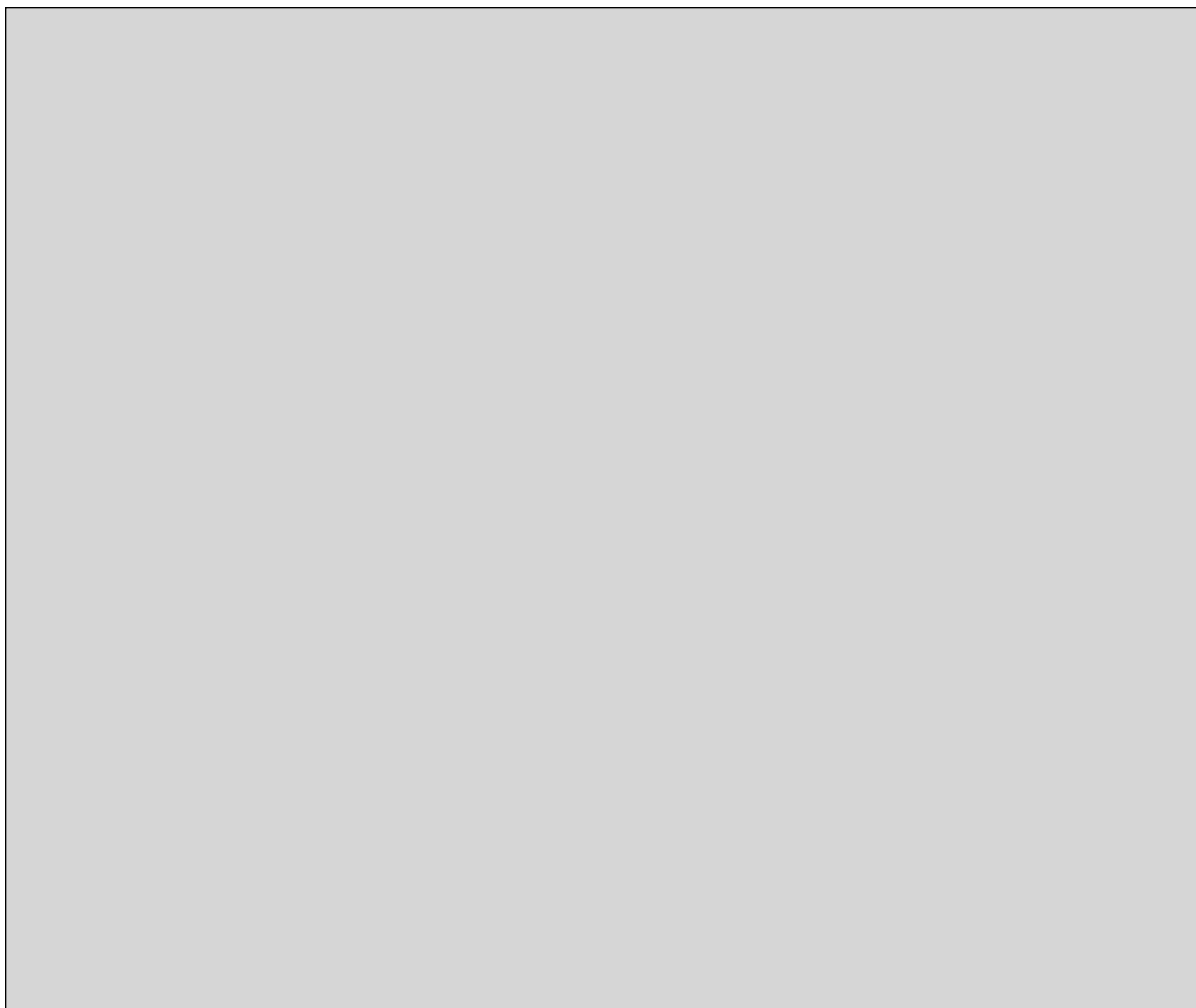


NWMO BACKGROUND PAPERS**7. INSTITUTIONS AND GOVERNANCE****7-4 LEGAL AND ADMINISTRATIVE PROVISIONS FOR RADIOACTIVE WASTE
MANAGEMENT WITHIN THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)****EXECUTIVE SUMMARY****Aaron Cosbey**

Executive Summary

This paper surveys Canada's rights and obligations under the North American Free Trade Agreement (NAFTA) in an effort to better understand what they imply for transboundary movement of radioactive waste and, by implication, to the choices Canada will have to make in selecting or approving a management approach for such waste. It was commissioned by the Nuclear Waste Management Organization (NWMO) as part of a broad-based effort to inform the public and other stakeholders about the current status of Canada's legal and administrative arrangements for radioactive waste.

It begins by analyzing those elements of NAFTA law applicable to the outright ban of import or export of radioactive waste, and then turns to the law applicable to the broader exercise of establishing a regulatory regime. It then briefly looks ahead to the future of trade law at the hemispheric level as embodied in the proposed Free Trade Area of the Americas, and projects what this might mean to the conclusions reached in the preceding analysis.

The first question to address is whether NAFTA in fact covers trade in radioactive waste and, if so, what specific provisions might be relevant. Radioactive waste is treated as a good under NAFTA law, and is thus covered under Chapter three (National Treatment and Market Access for Goods). Some types of radioactive waste may also be treated as a specialized category of goods: energy and basic petrochemical goods, meaning parts of Chapter six may be relevant.

A second question is what NAFTA says about import and export bans. Such bans are prohibited under articles 309 and 603(1), which basically incorporate GATT law on import and export restrictions. This is not the end of the story, however, since these articles must be read together with other NAFTA law and other international agreements.

The key elements of NAFTA in this context are the general exceptions (Article 2101) and the national security exceptions (Articles 2102 and 607). If they are found to apply, these exceptions are able to "save" a measure—such as an import or export ban—that would otherwise be illegal under NAFTA rules. Under certain conditions, the general exception for the protection of human, animal or plant life or health (the environmental exception) might apply to import or export bans on radioactive waste. The ban would need to be aimed at achieving a clearly defined environmental objective, and would need to be defensible as the least trade-restrictive reasonably available option to achieve that objective. The measure should, in addition, not be implemented so as to constitute

protectionism: promoting Canadian economic interests at the expense of those of the NAFTA partners.

There is also some scope for the successful use of the national security exceptions to justify an import or export ban. The relevant exceptions relate to non-proliferation, which is also addressed by the *Convention on the Physical Protection of Nuclear Material*, to which both Canada and the US are parties but Mexico is not. The security exceptions for energy and basic petrochemical goods are more restrictive than those for goods in general, demanding that any measure taken be “necessary” – a term that means “least-trade-restrictive” in WTO case law. But any dispute settlement body would probably be inclined to grant governments the use of this type of exception unless the measure in question was blatantly obvious protectionism.

Another piece of international law might be relevant to import or export bans: the *Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management*, to which Canada and the US are parties. The Joint Convention asserts that any state has the right to ban import of spent fuel and nuclear waste, and that it is preferable to manage such material in the country where it was produced. The Convention also references standards, in terms of administrative, regulatory and technical capacity, for disposal and storage, and obliges exporters to not authorize shipments to countries who do not meet the standards. Neither should they authorize imports if they themselves do not meet the standards. As the Convention was signed after the NAFTA, and as it is more specifically related to radioactive waste management, it would prevail in the event of any inconsistency between the agreements, though every attempt would be made to read the two agreements as mutually supportive.

Export and import bans are only one regulatory instrument for managing the safe storage and disposal of radioactive materials. With or without the existence of such bans, Canada will need to develop a broader regulatory management framework dealing with, among other things, the issues raised by transboundary movement of such materials.

Inasmuch as that framework will involve standards-related restrictions on the transboundary movement of radioactive waste, the provisions of NAFTA Chapter nine (Standards-Related Measures) will apply, as may parts of Chapter six. By “standards,” NAFTA means any mandatory or voluntary criteria to be met in the handling of radioactive waste, such as transport safety standards, standards for safe disposal, etc. The aim of NAFTA’s Chapter nine is to prevent such standards from being used to unfairly protect Canadian economic interests at the expense of our NAFTA partners. To that end, the basic rights and obligations in Chapter nine demand that any standards be used to achieve an

explicit legitimate aim, such as environmental protection. They specify that if a risk assessment is carried out (and it probably should be), that the results be reflected in the final standard, and that the standard-related measure not result in protectionism – the favouring of Canadian goods or services that are in like circumstances with those of our NAFTA partners.

Chapter nine also obliges Canada to use international standards, where they exist, as a basis for any standards-related measures. Canada has scope under NAFTA law to exceed international standards where it can justify doing so by the need to fulfill legitimate objectives. But any such higher standards may have to be defended as necessary and non-discriminatory, while standards based on international standards are automatically presumed to be so. While Canada and the other NAFTA Parties are signatories to a number of treaties that lay down standards for handling of radioactive waste, these would not be considered international standards within the meaning of Article 905.

Though NWMO is not currently set up as a monopoly provider of radioactive waste management services, such a scenario might eventually be considered as an option, and so it is worth noting what that would imply from a NAFTA law perspective. The relevant provisions are found in Article 1502 (Monopolies and State Enterprises). Among the results would be that NWMO would be obliged to provide non-discriminatory treatment to Mexican or US investors wanting to buy its services – for example, importers of radioactive waste for the purposes of disposal in Canada. Such a scenario is unlikely given the current industry structure in the US and Mexico, but the legal obligation is worth noting.

NAFTA's Chapter eleven, on investor protections, might also have implications for the final shape of Canada's regulatory approach to radioactive waste management. Based on NAFTA case law, two scenarios (both rather unlikely) are worth noting, assuming that NWMO is established not as a monopoly or state enterprise, but rather as a private firm. In the first, Canada would be forced to grant equal treatment to US or Mexican firms that decided to invest in Canada as competitors to NWMO, offering their services to Canadian producers of radioactive waste. This might even involve granting equal funding. In the second, Canada would be forced to allow the export of radioactive waste by a US or Mexican investor that set up a subsidiary in Canada in order to export to its parent firm for disposal or processing.

As we consider NAFTA's implications for a regulatory structure for the management of radioactive waste, it is also worth looking ahead to the possible developments under the Free Trade Area of the Americas (FTAA). This agreement, covering all the states of the Western Hemisphere save Cuba, is under negotiation and scheduled to wrap up by 2005 (though many now

question the realism of this deadline). Though predictions at this point are difficult, in general the issues raised by the prospective FTAA are not much different than those raised by NAFTA. Of course the probability of unforeseen or unlikely trade law challenges will increase with the number of parties (34 in the FTAA). One point of difference might be a scenario under which AECL's customers for CANDU reactors in the hemisphere (currently there is only one) requested that Canada take back the resulting radioactive waste for disposal in Canada.

In the final analysis, none of the legal issues noted above are necessarily problematic for the achievement of Canada's legitimate objectives in managing radioactive waste. But in order to construct a regulatory framework that will be robust to trade law challenges and unexpected developments, it is important to understand what steps need to be taken to respect Canada's rights and obligations under NAFTA.