

When adopting and implementing their standards-related measures, NAFTA countries would be required to respect three fundamental disciplines. First, Paragraph 904.3 would require that a country refrain from discriminating between domestic manufacturers of goods or suppliers of services and manufacturers or suppliers from other NAFTA countries solely on the basis of the NAFTA country from which the manufacturer or supplier operated. This principle is frequently referred to as "national treatment." Second, the same paragraph would require that any preference extended to a non-NAFTA country also be made available to the NAFTA partners. This is the "most favoured nation" principle. Third, Paragraph 904.4 would require that standards-related measures not create an "unnecessary obstacle" to trade between the NAFTA parties.

Paragraph 904.4 goes on to clarify that an "unnecessary obstacle" to trade would not be created if the demonstrable purpose of the measure was to achieve a "legitimate objective" and if the measure did not exclude goods that met the legitimate objective. Paragraph 915.1 would identify both "protection of human, animal or plant life or health, the environment or consumers" and "sustainable development" as constituting legitimate objectives. These provisions would clearly sustain Canada's right to refuse entry to hazardous products.

These disciplines constitute measures of equality and fairness and would not prevent jurisdictions from adopting and enforcing measures to protect their respective environments.

(iii) Right to Choose the Level of Protection

The fundamental premise of the NAFTA chapter on Standards-Related Measures is that governments would retain the right to determine the level of environmental protection that they deem appropriate for their own particular circumstances and priorities. Paragraph 904.2 states categorically that "Notwithstanding any other provision of this Chapter, each Party may, in pursuing its legitimate objectives of safety or the protection of human, animal or plant life or health, the environment or consumers, establish the level of protection that it considers appropriate in accordance with Article 907. 2."

Paragraph 907.2 would be relevant only should the regulating party choose to conduct an assessment of risk. This paragraph is discussed below.

(iv) Assessment of Risk

Although risk assessment would not be mandatory, Article 907 would permit a party to conduct an assessment of risk in pursuing its legitimate objectives. Paragraph 907.1 explicitly identifies, inter alia, "processes or production, operating, inspection, sampling or testing methods" and "environmental conditions" as constituting factors that could be considered in conducting the assessment of risk.

If a government conducts an assessment of risk, Paragraph 907. 2 would require that measures implementing the selected level of protection not be applied in a manner that would constitute "arbitrary or unjustifiable discrimination" or a "disguised restriction" against the goods or services of other parties. Neither could the measures "discriminate between similar goods or services for the same use under the same conditions that pose the same level of risk and provide similar benefits."