

Public Citizen Pocket Trade Lawyer

The Alphabet Soup of Globalization

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Globalization is a defining phenomenon of our time. The current model, corporate economic globalization, is one version of globalization which is being implemented by a new array of international commercial agreements. While these pacts are called “trade” agreements, today’s international commercial agreements no longer focus solely on traditional trade matters, such as tariffs and quotas. Instead, the main mechanisms of globalization, such as the World Trade Organization (WTO) and the North American Free Trade Agreement (NAFTA) focus on regulatory policy. These pacts prioritize commerce over other goals and values, in part by setting constraints on what environmental, food or product safety, social justice and other policies our national, state and local governments may implement.

Yet, while globalization mechanisms like the WTO, NAFTA and a whole alphabet soup of others have deep and direct impacts on many facets of the daily lives of people everywhere, the meaning and implications of their terms are often unintelligible. First, the agreements are written in a technical trade jargon which we have dubbed “GATTese,” in which words with a clear meaning in common usage have entirely different meanings or implications. In some cases, one or two words are shorthand for entire twenty-year bodies of legal jurisprudence that simply are not evident on the face of the term.

Second, words used in trade and investment agreements have extremely precise legal meanings which can turn on the slight difference in a verb’s tense. Since the text of these agreements are often only available in English (or perhaps also French), non-native speakers are put at a disadvantage from the start. Third, there are certain basics of legal interpretation that most non-lawyers simply do not know which can mask completely the meaning of trade agreement language.

The actual provisions of some of the key mechanisms of globalization -- such as the WTO and NAFTA -- are so drastic that simply being able to understand what they mean for our environmental, food safety, social justice and other laws and policies is one of critics’ strongest arguments. Meanwhile, innocent errors in interpretation are often used by proponents of corporate-managed trade to undermine the credibility of legitimate criticisms. This guide is intended to help people go to the legal sources with an understanding of some of the most essential specialized terms, language and legal quirks of globalization’s instruments. Its goal is to empower the maximum number of people to be able to make their own informed decisions about the often intentionally murky provisions hidden in policies and agreements promoting corporate globalization.

I. Globalization Mechanisms: The Agreements

AGOA: The so-called *African Growth and Opportunity Act* would extend NAFTA-like trade terms -- but with additional International Monetary Fund (IMF) conditionalities -- to the 42 sub-Saharan African nations. Pushed by a coalition of U.S.-based oil and other multinational corporations, AGOA is opposed by NGOs in Africa and the U.S. because it undermines African interests in sovereign, equitable development in order to promote U.S. corporate control of African economics and natural resources.

APEC: The *Asian Pacific Economic Cooperation* first met in 1993 to negotiate a NAFTA-style trade and investment agreement binding eighteen countries, including the U.S., China, Monaco, Malaysia, Indonesia, Thailand, Korea and Australia. After initial commitment to sign a treaty in 2001, binding agreements have proven elusive, particularly after the Asian financial crisis, which proved most devastating to the countries that had been following the NAFTA-APEC model.

CBI NAFTA expansion: The *Caribbean Basin Initiative* is more properly called “CBI NAFTA parity.” This one-way expansion of NAFTA provides special access to the US market for textile, apparel and other goods made in the 26-country CBI region, which includes Central American countries from Guatemala to Venezuela and Caribbean island nations, including Haiti but not Cuba. Then-President Reagan created the trade zone as a perk for nations which sided with the U.S. in Cold War politics and demonstrated commitment to “free market” principles. Because NAFTA gave Mexico even more preferential access to the U.S. market, U.S. clothing manufacturers who have relocated to Haiti and Guatemala to avoid unions and pay rock-bottom wages argue that now they are disadvantaged in their access to the U.S. market relative to Mexican-produced goods.

CUSTA: The 1988 *Canada-U.S. Free Trade Agreement* was the model for NAFTA. It was fought vigorously by Canadian citizens’ groups as a massive instrument of environmental deregulation, downward pressure on wages and labor standards, and weakening of social programs.

FTAA: The *Free Trade Area of the Americas* was launched at the “Miami Summit” in 1995 to expand NAFTA to cover all of the western hemisphere. While some countries seek to negotiate FTAA terms rather than just accede to NAFTA, countries now set 2005 as the date by which FTAA will be finished. Serious negotiations are occurring now.

GATS: The WTO's *General Agreement on Trade in Services* is one of eighteen agreements implemented by the WTO. It calls for continuing negotiations on deregulating service sectors, including patient care, education, data management, banking and insurance. GATS rules are “bottom-up,” meaning that each country decides what sectors it will expose to GATS requirements. However, there are two “top-down” GATS sub-agreements on financial services and telecommunications which apply to all WTO member nations. These parts are often called

“backdoor MAIs (Multilateral Agreements on Investment)” because they create a right for foreign investors

to enter any nation's service sector.

GATT: The *General Agreement on Tariffs and Trade*, signed in 1947, is one of the three Bretton Woods organizations set up after World War II, along with the IMF and the World Bank. For almost fifty years, GATT focused on tariff and quota cuts through "rounds" of negotiations. The Uruguay Round, completed in 1995, transformed the GATT system by establishing a binding enforcement body, the World Trade Organization. Now GATT has become one of the eighteen agreements enforced by the WTO.

GSP: *Generalized System of Preferences* refers to special preferential trade terms given to developing countries. Through GSP programs, the U.S. and European Union (EU) provide preferential tariffs for the poorest countries.

HOPE: The *Human Rights, Opportunity, Partnership and Empowerment for Africa Act* was introduced as a progressive alternative to the AGOA by Rep. Jesse Jackson, Jr. (D-IL) and Sen. Russ Feingold (D-WI). HOPE contains expansive access to the U.S. market, but also includes labor, environmental, and human rights and other provisions to ensure that the benefits of trade between the regions would be enjoyed by average citizens in both places, rather than by transnational corporate interests. The bill is supported by a broad coalition of African and U.S. NGOs and leaders, and has 100 House cosponsors.

IMF: The *International Monetary Fund's* original Bretton Woods-given role was to help nations with short-term cash crunches relating to trade financing. In recent decades, the IMF has morphed into a body providing long-term loans to developing countries on the condition that these countries reorganize their laws and economies to prioritize servicing debt, for instance, by cutting government spending and liberalizing trade and investment rules.

Lome/ACP: The *Lome Convention* is a treaty between the EU and former European colonies in *Africa, the Caribbean and the Pacific islands (ACP)*. Lome provides a variety of trade benefits that go beyond the GSP program, including setting aside small portions of the EU market for certain ACP goods, such as bananas.

Maastricht Treaty: This 1992 treaty transformed the European Community into the EU. Approval of this treaty was controversial in many nations; Denmark voted no and remains outside the EU because the treaty required "harmonized" environmental and other regulatory terms.

MAI: The *Multilateral Agreement on Investment* aimed to set strict global rules limiting governments' rights and abilities to regulate currency speculation and set public interest policies regarding investment in land, factories, service sectors, stocks and more. This proposal would have expanded the few NAFTA provisions on investment, including a new right not included in the WTO agreements: the ability for corporations to sue governments for cash damages over any regulatory action affecting profits. It was

negotiated in secret for two years at the OECD, a club of 29 of the world's richest countries, pushed by transnational corporations and major business lobbies worldwide, and ultimately killed after public exposure via an international NGO campaign. While the MAI itself was stopped, its agenda has been renewed in a variety of fora. (See GATS.)

NAFTA: The *North American Free Trade Agreement* was a radical experiment in rapid deregulation of trade and investment among the U.S., Mexico and Canada. Effective since 1995, the deal is seen as the symbol of the failed corporate globalization model as it resulted in lowered wages all around, worsening health and working conditions in Mexico, and downward harmonization (or decline) in environmental and labor standards across borders.

OECD: The *Organization for Economic Cooperation and Development* describes itself as “an intergovernmental organization comprising 29 advanced economies from Europe, North America, and the Pacific Region.” Until the MAI talks, which would have resulted in a binding treaty, the OECD served as a think tank for rich countries and a place for them to plan their WTO strategies.

SPS: Both the WTO and NAFTA have *Sanitary and Phytosanitary Standards* agreements which set constraints on government policies relating to food safety (bacterial contaminants, pesticides, inspection, labeling) and animal and plant health (imported pests, diseases). SPS rules undercut countries’ use of the “Precautionary Principle,” which calls for policies to err on the side of health and safety when there is not yet scientific certainty about potential threats to human health and the environment. Instead, SPS rules err on the side of protecting trade flows at all costs.

TBT: Both the WTO and NAFTA have *Technical Barriers to Trade* agreements which require that product standards, including environmental, worker, and consumer health and safety rules, be the least trade-restrictive version. They must also be based on international standards, including some named standards set by industry groups without any public participation.

TEP: The *TransAtlantic Economic Partnership* is the name given to US-EU commercial negotiations launched in late 1998 with the goals of standards deregulation and trade liberalization. The U.S. and EU initiated a 1995 Trans-Atlantic Dialogue which included an array of issues such as health, education and security. A business coalition succeeded in having the trade agenda prioritized above all others.

TRIMs: The WTO’s *Trade Related Investment Measures* agreement establishes investment rules. TRIMs covers performance requirements -- government policies regulating investment -- but does not contain the extensive new investor rights which exist in NAFTA and are proposed for global application through the MAI.

TRIPs: Both the WTO and NAFTA have *Trade Related Intellectual Property Rights* agreements

which set enforceable rules on patents, copyrights and trademarks. The pharmaceutical industry exercised heavy influence on NAFTA and WTO negotiations. As a result, the final pacts require countries to adopt US-style intellectual property laws, such as those granting monopoly sales rights to individual patent holders for extended time periods, and apply them to seeds, medicines and other sectors traditionally excluded from such constraints.

WTO: The *World Trade Organization* was established during the GATT Uruguay Round negotiations in 1995. The WTO is the enforcement agency for the 18 underlying agreements which shape our current global, corporate-managed trade system. The WTO system, rules and procedures are undemocratic and non-transparent. Over its five years in existence, the WTO has ruled against every health, safety, worker, human rights and environment law it has been asked to review. National policies and laws found to violate WTO rules must be eliminated or changed, or the violating country faces trade sanctions.

II. Concepts of Globalization

Equivalence: Under this concept, significantly different, and often lower, standards from other countries can be declared equivalent to a country's domestic standards. NAFTA and the WTO provide for *equivalence* determinations based on subjective comparisons without clear procedural guidelines or enumeration of factors to consider. Once countries declare each other's standards *equivalent*, they must be treated as though they were domestic standards to allow for the free passage of goods. (*See "harmonization."*)

FDI: *Foreign direct investment* means transfer of foreign funds to purchase service providers or to open a new factory.

Harmonization: Harmonization is the name given to the effort by industry to replace the variety of product standards and other regulatory policies adopted by nations in favor of uniform global standards. The harmonization effort gained a significant boost under NAFTA and the WTO. These pacts require or encourage national governments to harmonize standards or accept different, foreign standards as "equivalent" on issues as diverse as auto, food and worker safety, pharmaceutical testing standards and informational labeling of products.

Investor-to-state dispute resolution: This arrangement provides a new right for corporations and investors to overcome sovereign immunity protections. This allows them to sue governments before trade and investment tribunals outside a country's domestic court system for cash compensation for any government action undermining an investment's value. The *investor-to-state provisions* of NAFTA are so broad that they operate as a regulatory takings mechanism when non-discriminatory environmental laws come under attack. Most recently, a Canadian gas company, Metranex, sued the U.S. under NAFTA for \$970 million because the state of California passed a law phasing out the use of MTBE, a gasoline additive,

because of environmental and public health concerns.

LDCs: The *least developed countries* are the 47 poorest nations in the world, often disproportionately experiencing the negative effects of corporate globalization.

MFN: *Most favored nation* status means the best packages of tariff and other trade terms one country offers to others. Under MFN, a country commits to offering all of its MFN trade partners the same preferential treatment. MFN is a core NAFTA and WTO provision. Some U.S. trade partners get MFN on an annual basis, and others have it permanently. The corporate trade lobby changed the US statute on this question to refer to MFN as “normal trade relations” (NTR).

National treatment: The *national treatment* concept requires countries to treat domestic and foreign goods the same. This is also sometimes called “non-discriminatory” treatment.

Non-tariff barrier: This term is applied to any law or policy that is not a tariff but affects trade. For instance, a law that prohibits import of food containing carcinogenic pesticide residues could be considered a *non-tariff barrier* to trade, as it restricts trade in food. The WTO sets very narrow rules for when such constraints are permitted, even if they exist to protect citizens and are applied equally to domestic goods and imports.

PMFN: *Permanent most favored nation* status locks in MFN benefits to a country on a permanent basis. Once PMFN has been granted, Congress ceases annual reviews of a country’s human and worker rights, environmental protection, religious freedom and democracy records and gives unconditional access to the US market.

Precautionary Principle: This principle calls for action to avoid uncertain and possibly irreversible harm by requiring industry to prove a product’s long-term safety before it is approved for the market. The WTO subverts this by placing the burden of proof on governments to show scientifically that a risk exists prior to taking action, and exposes laws based on precaution to WTO attack.

III. Legal Tricks of the Trade

A. Preambular Language: Preambular language in trade and investment agreements is not legally binding. It does not create any obligations or privileges that are enforceable through dispute resolution. The only legal effect of such language is for use in disputes to guide interpretation of binding clauses. Pro-human rights, development, employment, health or environment language is often contained in the preamble of trade and investment agreements. This is a way to include the

language that citizens demand without creating binding obligations on such issues as labor rights or

environmental protection.

B. "And" versus "Or": How sentences or phrases are connected often determines their meaning. When "and" is used, it connotes that all of the clauses or provisions connected must be satisfied. Thus, the NAFTA investor-to-state expropriation language says that a country may only take an action if it is for a public purpose *and* on a non-discriminatory basis *and* done according to due process of law *and* compensated (NAFTA Article 1110). The use of "and" means that each and every one of these requirements must be met. The term "or" means that any one of the clauses or requirements must be satisfied. Thus, if the NAFTA expropriation clause were connected by "or," it would allow countries to take such action if any of the four conditions were present. Indeed, many countries' domestic laws generally forbidding expropriation specifically allow such government actions when taken in the public interest and with due process. Such laws, including U.S. laws, do not require compensation for such expropriation.

C. Latest in Time: A key rule of treaty legal interpretation is that "later in time rules the line." That means that provisions in the most recent treaty trump those of past existing treaties unless a specific measure in the later treaty provides otherwise. For instance, NAFTA contains a provision declaring that some aspects of three major environmental treaties which precede NAFTA should be given precedence to the extent they are conflicted by NAFTA terms. The WTO does not contain even this limited "hold harmless" clause. Thus, any provision of a WTO agreement or ruling that conflicts with even the most major multilateral environmental agreement (MEA) is overruled in priority by WTO requirements. This later-in-time rule is why environmental NGOs have called for a broad "hold harmless clause" for all MEAs and their domestic enforcement. Without such a safeguard, the WTO trumps MEA commitments assumed earlier.

D. "Hold harmless" or "savings" clauses: A legal construct used in treaties is called a "savings" or "hold harmless clause." This language means that certain named existing treaties are not to be affected by otherwise conflicting language in a later treaty. The model language in this regard is usually: "To the extent of conflict, X treaty's provisions shall be given precedence over the terms of Y treaty."

E. Brackets versus parentheses: When reading *proposed* agreement text (for instance, in reviewing the final draft of the Seattle Ministerial declaration), one must look carefully to see if language is set off by square brackets "[]" or is in parenthesis "()". Square brackets mean that the language is only proposed, and has not been agreed. Parenthesis, on the other hand, are generally used for clarification or simply punctuation in binding text.

F. The Vienna Convention on the Interpretation of Treaties: This is a multilateral treaty setting forth standard procedure for interpretation of treaties. Think of it as the global rules of international agreement procedure and interpretation. The terms of the Vienna Convention, such as the types of votes (majority, consensus, etc.) that must be used to take certain decisions, are generally binding on all other treaties unless such a treaty sets forth other specific rules. Both the WTO and NAFTA contain many of their own operational rules, while the proposed MAI's silence per these questions meant the Vienna Convention was the default operational system.

IV. Words with Special Globalization-Related Meanings

A. Operative Verbs: One must scrutinize both the precise verb and that verb's tense to determine if a clause in an international commercial agreement is binding or not. A classic example that many of the most fluent English-as-a-second-language speakers often miss is the drastic legal difference between "shall" and "should" and between "must" and "may." "Shall" and "must" are binding and mandatory but "should" and "may" are non-binding and permissive. These distinctions become crucial in determining what requirement an agreement establishes and whether language on public interest issues is only window dressing or is binding.

Shall: If a clause in an international commercial agreement uses the verb "shall" it is almost always binding with the exception being provisions that use the formulation: "a contracting party shall *strive* to do X, Y or Z." In that instance, the binding commitment is only to try to do X, Y, or Z, not to actually do X, Y or Z.

Must: "Must" is almost always binding unless it is used in the construction noted immediately above.

Should: The subjunctive tense in this verb makes it not binding, but advisory, i.e., a country ought to try to do X, Y or Z.

May: "May" is never binding. It is entirely permissive and discretionary. Thus, a clause that says: "a country may take into consideration..." creates no obligation for a country to do so.

B. Maintain: This seemingly innocuous word is one of the most important and most underestimated in the NAFTA and WTO agreements' texts. An example of this is in the WTO agreement, which says that countries shall not establish or maintain laws, regulations or procedures inconsistent with WTO rules. This language means that a country is committing specifically to eliminate existing laws or policies that do not comply. Generally, past international commercial pacts have applied only to future laws, i.e., a country is bound not to establish new non-conforming policies.

C. Necessary: Under jurisprudence developed in numerous cases over the past decade, the term "necessary" is code for application of what is called the "least trade restrictive" test. Thus, there is a potential exception to WTO rules allowed for "measures necessary to protect animal, plant or human health or life." A series of GATT and WTO cases has interpreted "necessary" to require that a country must prove that no less trade restrictive means for obtaining an objective could exist. (In addition, the legitimacy of the objective, not only the means used to obtain it, must separately stand up to a legal test.) It is important to be aware of the use of the term "necessary," as it can in effect eviscerate otherwise binding provisions. For instance, NAFTA's limited "hold harmless clause" for three specific Multilateral Environmental Agreements is rendered largely meaningless because it includes the requirement that only policies necessary to implement the MEAs are covered. To date, no GATT or WTO tribunal has ever

accepted a country's defense on the least trade-restrictive test, always ruling that the country failed to prove the negative: the non-existence of a less trade-impacting policy.

III. Reservations, Exceptions and Carve-outs

Each of the terms "reservation," "exception," and "carve-out" means something entirely different. It is important to carefully choose the legal term that expresses your intent and also to understand the precise meaning of these different mechanisms in international commercial agreements in regard to their ability to safeguard laws and policies that conflict with the terms of the agreements.

A. Reservations: Reservations are exemptions for individual laws or policies that violate the terms of international agreements. Each country puts forward lists of laws for which it would like to take a reservation and then these lists are negotiated among trade/investment partners. Once agreed upon, reservations are annexed to the completed agreement. In U.S. investment agreements such as the NAFTA and Bilateral Investment Treaties, two types of reservations have been utilized: narrow or closed reservations (Type A) to protect existing laws and open-ended reservations (Type B) to enable legislatures to adopt new laws in a certain policy area or make current laws stronger.

Type A reservations would normally enable a government to maintain a law that conflicts with an agreement, but governments cannot expand the law or adopt it in other contexts. Here's an example: a state has a law banning foreign ownership of real estate above a certain number of acres. The government has decided to claim a Type A reservation for this law. While the law may be able to stand, the legislature will not be able to promulgate new laws in the future along these same lines. For example, it would be unable to impose a ban on foreign ownership of agricultural land. It would also not be allowed to make the law more restrictive. For example, it would be unable to reduce the amount of land that a foreign firm could own.

Type B reservations would enable a legislature to violate the terms of the agreement when formulating public policy in certain areas after the agreement is signed. The United States could claim an open-ended reservation for "minority affairs." This reservation would enable the U.S. government to continue to make laws addressing the economic effects of institutionalized discrimination against minority populations, even if such laws involve, for instance, favoring minority businesses over other investors in the awarding of contracts and loans -- practices that would clearly violate the provisions of the MAI.

B. Exceptions: Exceptions are binding provisions on all signatories built into the core text of an agreement that list the circumstances when a country may violate a term of an agreement without penalty. Exceptions only come into play as a defense when a country's law or policy has been challenged in dispute resolution as a violation of an agreement. GATT Article XX lists the exceptions to that agreement, allowing countries to take some otherwise GATT-illegal actions necessary to protect human, animal or plant health

or life, for national security reasons, or in relation to preservation of a national treasure or public order or morals. Unfortunately, neither of the GATT exceptions that might apply to the environment or public health have been used with success under the GATT or WTO.

Past trade dispute panels often have not respected exceptions as a legitimate protection for nations choosing to elevate valued social objectives above commerce. Countries have unsuccessfully invoked both of the GATT Article XX exceptions relating to the environment in the two GATT Tuna-Dolphin cases, the CAFE standards challenge and the WTO challenges on Beef Hormones, Reformulated Gasoline Cleanliness and Turtle/Shrimp, only to be ruled against in each instance. The latest Turtle-Shrimp ruling goes so far as to disqualify use of the Article XX exceptions for any laws or policies that conflict with the WTO's primary goal of trade liberalization. This interpretation would gut the exceptions altogether, as protecting just such laws is precisely their intent. The long string of GATT and WTO rulings voiding exception claims highlight the problem of such decisions being made in tribunals without due process, openness, balanced judges or other safeguards.

C. Carve-outs: A carve-out removes an entire economic sector or industry or topic from coverage under an agreement. A full carve-out essentially serves to narrow the scope of the agreement by declaring some matters off-limits. For instance, Canadian public interest groups fought for health and education to be carved out of NAFTA's service sector terms, but failed. However, as with reservations, it is vital to ensure that anything less than a complete carve-out applies to all necessary provisions. For instance, Canada took a reservation under the 1988 CUSTA's agreement on Trade in Goods for its laws banning the export of raw logs. The U.S. then successfully challenged that very law by using provisions under the CUSTA's Subsidies Agreement, arguing that even though the raw log export policy was not covered by trade-in-goods rules, the raw log export ban was an illegal subsidy for Canadian furniture, home building and other industries.

D. Some Other Key Facts About Reservations, Exceptions and Carve-outs: None of the mechanisms described above prevent a corporation or country from challenging a law or policy under the WTO or NAFTA. Nations must bear the expense of defending any and all challenges before WTO or NAFTA tribunals. The WTO and NAFTA place the burden on the defending country in many instances, as highlighted in the WTO Beef Hormone ruling. The right to challenge laws in international court would even include legal challenges arising out of a disagreement as to the scope of a carve-out (i.e., would often-proposed cultural carve-outs include the computer industry?). Given the considerable expense of defending a law at a NAFTA or especially a WTO tribunal, the threat of a suit alone often discourages a government from promulgating or enforcing a certain law.

After five years of WTO operations in which the challenger has won almost every case, a new pattern of threats by governments -- and now also corporations -- is resulting in governments preemptively dropping new proposals or weakening existing public health and environmental laws. This trend is most evident in cases where rich countries challenge developing countries; however, WTO threats have had a chilling effect on several EU humane animal treatment and environmental proposals. In addition, sub-federal governments will have to rely on their federal governments to defend their laws should they be faced

with a legal challenge under the WTO. There is no guarantee that the federal government will have supported the law in the first place, and thus no guarantee that it will put up a real defense.

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