Food Labels, NAFTA, and Harmonization: A Maze of Regulation in North America

FOOD LABELS, NAFTA, AND HARMONIZATION:

A MAZE OF REGULATION IN NORTH AMERICA

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ABSTRACT

In 1992, Canada, Mexico and the U.S. entered into the North American Free Trade Agreement (NAFTA) whose goal was to increase trade in North America by uniting the three nations in a free trade zone. Through the reduction of tariffs, trade among the three countries has significantly increased in the last 17 years. However, a truly free market eludes the continent. Incongruent regulations have created technical barriers to trade for businesses trying to operate across borders. The regulation of food labels is a good example of this problem. America, Canada, and Mexico have three different and incompatible systems for regulating food, and any cross-border vendor must treble their allotted time, effort, and cost to ensure compliance.

Any attempts to change this situation, however, will require more than a mere summit of the regulators from each country. While each country has a tripartite government creating statutes that are then administered by administrative agencies, the influences on policy making and procedures for changing regulation in each country actually vary widely. Though the countries may all benefit from harmonization of regulations, the countries will have to overcome cultural, historical and political obstacles to create beneficial economic policies.

The challenges are many, but not overwhelming. For one, harmonization of regulation is but one step in a process. There is no reason for the three countries to feel their differences are insurmountable. Only 50 years ago, Europe faced much deeper and older intra-continental hang-ups, but now Europe is as close to a continental free market as the world has known. If Europe can overcome their problems, so can North America. Both creative and practical solutions may be needed, but harmonization is possible.

I: INTRODUCTION

What is a food label? It seems a simple question. We all know what labels *do*: they identify a product.

Or is it that they describe a product? Do they warn about a product? All of the above? Dictionary.com provides twelve definitions on a cursory search for the word "label." All of them relate to some sort of identification, but none are particular to food.

The precise definition of the term "label" seems unimportant in a supermarket aisle. A label is a label is a label. When we walk into a supermarket, we see labels stacked one upon another, all of which providing about as much information as we can process, most of which providing much more information than we actually do process. We have no need to deeply investigate labels because at first glance there are few variations between products: a product name, a picture, maybe some special characteristic, and the nutritional information on the back of the package.

The information provided upon labels may, to most consumers, appear sufficient yet arbitrary. Still, they are indisputably necessary. People use labels to identify and distinguish products. Through experience, labels take on a meaning relative to one another. "Creamy," means something different from "Low Fat," which means something different from, "Fat Free." We compare one label to another, decide which identifier fits our wishes, and toss the product into the cart.

The same experience that allows us to purchase products based wholly on their labels also tells us that we need not worry about veracity or safety when reading labels. One of the luxuries of living in the world's richest country is that our food labels are anything but

"arbitrary." Indeed, they are battled over, negotiated, monitored and thoroughly intentional. Every producer hoping to sell their wares at the market knows that their first chance at making a sale is how they label their food: "Do my customers want jelly, preserves, marmalade or jam?" With such pressure on what the label says (on the name of food, on the claims made about the food and the nutritional information), regulation is necessary. Without exacting oversight, producers might be tempted to tell lies to suit what consumers want to hear, instead of telling them the truth about the product.

Enter the Food and Drug Administration (FDA). As the most competent, thorough, respected regulator of foods in the world,[1] FDA and its predecessor agencies have policed America's food supply for over a century. Whatever one might say about the American diet, being tricked, misinformed or otherwise ill-served by the labels on our food is not Americans' problem. Unless one asks the Canadians. Or the Mexicans. Or, come to mention it, most other countries around the world.

As it turns out, FDA's food regulations are not a pure function of ingredients, nutritional information, and concern for the common welfare. Like any regulations, they are the result of political horse trading. Interested parties compete with one another for influence among lawmakers. Lawmakers weigh the value of various facts, interests and concerns. After lengthy discussions and compromises, regulations are promulgated, labels stuck on food products, and Americans sleep easily about their food supply.[2]

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[1] Katharine E. Gourlie, *NAFTA Countries: Convergence and Fracture*, 51 FOODDLJ 423, 425 (1996).

[2] This abbreviated summary of the regulatory process is not to imply anything sinister in the politics of food regulation. "Interested parties" are merely any groups or individuals with a comment to add to the legislative dialogue. Rather, the point is to highlight that governmental food regulation does not happen in an apolitical vacuum.

It should surprise no one then, that what American lawmakers decide upon as the optimal balance of interests and concerns might not be identical to what Canada and Mexico have settled upon as the optimal balance of interests and concerns. After all, Canada and Mexico have democratically elected governments and competent regulators and civil servants, along with sophisticated lobbying and campaigning cultures. While food safety may be a scientific undertaking, the legislative process is as scientific as alchemy.

The lack of consensus would trouble no one in a world where food was a strictly intra-national product. However, the North American Free Trade Agreement (NAFTA),[3] General Agreement on Trade and Tariffs (GATT) and most economic theory of the last 20 years has caused food, like t-shirts and widgets, to be traded without regard to national boundary. In light of the international nature of the food trade, discordant regulation of food products brings economic harm to both producers and consumers of each country. The harmonization of food regulations is an issue which must be addressed to fully benefit both consumers and producers in a free-trade world.[4]

This paper aims to explore the topic of disharmonized food regulations between the United States, Mexico, and Canada. I will specifically focus upon the discordant regulation of food labels. This segment of the trans-continental trade is an illustration of the current regulatory situation among the NAFTA Parties.

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[3] North American Free Trade Agreement, U.S.-Can.-Mex., 32 I.L.M. 289, Art. 904 (4) (1993). (Hereinafter "NAFTA"). Throughout the paper, as is done in the language of the NAFTA itself, Canada, Mexico, or the United States may be referred to as "the Parties" collectively, or "Party" as individuals, when referred to in their roles as signatory states.

[4] Gourlie, *supra* note 1, at 423. It should be noted that this paper assumes "economic benefit" to mean an increase in the net wealth of a country. Free trade does bring complications, particularly in the redistribution of pre-existing wealth. But that is a problem with how a society redistributes its wealth, not with the existence of free trade. While it is an interesting topic, that problem is beyond the scope of this paper.

To begin, I will very briefly discuss the historical background and structures of administrative law in the United States, Mexico, and Canada. With a picture of administration in each country, I will compare and contrast the regulatory schemes for food labels in Mexico, Canada, and the United States. My primary focus will be on the labeling of foods.[5] Next, I shall discuss the history underlying the North American Free Trade Agreement (NAFTA) and some of its substantive provisions. A particular emphasis will be placed upon its provisions regarding standards-related measures (SRMs). Finally, I will look at the topic of harmonization and how to break down the barriers to trade between the three nations. Though North America's quest for harmonization might seem daunting, it is not impossible. A flexible approach that borrows from other free trade zones can be the starting point for greater realization of NAFTA's aims.

II: HISTORY, GOVERNMENT, STRUCTURE

The rise, scope and power of executive agencies in America has been well documented over the past few decades.[6] But that growth did not happen in a vacuum. Federal agencies reach deeply into the everyday lives of Americans, and their fundamental structure and policies cannot be separated from the history of the United States. Similarly, Mexico and Canada have large administrative states which govern their citizens' day to day transactions. Before delving into the actual regulations of the three nations, we must look briefly at the underpinnings of administrative law in each country.

Administrative Law in America

[5] As regulations on food labels are incredibly extensive in all three countries, the discussion will only touch on a few particular aspects of the regulations.

[6] *See, e.g.*, Elena Kagan, *Presidential Administration*,114 HVLR 2245 (2001).

In the 1920s, the United States government still roughly hewed to the design of the original Framers of the Constitution. As any sixth grade civics lesson would impart, America has three branches of government where the Congress makes the laws, President executes the laws, and Supreme Court interprets the laws. But that model was changed during the 1930s. President Roosevelt and Congress responded to the Great Depression by expanding the federal government with executive-run agencies. The new agencies, subject to the limits set by Congressional statutes, would craft new rules to regulate various industries, then police and administer those rules.

To maintain order among the agencies, the Administrative Procedure Act (APA)[7] was enacted in 1946. The bill was a triumph of compromise, whose unanimous passage was the culmination of years of debate and negotiation among politicians and interested parties. Very roughly speaking, the compromise was struck between New Deal Democrats who sought to keep a tight rein on industry and Republicans who felt that less government intervention would speed recovery after World War II.

The resultant APA sets forth a system hoping to nimbly create, enforce, and adjudicate rules that agencies produce. Despite a measure of autonomy for the executive branch, the APA places a high priority on public/industry input and government transparency.[8] Interested parties, including private individuals, interest groups, and industry groups all get an opportunity to submit views to the agencies before they make rules. The agencies must respond to those concerns as they promulgate their rules. Some say that the American regulatory process, including food regulation, is too prone to industry capture, as industry is the most vigilant and

[7]Administrative Procedure Act, 5 U.S.C. §§500 et seq.
[8] 5 U.S.C. §553.

active player in rulemaking.[9] True or not, it must be admitted that insofar as capture happens, it occurs in plain sight. There is a political price to be paid by any administration that appears too beholden to special interests, and this does act as somewhat of a balance.

Administrative Law in Mexico

Whereas the United States' administrative state came about through inter-party compromise, Mexico's came about through one-party, authoritarian, centrally-controlled government.[10] Any discussion of Mexico's system of government and administrative laws necessarily entails a glance at Mexico's larger political history.[11] From its establishment in the 1920s, the Partido Revolucionario Institucional (*Instutional Revolutionary Party*, "PRI") had near-ubiquitous control over Mexico until 2000.[12] Pursuing a wide-tent strategy, the PRI maintained political power through satisfying many separate constituencies' pet issues.[13] In return for spreading patronage jobs and resources throughout the country, the PRI received support and loyalty from local governments and the populous.

The power concentrated in Mexico City did not disperse among the three branches. PRI's power was always exercised through an "unfettered" executive branch.[14] The Mexican Congress of Deputies, especially during PRI's hegemony, has historically been little more than a rubber

[9] Todd Mumford, *Voluntary International Standards: Incorporating "Fair Trade" Within Multi-Lateral Trade Agreements*, 14 SWJLTA 171, 177 (2007).
[10] Zamora, Cossío, Pereznieto, Roldán and Lopez, *Mexican Law*, 134 (2004).
[11] *Id.* at 133.
[12] *Id.*
[13] Ernesto Hernández-López, *Law, Food, and Culture: Mexican Corn's National Identity cooked in "Tortilla Discourses" Post-TLC/NAFTA*, 20 STTLR 670, 678 (2008).
[14] *Id.* at 136.

stamp on the president's initiatives.[15] Likewise, the Mexican courts, which follow the civil law tradition, are institutionally weak.[16]

Though the Mexican president is endowed with more powers than the American President,[17] he too exerts influence on federal agencies primarily through appointment of allies to cabinet posts.[18] With no Mexican counterpart to the APA until 1994, ministries could be run as the private fiefdoms of the president and his ministers. The lack of political opponents or accountability bred corruption within Mexico's federal agencies.[19] Laws and regulations were often passed solely on the President's orders; without public input or meaningful debate.

The political landscape in Mexico has changed a great deal since 2000, when opposition candidate Vicente Fox, of the Partido Acción Nacional (National Action Party, or PAN) won the presidency.[20] There is now a proliferation of political parties and the Mexican Congress is no longer dominated by PRI. Congress now provides opposition to the president when they please, even if the institution remains comparatively weak.[21] The 1990s de-nationalization of industry has resulted in fewer federal agencies, fewer patronage jobs, and a somewhat less corrupt civil

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[15] *Id.* at 152.
[16] *Id.* at 78)
[17] The Mexican President's powers are outlined by the Mexican Constitution. In Article 89, some of the most important powers include the propose legislation for the Congress of Deputies to pass, promulgate regulations subject to the laws passed by the Congress of Deputies, appointing the cabinet ministers to manage and conduct foreign affairs. In Article 73 he receives the power to promulgate laws respecting Mexicans' health without the approval of the Congress of Deputies.
[18] Zamora et al., *supra* note 10, at 292. It should be noted that the Mexican President does have more direct control over his ministries than the American President. The Mexican President's powers also extend to removal of cabinet ministers.
[19] *Id.* at 310.
[20] In 2000, President Fox also passed an updated law, the Ley Federal de Prodecimienoto Administrativo ("Federal Law of Administrative Prodecure"), which sets out standards for administrative lawmaking in Article III. Some important ones include requirements that administrative laws must be passed: by a competent body; in the public interest; recorded and signed; grounded in law and supported by facts; and passed pursuant to procedural formalities
[21] Zamora et al., *supra note 10*, at 185.

service.[22] Despite these fairly recent changes, much of the regulatory scheme created under the PRI remains. And though it is no longer a one-party state, the regulatory power in Mexico still does, and will for some time, travel directly through the President in Mexico City.

Administrative Law in Canada

Like the U.S. and Mexico, administrative law in Canada is the place where the law touches people's day to day lives. The purposes of administrative agencies in Canada would seem familiar to any student of American law: expertise, flexibility, speed of administration, innovation, sheer practicality.[23] However, Canada's system is built on a much different foundation. Administrative law in Canada is wholly the pursuit of a fair relationship between Canadian individuals and the state.[24] There is no counterpart to the APA, no assessment of the complicated dynamics between the legislature, agencies, judiciary and individuals. Rather, the questions at issue in administrative law cases are simple: "How does the government relate to the individual? Has that relationship been fair?" It is the duty to act fairly and in the interests of fundamental justice,[25] which undergirds all administrative law in Canada.

Unlike America and Mexico, whose systems of administration follow a predictable plan from congressional legislation to executive agencies, in Canada, the administrative bodies can be any creature of statute.[26] Known as "administrative tribunals," they can take many forms. Some would be familiar to American and Mexican observers, some would not. Health Canada, which would look a great deal like the American FDA, is of the former category. In the latter category

[22] Zamora et al., *supra* note 10, at 169.
[23] Neil Boyd, *Canadian Law*, 274 (2002).
[24] *Id.*, at 273.
[25] This duty arises from the Canadian Charter of Rights and Freedoms, §7.
[26] Boyd, *supra* note 23, at 275.

are universities, provincially-created commissions and any boards with a tie to statute. The only requirement is that the body has been delegated power by the Canadian Parliament.[27]

The delegation of authority to these administrative bodies created a need for Canadian courts to ensure that individuals were treated according to the government's duty to act fairly. In contrast to the U.S., where administrative law inhabits an uneasy netherworld at the intersection of "unconstitutional," "too big to get rid of after 80 years," administrative law in Canada is uncontroversially *not* a constitutional body of law. Though it does not derive from Canadian constitutional law, it is still beholden to the constitution's edicts, in particular the command that all Canadians will be served by "fundamental justice."[28]

Under this scheme, agencies such as Health Canada operate with wide latitude to affect the lives of Canadians, as long as they obey statutory guidelines and are fair. Both substantive and procedural administrative decisions are reviewed under an abuse of discretion standard, and are rarely overturned.[29] Health Canada would therefore have had a largely free hand in promulgating its food labeling regulations.

III: THREE COUNTRIES, THREE SETS OF REGULATIONS

Influences and Decision Making: Mexico

[27] Boyd, *supra* note 23, at 274.
[28] *Id.* A brief explanation of Canadian law might be useful. Canada has two texts which Americans might conceive of as "constitutional" documents: The British North America Act of 1867, and the Constitution Act of 1982. These two documents are where Canada was established as an independent entity and Canadians get their fundamental rights and structures of government. Though Canadian administrative law is not derived from either of these texts, it must not violate any precepts within them. For an excellent outline of the Canadian legal structure, see, Boyd, *supra* note 23.
[29] *Id.*, at 280.

In Mexico, the labeling of prepackaged food is governed by multiple statutes and regulations. Primary among them are the Ley General de Salud ("General Law of Health," hereafter referred to as the "LGS," in reference to its Spanish title.),[30] and the Reglamento de Control Sanitario de Productos y Servicios ("Regulation of Sanitary Control of Products and Services," hereafter referred to as "RSCPS.").[31] The LGS, passed by the Mexican Congress of Deputies ("Congreso de Diputades) in 1984, is incredibly broad, and grants wide rulemaking authority to the executive branch of the Mexican government. The LGS charges the Secretariat of Health with administering food labeling regulations,[32] while the Ley Orgánica de Administracíon Pública Federal ("Organic Law of Federal Public Administration") directs the Secretariat of Commerce and Industrial Promotion to actually establish the regulations.[33] The most recent version of these regulations, passed in 1994, is known as the Especificaciones generales de etiquetado para alimentos y bebidas no alcohólicas preenvasado ("General specifications for labeling prepackaged foods and nonalcoholic beverages," hereafter referred to as the "NORMA," in reference to the fact that it is a "Norma Oficial de México.").[34]

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[30] Ley General de Salud [L.G.S.][General Law of Health], as amended, Título 12, Capítulo 1, Artículo 194.I, Diario Oficial de la Federación, 7 de febrero de 1984 (Mex.).

[31] Reglamento de Control Sanitario de Productos y Servicios [R.C.S.P.y S.] [Regulation of the Sanitary Control of Products and Services], Título 1, Capítulo 1, Artículo. 1, Diario Oficial de la Federación, 9 de agosto de 1999 (Mex.). The RSCPS is an act of the Congress of Deputies whose provisions relevant to prepackaged food labels are verbatim reproductions of corresponding provisions in the NORMA (see note 7 below), which was passed five years earlier. Thus, the NORMA's §3.16, the definition of "label,"and §4, specifications for food labels, are the blueprint for the RSCPS's Article 2, Section V and Article 25. Since they are identical, rather than repeat the same definitions, I will focus upon the NORMA, which is narrowly concerned with food labels, and which has other relevant specifications.

[32] Ley General de Salud, Artículo 195.

[33] Ley Orgánica de Administración Pública Federal [L.O.A.P.F.] [Federal Organic Law of Public Administration], Artículo 34.1, Diario Oficial de la Federación, 29 diciembre de 1976 (Mex.).

[34] Especificaciones generales de Etiquetado para alimentos y bebidas no alcohólicas preenvasados. [General Specifications of packaging for prepackaged foods and non-alcoholic beverages], Diario Oficial de la Federación, 24 de enero 1996 (Mex.). Note, the rules on capitalization of titles in Spanish are different from English.

Since Mexico has a civil law tradition, courts depend mightily upon the literal text of legislation for guidance, rather than look to other sources of law such as legislative history.[35] Mexican courts presume that laws have been written in their entirety, and efforts are made by legislators and regulators to clearly express their intentions and include extraordinary detail in the text of all rules and laws.[36] As a result, the Mexican Congress of Deputies does not produce legislative history as Americans might consider it. Therefore, in analyzing Mexico's food labeling regulations, all discussion will be limited to language actually included in the published law.[37]

The NORMA's preliminary provisions state that, in addition to the Secretariat of Health, a plethora of Mexican governmental agencies played their part in crafting the regulation.[38] The Secretariats of Commerce and Industrial Promotion, Fisheries, Social Development, and Agriculture and Water were all represented, along with the Mexican Consumer Protection Agency. This broad list of actors is appropriate, given how deeply the regulation of labeling of prepackaged food reaches into the country's activity.

A prominent omission from the list of participants, however, is the Secretariat of Foreign Relations. Specifically within that office, the Economic Relations and International Cooperation Unit[39] (ERICU) would have been instrumental in calling attention to the implications of any regulatory scheme on the newly-minted NAFTA. The ERICU may also have been able to contribute information on anticipated changes to regulations in the United States and Canada.

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[35] Zamora et al., *supra note 10*, at 100 Oxford (2004).
[36] *Id.*, at 78.
[37] There is, however, a good deal of non-operative information published in the NORMA.
[38] Especificaciones generales de Etiquetado para alimentos y bebidas no alcohólicas preenvasados, *supra* note 34, Preface.
[39] This is Mexico's counterpart to the United States Trade Representative. Its Spanish name is the "Unidad de Relaciones Económicas y Cooperación Internacional."

While such insights may be brought by industry or even the purely domestic Mexican governmental agencies, it is likely that governmental representatives with an international mission are best-placed to take a more global view of costs and benefits.

On behalf of private industry, there were dozens of representatives, including many large multi-national corporations.[40] Some of the representatives from the private sector are well-known in the United States, such as Proctor & Gamble, Kellog's, and Kraft. However, there were also other massive, non-U.S. - centric international food producing corporations. Most notable among them is the Bimbo Group. Bimbo Group's Latin-American oriented baking empire has made it the preeminent food producer in Mexico, and one of the largest baked-goods distributors in the entire world.[41]

The agendas and motivations for large corporations operating across borders may be mixed. On the one hand, it stands to reason that these large corporations, who already have expertise in operating trans-nationally, may have been interested in the opening of new markets in America and Canada. On the other hand, as much as each company might want entry into the other market, there seems a powerful incentive to maintain the status quo. Large companies in hegemonic positions may not look favorably towards new competitors. While Bimbo owns a Texas-based subsidiary,[42] most of Bimbo's foreign business looks towards Latin America.[43] For

[40] Especificaciones generales de Etiquetado para alimentos y bebidas no alcohólicas preenvasados, *supra* note 34 Preface.
[41] From the Grupo Bimbo website, available at: http://www.grupobimbo.com.mx/display.php?section=1&subsection=26 (last visited on 3-16-09)
[42] From the Grupo Bimbo website, available at: http://www.grupobimbo.com.mx/display.php?section=2 (last visited on 3-17-09)
[43] From the Grupo Bimbo website, available at: http://www.grupobimbo.com.mx/display.php?section=1&subsection=26 (last visited on 3-16-09)

Bimbo, harmonization with the United States might be nice, but maintaining the already-in-place harmonization with other Latin American countries is even better.[44]

Given the above marketplace factors, it does not take much imagination to craft a scenario where Mexican-owned Bimbo (who owns cookie-maker Entmann's)[45]might be quite happy to maintain substantial standards harmonization with Spanish-speaking South American countries, while simultaneously striking a blow to the Mexican expansion plans of American-owned Kellog's (who owns Keebler's and Famos Amos cookies[46]).

Such an attempt to thwart competition (with harmonization as collateral damage) might also have benefits for Mexican consumers. Sharing a language and more similar diets, Mexico and Latin American consumers and producers alike might not want to trade South and Central American harmonization for North American harmonization. Given the interests represented at the regulations' promulgation, and the absence of key public entities, Mexico's ultimate regulations, unaligned as they are with Canada and the United States, are no surprise.

Influences and Decision Making: Canada

Like Mexico, Canada's prepackaged food labeling is also covered by multiple laws and regulations. The two main Parliamentary laws are the Consumer Packaging and Labelling Act of 1985[47] [sic][48] and the Food and Drugs Act of 1985.[49] Both of those Parliamentary statutes are

[44] Mexico's prepackaged food labeling standards, as will be discussed below, are an intentional adoption of the Codex Alimentarius "General Standard for the Labelling of Prepackaged Foods. Codex is also the preferred standard in the large South American nations of Argentina, Brazil, Paraguay and Uruguay. See p. 32 of *Understanding the Codex Alimentarius*, available at: ftp://ftp.fao.org/codex/Publications/understanding/Understanding_EN.pdf

[45] http://www.grupobimbo.com.mx/display.php?section=2

[46] http://www2.kelloggs.com/

[47] Consumer Packaging and Labelling Act, R.S.C, ch. C-38 (1985). The Consumer packaging and Labelling Act was included in a major re-organization of Canadian statutes in 1985. As such, it is now referred to popularly as the Consumer Packaging and Labelling Act of 1985, though it is actually directly derived from a law passed in 1970.

supplemented by regulations. Health Canada is given a great deal of discretion to promulgating standards to give the two acts sufficient detail.[50] The resultant regulations are the Consumer Packaging and Labelling Regulations,[51] and the Food and Drugs Regulations.[52] The Minister of Health, operating through the Canada Food Inspection Agency, is designated as the primary enforcement agent.[53]

In 2006, the Canadian Parliament spent time discussing amendment to the Food and Drug Act. Food labeling was the major focus of debate. The debate played out much along what one would expect in a legislature discussing regulation.[54] Some Members of Parliament were all for greater regulation and greater information for consumers.[55] Some Members said that the benefits to consumers, while considerable, simply did not justify the costs to industry.[56] Some Members said, essentially, that it was a close debate, and that the Parliament should leave the truly difficult decisions to the expertise of Health Canada.[57] In an impassioned plea before the bill's ultimate defeat, one of the Parliament's most pro-labeling-regulation members, Member Tom Wappel of the Scarborough Southwest district, emphasized that food labeling is in the interests of

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[48] Rather than write [sic] after every instance of Canadian or British spelling of the word, "labeling," I will just note that if it is spelled, "labelling," elsewhere in the paper it is because I am using the Canadian spelling.
[49] Food and Drugs Act, R.S.C., ch. F-27 (1985). Like the Consumer Packaging and Labelling Act, *supra* note 47, the Food and Drugs Act of 1985 is a direct descendant of an act passed decades earlier. The original version of the Food and Drugs Act was passed by the Canadian Parliament in 1953.
[50] *Id.*, §30 (1) (*b*)
[51] Consumer Packaging and Labelling Regulations (Consumer Packaging and Labelling Act), C.R.C., ch. 417.
[52] Food and Drug Regulations (Food and Drugs Act), C.R.C. ch. 870.
[53] R.S.C. ch. F-27 ,§22 (1).
[54] The particular debate discussed herein was made on 11-2-06. Legislative debate in the Canadian House of Commons can be found on the Parliament's website, at: http://www2.parl.gc.ca/housechamberbusiness/ChamberPublicationIndexSearch.aspx?arpist=b&arpidf=2006%2f04%2f03&arpidt=2007%2f09%2f14&arpid=True&arpij=False&arpice=False&arpicl=&arpics=True&arpicp=True&arpicd=True&arpico=True&arpicc=True&ps=Parl39Ses1&Language=E&Mode=1&arpit=&arpitp=F&arpialtid=37561,39252&arpicpd=2463069#Para239588 (last visited on 3-29-09).
[55] See Member Martin's comments in the legislative debate.
[56] See Member Cullen's comments in the legislative debate.
[57] See Member Kramp's comments in the legislative history.

consumers, and that Parliament ought to represent those interests. The bill ultimately was soundly defeated (more than 2-1) in a clear show of support for the food industry's interests over consumers.

In other records[58] from that session of Parliament, the House of Commons debated whether Canada should harmonize its standards with Codex Alimentarius Commission's standards for genetically modified foods labeling. In that discussion, polling data was introduced which showed that 80% of Canadian consumers wanted mandatory labeling about genetically modified organisms in food. Despite the apparent popularity of such a measure, that bill did not pass, either.

The debates and results in Canada's Parliament are illustrative of the fact that food labeling regulation has its defenders in the Parliament, but that the food industry also has significant representation. Perhaps the most illuminating comment was the one stating that Canada Health (an apolitical body) has heretofore done a good job regulating, and Parliament should not concern itself. It speaks to the reluctance by Parliament to take up an issue which has already been through the political process. The members of Parliament do not want to fight a battle that is not necessary when an agency could do it instead.

While the issue of more consumer information is quite popular among Canadians, the issue of international harmonization would be much more difficult. It brings up issues of sovereignty and independence, which will always be thorny in Canada.[59] Given the political realities of harmonization and intensive food regulation, it seems unlikely that the present

[58] This debate was from 6-12-06. Available at: http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=1&DocId=3033868#OOB-2146118

[59] See Part V, *infra*.

Canadian Parliaments will take up the issue of harmonization. That task would have to fall to Health Canada.

Influences and Decision Making: United States of America

Like its NAFTA partners, the United States regulates its prepackaged food labels through both statute and regulations. The pertinent[60] statute is the Food, Drug, and Cosmetic Act (FD&C Act).[61] The FDC Act is regularly amended with major recent amendments relevant to this paper coming with the Nutritional Labeling and Education Act of 1993 (NLEA), and the Food and Drug Administration Modernization Act of 1997 (FDAMA).[62] The FD&C Act charges the Secretary of Health and Human Services[63] with enforcing the Act, as well as both promulgating and enforcing regulations concerning food labels.[64] The agency through which the Secretary accomplishes this mandate is the U.S. Food and Drug Administration.

In 1997, only a few years after the passage of NAFTA, Congress passed the Food and Drug Association Modernization Act of 1997. The FDAMA did contain a passage of language to encourage harmonization[65] with international bodies. However, the Congressional record reveals that the provision encouraging international harmonization of standards was drawn up primarily out of concern for international pharmaceutical standards instead of than food.[66]

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[60] The Fair Packaging and Labeling Act of 1966, 15 U.S.C. §§1451-1461 (2000), also has provisions concerning the labeling of food. This statute aims for accurate labeling of quantities within packages to "facilitate value comparisons" between like products. Though still good law, its provisions relevant to this paper are duplicated by the FD&C Act.

[61] Federal Food, Drug, and Cosmetic Act, 21 U.S.C., §§301-399.

[62] Nutritional Labeling and Education Act of 1993, 21 U.S.C. 343 (q). Food and Drug Administration Modernization Act of 1997, 21 U.S.C. 353 (a).

[63] 21 U.S.C. 371 (a).

[64] Food and Drug Administration, Department of Health and Human Resources, 21 C.F.R. pt. 1.

[65] 21 U.S.C. §383

[66] *See e.g.*, 143 Cong.Rec. S12241-02 (1997) (Statement by Senator Mosely-Braun). Senator Mosely-Braun's comments were one of many which conveyed a focus upon the drug industry and not the food industry. Though the comments make clear that the Act was focused upon drugs, the statutory language of the Act is actually broad enough that it could be seen to include food regulations.

Indeed, it appears that while Congress recognized the relevance of harmonization, the FDAMA was not intended force the issue with regards to food labeling.

In 1999, the FDA took it upon itself to declare an intention to participate more fully in the harmonization of international food regulations.[67] In a thorough paper, entitled, *Affirmative Agenda for International Activities*, FDA recognizes that the agency faces rising expectations and pressure from other U.S. government agencies, American industry, and the international community to participate more fully in harmonizing regulatory initiatives. It also declares an intention to lead in the development of the Codex Alimentarius Commission's[68] international food regulations (even singling out food labeling as an area of interest). At the same time, the FDA asserts that its primary mission is domestic in nature and its resources are limited. As such, FDA will address issues from a domestic perspective—notwithstanding the international effect policy decisions may have.

From a 2009 perspective, the FDA's 1999 document appears naïve. Amid an era of declining America popularity abroad, the FDA's stated intent to lead the development of the Codex standards without actually subscribing to them is somewhat of a contradiction in terms. As the American scheme makes any non-adherence to the FD&C Act a misbranding, the practical effect of FDA's stance is, "If Codex doesn't follow the FD&C Act verbatim, it will result in no benefit to producers trying to export to the U.S." On some levels, this could be a

[67] See the FDA *Affirmative Agenda for International Activities* (1999), available at: http://www.cfsan.fda.gov/~comm/intlact.html (last visited on 3-27-09).

[68] The Codex Alimentarius Commission is an international body, created in 1963 by FAO and WHO. It still operates under the umbrella of those two organizations, and develops standards and guidelines to protect the health of consumers, ensure fair trade practices in the food industry. Another significant aim of the commission is to promote harmonization of food standards throughout the world. Available online at: http://www.codexalimentarius.net/web/index_en.jsp (last visited on 3-27-09).

valid policy—American industry and consumers can support a more onerous regulatory system than many developing nations.

On other levels, however, FDA's policy has not worked to guide international regulations towards American standards. In the 10 years since FDA declared an intention to harmonize international regulations, Codex Alimentarius has settled on a set of standards which track the European Union's regulations, not America's. The FDA policy on Codex,[69] is that it will consider adoption of Codex standards, but that it has discretion on whether or not to adopt them. Keeping in mind FDA's comment that it is limited by resources and statutory demands, America's regulatory disharmony with the world may well continue until Congress decides to dramatically alter the system of food regulation by mandating harmonization.

IV: SUBSTANTIVE FOOD LABELING PROVISIONS

This part will compare and contrast various provisions regulating labels for each of the NAFTA Parties. The actual statutes passed by the Mexican Congress of Deputies, U.S. Congress and Canadian Parliament are largely similar as they relate to food labeling. All three countries have governing statutes which broadly outline legislative purpose, dictate only a few specific mandates, then leave many details to regulatory bodies.

Though the legislative bodies of all three nations may have been of similar minds, the cession of authority to regulatory agencies is what produces the disharmony among regulations. All three countries have had major food legislation or regulation since the NAFTA was signed in

[69] 21 C.F.R. § 130.6

1992.[70] The timing of the regulations' promulgation is significant for the purposes of this paper because the regulations were finalized two years after the NAFTA had been consented to by all three participating nations. Thus, they were considered and negotiated in the full knowledge of the NAFTA and its exhortation for harmonized regulations between the three nations. As the regulations show, NAFTA's provisions alone were not enough to ensure that the Parties' agencies promulgated harmonized rules.

Intention to Harmonize

Before international harmonization may be discussed, one must consider the declared intentions of the various governments. Mexico's NORMA expressly aligns[71] itself with the Codex Alimentarius Commission's General Standard for the Labelling of Prepackaged Foods (1985).[72] Though the Codex Alimentarius Commission itself aims for harmonization, two notable abstainers from its standards are Canada and the United States. The Codex, and thus the Mexican, regulations are of a familiar tone to the American and Canadian models, but they are somewhat briefer and less minutely detailed.

While Mexico's official regulations affirmatively acknowledge a desire to harmonize with international standards, Canada only mentions international harmonization in the "Regulatory Impact Analysis Statement,"[73] of the Canada Gazette,[74] in which the regulations

[70] In the United States, there was the Food and Drug Administration Modernization Act of 1997, in Canada, they had significant regulatory reform in 2003, and in Mexico, the Ley General de Salud was last amended in 2007.
[71] Especificaciones generales de Etiquetado para alimentos y bebidas no alcohólicas preenvasados, *supra note 34* §10.
[72] Available at: http://www.codexalimentarius.net/web/standard_list.do?lang=en.
[73] *The Canada Gazette*, 1-1-2003 at 365. The Regulatory Impact Analysis Statement is a non-legally-binding comment accompanying new regulations, which is put forth by the Canadian government to explain various provisions therein.
[74] *The Canada Gazette* is a government publication, similar in many ways to the United States' *Federal Register*

were published. The Statement makes note that Canada Health based their new regulations on the United States' NLEA.[75]

For its part, the United States' FD&C Act discusses international harmonization with respect to pesticide chemical residues on food,[76] but declines to do so in the context of food labels. Indeed, the pesticides chemical residues provision expressly invokes the Codex Alimentarius Commission and implies encouragement, if not preference, for international harmonization. The FD&C Act says that the Administrator shall first look to Codex standards and, if she elects to depart from them, she must explain her reasons for doing so. Given that Congress has displayed an ability to encourage harmonization when it wants to do so (as it has for pesticides), the absence of any similar provision with regards to food labels could be taken to mean that Congress had no intention of harmonization with the U.S.' North American neighbors.[77]

From the actions of the three governments, it is clear that international harmonization has not escaped the attention of anyone. Though all three NAFTA Parties have addressed the matter, they all take a different approach. Mexico sees its interests best served by looking outward, rather than inwards to North America. Canada sees benefit in aligning itself with the U.S., but is determined to tailor its policies as it sees fit. And the United States acknowledges that harmonization is an issue, but it cannot overtake the domestic mission assigned to FDA by statute.

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[75] See note 62, *supra*.
[76] *Id.* at §346a (b) (4).
[77] In one respect, this may not be evidence of Congressional intention to ignore NAFTA's exhortation to harmonization of standards, since the FD&C Act was made prior to NAFTA's enactment. However, NAFTA's major negotiations took place in 1992, and the FD&C Act is regularly amended. In any event, it has now been 15 years since NAFTA officially took effect, and the FD&C Act contains no language encouraging harmonization.

Objective of the Label

Each government, in promulgating these standards, does so for a reason. The purpose of labeling regulations, as reflected in the language used by each of the NAFTA Parties' governments, is similar, though not fully consistent. The different ways to express the intentions of food labels reflect some of the differences in governmental structure described earlier in this paper.

The Mexican NORMA begins with a common sense objective:

> "[T]o ensure that products marketed within [Mexico] bear the necessary commercial information so that consumers and users can properly make their decisions about buying, using, and fully benefiting from the products and services they acquire."[78]

Though the directions are all ones which direct how producers of food must act, the language seems to imply that, at the heart of the matter, Mexican regulators were concerned with the consumers.

The Canadian purpose in regulating labels points much more towards producers. "No person shall label . . . any food in a manner that is false, misleading or deceptive."[79] While the obvious beneficiaries of such a policy are consumers who needn't worry about being deceived, the purpose stated in the act is strictly one of prohibition for the producers. Only on Canada Health's website does the Canadian government express a desire to help Canadian consumers, ". . . make healthy and informed choices about the foods they eat."[80]

[78] Especificaciones generales de Etiquetado para alimentos y bebidas no alcohólicas preenvasados, *supra note 34* Front Matters.
[79] R.S.C. ch. F-27 §5.1
[80] From the Canada Health website, available at: http://www.hc-sc.gc.ca/fn-an/label-etiquet/index-eng.php (last visited on 3-24-09).

Like Canada, America's labeling initiatives address themselves to the producers of food. Indeed, neither the FDA home page for labeling,[81] nor the FD&C Act nor the federal regulations, have provisions or commentary implying that the consumer is the central concern for food labels. Though the modern American regulatory scheme does concern itself with providing thorough information to consumers,[82] the language (or lack thereof) of the actual laws belies an FDA focus on industry as the most important stakeholder in food label regulation.

Scope of Application

As for applicability of food labeling regulations, the three countries go from near unlimited exemptions (Mexico), to highly specific limitations (United States), with Canada falling somewhere in between.

The Mexican regulations apply very broadly, to "all prepackaged foods and nonalcoholic beverages … intended for consumption [in Mexico]."[83] The expansive inclusion, however, is tempered by an equally expansive category of exemptions, including, "other products determined by competent authorities…"[84] This provision keeps in line with the Mexican tendency to concentrate enormous amounts of discretion in the executive branch.[85]

Canada, too, casts an initial wide net for requirement of labels and includes any prepackaged product.[86] However, unlike Mexico, Canada has more limited exemptions. The exemptions include food intended for commercial clients, raw fruit and vegetables bound with

[81] http://www.foodsafety.gov/label.html (last visited on 3-24-09)
[82] Peter Barton Hutt, *Food and Drug Law Cases and Materials*, 96 (2006).
[83] Especificaciones generales de Etiquetado para alimentos y bebidas no alcohólicas preenvasados, §1.1
[84] *Id.*, at §1.1 (c).
[85] Zamora et al., *supra* note 10, at 136.
[86] R.S.C., ch. C-38, §3.

less than 1/2 inch of packaging, individually-packaged confections, re-usable soft-drink containers,[87] and meat cooked on the retail premises.[88]

The United States regulations are similar to Canada's. Rather than affirmatively including all foods, the U.S. exempts only specific foods from labeling requirements. Exemptions include: assortments of various foods, items received in bulk for resale in individual packets, and incidental additives to food.[89] The regulations also exempt specific foods from selected provisions of the FD&C Act. Examples of this category include some fruits and vegetables, foods re-packaged at the retail establishment where they shall be sold, and various dairy products.[90]

Definition of Food and Labels

It seems fundamental that the regulation of food labels must begin with definitions of both the terms "food" and "label." As mentioned in the introduction to this paper, such common-sense terms take on new complexity when asked to fit into a regulatory structure. The definitions are of vital importance, as something that is not "food" in the government's definition, will not be subject to regulation. The NAFTA Parties did not reach the same result when trying to address these complexities.

For Mexico, food itself is defined as, "Any substance or product . . . intended for human consumption and that provides the organism with nutritional elements by oral ingestion."[91] It seems a simple definition, but it is also incomplete. At the very least, there can be confusion as to what qualifies as a "nutritional element" under the meaning of the NORMA.

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[87] Consumer Packaging and Labeling Regulations (Consumer Packaging and Labelling Act), C.R.C. ch. 417 §§3-4.
[88] Food and Drug Regulations (Food and Drugs Act), C.R.C. §B.01.003
[89] 21 C.F.R. § 101.100 (a) (1999).
[90] 21 C.F.R. § 101.100 (b)-(g) (1999).
[91] Especificaciones generales de Etiquetado para alimentos y bebidas no alcohólicas preenvasados, §3.2.

Labels in Mexico are defined as any marking, tag, inscription, image, or other descriptive or graphic material that is written, stuck to, [or applied in many other ways] … on the packaging."[92] This is a fairly comprehensive definition, which aims to include as much as possible.

Canada describes food as, ". . . any article manufactured, sold or represented for use as food or drink for human beings, chewing gum, and any ingredient that may be mixed with food for any purpose whatever."[93] The inclusion of chewing gum seems to expand the definition of food from Mexico's version. Chewing gum might not be covered under the Mexican definition for it is neither "consumed" nor "ingested,"[94] and its provision of "nutritional elements" is minimal.

As to labels, Canada has defined labels as, ". . . any legend, word or mark attached to, included in, belonging to or accompanying any food."[95] Like Mexico, Canada's definition of a label seems to aim to include as much as possible under its terms.

The United States goes one step further in expanding the definition of food by including food intended for non-human animals. The FD&C Act defines food as, ". . . articles used for food or drink for man or other animals . . ."[96] and includes chewing gum and ingredients for those articles. Like its Canadian and Mexican counterparts, the American statute defines labels as broadly as possible. The FD&C Act's definition is quite long, and leaves nothing to chance in casting a wide net.[97]

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[92] Especificaciones generales de Etiquetado para alimentos y bebidas no alcohólicas preenvasados , §3.16.
[93] R.S.C., ch. F-27, §2
[94] Dictionary.com's definition of these two terms makes reference to absorption and taking "into" the body, rather than mere mastication.
[95] R.S.C., ch. f-27, §2
[96] 21 U.S.C. §321 (f).
[97] *Id.*, at §321 (k).

In some respects, the definitional discrepancies are reconcilable. All three countries make an effort to include everything in their definition of labels, and it seems that the wording is all that would need changing. However, by including articles used for "other animals," in the definition for food, the FD&C Act significantly expands the category of products which is regulated by corresponding statutes in Canada and Mexico. To harmonize the three regulations, either Canada and Mexico, or the United States would need significant realignment of their domestic agencies' jurisdictions.

Labeling Basics

Though the definitions of labels are largely similar, the requirements for all labels are different. Even the slightest difference is important, as all three sets of regulations have provisions which would, if followed, thereby render the labels in derogation of regulations in the other two countries.

Mexican labels have eleven requirements. Each must include: the name of the food, ingredients, net content, additives, name and fiscal domicile of the producer, country of origin of the food, batch identification, expiration date and instructions for their proper storage.[98] In addition, each label is required to be written in Spanish (at least as prominently as any other language)[99] as well as using the International System of measurements for all quantities.[100] Finally, Mexican labels' fonts and presentation (including the nutritional information) are circumscribed only by a requirement that letters be,[101] "clear . . . and be easily read by the consumer . . . ." Only the brand name must be on the main exhibition surface of the packaging,

[98] Especificaciones generales de Etiquetado para alimentos y bebidas no alcohólicas preenvasados , §4
[99] *Id.*. §4.2.11.
[100] Ley General de Salud, Art. 209.
[101] Especificaciones generales de Etiquetado para alimentos y bebidas no alcohólicas preenvasados §4.2.10.1.3.

and all other information can be applied anywhere upon the surface of a label (or even below the surface, if easily legible) of a package.[102]

All Canadian prepackaged food labels must include: the net quantity,[103] common name of food, name and address of the producer,[104] list of ingredients of the food,[105] and a nutrition facts table.[106] In addition, certain foods require information on a food's durable life,[107] information regarding freezing of the food,[108] and information on artificial flavors.[109] The Canadian labels must be in both French and English,[110] and use either International System of measurement or Canadian Units.[111]

In the American iteration, prepackaged food labels must include the name and address of the producer and quantity of contents,[112] along with the common name of the food, and ingredients,[113] and a nutritional information panel.[114] All labels in the United States must be written at least in English[115] and can be displayed using the International System of Measurements.[116]

As is evident, the labels' requirements are substantially overlapping, yet still incongruent. One requirement where there is divergence, nutritional information, is particularly prominent.

Nutritional Information

[102] *Id.*, at §4.2.10.1.5.
[103] R.S.C., ch. C-38, §4.
[104] *Id.*, §10.
[105] C.R.C., ch. 870, §B.01.008.
[106] *Id.*, §B.01.401 (1).
[107] *Id.*, §B.01.007.
[108] *Id.*, §B.01.080 (2).
[109] C.R.C., ch. 417, §34.
[110] *Id.*, §6 (2).
[111] R.S.C., ch. C-39,§4 (b).
[112] 21 U.S.C. § 343 (e).
[113] *Id.*, § 343 (i).
[114] *Id.*,. § 343 (q).
[115] 21 C.F.R. § 101.15 (c) (2) .
[116] 15 U.S.C. § 204.

Led by the United States in the 90s, nutritional information can today be found on food labels the world over. By all accounts, nutritional information helps people make better-informed choices regarding their diets by ensuring quality and avoiding consumer deception.[117] One might presume that since human physiology has no nationality, and since proper scientific research should produce the same results in different countries, the information which is important for consumers to know about their food would be the same across jurisdictions. However, such is not the case, as the NAFTA Parties' incompatible regulations demonstrate.

In Mexico, the LGS commands that all food labels "include data of nutritional value . . . which shall contribute to the nutritional education of the population."[118] However, the NORMA's stance on nutritional information is that it is not required on all labels.[119] Mandatory labels are only triggered if the producer makes statements regarding the food's nutritional property.[120] In the event that nutritional information is required by such a statement, the required information is: energy content, proteins, carbohydrates, fat, and sodium, plus any vitamins about which claims are made.[121] The information for calories must be presented in calories (kcal) per 100g; while fats, proteins, and carbohydrates[122] and sodium or the optional vitamins[123] must be presented as mass per 100g. The vitamins may be expressed either in metric units or as a percentage of the recommended daily allowance for Mexicans.

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[117] Jason Sapsin, Theresa Thompson, Lesley Stone, and Katherine DeLand *International Trade, Law, and Public Health Advocacy*, 31 JLMEDETH 546, 550 (2003)
[118] Ley General de Salud, Art. 212.
[119] Especificaciones generales de Etiquetado para alimentos y bebidas no alcohólicas preenvasados, §4.2.8.1.
[120] *Id.*, §4.2.8.1.
[121] *Id.*, §4.2.8.2.1.
[122] *Id.*, §4.2.8.3.3.
[123] *Id.*, §4.2.8.3.4.

Since 2007, all prepackaged food labels for food sold in Canada must carry a "nutrition facts table,"[124] subject to specific exemptions.[125] The nutrition facts table must contain: a serving size,[126] energy content (in calories), fat, combined saturated and trans fat, carbohydrates, fibers, sugars and protein (each category in grams), cholesterol and sodium (both in milligrams), and calcium, iron, vitamin A and vitamin C (each as a percentage of recommended daily intake).[127] The regulations contain considerable detail with regards to how to present this information. For instance, there are specifications for how to properly round the fat content,[128] and the size and color of the font which must be on the nutritional facts table.[129]

The mandatory[130] nutritional labels in the United States are, to an average consumer, indistinguishable from their Canadian counterparts. Like Canada, the United States requires information on serving size, energy value, fat, saturated and trans fat, carbohydrates, fibers, sugars, protein, cholesterol and sodium, along with the amounts of calcium, iron, vitamin A and vitamin C.[131] All of these bits of information must be presented in the same units of measure as in Canada. The details like the rounding of fat content,[132] and the presentation of nutritional information[133] are not absolutely consistent, but are so similar as to be functionally identical.[134]

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[124] C.R.C., ch. 870 §B.01.401. (1).
[125] *Id.*, §B.01.401. (2).
[126] In the Food and Drug Regulations §B.01.002A, a serving size is, "the quantity of food that can reasonably be consumed by one person at a single eating occasion.s"
[127] C.R.C., ch. 870 §B.01.401.
[128] *Id.*, §B.01.401. Table Core Information
[129] *Id.*, §B.01.450.
[130] 21 U.S.C. 343 (q) (1).
[131] 21 U.S.C. 343 (q) (1) (A)-(D). *See also*, 21 C.F.R. §101.9 (c).
[132] 21 C.F.R. §101.9 (c) (2).
[133] 21 C.F.R. §101.9 (d).
[134] An example of the difference: in Canada, if the fat content total is less than two grams per serving, producers must round that number off to the nearest multiple of one (see Table Core Information, note 95 above), but if the total is between two and five grams, producers must round to the nearest multiple of 1/2 gram of fat; in the United States, they eliminate the separate category for foods with total fat of zero to two grams, and have producers round the fat to the nearest half gram for all servings which total under five grams (see 21 U.S.C. §101.9 (c) (2)

However, there are particular differences. Unlike Canada, the United States also requires that the label convey how many servings are included in a given package of food.[135] The United States also requires that saturated and trans fats are displayed on separate rows[136] (whereas in Canada they are displayed as a sum of the two on only one line).

Harmonization of the nutritional labels is an area where harmonization seems the most attainable, yet willfully rejected. It would require addition of only a few extra pieces of information to bring Mexican standards in line with America and Canada. And to call the "differences" between the American and Canadian nutrition labels "useful" would be a disservice to the words "difference" and "useful."

Disease-Related Claims

So-called "disease-related claims" are basically claims made by producers on labels regarding the effect a particular non-drug food may have with regards to risk factors for a particular diet-affected disease. They have the potential to be quite helpful to consumers—as a kind of short cut to making health-conscious purchasing decisions. However, health claims also have the potential to be dangerously misleading. For that reason, they are quite heavily regulated in all three countries.

The LGS expressly forbids food packages from containing "hidden or obfuscated"[137] claims relating to disease or illness,[138] but claims are not barred altogether. That task is left to

[135] 21 U.S.C. 343 (q) (1) (B).
[136] 21 C.F.R §101.9 (c) (2) (i) – (ii).
[137] The word, "hidden or obfuscated," is an admittedly imprecise translation. After consultation with multiple sources, including native speakers, no precise translation of "clara o veladamente," was apparent. However, the connotation inherent in those words seems to maintain the spirit of the text.
[138] Ley General de Salud, Article 212.

the NORMA, whose list of prohibited categories of claims results in a complete ban on any disease-related claims,[139] along with any statement that "cannot be proved."[140]

In Canada, there was a similar ban upon health claims until 2002.[141] Then Health Canada adopted five of the ten claims then-permitted in the U.S. after having observed and studied the health claims permitted under the Nutrition Labeling and Education Act.[142] Any health claims in Canada must be made in regulation-prescribed language, and are limited to claims discussing: potassium's relationship to heart disease/blood pressure/stroke; calcium's relationship to osteoporosis; saturated and trans fats' relationship to heart disease; vegetables and fruit's relationship to cancer; various foods' relationships to dental problems.[143]

In the United States, the regulations are somewhat less prescribed and somewhat less limited. Health claims in the United States are governed by the FD&C Act, which commands that all disease-related claims be approved by either the FDA on the basis of "significant scientific agreement," or another authoritative statement from the federal government or National Academy of Sciences.[144] While the U.S. standard looks nebulous on its face, FDA has construed the statute narrowly, and has only approved twelve disease-related claims. They include: calcium and vitamin D's relationship to osteoporosis; fat's relationship to cancer; saturated fat and cholesterol's relationship to heart disease; dietary sweeteners and dental caries; fiber-containing grain products, fruits, and vegetables' relationship to cancer; folic acid and neural tube defects; fruits and vegetables relationship to cancer; sodium and hypertension; fruits, vegetables

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[139] Especificaciones generales de Etiquetado para alimentos y bebidas no alcohólicas preenvasados§6.1.1.
[140] *Id.*, §6.1.1.
[141] Health Canada Website, available at: http://www.hc-sc.gc.ca/fn-an/consultation/init/man-gest_health_claims-allegations_sante_1-eng.php#execintro (last visited on 3-26-09).
[142] Canada Gazette Part II, 1-1-03, 379.
[143] C.R.C. ch. 870, §B.01.603.
[144] 21 U.S.C. §343 (r) (3) (B) - (C).

and grain products that contain soluble fiber's relationship to heart disease; soluble fibers' relationship to heart disease; soy protein relationship to heart disease; stanols/sterols' relationship to heart disease.[145]

The Canadian and American standards both claim to be based upon science. Indeed, the claims permitted in the U.S. but not Canada are so-limited because the Canadian agency does not feel that the evidence is sufficiently convincing to warrant approval.[146] The hurdle to harmonization here seems to be one of getting the *scientists* to confer more thoroughly, instead of the bureaucrats.

V: THE NORTH AMERICAN FREE TRADE AGREEMENT

This part of the paper will discuss the NAFTA and its historical background. Making compatible new regulations is more than just logically reconciling interested industries and consumers. The three Parties have all co-existed on this continent for hundreds of years. A treaty (or re-working of a treaty) between the three must take into account the history, relationships, and resultant concerns which arise out of this shared existence.

In December of 1992, American President George H. W. Bush,[147] Mexican President Carlos Salinas, and Canadian Prime Minister Brian Mulroney sat at a table in Texas and signed the North American Free Trade Agreement (NAFTA). Aiming for the same goals as the World

[145] 21 C.F.R §101.71-83.
[146] Canada Gazette Part II, 1-1-03, p.379.
[147] Though President Bush's administration negotiated the NAFTA, its passage by the Congress did not come until Bill Clinton took office. Thus, President Bush negotiated the bill, and President Clinton ushered it through Congress and signed it. It might also be noted that the NAFTA, like every treaty into which the U.S. has entered since the Truman administration, was passed as a federal statute with the approval of both houses of Congress, rather than as an Article II treaty.

Trade Organization's General Agreement on Trade and Tariffs,[148] the agreement promised new opportunities for businesses and consumers across North America.

The ultimate aim was the unencumbered movement of goods and services[149] across two of the world's longest unguarded land borders. However, bringing 446, 000, 000 people[150] together across three vast democracies, dozens of sovereign or semi-sovereign governments and scores of regulatory agencies was always going to be a massive undertaking. As has already been shown by the few examples in the previous part of this paper, the differences in the regulations create a veritable labyrinth of regulations and red tape. Compliance in one country is non-compliance in the other two; a legitimate marketing plan in two countries constitutes fraud in the other. The opportunities for confusion abound.

All three countries were ambivalent about entering into NAFTA. The debate in the U.S. Congress provided insight into the way NAFTA and free trade tugged at American politicians: "When Jesse Helms and Jesse Jackson are against NAFTA and Ronald Reagan and Bill Clinton are for it, one realizes the complexity and uncertainty of the issue."[151] Other unlikely bed fellows included Ralph Nader and Pat Buchannan (against the pact). Balanced against the increased market access and historical success of free trade, were concerns over lost jobs and falling environmental standards. In Canada, the newspapers recount that debates were all about sovereignty and maintaining Canada's independence.[152] And in Mexico there was concern about large American companies using their might to overwhelm local businesses. These concerns

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[148] Matthew Schaefer, *Food Safety Regulations – Cross-Border Implications—A U.S. Perspective*, 24 CUSLJ 377, 380 (1998). *See also*, Todd Weiler, *The Treatment of SPS Measures Under NAFTA Chapter 11: Preliminary Answers to an Open-Ended Question*, 26 B.C. Int's & Comp. L. Rev. 229, 230 (2003).
[149] NAFTA Art. 102 (1)(a).
[150] Estimated combined population of the United States, Mexico, and Canada, according to CIA World Factbook. Available at: https://www.cia.gov/library/publications/the-world-factbook/
[151] 139 Cong.Rec. E2946-05 (Comment by Rep. Martin Lancaster).
[152] "Free Trade: The shoe is on the other foot," *The Globe and Mail*, Nov. 13,1993.

arose out of each country's past experiences with their neighbors, and their already-formed notions of their new trading partners. It may be useful to investigate some of those histories before delving directly into the act.

North American History Prior to NAFTA

Without entering into a regurgitation of the history of the United States, there are three moments which must be mentioned with regards to the present dynamics in North America. The first is the time leading up to the War of 1812. Next is the Mexican-American War of 1847-48, and the third is the end of World War II. Early in U.S. history, the fate of the North American continent was unclear. Particularly in Canada, which had been a sanctuary for British loyalists during the Revolutionary War, there was concern that large parts of the country would be annexed to the United States. Though not the only cause, this was one of the precipitating sentiments of the War of 1812. Britain and the United States ended the war with territory claims much similar to those before the war, but the impression was clear: Canada was to remain distinct from the United States.

The United States in 1847 was a still young country, dwarfed by its neighbors to the north and south, and still unsettled within its confines. After declaring war with Mexico under the banner of "manifest destiny," the United States Army advanced all the way to Mexico City. The terms of peace resulted in the United States' annexation of the modern-day American West. The United States was now the major power on the continent.

Though ascendant in North America, the nation was not a major player outside of this hemisphere, militarily or economically. Only after the end of World War II did the United States begin to wield the sort of influence which exists today. Carrying the twin banners of free

markets and democracy, in the second half of the Twentieth Century America became a super power whose reach extended throughout the world. Within the continent, America's policy was not particularly hostile. For instance, the U.S. no longer declared un-provoked wars with Mexico. But it might be said that the U.S.'s treatment of Mexico and Canada was one of clients, rather than true equals. While it might be inappropriate, it is a common refrain to hear Americans characterize Canada as the 51st state with polite people, and to Mexico as a great vacation spot where the water gets you sick.

The colloquial perception of its neighbors notwithstanding, the Canada and Mexico are ideal trading partners for America. As free trade becomes the world norm, businesses and consumers within the U.S. will have a preference to continue policies which have served the U.S. well over the last 50 years.

Within both Canada and Mexico, however, the U.S.'s general policies created some tension. Mexico ended the Twentieth Century well behind the United States and Canada in standard of living.[153] Mexico had never quite let go of the trauma of the Mexican-American War. Just as all Americans know some history of the Revolutionary War and the Civil War, all Mexicans today know the story of how their northern neighbors forcibly took over half of their nation's territory in the 1840s. This memory has bred an underlying sense of resentment towards the United States. Added to the country's identity as a nation whose history includes a painful Spanish domination of indigenous peoples, there is a natural resistance towards anything with the odor of imperialism, including free trade.[154]

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[153] United Nations Development Programme Human Development Reports. Available online at: http://hdr.undp.org/en/media/hdr_1990_en_indicators1.pdf (last visited on 3-26-09)

[154] It may not be so absurd to fear that the United States will use free trade to overwhelm a "weaker" country's laws and way of life. In Sapsin et al, *supra* note 117, at 547, there is a description of an incident where the United States

In the 20th Century, the PRI's rhetoric championed a uniquely "Mexican" identity (which just happened to include fealty to PRI). Among the virtues of modern Mexicans was the Mexican diet—based heavily upon corn.[155] As Mexican food became a world-wide export, it became a source of national pride, unity and independence.[156] With the advent of NAFTA, it was a particular concern that the American corn industry would overwhelm the Mexican sector. People did not like the idea that tortillas eaten in Mexico would come in packages saying, "Made in the U.S.A." It was such a symbolically loaded issue that corn became one of the few goods which retained tariffs between the U.S. and Mexico for fully fifteen years after NAFTA's passage.[157]

With the opening of Mexico to America's massive corn industry, the problems have become acute. Mexico now grows less corn, and purchases much of it from the United States. The result is that Mexican consumers now pay more for corn while they compete with American commuters for the use of the crop as ethanol.[158] This is a highly unpopular fact in Mexico, and the politicians have been put on notice:[159] Mexicans will not be satisfied with NAFTA if they feel they're being they're being taken for a ride by the Americans. Any changes that occur to NAFTA must keep in mind that the Mexican voting public will hold their leaders accountable for how much they are perceived to "cave" to American-imperial interests.[160]

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held access to the American market hostage until the tiny island nation of Vanuatu amended its gun laws to allow their purchase on the island.

[155] Hernández-López, *supra* note 13, at 680.

[156] *Id*.

[157] NAFTA, Annex 302.2.

[158] Marsha A. Echols, *Paths to Local Food Security: A Right to Food, A Commitment to Trade*, 40 VNJTL 1115, 1124 (2007).

[159] Hernández-López, *supra* note 13, at 688.

[160] Hernández-López, *supra* note 13, at 688, discusses how, during the 2006 election, then-Candidate Felipe Calderón was taunted by his opponents for appearing to desire more open trade with the United States. Though

Whereas Mexico's hesitancy towards the United States might be considered an outwardly-oriented suspicion, Canada's could be characterized as an inwardly-oriented inferiority complex. Right from the end of the French and Indian War, Canada's history has been one caught between various forces competing for the hearts and minds of Canadians. Part of the country has seen itself as quasi-French. Part has seen itself as quasi-British. And all the while, many have been trying to establish a national identity that is neither French, nor British, but Canadian above all else. With the cultural tug-of-war raging in the foreground, in the Twentieth Century, the business community has cultivated tremendous ties with the United States in the background. Today, the extent of Canada's economic ties to the United States might be illustrated by the fact that the United States receives approximately 80% of Canadian exports.[161]

Given the unavoidable bonds between the two nations, the smaller one will need to make sure its identity is recognized. An outgrowth of Canada's desire to assert its independence is that much of Canada's immediate concern about NAFTA was that it was a cession of Canadian sovereignty to the United States.[162] A cursory glance at any major Canadian newspaper will show that nearly every page will have some allusion to the United States. Any pact with the U.S. must be crafted in such a way to respect that Canadians are conscious of how they interact with the U.S., and they want, above all else, to maintain a Canadian identity.

Substantive Provisions of NAFTA

Popularly known in English as "NAFTA," the North American Free Trade Agreement is an incredibly hopeful treaty. The preamble to the treaty is all-encompassing in its scope:

Calderón ended up winning, it was hardly a unanimous victory, with the candidates each getting about 50% of the vote, and Calderón only winning by a slim margin.

[161] CIA World Factbook, available online at: https://www.cia.gov/library/publications/the-world-factbook/print/ca.html

[162] Paul Martin, *Sovereignty and Food Safety in a NAFTA Context*, 24 CUSLJ 369, 373 (1998).

> The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to: Strengthen the special bonds of friendship and cooperation among their nations;…Reduce distortions to trade;…Establish clear and mutually advantageous rules governing their trade;…[and] Ensure a predictable commercial framework for business planning and investment….[163]

The text speaks to a desire for more than a mere increase in trade. The Preamble begins with "friendship and cooperation," before mentioning trade. This is a logical step, trade thrives on relationships, and before private businesses can engage in trade, it behooves the governments to foster an environment conducive to trade.

It is a credit to the treaty's drafters that they knew that such an environment would necessitate affirmative action, not simply resolutions in the preamble. As a baseline, they sought to avoid difficulties that would arise if too many regulatory entities had control over the terms of the agreement. In an effort to limit the authoritative bodies involved in regulation, the agreement specifically states that any matters directly addressed in the treaty shall preempt state and provincial laws.[164]

The objectives then declared an intention to "eliminate barriers to trade,"[165] and pledged to the creation of, "…effective procedures for the implementation and application of this agreement, for its joint administration and for the resolution of disputes …."[166] Though the elimination of barriers to trade was rightly the ultimate objective, it seems to put the cart before the horse by mentioning barrier-elimination before creating effective procedures for the agreement's joint administration. In 15 years since the signing of NAFTA, the three nations have yet to effectively address the issue of joint administration of the agreement. Though there is the

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[163] NAFTA Preamble.
[164] NAFTA Art. 105 "The parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided, by state and provincial governments."
[165] NAFTA Article 102 (1)(a).
[166] NAFTA Article 102 (1) (e).

NAFTA Secretariat, it acts as more of a consultative liaison and dispute settlement body for businesses than as an administrative body.[167]

In some respects, the objectives of the agreement have been realized. Trade has undoubtedly increased,[168] and through that, the commercial relationships between businesses in all three countries have grown stronger. But problems which were evident from the first days of the agreement remain. Rather than solve them in one fell swoop, they were saved for later negotiations, later moments.

Created concurrent with, and parallel to the Uruguay Round of GATT negotiations, the NAFTA specifically incorporates provisions of the GATT to its terms. Incorporation is good in that it does not create confusing international obligations for the treaty's signatories. However, it is a negative matter in that it leaves unsolved the very same disputed issues that the Uruguay Round could not settle for GATT. Specifically, NAFTA does not adequately address the matter of Technical Barriers to Trade (TBTs).

Technical Barriers to Trade are dealt with in Chapter Nine of NAFTA: Standards-Related Measures. Article 901 brings within its scope, "…standards-related measures…that may, directly or indirectly, affect trade in goods or services between the Parties, and to the measures of the Parties relating to such measures."[169] The Standards-Related Measures (SRMs) dealt with in Chapter Nine of NAFTA include many regulations, including the regulation of food labels.

One might presume that a free trade agreement's chapter on TBTs would begin by setting definite boundaries as to scope, before narrowing itself with regards to particulars. However,

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[167] NAFTA Secretariat Website: http://www.nafta-sec-alena.org/en/view.aspx?x=202 (last visited on 3-27-09).
[168] United States Trade Representative website, available on 2-26-09 at: http://www.ustr.gov/Trade_Agreements/Regional/NAFTA/Section_Index.html
[169] NAFTA Art. 901.

Chapter Nine departs from this plan at the outset by immediately creating a loophole. It replaces Article 105's compulsory federal preemption[170] with language encouraging Parties to "seek" state and provincial adherence to the agreement.[171] This slackening of compulsion is inimitable to the Preamble's stated goal of predictability. Insofar as any Party or sub-division of a Party is able to depart from a common regulatory scheme, there will be less free trade because of timidity among businesses. In the context of labeling requirements, the mere uncertainty of regulatory outcomes and Article 902's intentional allowance for change may be a barrier in itself.

If Article 902 may be seen as an un-exploited loophole to discordant regulations, Article 904: Basic Rights and Obligations, could only be characterized as a well-received and gratefully-accepted invitation.

> Each party may … adopt, maintain or apply any standards-related measure, including any such measure relating to safety, the protection of human, animal or plant life or health, the environment or consumers, and any measure to ensure its enforcement or implementation. Such measures include those to prohibit the importation of a good of another Party . . . .[172]

This article provides the justification by which the Parties have all established and actively maintained their discordant SRMs on labels. As if attempting to emphasize each country's sovereign right to impede trade by creating discordant regulations, the Agreement continues:

> 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 levels of protection *that it considers appropriate* in accordance with Article 907 (2).[173] (emphasis added)

[170] NAFTA Art. 902.1.
[171] NAFTA Art. 902.2.
[172] NAFTA Art. 904 (1).
[173] NAFTA Art. 904 (2). The reference to Art. 907(2) is a reference to the Article which prohibits, among other things, SRMs which "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."

Given the reality of the many interests pulling any nation's regulations in multiple directions, it is – and must have been at the time of drafting – obvious that each country would eventually arrive at different "appropriate" levels of protection.

But the NAFTA, particularly in Chapter Nine, is an exercise in contradictions. In a later section of the very same Article 904 which invites discordant regulations, the Agreement prohibits SRMs "with the effect of creating an unnecessary obstacle to trade between the Parties."[174] The imprecise language in Article 904 promotes conflict. It simultaneously allows each Party to make its own regulations as it "considers appropriate" while mandating that the differences cannot be "unnecessary." It is hard to imagine that the drafters did not know that such terms as "appropriate" and "unnecessary" are highly malleable.

Indeed, pursuit of NAFTA's ultimate objective of unfettered movement in goods suggests that there would be language requiring the use of common international standards. With that in mind, the NAFTA declares: "Each Party shall use, as a basis for its standards-related measures, relevant international standards . . . except where such standards would be an ineffective or inappropriate means to fulfill its legitimate objectives . . . . "[175] It might be noted that the language implies a requirement by saying each Party "*shall*" use international standards as a basis for their own SRMs. However, as with other harmonization-promoting sections of the Agreement, the same Article proceeds to nullify any language which would suggest a compulsion for the Parties to harmonize their regulations:

> Nothing in paragraph 1 shall be construed to prevent a Party, in pursuing its legitimate objectives, from adopting, maintaining, or applying any standards-related measure that results in a higher level of protection than would be achieved if the measure were based on the relevant international standard.[176]

[174] NAFTA Art. 904 (4).
[175] NAFTA Art. 905 (1).
[176] NAFTA Art. 905 (3).

At first glance, this is an unassailable provision. Allowing for a "higher level of protection" in pursuit of legitimate objectives such as health is a good goal. However, as discussed above in the previous part of this paper, the countries do not agree on what constitutes a "higher level of protection." What is both legal and uncontroversial in the United States may be vilified and troublesome in Canada or Mexico.[177] Put differently, one country's "higher level of protection" is considered superfluous or even an inferior protection in another.

In Article 906, the drafters tried to limit the anti-harmonization loopholes they had created in the Chapter's earlier Articles. The Article contains instructions for the Parties to "work jointly to enhance the level of safety and protection [in the countries]."[178] It also commands that, " . . . taking into account international standardization activities, the Parties shall, to the greatest extent practicable, make compatible their respective standards-related measures, so as to facilitate trade in a good or service between the Parties."[179] Finally, it asks that Parties, "seek, through appropriate measures, to promote the compatibility of a specific standard . . . that is maintained in its territory with the standards . . . maintained in the territory of the other Party."[180]

Taken together, these sections convey the sense that the drafters of the Agreement were well aware that it would take collective action and mutual compromise for the SRMs to avoid being unnecessary barriers to trade. Though Article 906 is effective in tone, in practice it seems

[177] An analogous and well-known example of such a situation, which falls outside the scope of this paper, is the U.S.-E.U. dispute concerning genetically modified corn, and hormone-fed meat. In the United States and Canada, such foods were accepted with little discussion, whereas in Europe they have been viewed with a great deal of suspicion. Whereas America's sanitary and phytosanitary regulations were wholly unconcerned with such meat, Europe's were very restrictive.
[178] NAFTA Art. 906 (1).
[179] NAFTA Art. 906 (2).
[180] NAFTA Art. 906 (3).

more aspirational. For instance, with regards to compatibility of different SRMs, once a country has determined that its citizens and consumers will only be protected by nutrition labels with text *X* millimeters high, any text which is not big enough is, by definition, a weaker protection. The regulatory authorities of that country then face a choice: Either (A) they enforce their own standard claiming that it is a higher level of protection and therefore incompatible with the other country's, or (B) accept that their standard is unnecessarily strict and permit for "lesser" protection in the form of smaller lettering.

The first option supports the claim that the existing regulations are both indispensable and perfectly tuned. It allows for no compatibility, no harmonization. The second option is tantamount to abandonment of a country's stricter ("more highly protective) standard in favor of adoption of the least stringent standard among the Parties. What is more, if a country accepts the second option and allows for a less-stringent regulation to be enforced, the acquiescing Party would tacitly admit that, theretofore, they had been violating NAFTA Article 904 (4) (b).[181] The selection of the second option, that which admits guilt and sacrifices a country's own regulation in favor of a foreign standard, seems highly unlikely. Rather than promote cooperation and compatibility, Article 906 seems to reinforce how difficult harmonization will be under the current text of the NAFTA.

Chapter Nine of the NAFTA contains contradictions throughout, being at times productive, counter-productive, and even unrealistic. It makes many overtures to harmonization of the three Parties' regulations. However, in every instance, it subsequently eviscerates any

[181] The text of NAFTA Art. 904 (4) (b) reads, "An unnecessary obstacle to trade shall not be deemed to be created where . . . the measure does not operate to exclude goods of another Party that meet that legitimate objective." They would also be admitting that they had been violating the GATT agreement on TBTs, and thus be subject to WTO trade sanctions.

harmony-forcing provisions. Thu, it appears that in its current form, the NAFTA will not result in harmonized regulations.

VI: POSSIBILITIES FOR HARMONIZATION

Is harmonization even possible? The preceding pages have highlighted policy differences, political obstacles, historical hangovers and sometimes inexplicable ways that the three Parties in NAFTA have found to avoid a truly unencumbered market. Either NAFTA must be renegotiated to make it less available to interpretation, or the countries must amend their regulations in concert (while also interpreting NAFTA identically). Those are both tall orders. However, the harmonization of standards is not a pipe dream.

Possibilities For Harmonization

The most important ingredients for the improved harmonization of regulations would be political will, sound logic, and humility. No measures will be taken towards harmonization without the politicians willing it so. In each country, there are massive incentives for politicians to avoid looking like they support free trade and harmonization of regulations. The recent presidential elections in Mexico[182]and the United States[183]provide an example. Any politician can receive a cheer from the crowd when they tell their audience that "we" will lose out to "them" in the presence of truly free trade. Conversely, expository lectures on the theories of Adam Smith and David Ricardo do not make for scintillating stump speeches.

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[182] *See* note 159, *supra*.

[183] The two front-runners, Hillary Clinton and then-candidate Obama both battled to show that they were more anti-NAFTA than the next. Even Canada, though not as anti-free trade today, once had a similar zeitgeist. In the 1993, Prime Minister Jean Chrétien was carried to power on a promise to curtail and renegotiate NAFTA. Like the Republicans in America, the Conservatives in Canada had been voted out of office after agreeing to NAFTA.

However, as world leaders meet to try to resolve the current economic crisis, the watchword is collective action. The recent re-acknowledgement that a rising tide lifts all ships (and its converse) has forced policy makers to embrace collaboration. People now want results, not rhetoric. The recent public debate over protectionist language in the 2009 American Recovery and Reinvestment Act[184] (more popularly known as the "stimulus bill") provides some hope.

At first, many people sought to over-simplify the debate over free trade and say that America needed protectionism. Indeed, some protectionist language did make its way into the bill.[185] However, the President had to use the bully pulpit to explain to people that protectionism in one country could spark retaliatory measures from other countries, leaving everybody worse off. The result was that Congress inserted language which effectively eviscerated the protectionist provision.[186] In this instance, the political decision to risk political capital and present an explanation of cause-and-effect had a significant impact upon the public's perception and ultimate policy decision.

The second ingredient, sound logic, relates not only to the public debate, but to the regulators themselves. Certain aspects which initially appear intractable may be simpler than anticipated. For instance, language is not an immovable object. If a label is written in the "wrong" language for the location (say, a French/English label in Guadalajara), perhaps the retailer could be required to place a Spanish-language label on the vending display—next to the price. Yes, it would shift the burden onto the vendor, but it might be better-placed there. A vendor could make the translation once, instead of making the producer do it constantly.

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[184] American Recovery and Reinvestment Act of 2009, Pub. L. 111-5.
[185] *Id.* §1605.(a)
[186] *Id.* §1605 (b) (1).

Or, perhaps, sometimes languages can be mutually intelligible if the Latin root is used—though it might take a slight readjustment. If one considers the nutritional facts table, "fat" could be changed to, "lip." an abbreviation for "lipids." That abbreviation could work across all three languages: "lipids," "lipides," (French) and "lípidos" (Spanish). Creative, but not-so-complicated thinking is what is needed.[187]

Other issues might require some common-sense and or compromise. Do consumers in America really have superior information on the trans fat/saturated fat content than Canadians?[188] It strains logic to think that there is a significant population in the U.S. who *must* know the breakdown of trans versus saturated fat in their food (as opposed to knowing the sum like in Canada). Furthermore, would Mexican industry really be put to such a disadvantage if they had to find out the nutritional values of all of their food? Claims that they would be crippled would have to overcome the fact that in America and Canada, producers didn't go bankrupt en masse, and food continued to be sold even after people knew what their food's nutritive value was. The list of possible but not radical compromises could take up many volumes of text. The key, though, is that regulatory do not become wedded to their previous policies, and rather make the decision to find common ground.

And finally, the third ingredient of humility is both necessary and achievable. Disease claims are limited in America, more limited in Canada, and banned in Mexico. These regulations have all been taken by the regulatory agencies, after their respective legislatures

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[187] There are other ways that language can be approached. For instance, the ingredient label on most foods is unintelligible to the average consumer in any language: "Maltodextrin," has no more meaning to an English speaker than it does to a Spanish speaker. Perhaps establishing a common list of ingredients based on Latin or some "base language"—almost creating a new "language"—would be an adjustment, but it would have little effect upon the practical knowledge of the common consumer.

[188] Recall that in Canada, the two are presented on one line as a sum total, and in America they are presented on two lines as separate figures. *See* notes 127 and 136, *supra*.

sanctioned them subject to scientific approval. It would seem that the problem in this instance is that American scientists are very confident in their abilities, scientists in Canada think the Americans are too cavalier, and scientists in Mexico think they are all too crazy. Either that, or regulators in one country think the science in another country is less than authoritative.

Perhaps an international council of eminent scientists—all of whom respecting that the scientific process is an international language unto itself—could be formed that would deliver authoritative pronouncements in one voice.[189] Scientific advancement has long depended upon spirited and intelligent debate among colleagues. There seems no reason for governments to turn away from the possible benefits of scientific debate. If the scientists could come to a collective agreement, harmonization would then fall to the regulators to decide whether they wanted to accept or reject the scientific justifications for a policy. This final point—agreement among scientists—would be crucial for the purpose of overcoming countries' current use of NAFTA Article 905 (which demands that SRMs be based upon scientific evidence) to avoid harmonization of regulation.

The possibilities for harmonization require less of a miracle than an intelligent and methodical approach to the problem. If leaders can help educate public, the public can help direct the politicians, and politicians can provide a space for regulators to make scientific and logic-based decisions, there are real opportunities ahead.

The European Union: A Blueprint

Europe is an example of the possible benefits. Those nations have longer historical obstacles, and more participating parties, yet they have achieved a remarkably open market.

[189] In the United States, the National Academy of Sciences performs such an advisory role. *See*: http://www.nationalacademies.org/about/

From the consolidation of the modern European states in the 1500s to 1945, Europe was never more than a few years away from a war between major powers. Britain versus Spain, France versus Germany (Prussia), Italy versus Austria, the permutations of adversaries are as interchangeable as Lego blocks. Nationalism in Europe often takes on local flavor un-known in the New World[190] and the idea of a unified continent in 1945 would have been laughable. Yet, with the 1999 introduction of the Euro, the European Union (EU), achieved what can only be called the greatest victory of free markets since the United States' constitutional convention decided to include the commerce clause.

But the EU as we know it did not spring from whole cloth in 1999, or 2002 when the Euro currency became "real" money. Rather, the EU was born of nearly 50 years of negotiations and wrangling. It began with the Treaties of Rome and the 1957 establishment of the European Economic Community.[191] What began as six countries trading steel and coal, grew steadily to other industries and nations.

Countries which had been at war less than a generation earlier were now working together for their common economic benefit. While everyone (both in the 1950s and 2000s) would admit that Europeans tend to harbor intra-continental stereotypes and even mistrust, they also realize that cooperation is the key to prosperity. A 1998 pamphlet published by the European Commission's General Publications sets forth the mindset necessary to transcend the nationalistic tendencies which impede free trade:

> All [European] governments, regardless of political complexion, now recognise [sic] that the era of absolute national sovereignty is gone. Only by joining forces and working towards a "destiny

[190] This theory can be tested by calling a Catalonian "Spanish," a Neapolitan, "Italian," or calling some Greek-Macedonians merely “Greek.”

[191] The EEC itself was a continuance of the work begun in 1951 by the Treaty of Paris, which established the European Coal and Steel Community.

> henceforward shared," to quote the ECSC Treaty, can Europe's old nations continue to enjoy economic and social progress and maintain their influence in the world.[192]

Perhaps an end to "absolute national sovereignty" is unlikely in the U.S., Canada, and Mexico. However, the three nations do not need to replicate the entirety of the EU's model in order to harmonize regulations.[193] The harmonization of regulatory standards would be a major step forward in a long process. Indeed, Europe needed nearly 50 years of negotiation to arrive at a basically unified market, so North America should not be expected to accomplish the same feat after only 15 years.

North America now finds itself in a stage roughly analogous to what Europe faced in the late Twentieth Century.[194] The establishment of a free trade area comes as a process, and not as a single seismic event. As free-traders' attention has shifted from tariffs to regulatory hurdles, the elimination of technical barriers to trade is but another step in the process. If that process results in some loss of "sovereignty" over regulation of food labels, there would still be nearly-infinite issues left for countries to assert sovereignty.

VII: CONCLUSION

By entering into the NAFTA, the governments of the United States, Mexico and Canada made clear their desire to achieve a free trade area that would stretch from the Yucatán Peninsula to the Arctic Ocean. However lofty those ambitions, they are not impossible. Free trade can occur if the countries make the commitment to address each barrier to trade in turn. The first

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[192] Pascal Fontaine, *Europe in Ten Points*, (1998). Available online at: http://ec.europa.eu/publications/booklets/eu_glance/12/txt_en.htm (last visited on 3-28-09).
[193] For instance, the EU allows for the free movement of nationals between the member states and has a common currency. These elements might aid in lowering transaction costs, but they are not the only elements of free trade.
[194] Taylor W. French, *Free Trade and Illegal Drugs: Will NAFTA Transform the United States into the Netherlands?*, 38 VNJTL 501, 538 (2005).

hurdles—tariffs—were effectively eliminated by the treaty as applied. Now, the three countries find themselves at the next hurdle—the harmonization of regulations which create technical barriers to trade.

Food labeling is but a single example of the many barriers that can exist. As the regulations show, neither NAFTA nor similar thinking between legislatures on broad principles are enough to force detailed uniformity among regulatory bodies. Differences can be at times tiny (the difference in rounding of fat content between American and Canadian labels), and at times large (the blanket Mexican ban on disease claims versus the American and Canadian methods of approval). That uniformity will only come through explicit commands from the legislatures.

Such commands will require bravery on the part of legislatures. In over 200 years of sharing this continent, the three Parties to NAFTA have crafted dynamics which may stand in the way of dispassionate policy making. The pride and prejudices of the respective populations can be enough to frustrate any efforts at harmonization. Fears of cession of sovereignty, loss of cultural identity, and diminution of safety protections are all valid concerns which must be addressed.

Despite seemingly high odds, greater cooperation is possible. Europe had longer and sharper divisions to overcome before reaching its current level of harmonization. If Europe can transcend centuries of conflict North American can overcome its own grudges.

The harmonization of food labeling standards in North America is an achievable goal, and policy makers in Mexico, Canada and the United States would benefit both consumers and industry to take up the mantle.