight of the protection negotiated for and guaranteed by the very same agreement, a member state's legitimate objective could easily be lost in the shuffle. In an effort to overrule a member state's alleged legitimate objectives, a NAFTA panel could use the assessment of risk clause[62] to find that the regulating state inaccurately analyzed the potential for harm; the conformity assessment clause[63] to find that the regulating state inaccurately determined that

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57. *Rewe-Zentral*, 3 C.M.L.R. 494 (1979).
58. *Id.*
59. *Commission v. Germany*, 1 C.M.L.R. 780 (1988), at para. 32.
60. *Id.* at paras. 33-34.
61. *Supra* note 7.
62. NAFTA, *supra* note 1, art. 907.
63. *Id.* art. 908.

the goods were not in conformity to regulations at issue; or even the current international standards[64] to demonstrate that other regulations exist and are satisfied, though they may be weaker than those in dispute.

While NAFTA is open to these potential distortions, to which both the provisions of the Treaty of Rome and the FTA occasionally have succumb, it is not a predisposed conclusion. The pro-active development of North American trade law jurisprudence is a possible solution to this looming problem.

B. Establishing a Lowest Common Denominator

In conjunction with the rejection of legitimate objectives in the name of free trade, both the EU and the FTA have shown tendencies of pushing themselves toward an equilibrium of a lowest common denominator. In fact, significant opposition to the current GATT proposal, to which the NAFTA framework is closely tied, reports a similar claim against that trade agreement as well. As alleged by Lori Wallach, director of Public Citizen's Trade Program, before the Senate Commerce Committee,

> The effect of GATT on food and other product standards would be a "downward pressure" to require worldwide harmonization at weaker standard levels.[65]

Ms. Wallach's claim is based on the GATT-imposed obligation that governments use accepted international standards when effective and appropriate. The fear is that, because of the disparity between levels of regulation between states, states with lower regulations would be unable or unwilling to immediately upgrade their regulations to the higher level. Therefore, because the goal of unified standards is key to free trade agreements, the lower regulations would be applied. Further, the free development of more stringent standards may be retarded because of an inherent reliance on the international status quo as a default when examining unequal regulation.

In *UHT Milk from Quebec*, Puerto Rico made a sincere attempt at improving the quality of life for its citizens. However, the final report of the panel pushed Puerto Rico in the opposite direction. Despite their efforts to tighten safety standards in the name of better public health, Puerto Rico was hindered in the interest of not offending a fellow member state who had not yet proven that their milk production was equivalent to or satisfied the updated standards. Puerto Rico could have chosen to enforce the standards on only domestic goods, but that decision would have unfairly favored foreign producers. Thus, the only other option was to put the importance of the Puerto Rican health on hold until Canada sufficiently demonstrated a safety equivalency.

Likewise, the German Bier case demonstrates a comparable threat to the interests of the consumer in the event that legitimate TBTs are disallowed. To allow the marketing of goods that fail to meet the purity standards, such as "bier," to be passed-off as goods that meet those standards, an economic disadvantage is created against the conforming goods. It is no longer in the interest of a manufacturer to meet high standards if the consumer is not granted the opportunity to differentiate between two distinct classes of goods. Economically, it is more sound to lower standards (thereby lowering costs) to achieve maximum competitiveness. Borrowing a term from American corporate law, this "race to the bottom" could likely drive the market to a balance of medi-

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64. *Id.* art. 905.

65. *Environmental Groups Express Opposition to GATT Bill at Hearing*, INT'L TRADE REPORTER, Oct. 19, 1994, at 1607.

ocrity and may serve to weaken the output quality of the member states as a result. Thus, the consumer suffers by being denied quality goods and the opportunity to distinguish the quality goods from the sub-standard products. While it is true that such an effect could be countered with labelling, labelling is only effective if the consumer is able to read and understand the differences in products.

Again, these same hazards are potential stumbling blocks for NAFTA. Under Article 906, NAFTA members are urged to make compatible the technical standards established by one another.[66] An importing party is required to accept an exporting party's regulation when the exporting party satisfactorily demonstrates that the regulation adequately fulfills the importing party's legitimate objective.[67] The question of what counts as a satisfactory demonstration inevitably arises.

In *UHT Milk from Quebec*, the United States gave Canada a set time-frame to demonstrate compliance. Canada failed to do so and it remained unclear whether or not the Canadian methods of milk production complied with the PMO. To force Puerto Rico to accept the UHT milk without proof that it meets the established health standards both weakens the effect of the domestic regulation and potentially subjects the citizens of that market to a product of lower quality than their government determined to be acceptable.

Whether a comparable NAFTA panel would likewise find for the Canadian position is unclear; however, this potential exists. If the panel were to overemphasize the free trade purpose of the agreement and neglect the preserved legitimate interests of the regulating member state, Article 906(4) could easily provide a basis to override the importing state's interests. Further, a panel could determine that the importing state failed to properly conduct an assessment of risk,[68] and therefore the adopted TBT would be disregarded.

A very real potential result of this would be a softening of the health protection granted to the importing state. If the exporting state is not held to the higher safety standards, which are presumably more expensive, the domestic producers are at an economic disadvantage if forced to comply. In what amounts to a lose-lose situation, the government of the importing state is then faced with the option of either enforcing this market inequality to the detriment of the domestic economy, or relaxing the safety standards to allow both the domestic and foreign goods equal market access, albeit at a less safe level.

In an attempt to deal with this problem, the United States, Canada and Mexico have established the North American Trilateral Standardization (NATS) forum to discuss harmonization of product standards between the member states. The forum recently convened in Mexico City, the first since the official adoption of NAFTA. That forum held discussions regarding construction and building regulations; medical devices and technology; and accreditation programs between the member states for quality systems. An American National Standards Institute (ANIA) representative defined the long-term goal of the forum as "mak[ing] the flow of trade among the three partners as smooth as possible."[69]

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66. NAFTA, *supra* note 1, art. 906(4).
67. *Id.*
68. *Id.* art. 907.
69. *Groups from NAFTA Partners Meet to Discuss Standards, Report Progress*, 11 INT'L. TRADE REP. 1616 (1994).

Despite these efforts, however, it must be recognized that the threat of a lowest common denominator resolution remains possible unless the member states remain cognizant of the fact that they have the right to establish *legitimate* technical barriers, and unless the enforcement bodies of NAFTA act to maintain such legitimate barriers.[70]

It is necessary for member states to have the power to enact TBTs that are legitimate in nature and have the real ability to properly benefit the citizens of that state. However, protective safeguards must also remain in order to protect against the improper use of TBTs for purposes that are protectionist in nature. The ability to establish such a synthesis is there, it is merely a matter of realizing the issue.

IV. THE NEED FOR PRUDENT TRADE JURISPRUDENCE

In light of these problems with the regulation of TBTs in the framework of an international trade agreement, the question arises as to how reasonable limits can be placed on TBTs without infringing on the valid interests of member states. One of the greatest hurdles of international agreements is the need to draft language that is loose enough to serve its purpose, but tight enough to bind the member states through mutual understanding.

The text of NAFTA Chapter 9 serves as a credible safeguard against the improper and illegitimate establishment of TBTs. It is true that one of the primary purposes of NAFTA is the elimination of improper TBTs between member states. However, Chapter 9 also incorporates a number of safeguards against over-intrusion on a member state's recognized legitimate interests which inherently require some form of TBT.

These safeguards can likewise be found in the FTA, the EU's treaty and case law. While they have at times been overridden, each of these free trade coalitions has also recognized the protection of a member state's legitimate objectives. Under the FTA, in *Lobsters from Canada*,[71] the binational panel found that a United States ban on the marketing or transport of sub-sized live lobsters should be reviewed under the "national treatment"[72] provisions of the FTA.[73] While the panel did not ultimately decide on the propriety of the U.S. statute because it was beyond the terms of reference laid down by the parties,[74] by defining this as an issue of national treatment, the panel appears to acknowledge the fact that a legitimate objective exists, with further consideration needed. This is an important consideration to be noted, as it gives credible prominence to the notion of the legitimate objective of the member state.

Likewise, the EU has seen a development toward a more legitimate objective-conscious standard for Article 30 cases. In what is deemed the turning point decision for Article 30 case law,[75] *Cinetheque SA v. Federation Nationale des Cinemas Francais*[76] found that a French marketing ban which delayed the release date of video cassettes did not aim to regulate trade movement because it applied equally to both domestic and foreign goods. A similar determination was also made in *Torfaen BC v.*

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70. *Id.*
71. *Lobsters from Canada*, USA 89-1807-01.
72. FTA, *supra* note 5, art. 501(1).
73. *Lobsters from Canada*, USA 89-1807-01, at paras. 7.1.1-7.1.3.
74. *Id.* at para. 7.22.2.
75. Kamiel Mortelmans, *Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances*, 28 COMMON MKT. L. REV. 115, 119 (1991).
76. 1985 E.C.R. 2605, 1 C.M.L.R. 365 (1986).

B & Q[77] (concerning mandatory shop closure on Sundays) and in *Quietlynn v. Southend-on-Sea BC*[78] (dealing with local prohibitions on pornographic material).

Thus, an established basis exists for a liberalized interpretation and application of a member state's legitimate objectives. Just as these two free trade coalitions have recognized the need for such protection of such objectives, so too should NAFTA. In order to facilitate such a protection, and to avoid the mistakes demonstrated by their predecessors, NAFTA's member states should convene the Committee on Standards-Related Measures and draft an official statement of North American Trade Jurisprudence that lays out the philosophical basis to be used in future NAFTA decisions regarding TBTs.

Under Article 913(3)(b), the Committee is required to report annually to the North American Free Trade Commission on the implementation of Chapter 9. Included in one of the early reports should be such a statement of judicial philosophy to give a basis by which both member states and the Committee itself can gauge future decisions. While this statement could take any one of a number of forms, perhaps the most useful would be to formulate the statement as a set of accompanying comments to the official text of NAFTA. Understanding the role of the FTA as a model to NAFTA, the Committee could cite cases such as *UHT Milk from Quebec* and *Pacific Coast Salmon* in those comments to demonstrate the outer limits of treaty-intrusion into domestic policy of member states.

The drafted comments would function similar to the advisory comments found in various American legal codes, such as the Uniform Commercial Code and the Federal Rules of Evidence. The comments should include an inference that a TBT is legitimate provided that it meets the national treatment standard and that it deals with at least one of the legitimate objective exceptions specified in Article 915. In order to overcome the presumption, the challenging member state would be obligated to demonstrate either a malicious intent on the part of the regulating state or otherwise disprove the legitimacy of the regulation's purpose. A failure to do so would result in the affirmation of the regulation. Such an obligation is in keeping with the spirit of NAFTA, which allows for legitimate protection.

Further, the comments should direct a Panel to strictly scrutinize any objective that could be satisfied through the use of less restrictive means than the regulation in question. Failure of such a scrutiny test would also overcome the presumption of validity, and would obligate the Panel to invalidate the restriction.

These comments would work in conjunction with the harmonization efforts of the NATS forum previously mentioned. It would serve to fill any gaps that could not be resolved by the forum, while respecting the successful compromises established.[79] The comments could be updated periodically to reflect such compromises and any other relevant developments regarding TBTs.

V. CONCLUSION

The concept of a free trade economic zone in North America has great potential for expanding the economic welfare of each of the three member states. In the larger picture, the region stands to gain a great deal from the agreement. However, it is para-

77. 1989 E.C.R. 765, 1 C.M.L.R. 337 (1990).
78. 3 C.M.L.R. 55 (1990).
79. *Groups from NAFTA Partners*, *supra* note 69.

mount to keep in mind that the members of this organization have not given up their sovereign interests to the extent of an economic union. Thus, credible consideration must be given to each member state's rights to protect and preserve the quality of life in each of their respective countries. Technical barriers to trade is one necessary way for a member state to either preserve or enhance that quality. The member states and the North American Free Trade Commission have the responsibility to insure that the practical and acceptable use of TBTs is not sacrificed blindly in the name of free trade, to the detriment of the citizens of those states.

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