

# 1. NAFTA Services and Climate Change

Robert K. Stumberg

Six chapters of NAFTA cover services.<sup>1</sup> For the first 15 years, the face of NAFTA services has been a sleep-deprived Mexican trucker. Citing safety concerns, the United States maintains an indefinite moratorium on Mexican long-haul trucking.<sup>2</sup> It does so despite the fact that Mexico filed—and won—the first NAFTA services dispute against the moratorium under chapter 12, Cross-Border Trade in Services.<sup>3</sup> When Mexico finally imposed \$2.4 billion in trade sanctions, the Obama Administration quickly announced its intent to negotiate safe and gradual access for Mexican trucks.<sup>4</sup> That was in March 2009.

That was the month that Canada shifted the spotlight to the northern border. In a bicoastal lobbying campaign, Canada complained that proposed climate measures in the U.S. Congress

---

**Other cross-border services have generated controversy about NAFTA,<sup>5</sup> but trucking and energy are the cross-border services where a trade dispute—or the threat of one—has the power to shape major policy decisions.**

---

and the State of California would discriminate against distribution of crude oil (“bitumen”) extracted from Alberta tar sands. Canada also asserts that state renewable energy policies discriminate against exports of Canadian hydropower.

Other cross-border services have generated controversy about NAFTA,<sup>5</sup> but trucking and energy are the cross-border services where a trade dispute—or the threat of one—has the power to shape major policy decisions.

During the 2008 presidential campaign,<sup>6</sup> candidate Barak Obama proposed to “amend” NAFTA.<sup>7</sup> While recanting ambitions to reopen NAFTA’s text, his Administration is evaluating trade agreements for lessons on how to change the model for future agreements.<sup>8</sup>

Several lessons emerge from the trucking dispute and the energy conflict under chapters 6 (energy) and 12 (cross-border services). Regardless of the outcome, the debates provides a revealing snapshot of structural imbalance, which NAFTA shares with its successor free trade agreements. For purposes of national treat-

ment, for example, NAFTA does not provide parallel exceptions (compared to goods) for measures that relate to cross-border services. In the absence of parallel exceptions for health and resource conservation, a trade dispute based on services chapters can undermine the exceptions for measures that regulate goods. These vulnerabilities persist in the most recent free trade agreements (FTAs).

A similar comparison holds between NAFTA and WTO provisions on national treatment of services. NAFTA's provisions on services have both broader coverage and more limited exceptions than the WTO's General Agreement on Trade in Services (GATS). In cases where coverage overlaps, then, NAFTA could constrain the flexibility built into the WTO system. In theory, NAFTA provides mechanisms to preserve policy space by carving out new climate agreements and policies as they emerge. But by the time a policy emerges, the lines of trade conflict are already drawn. In the end, the realistic lesson is to fix NAFTA's shortcomings by not repeating them. Future agreements should treat goods and services as the parallel sectors that they are—with parallel exceptions for legitimate policy objectives.

## **I. NEED FOR REFORM**

### **Dual Coverage: NAFTA and the WTO**

Mexico's trucking sanctions remind us that NAFTA rules on services still have teeth. We may need reminding because a year after NAFTA took effect, the NAFTA countries joined a broader services agreement with global reach and additional trade rules, the GATS.<sup>9</sup> Like NAFTA,<sup>10</sup> GATS prohibits discrimination with rules on National Treatment and Most-Favored Nation Treatment (MFN).<sup>11</sup> But GATS goes farther to prohibit non-discriminatory limits on number, quantity or legal form of services and suppliers.<sup>12</sup>

However, the GATS eclipse of NAFTA is only partial. GATS rules apply to specific "committed" sectors, while NAFTA covers all sectors, with only a small number of measures that are excluded by the annexes.<sup>13</sup> Although NAFTA annexes could exclude state and provincial measures, negotiators never completed the process for future measures due to complexity and political resistance surrounding such measures.<sup>14</sup>

In addition to broader coverage than GATS, NAFTA provides fewer exceptions. A NAFTA country can defend a challenge to treatment of goods by invoking the general exceptions of GATT, the General Agreement on Tariffs and Trade, for measures "necessary to protect human, animal or plant life or health" or measures "relating to the conservation of exhaustible natural resources..."<sup>15</sup>

There is some speculation that GATT exceptions might apply to other WTO agreements (e.g., procurement, services, subsidies, etc.).<sup>16</sup> However, the WTO agreements demonstrate the intent to selectively include the same exceptions as GATT in some cases<sup>17</sup> and exclude them in others.<sup>18</sup> NAFTA explicitly incorporates GATT environmental exceptions into its energy chapter, but only for goods and not for services.<sup>19</sup>

NAFTA does provide one lone exception for services: measures “necessary to ensure compliance” with a measure that is otherwise consistent with NAFTA.<sup>20</sup> However, as interpreted by the NAFTA panel in *Cross-Border Trucking*, the measure being defended must enforce “another law,” not itself.<sup>21</sup> In addition, the measure being enforced must be consistent with NAFTA. That condition is not met if the law being enforced is the same measure being challenged.<sup>22</sup>

### Dual Coverage: Goods and Services

NAFTA does not define the distinction between “goods” and “services.” Instead, it defines goods by referring to the Harmonized Tariff System of tariff classifications. In the case of energy and petrochemical goods, that includes the product categories for electricity, natural and artificial gas, crude oil, specific refined petroleum products, etc.<sup>23</sup> For services, NAFTA refers to business activities such as transmission, distribution and storage of energy and petrochemical goods.<sup>24</sup> As with other trade agreements, the question is not whether a law is covered only by a NAFTA chapter on goods or a chapter on services because both can apply. For example, California’s Low-Carbon Fuel Standard (LCFS) is likely covered by NAFTA chapters on:

- *Goods*—which applies to “trade in goods,” and it incorporates GATT coverage of internal regulations “*affecting* the internal sale, offering for sale, purchase, transportation, distribution or use...”<sup>25</sup>
- *Energy and petrochemicals*—because it is a measure “*relating to* ... basic petrochemical goods originating in the territory of the Parties... and to cross-border trade in services associated with those goods.”<sup>26</sup>
- *Cross-border services*—because it is a measure “*relating to* cross-border trade in services.”<sup>27</sup>

Each chapter applies to a broader scope of measures than those that directly regulate goods or services, respectively. A measure that regulates distribution services can easily “affect” trade in the goods being distributed. A measure that

regulates a good can also “relate to” distribution services for that good. In other words, a single regulation can be covered by two or more chapters of NAFTA.

One reason for the absence of service exceptions is that NAFTA provides alternate routes to safeguard service regulations. One was to carve them out of the energy chapter, as Mexico did; the other is to carve them out by listing them in Annex II, which the United States could still do through negotiations. The United States did not use either approach for energy or climate policy.

The bottom line is that even if a NAFTA country could defend a measure under the exceptions for trade in goods, it could lose a challenge based on national treatment of services. This distinction comes to life in the context of Canadian exports of energy services to the United States.

**Table 1. Comparing NAFTA's General Exceptions**

<b>Goods</b> —Selected Exceptions, Incorporated from GATT art. XX	<b>Cross-Border Services</b>
<ul style="list-style-type: none"> <li>a. Measures necessary to protect public morals.</li> <li>b. Measures necessary to protect human, animal or plant life or health.</li> <li>d. Measures necessary to ensure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement...</li> <li>g. Measures relating to the exhaustion of exhaustible natural resources...</li> <li>i. Measures essential to distribution of products in short supply...</li> </ul>	<p>Measures necessary to ensure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement...</p>

*Source: NAFTA article 2101.1, which for measures that relate to trade in goods, incorporates GATT article XX.*

**II. ENERGY AND CLIMATE SERVICES**

As Robert Howse and Petrus van Bork observe, “Energy is inherently dynamic—it is a process of transformation. The product is the process.”<sup>28</sup> NAFTA’s chapter 6 requires national treatment of energy goods (like electricity and petroleum);<sup>29</sup> and cross-border suppliers of energy services (like distribution of those goods).<sup>30</sup> Chapter 14 covers energy-related financial services (like trading in carbon credits and offsets). A NAFTA country can challenge a measure that relates to distribution of goods under NAFTA chapters on goods or

services or both.<sup>31</sup> This is consistent with the WTO's interpretation that both GATT and GATS can cover the same measure.<sup>32</sup>

A GATS claim would give Canada the opportunity to ally with other countries, some of which (e.g., Venezuela and Brazil) have won WTO disputes against the United States.<sup>33</sup> And like NAFTA, GATS is also lacking an exception for conservation of resources.<sup>34</sup> But unlike NAFTA, GATS provides an exception for human and animal life and health.<sup>35</sup> This exception is untested in a climate context, but it is theoretically available as a defense.<sup>36</sup>

Assuming that a country wants to challenge a measure based on national treatment of services, the threshold question is whether the measure is covered under NAFTA, GATS, or both? As noted above, NAFTA covers measures that "relate to" cross-border supply of energy,<sup>37</sup> whereas GATS applies national treatment to measures that "affect" trade in sectors where the United States has a specific commitment.<sup>38</sup> The United States has a commitment on wholesale distribution of goods (including petroleum products)<sup>39</sup> and other existing and proposed commitments.<sup>40</sup> In short, there is a reasonable prospect of coverage under both GATS and NAFTA services chapters.

Canada could use these services chapters to frame its discrimination argument against two state-level measures. While a full analysis exceeds the scope of this paper, two important lessons can be highlighted. First, the scope of NAFTA services conflict is not likely to be over the environmental objective, per se, but over how governments "count things as green" or "how green they are."<sup>41</sup> Second, neither NAFTA nor GATS allows a country to defend a services claim with the natural resource exception that applies to trade in goods.

---

**The scope of NAFTA services conflict is not likely to be over the environmental objective, per se, but over how governments "count things as green" or "how green they are."**

---

### Tar Sands Oil from Canada

Canadian production of crude oil made from Alberta tar sands is projected to grow 158 percent between 2007 and 2015, with most of the oil to be exported to the United States.<sup>42</sup> Expansion of exports above 2007 levels will require investments of \$31 billion in new pipelines, mixing stations and refinery capacity, much of it between Alberta and refineries in Oklahoma and Texas.<sup>43</sup>

Some of this increase will reduce dependence on “foreign” sources,<sup>44</sup> but unfortunately, tar sands crude releases three times more greenhouse gas (GHG) than conventional crude oil.<sup>45</sup> Since 2004, GHG emissions from oil extraction in Canada have increased 57 percent, largely from tar sands crude destined for the U.S. market.<sup>46</sup>

The government of Canada is lobbying against U.S. climate measures that might constrain Canada’s share of the crude oil market. These measures include a federal LCFS and border “adjustment” on the carbon content of products.<sup>47</sup>

The governments of Canada<sup>48</sup> and Alberta<sup>49</sup> also complain that California is developing its state-level LCFS in a way that discriminates against tar sands crude. The California LCFS (March 5, 2009) requires fuel suppliers to meet a carbon intensity standard.<sup>50</sup> The baseline for measuring petroleum products is a “lookup chart,” which applies to 98 percent of the fuels sold in California in 2006, but not tar sands crude.<sup>51</sup> The letters from Canada translate into a NAFTA national treatment argument along the following lines:

**Like service.** NAFTA requires California to give Canadian fuel suppliers treatment that is no less favorable than it gives, “in like circumstances,” to suppliers from California or elsewhere in the United States. To challenge the LCFS, Canada would have to establish the “likeness” of its suppliers before it could assert that they are being treated less favorably. On the surface at least, the LCFS rule treats new suppliers differently only because their production “path” is more carbon-intensive (that is, not comparable) than the California baseline average. That California average was based on diverse sources of crude oil consumed in 2006, including heavy crude from within the state of California.<sup>52</sup>

Canada has yet to present a services argument under NAFTA. However, Canada has highlighted facts that support an argument that distribution of tar-sands crude is a comparable “like service” to distribution of the heavy crude oil within California’s 2006 fuel mix.<sup>53</sup> Distributors blend oil from many sources, and crude oil sources vary in carbon intensity.<sup>54</sup> Alberta has commissioned a study to prove that the carbon intensity “of conventional crude oils, domestic and imported, is significant and in some cases comparable to heavy oil and oil sands derived crude.”<sup>55</sup> In other words, Canada is likely to argue that distributing tar sands crude is “like” distributing the crude oils within California’s baseline with respect to extraction process and carbon intensity.

**Less-favorable treatment.** Canada asserts that the California LCFS will treat suppliers of tar sands crude less favorably. Its suppliers will have to calculate their

unique carbon intensity,<sup>56</sup> which will require extensive new record keeping and changes in supply chain management.<sup>57</sup> Since their oil is more carbon intensive than the 2006 average, they will also have to take measures such as carbon sequestration in order to sell into the California market (or any other state that adopts a similar fuel standard).<sup>58</sup> California-based suppliers can use the baseline average as their measure of carbon intensity, but Canada claims that some of the California crude is “similar to or higher than” the GHG emissions from tar sands.<sup>59</sup> Canada has not presented evidence that California heavy crude is as carbon-intensive as tar-sands crude. However, California’s LCFS report acknowledges that 16 percent of California’s baseline oil came from sources that required steam extraction,<sup>60</sup> as does oil from tar sands. In short, Canada may be able to prove that the state-level LCFS gives California’s dirty oil an advantage over Alberta’s dirty oil.<sup>61</sup>

In considering “less favorable” treatment, the NAFTA panel in *Cross-Border Trucking* reasoned that differential treatment is justified so long as it is no more trade-restrictive than necessary to achieve a non-discriminatory purpose of regulation.<sup>62</sup> The NAFTA panel’s necessity test for trucking regulations sounds a lot like the exceptions (measures necessary to protect public morals, human health, etc.) that NAFTA pointedly *does not* provide for services. Eric Leroux observes that the panel’s approach is “surprising and appears unjustified and in conflict” with NAFTA exceptions.<sup>63</sup>

Nonetheless, even without reference to general exceptions, several GATT decisions recognize that a legitimate regulatory purpose can justify differential treatment of like products that compete with each other (e.g., asbestos vs. asbestos-free insulation).<sup>64</sup> In other words, GATT allows governments to treat products differently if one poses a threat the other does not, even if they are “like” in terms of commercial use.

Natural Resources Canada does not contest the legitimacy of California’s regulatory objective. Instead, it offers alternatives to the LCFS treatment of tar sands oil as a special case: either assign all crude oil the same carbon intensity, or “treat each pathway on its own merits.”<sup>65</sup> Alberta asserts that six additional alternatives will meet California’s objectives.<sup>66</sup>

**Exception.** If Canada succeeds in proving less favorable treatment, then the United States would not be able to invoke the sole services exception for “measures necessary to enforce” a NAFTA-consistent measure. The measure being

defended must enforce another law, not itself. The California LCFS is authorized by state legislation, but it does not enforce another NAFTA-consistent measure, as the exception requires.<sup>67</sup> Further, the measure does not meet the “consistent with NAFTA” test if it is the subject of the NAFTA dispute.<sup>68</sup>

There is one more NAFTA article about exceptions that deserves mention because it is controversial in Canada. A coalition of environmental advocates is urging the Canadian government to ban extraction of tar sands oil and stop exports to the U.S. market.<sup>69</sup> NAFTA article 605 says that NAFTA parties may not use the GATT exception for conserving exhaustible natural resources, article XX(g), to defend a measure that reduces exports or changes the export proportion among “specific energy goods” (e.g., tar sands bitumen versus conventional crude).<sup>70</sup> Known as the “proportionality” rule, article 605 basically says that Canada cannot itself try to limit exports of tar sands oil and then use the exception for conserving resources to defend itself in a subsequent trade dispute should the United States challenge the measure. As the tar sands industry builds out its infrastructure for expanded bitumen exports, article 605 could be a constraint on Canadian federal climate policy.<sup>71</sup> It turns off a NAFTA exception for trade in goods, but it does not change the scenario for a services dispute simply because there is no services exception to turn off.

To summarize, a NAFTA panel might recognize that California’s LCFS serves a legitimate regulatory purpose. However, it would apply a necessity test akin to some exceptions in GATT article XX and GATS article XIV. “Necessity” is a more demanding exception than the one for measures that “relate to” conservation of exhaustible resources. This means the California LCFS would face a higher burden of proof if the United States has to defend a NAFTA services challenge than a comparable challenge under GATS or NAFTA provisions on energy goods.

## **Renewable Electricity from Canada**

The United States is also Canada’s customer for cross-border distribution of electricity, 96 percent of which comes from large dams (greater than 30 megawatts).<sup>72</sup> However, use of large hydro is excluded by Renewable Portfolio Standards (RPS), which have been adopted by 28 states as a way to stimulate development of renewable sources. RPS obligates utilities to purchase a growing percentage of their electricity from renewable sources including wind, solar, geothermal, biomass, and small-scale hydro (less than 30 megawatts).<sup>73</sup> Canada’s trade ministry argues that state RPS laws deny national treatment.<sup>74</sup>

**Like service.** Canada argues that large-scale hydro is comparable to “like” renewable sources that the RPS laws favor. There is a long-standing debate about whether renewable and nonrenewable energy are “like” products.<sup>75</sup> However, a Canadian challenge of RPS would likely frame the comparison between two renewable service suppliers; one is included (small hydro), and one is not (large hydro).<sup>76</sup> In defense, the United States could argue that large-scale hydro is excluded because it blocks salmon migration, causes sedimentation, concentrates toxins, and, in some boreal settings, increases GHG emissions.<sup>77</sup>

**Less-favorable treatment.** The RPS laws provide less favorable treatment of large hydro by excluding it from the program altogether. In defense of the RPS programs, they treat U.S. hydro the same as they treat Canadian hydro. A NAFTA panel might accept the objective of protecting salmon habitat, but it might not accept the extraterritorial application of that objective.<sup>78</sup>

**Exception.** If Canada makes its national treatment argument, the United States would not be able to invoke an exception. RPS programs do not enforce another NAFTA-consistent measure, as the exception requires.<sup>79</sup>

### III. OVERARCHING PRINCIPLES AND GOALS FOR REFORM

This brief review shows that NAFTA retains the power to constrain public policies in service sectors other than trucking, notably the cross-border supply of transportation fuels and electricity.

The overarching principle for reform is to preserve policy space, especially for measures that evolve beyond the status quo of 1994 when NAFTA took effect. Specifically, NAFTA does not provide parallel exceptions (compared to goods) for measures that relate to cross-border services. In the absence of parallel exceptions, a trade dispute based on services chapters can undermine the exceptions for measures that regulate goods.

#### Instruments for Reform

The absence of health or resource exceptions for NAFTA services chapters is a structural problem; it would require renegotiation of NAFTA in one of these formats:

- *Exceptions for trade in services.* For measures that regulate services, NAFTA could provide exceptions that parallel the ones it provides to trade in goods under GATT article XX, including measures necessary to protect public morals, life and health, and conservation of exhaustible resources.

- *Exclusion of measures under Annex II.* The United States did not avail itself of the opportunity to exclude (or “reserve”) future energy, environmental or climate measures in U.S. Annex II. It is not an accident that the energy measures sparking NAFTA controversy arise from new and experimental policies at the state level. Back in 1993, NAFTA negotiators did not complete the framework of exclusions that NAFTA authorizes for future state and provincial measures. When confronted with political resistance from some provinces and too many proposed exclusions from some states, the negotiators simply gave up.<sup>80</sup> Furthermore, in addition to state and provincial measures, In the post-NAFTA FTAs, the U.S. schedule to Annex II carves out measures from coverage by market access rules to the extent that the measure is not covered by the U.S. schedule of GATS commitments.<sup>81</sup> That carve-out could be broadened to read: “The United States reserves the right to adopt or maintain any measure that is consistent with U.S. obligations under the General Agreement on Trade in Services.” This broader language would synchronize NAFTA and GATS with respect to national treatment.
- *New environmental agreement.* Another way to negotiate an exception is to add an environmental agreement to Annex 104.1. However, the exception would be limited by a necessity test that requires implementing measures to be the least-restrictive alternative.<sup>82</sup> On the other hand, NAFTA’s proportionality rule under article 605 would not apply to measures that enforce an environmental agreement.<sup>83</sup>

The last option shows how myopic NAFTA is. At its inception in 1994, NAFTA sought to preserve policy space to implement the leading environmental agreements of the day. Neither the U.N. Framework Convention on Climate Change nor the Kyoto Protocol existed when NAFTA was drafted in 1994.

NAFTA provides mechanisms to preserve policy space by carving out new environmental agreements and policies as they emerge. But the lesson of NAFTA is that by the time a new policy emerges, the lines of trade conflict are already drawn. The realistic lesson is to “fix” NAFTA’s shortcomings (Mr. Obama’s words as a candidate) by not repeating them in future agreements.<sup>84</sup>

Future trade agreements should treat goods and services as the parallel sectors that they are—with parallel exceptions for legitimate policy objectives. The United States should also learn from its neighbors and carve out sectors where policy requires experiments to evolve.

- 
- 1 Six NAFTA chapters apply to government measures that regulate services: Chapter 6, Energy and Basic Petrochemicals; Chapter 9, Standard-Related Measures; Chapter 11, Investment; Chapter 12, Cross-Border Trade in Services; Chapter 14, Financial Services; and Chapter 15, Competition Policy, Monopolies and State Enterprises. The Investment chapter is explained in the paper by Gus Van Harten. It covers enterprises that provide a service through commercial presence (e.g., as a subsidiary) in a country, and it enables private investors to seek compensation for violations of the chapter. The other chapters enable governments, not private investors, to enforce rules through trade sanctions. In an investment dispute about cross-border transport of hazardous waste that Canada lost, the tribunal made clear that NAFTA chapters are “cumulative,” meaning that Chapter 11 and Chapter 12 could apply to the same measure. *S.D. Myers v. Canada*, Partial Award (Merits) (2000, November 13), 40 *International Legal Materials* 1408, ¶ 292.
  - 2 See Christopher Stoltz (2005). NAFTA, The United States, Texas, and Mexico: Problems Facing Commercial Vehicles at the Border and What Is Being Done to Ensure Safety on the Roadways. *Texas Tech Journal of Texas Administrative Law*, 6, 165.
  - 3 NAFTA Panel (2001, February 6). *In the matter of Cross-Border Trucking Services* (Cross-Border Trucking). Secretariat File No. USA-MEX-98-2008-01. See generally Elizabeth Townsend (2004). NAFTA, Mexican Trucks and the Border: Making Sense of Years of International Arbitration, Domestic Debates and the Recent U.S. Supreme Court Decision. *Transportation Law Journal*, 31, 131.
  - 4 Mexico Announces \$2.4 Billion In Retaliation Over Truck Program (2009, March 17). *Inside U.S. Trade*; Administration Seeks To Respond Quickly To Mexican Truck Retaliation (2009, March 20). *Inside U.S. Trade*. Mexico’s imposition of trade sanctions appears to reflect a change within the Mexican trucking industry, which signaled that it is ready to claim its share of the long-haul market by filing for investor arbitration under NAFTA Chapter 11. The Mexican truckers seek over \$6 billion in compensation. *CANCAR v. United States* (Notice of Arbitration) (2009, April 2); Jose de Cordoba (2009, June 2). Mexican Truckers File \$6 Billion Claim Against U.S. in Nafta Spat. *Wall Street Journal*. Available at: <http://online.wsj.com/article/SB124390544386374905.html> (viewed June 2, 2009).
  - 5 NAFTA service sectors that have generated controversy (but not a likely trade dispute) include:  
*Gambling*—Justin Rex (2008). The options for Internet gambling in Canada. *American Review of Canadian Studies* (summer). Available at: [http://findarticles.com/p/articles/mi\\_hb009/is\\_2\\_38/ai\\_n29452629/?tag=content;col1](http://findarticles.com/p/articles/mi_hb009/is_2_38/ai_n29452629/?tag=content;col1) (viewed May 20, 2009). See also CBC News (2003, November 17). Online Gambling. *CBC News Online*. Available at [www.cbc.ca/news/background/gambling/onlinegambling.html](http://www.cbc.ca/news/background/gambling/onlinegambling.html) (viewed March 19, 2009); Michael D. Lipton (2002, June). Internet gaming: A look at online gambling in Canada. *The International Masters of Gaming Law*. Available at [www.gaminglawmasters.com/jurisdictions/canada/inet\\_canada.html](http://www.gaminglawmasters.com/jurisdictions/canada/inet_canada.html) (viewed May 20, 2009).  
*Health*—See Heather Heavin (2003). The Romanow Report: NAFTA Reservations and Proposed Reform. *Saskatchewan Law Review*, 66, 577.  
*Tourism, general*—See Luz Aída Martínez Meléndez (2008, April 21). NAFTA, Tourism and the Environment in Mexico. Research Paper, Fourth North American Symposium on Assessing the Environmental Effects of Trade.  
*Tourism, fishing*—See Katherine McGuire (2001). State and Provincial Regulations with Cross-Border Impact. *Canada-U.S. Law Journal*, 27, 243.
  - 6 Ohio Conference on Fair Trade (2008, February 28). Presidential Candidate Questionnaire: Barak Obama, Question 7, Replacing the NAFTA model, pp. 5-6. Available at: [www.citizenstrade.org/pdf/OCCFT\\_%20PresPrimaryTradeQuestionnaire\\_Obama\\_022008.pdf](http://www.citizenstrade.org/pdf/OCCFT_%20PresPrimaryTradeQuestionnaire_Obama_022008.pdf).
  - 7 North American Free Trade Agreement (NAFTA) (1992, December 17). Can.- Mex.-U.S., *International Legal Materials*, 32, 299.
  - 8 See Advisory from the Committee on Ways and Means, Subcommittee on Trade (2009, May 7). *Trade Subcommittee Chairman Levin Announces a Hearing on Investment Protections in U.S. Trade and Investment Agreements*. No. TR-2.
  - 9 General Agreement on Trade in Services (GATS) (1994, April 15). Marrakesh Agreement Establishing the World Trade Organization, Annex 1B. *United Nations Treaty Series*, 1869, 183.
  - 10 NAFTA, art. 1202. See Harry G. Broadman (1993). International Trade and Investment in Services: A Comparative Analysis of the NAFTA. *International Lawyer*, 27, 623.
  - 11 GATS art. II (MFN) and art. XVII (National Treatment).

- 12 GATS art. XVI (Market Access). GATS also authorized negotiations on new trade rules for domestic regulation, subsidies and procurement of services, which are now in progress. GATS art. VI(4) (Domestic Regulation), art. XIII (Government Procurement) and art. XV (Subsidies).
- 13 Annex I excludes listed measures that existed in 1993, including all inconsistent state and provincial measures. Annex II excludes types of future inconsistent measures.
- 14 NAFTA Parties to Protect Existing Sub-Federal Measures Indefinitely (1996, April 3). *Inside U.S. Trade* (Inside NAFTA). See McIlroy, James P. (1997). NAFTA and the Canadian Provinces: Two Ships Passing in the Night? *Canada-U.S. Law Journal*, 23, 431; Matthew Schaefer (1997). Searching for Pareto Gains in the Relationship between Free Trade and Federalism: Revisiting the NAFTA, Eyeing the FTAA. *Canada-United States Law Journal*, 23, 441; Edward T. Hayes (2005). A Comparative Analysis of the Regulation of State and Provincial Governments in NAFTA and GATT/WTO. *Chicago Journal International Law*, 5, 605.
- 15 NAFTA art 2101; General Agreement on Tariffs and Trade (GATT) (1994, Apr. 15). Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, United Nations Treaty Series, 1867, 187, art. XX(b) and (g).
- 16 See World Trade Organization (WTO) Panel Report (2009, April 27). *Columbia—Indicative Prices and Restrictions on Ports of Entry*, Doc. WT/DS366/R, ¶ 7.498. There, the panel opined, “In any cases where a measure may violate a particular provision of the WTO Agreements, a number of exceptions—notably those included in Article XX of the GATT 1994—allow WTO Members to justify a WTO-inconsistent measure.” Christopher D. Stone (1997). Too Many Fishing Boats, Too Few Fish: Can Trade Laws Trim Subsidies and Restore the Balance in Global Fisheries? *Ecology Law Quarterly*, 24, 505 (“...the SCM carried forward by implication the “general exceptions” defenses under GATT Article XX ....”).
- 17 For example, the Agreement on Subsidies and Countervailing Measures (SCM) (1994, April 15). Marrakesh Agreement Establishing the World Trade Organization, Annex 1A. *United Nations Treaty Series*, 1867, 14, art. 8 (Non-Actionable Subsidies), which is terminated under art. 31, Provisional Application (“The provisions of ... Article 8 ... shall apply for a period of five years...”).
- 18 For example, the Agreement on Trade-Related Investment Measures (TRIMS) (1994, April 15). Marrakesh Agreement Establishing the World Trade Organization, Annex 1A. *United Nations Treaty Series*, 1868, 186, art. 3 (“All exceptions under the GATT 1994 shall apply, as appropriate, to the provisions of this agreement.”).
- 19 NAFTA, art. 2101.1 (“For purposes of (a) Part Two (Trade in Goods), except to the extent that a provision of that Part applies to services, and Part Three (Technical Barriers to Trade), except to the extent that a provision of that Part applies to services, GATT Article XX and its interpretive notes... are incorporated into and made part of this Agreement. The Parties understand that the measures referred to in GATT Article XX(b) include environmental measures necessary to protect human, animal or plant life or health, and that GATT Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources.”)
- 20 NAFTA art. 2101.1.
- 21 *Cross-Border Trucking*, ¶ 264 (citing WTO Panel Report (1957, March 14). *Canada—Certain Measures Concerning Periodicals*. Doc. WT/DS31/R, ¶¶ 5.8-5.1). The exception in NAFTA art. 2101(2) is similar to the exception in GATS art. XIV(c) and GATT art. XX(d). For example, see the WTO Appellate Body Report (2005, April 20). *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (United States—Gambling Services). Doc. WT/DS285/R; WTO Panel Report (2001, January 10). *Korea—Measures Affecting Imports of Fresh, chilled and Frozen Beef*, Doc. WT/DS161,169/R / DSR 2001:I, 59; GATT Panel Report (1990, May 16). *EEC—Parts and Components*. Doc L/6657 - 375/132. See also, Leroux, Eric H. (2007). Eleven Years of GATS Case Law: What Have We Learned? *Journal of International Economic Law*, 10, 749.
- 22 *Cross-Border Trucking*.
- 23 NAFTA art. 602.2; U.S. International Trade Commission (USITC) (2009). *Official Harmonized Tariff Schedule*. Retrieved July 22, 2009 from USITC website: [www.usitc.gov/tata/hts/index.htm](http://www.usitc.gov/tata/hts/index.htm).
- 24 As an example, see NAFTA art. 602.3.1.
- 25 NAFTA chapter 3 (National Treatment and Market Access for Goods), art. 1; GATT art. III:1.
- 26 NAFTA chapter 6 (Energy and Basic Petrochemicals), art. 602.1.
- 27 NAFTA chapter 12 (Cross-Border Trade in Services), art. 1201.1.
- 28 Howse, Robert L. and Petrus van Bork (2006). Opportunities and Barriers for Renewable Energy in NAFTA.

Research Paper, *Third North American Symposium on Assessing the Environmental Effects of Trade* (February), p. 29, note 109.

29 NAFTA art. 606; NAFTA art. 301.

30 NAFTA art 1202.

31 Howse and van Bork (2006).

32 WTO Appellate Body Report (1997, July 30). *Canada—Certain Measures Concerning Periodicals* (Canada—Periodicals). Doc. WT/DS31/AB/R; WTO Appellate Body Report (1997, September 25). *European Communities—Regime for the Importation, Sale and Distribution of Bananas* (EC—Bananas). Doc. WT/DS27/AB/R; Leroux (2007).

33 However, Venezuela may not be a willing partner if Canadian crude displaces Venezuelan crude in the U.S. market. See Lindsay Sword (2008, August 18). U.S. Refinery Investments Align with Oil Sands Supplies to 2015. *Oil and Gas Journal*. Available at: [www.istockanalyst.com/article/viewiStockNews/articleid/2626911](http://www.istockanalyst.com/article/viewiStockNews/articleid/2626911) (viewed May 20, 2009).

34 GATS art. XIV.

35 Compare GATS art. XIV(b) to NAFTA art. 2101. GATS art. XIV(b) is similar to GATT art. XX(b).

36 See Lisa Heinzerling (2008). Climate Change, Human Health and the Post-Cautionary Principle. *Georgetown Law Journal*, 96, 445.

37 NAFTA art. 602(1); NAFTA art. 1201(1).

38 NAFTA art. 1201(1); GATS art. I:1, art. XVII:1.

39 United States Revised Services Offer (2005). Doc. TN/S/O/USA/Rev.1 (4.B.CPC 622) (except wholesale trade of alcoholic beverages, firearms and military equipment) (no limitations on mode 1, cross-border supply). CPC 62271 covers "Wholesale trade services of solid, liquid and gaseous fuels and related products." U.N. Statistics Division (2009). *Detailed Structure and Explanatory Notes: CPCprov*. Retrieved May 20, 2009 from U.N. Statistics Division website: <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&>.

40 United States Revised Services Offer (2005), including the relevant sectors:

*Commitment—Services incidental to energy distribution*: 1. Business Services, F. Other Business Services, (j) Services incidental to energy distribution, 46 (no limitations on mode 1, cross-border supply)

*Offer—Bulk storage of fuels*: 11. Transport Services, (Offer) H. Services Auxilliary to All modes of Transport, (b) Storage and warehouse services (except maritime transport services or services to which the Annex on Air Transport Services Applies) (CPC 742), 104 (no limitations on mode 1, cross-border supply).

*Promise to commit to settle a WTO dispute—Bulk storage of fuels*: Joint letter of the United States and the European Communities pursuant to paragraph 5 of the Procedures for implementation of article XXI of the General Agreement on Trade in Services (2007, December 17). Doc. S/L/80.

*Offer—Pipeline transportation of fuels*: United States Revised Services Offer (2005). 11. Transport Services, (Offer) G(a) Pipeline transportation of fuels, 103 (no limitations on mode 1, cross-border supply).

41 Howse and van Bork (2006), p. 23.

42 The base of Alberta's production of bitumen (the heavy product of extraction from tar sands) was 1.2 million barrels per day in 2007; the increase is projected to be 3.1 million barrels per day by 2015. Sword (2008).

43 Ibid.

44 Ibid.

45 Andrew Nikiforuk (2008). *Tar Sands: Dirty Oil and the Future of a Continent*. Vancouver: Greystone Books.

46 Environment Canada (2007). *Canada's 2007 Greenhouse Gas Inventory*. Retrieved May 20, 2009 from Environment Canada website: [www.ec.gc.ca/pdb/ghg/inventory\\_report/2007/som-sum\\_eng.cfm](http://www.ec.gc.ca/pdb/ghg/inventory_report/2007/som-sum_eng.cfm).

47 Sheldon Alberts (2009, May 14). U.S. Climate bill would be 'disaster.' *Canwest News Service*. Available at [www.nationalpost.com/story-printer.html?id=1593753](http://www.nationalpost.com/story-printer.html?id=1593753) (viewed May 20, 2009). See Discussion Draft of Waxman-Markey, American Clean Energy and Security Act of 2009 (2009, March 31). Low carbon fuel standard; Liz Barratt-Brown (2009, May 15). Waxman-Markey bill ups the ante on tar sands and other dirty energy. *NRDC Switchboard*. Available at [http://switchboard.nrdc.org/blogs/lizbb/waxmanmarkey\\_bill\\_ups\\_the\\_ante.html](http://switchboard.nrdc.org/blogs/lizbb/waxmanmarkey_bill_ups_the_ante.html) (viewed May 20, 2009) ("although a key provision addressing carbon in fuels [a federal LCFS] was removed under intense pressure from dirty oil interests, the cap will start to make winners out of companies producing clean fuels and losers out

of companies producing dirty fuels, like tar sands oil strip mined and drilled from the heart of Canada's Boreal forest"); Susan Casey-Lefkowitz (2009, May 14). Tars sands makes a trade bully of Canada. *NRDC Switchboard*. Available at [http://switchboard.nrdc.org/blogs/sclefkowitz/tar\\_sands\\_makes\\_a\\_trade\\_bully.html](http://switchboard.nrdc.org/blogs/sclefkowitz/tar_sands_makes_a_trade_bully.html) (viewed May 20, 2009).

48 Letter from Kevin Stringer, Director General of Petroleum Resources Branch, Natural Resources Canada, to the California Air Resources Board (2009, March 4) (Natural Resources Canada letter).

49 Letter from Alberta Energy, Christopher J. Holley, Branch Head of Research & Technology, to California Air Resources Board (2009, February 13) (Alberta Energy letter).

50 For gasoline, the carbon-intensity standard starts at 95.61 grams of carbon dioxide per unit of energy in 2010 and then declines by 10 percent over 10 years. California Air Resources Board (CARB) (2009, March 5). CARB, Proposed Regulation to Implement the Low Carbon Fuel Standard, Vol. I, Subchapter 10, Art. 4, Subarticle 7, § 95482(b), Table 1 (Proposed LCFS); Public Hearing to Consider Adoption of a Proposed Regulation to Implement the Low Carbon Fuel Standard, Staff's Suggested Modifications to the Original Proposal, Modifications to section 95486 (2009, April 23). Attachment B, Lookup Table IV-20.

51 CARB, Proposed LCFS, § 95486(b) Method 1—CARB Lookup Table.

52 CARB, Proposed LCFS, § 95486(a)(2)(A)(1).

53 Townsend (2004).

54 Natural Resources Canada letter; Alberta Energy letter.

55 Alberta Energy letter, p. 2.

56 CARB, Proposed LCFS, § 95486(a)(2)(A)(2).

57 Natural Resources Canada letter; Alberta Energy letter.

58 CARB, Proposed LCFS, § 95486(a)(2)(A)(2), For All Other CARBOB, Gasoline or Diesel Fuel, Including Those Derived from High Carbon-Intensity Crude Oil.

59 Letter from Minister of Natural Resources, Hon. Lisa Raitt, to Gov. Arnold Schwarzenegger (2009, April 21) ("... crude oil derived from Canada's oil sands may be discriminated against as a high CI crude oil, while other crude oils with similar upstream emissions are not singled out. This could be perceived as creating an unfair trade barrier ...").

60 CARB, Proposed LCFS, Staff Report: IV-6 (Table IV-3, Fuel Pathways Completed for Use in the LCFS, Fuel Pathway Description of the Pathway, California Reformulated Gasoline Blendstock for Oxygenate Blending (CARBOB): 1 average pathway based on the average crude oil used in California refineries), [www.arb.ca.gov/fuels/lcfs/022709lcs\\_carbob.pdf](http://www.arb.ca.gov/fuels/lcfs/022709lcs_carbob.pdf); Staff Report: IV-13 ("Crude recovered in California amounts to approximately 40 percent of all crude delivered to California in 2006. Of the crude produced in California, 40 percent requires tertiary methods to recover the crude and requires steam generation for the process. Therefore, the energy use is higher compared to primary extraction.").

61 *Ibid.*; Alberta Energy letter.

62 NAFTA Panel—*Cross-Border Trucking*.

63 Leroux (2007), p. 784.

64 Chamovitz, Steve (2007). The WTO's Environmental Progress. *Journal of International Economic Law*, 10, 285.

65 Natural Resources Canada letter, p. 2, ¶1.

66 Alberta Energy letter.

67 NAFTA art. 2101(1)-(2).

68 See NAFTA Panel—*Cross-Border Trucking*, ¶ 269.

69 A coalition of Canadian organizations is campaigning for amending NAFTA to remove art. 605. The coalition includes: Canadian Centre for Policy Alternatives, Canadian Labor Congress, Canadian Union of Postal Workers, Communication, Energy and Paperworkers, Council of Canadian, Le collectif national stop au methanier, KAIROS—Canadian Ecumenical Justice Initiatives, Parkland Institute, Polaris Institute, and Rideau Institute. Polaris Institute (2008). *A Message to Canada's Political Leaders: Stop Ducking Obama's NAFTA Challenge*. Retrieved May 20, 2009 from Polaris Institute website: [www.polarisinstitute.org/a\\_message\\_to\\_canada\\_s\\_political\\_leaders\\_stop\\_ducking\\_obamas\\_nafta\\_challenge](http://www.polarisinstitute.org/a_message_to_canada_s_political_leaders_stop_ducking_obamas_nafta_challenge).

70 NAFTA art. 605 reads as an exception to an exception: "...a Party may adopt or maintain a restriction otherwise justified under Article XI:2(a) or XX(g), (i) or (j) of the GATT with respect to the export of an energy or basic petrochemical good to the territory of another Party, only if: (a) the restriction does not reduce the proportion of the total export shipments of the specific energy or basic petrochemical good made available to that other Party relative to ... the most recent 36-month period for which data are available... and (c) the restriction does not require the disruption of normal channels of supply... or normal proportions among specific energy or basic petrochemical goods... such as, for example, between crude oil and refined products and among different categories of crude oil and of refined products." (emphasis added)

71 However, the scenario for a U.S. government challenge of Canadian climate policy is unlikely. More likely, Canadian or U.S. investors would use NAFTA chapter 11 to challenge climate policy in either country that significantly constrains, burdens or imposes performance requirements on trade in tar sands oil. In general, see Laxer, Gordon and John Dillon (2008). *Over a Barrel: Exiting from NAFTA's Proportionality Clause. Parkland Institute and Canadian Centre for Policy Alternatives*. Available at [www.ualberta.ca/PARKLAND/research/studies/OverABarrel.pdf](http://www.ualberta.ca/PARKLAND/research/studies/OverABarrel.pdf).

72 Department of Foreign Affairs and International Trade (DFAIT) (2007). *Canada's International Market Access Report—Renewable Energy*. Available at [www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/itc\\_marketaccess\\_eng\\_final.pdf](http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/itc_marketaccess_eng_final.pdf). (viewed May 20, 2009).

73 Energy Efficiency and Renewable Energy (2007). *States with Renewable Portfolio Standards*. Retrieved May 20, 2009 from Department of Energy website: [www.eere.energy.gov/states/maps/renewable\\_portfolio\\_states.cfm](http://www.eere.energy.gov/states/maps/renewable_portfolio_states.cfm).

74 DFAIT (2007); NAFTA arts. 602:1 and 1205.

75 Howse and van Bork (2006). Also see Hempling, Scott and Nancy Rader (2002). Comments of the Union of Concerned Scientists to the Commission for Environmental Cooperation in response to its "NAFTA Provisions and the Electricity Sector" Background Paper to its October 22, 2001, Working Paper Entitled "Environmental Challenges and Opportunities of the Evolving North American Electricity Market." Washington, DC.

76 Howse and van Bork (2006).

77 World Commission on Dams (2001). *Dams and Development: A New Framework for Decision-Making. The Report of the World Commission on Dams*. London: Earthscan Publications Ltd.

78 Howse and van Bork (2006).

79 NAFTA art. 2101(1)-(2).

80 *Inside U.S. Trade* (1996); Schaefer (1997); McIlroy (1997).

81 The exclusion reads: "The United States reserves the right to adopt or maintain any measure that is not inconsistent with the United States' obligations under Article XVI of the General Agreement on Trade in Services." Office of the United States Trade Representative (USTR). *Peru TPA Final Text*. Retrieved August 9, 2009, from USTR website: [www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text](http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text), Annex II, U.S. Schedule.

82 For a narrow interpretation of NAFTA's exception for listed environmental agreements in the context of an investment dispute under chapter 11, see *S.D. Myers*, ¶¶ 210-215, 298. (investor rights trump Canada's policy for processing hazardous waste (PCBs) in Canada, even though the Basel Convention encourages countries to avoid cross-border shipment of hazardous waste).

83 NAFTA art. 104 provides an exception for measures that are necessary to enforce environmental agreements; NAFTA art. 605 turns off exceptions under GATT arts. XX and XI, but not measures excepted under art. 104.

84 Ohio Conference on Fair Trade (2008).

This chapter is part of a Boston University Pardee Center Task Force report on reforming NAFTA and U.S. trade agreements. For more information on the project, and to find links to the full report and to Spanish language content, visit:

[http://www.ase.tufts.edu/gdae/policy\\_research/pardee.html](http://www.ase.tufts.edu/gdae/policy_research/pardee.html)

Recommended Citation:

**The Future of North American Trade Policy: Lessons From NAFTA,**

Kevin P. Gallagher, Enrique Dussel Peters, and Timothy A. Wise (eds.),

Pardee Center Task Force Report, Boston University, November 2009.

URL: <http://www.bu.edu/pardee/files/2009/11/Pardee-Report-NAFTA.pdf>