

NAFTA DEPLOYED:  
OPENING THE AMERICAN BORDER TO CANADIAN BEEF  
SETTING THE AMERICANS STRAIGHT ON CUBAN SUGAR  
*(for those that would rather fight than duck...)*

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CANADIAN BEEF - TIME FOR CHAPTER ELEVEN

Canada has a legitimate NAFTA claim against the US government for the losses (\$11 million a day) sustained by the Canadian beef industry and its affiliates for each and every day the US border remained closed after internationally-recognized science cleared Canada's beef herd from any whiff of suspicion. The Americans are doing this because it is easier to bluster Canada than to take action that will be prejudicial to their domestic and export markets (allowing Canadian beef to compete with American beef).

If the US is in such a conflict of interest on this issue that they cannot act, then Canada should do it for them via Chapter 11. Immediately. Here are the sections:

FTA/NAFTA 704 Market Access for Meat *Neither Party shall introduce, maintain or seek any quantitative import restriction or any other measure having equivalent effect on meat goods originating in the territory of the other Party except as otherwise provided in this agreement. (FTA articles 701, 702, 704, 705, 706, 707, 710 and 711 of FTA were ported into NAFTA as Annex 702.1)*

NAFTA Article 712 Sanitary and Phytosanitary Measures, Basic Rights and Obligations.

*Scientific Principles: 3. Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains or applies is (a) based on scientific principles... (b) not maintained where there is no longer a scientific basis for it and (c) based on a risk assessment, as appropriate to the circumstances.*

*Unnecessary Obstacles 5. Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains or applies is applied only to the extent necessary to achieve its appropriate level of protection, taking into account technical and economic feasibility.*

*Disguised Restrictions 6. No Party may adopt, maintain or apply any sanitary or phytosanitary measure with a view to, or with the effect of, creating a disguised restriction on trade between the Parties.*

NAFTA Article 713: International Standards and Standardizing Organizations

*1. Without reducing the level of protection of human, animal or plant life or health, each Party shall use, as a basis for its sanitary and phytosanitary measures, relevant international standards, guidelines or recommendations with the objective, among others, of making its sanitary and phytosanitary measures equivalent or, where appropriate, identical to those of the other Parties.*

*2. A Party's sanitary or phytosanitary measure that conforms to a relevant international standard, guideline or recommendation shall be presumed to be consistent with Article 712. A measure that results in a level of sanitary or phytosanitary protection different from that which would be achieved by a measure based on relevant international standard, guideline or recommendation shall not for that reason alone be presumed to be inconsistent with this Section.*

Once the "internationally recognized science documented the safety of Canada's herds there was no remaining legitimate reason for the border to remain closed.

There is nothing in the FTA or the NAFTA that would permit the Americans to keep the border closed to protect American export markets in Japan.

## CUBAN SUGAR - NAFTA APPLIED TO AMERICAN INTERFERENCE IN CANADA-CUBA TRADE

With respect to Canada's ability to defend their use of Cuban sugar in products imported to the US (treat as sovereign their ability to buy from whomever they wish), the reader is referred to the following. (Only the FTA reference is given, as the wording in each case is virtually identical.)

**FTA/NAFTA Article 102: Objectives:** *The objectives of this Agreement... are to (a) eliminate barriers to trade in [NAFTA ONLY: and facilitate the cross-border movement of], goods and services between the territories of the Parties.*

**NAFTA Article 401 Originating Goods:** *...a good shall originate in the territory of a Party where... (b) each of the non-originating materials used in the production of the good undergoes an applicable change in tariff classification... as a result of production occurring entirely in the territory of one or more of the parties.* **(FTA Article 301.2)**

**NAFTA Article 309.3 Import and Export Restrictions:**

*In the event that a Party adopts or maintains a prohibition or restriction on the importation from... a non-Party of a good, nothing in this Agreement shall be construed to prevent the Party from a) limiting or prohibiting the importation from the territory of the other Party of such good of that non-Party...(FTA Article 407.3)*

**NAFTA Article 309.4 Import and Export Restrictions:** *In the event that a Party adopts or maintains a prohibition or restriction on the importation of a good from a non-Party, the parties, on request of any Party, shall consult with a view to avoiding undue interference with or distortion of pricing, marketing and distribution arrangements in another Party. (FTA Article 407.4)*

**FTA/NAFTA Article 707: Market Access for Sugar-Containing Products:** *The United States of America shall not introduce or maintain any quantitative import restriction or import fee on any good originating in Canada containing ten percent or less sugar by dry weight for purposes of restricting the sugar content of the good.* **FTAA**

Basically, a FTA/NAFTA Defense against US interference with Canada-Cuba trade (e.g. raw cane sugar imports) would, I suspect, be based in the following arguments:

1. A product produced in Canada is considered a NAFTA Good originating in Canada regardless of where the sugar used in its production came from.

Cuban sugar imported into Canada never becomes a Good under NAFTA because Canada does not resell it in its raw form to the US but rather refines and sells it - blended with sugar imported from other countries - to our domestic food products manufacturing sector, which combines it with other ingredients and transforms it into a different product with a different tariff designation. (NAFTA 401 and FTA 301.2)

2. Consequently, import prohibitions potentially allowable under NAFTA 309.3/FTA 407.3 do not apply.
3. The manufacturer of a NAFTA Good has a right to rely on NAFTA in matters of trade disputes between the Parties.
4. The US cannot enact legislation against Cuban sugar that extends to and results in trade penalties (causes buyers to reject) NAFTA goods originating Canada that happen to contain Cuban sugar.

Cuban sugar is not the NAFTA Good, the manufactured product is, and as such, has guaranteed rights of access and protection from arbitrary barriers to trade under both FTA and NAFTA.

Further, US foreign policy that causes Canada to abandon a major supplier constitutes *undue interference with or distortion of pricing, marketing and distribution arrangements in Canada*. (NAFTA 309.4/FTA 407.4). The Canadian industry chose Cuban sugar for market reasons. Cuba's 50% market share prior to 1993 can only be interpreted to have occurred because Cuba had a competitive edge in

price or quality. 1992 was not an isolated year; Cuba's share of Canadian cane sugar import market was trending upwards, from 32.9% in 1990, 37.6% in 1991 to 50.6% in 1992.

5. If the Canadian NAFTA good contains more than 10% sugar by weight, the US may levy quantitative restrictions or import fees across the board on all such products with similar sugar content but not create restrictions on trade for Cuban sugar only. (FTA/NAFTA 707.)

Of course, when the ox being gored is someone else's (Cuba's farmers), the incentive for one country (Canada) to launch a NAFTA trade challenge against a major trading partner (the U.S.) is minimal. Particularly for those who would rather duck than fight.

But perhaps its time Canada took the lead on this one. Other nations would quickly follow. It's not enough to pass a law saying Canadian companies are not allowed to comply with Helms Burton. This simply shifts the onus on the private sector, who would legitimately rather duck than fight because the former is the only rational business case.

This is why we have a federal government - to take on the big ones.