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September 27, 1993

**The Honorable Bob Dole
United States Senate
Washington, D.C. 20510**

Dear Senator Dole:

On behalf of The Humane Society of the United States (HSUS), the nation's largest animal protection organization with more than 1.7 million members and constituents, I am writing to express our grave concern about the negative impact that the proposed North American Free Trade Agreement (NAFTA) may have on U.S. wildlife and animal welfare laws. For forty years, The HSUS has been committed to passage of state and federal laws that protect wildlife and ensure that domestic animals are treated humanely. By passing these laws, the U.S. Congress has also indicated its similar commitment. The HSUS is not opposed to free trade. We are concerned, however, that if this NAFTA is approved as it is currently written, many U.S. wildlife and animal welfare laws may be in conflict with U.S. trade policy. We do not believe that U.S. wildlife and animal welfare laws need be in conflict with U.S. trade policy and we urge you to ensure that these laws are not imperiled by NAFTA.

We have reviewed the North American Agreement on Environmental Cooperation and conclude that it, unfortunately, does nothing to alleviate the damaging impact that NAFTA may have on our wildlife and animal welfare laws.

In our analysis, many of the laws passed by Congress to which we are committed will be subject to challenge under NAFTA. If challenged, laws such as the Marine Mammal Protection Act, the Wild Bird Conservation Act, the High Seas Driftnet Enforcement Act, the Federal Humane Slaughter Act, the International Dolphin Conservation Act, the Sea Turtle Act and the Pelly Amendment to the Fisherman's Protective Act

**The Humane Society of the United States
2100 L Street, NW, Washington, DC 20037
(202) 452-1100 FAX (202) 778-6132**

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will be found to violate NAFTA primarily because most of these laws regulate the way animals are harvested, caught or slaughtered. These types of laws are called "process standards" in trade parlance and may be considered technical barriers to trade under NAFTA.

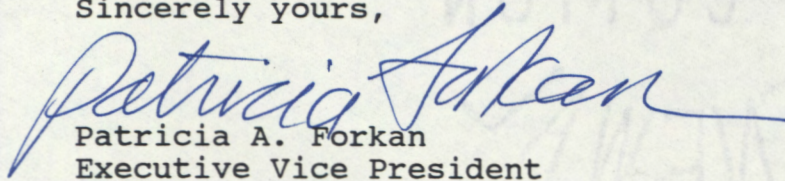
This is not just conjecture on our part. In fact, on August 16, 1991, a secret dispute resolution panel of the General Agreement on Tariffs and Trade (GATT) declared the U.S. Marine Mammal Protection Act to be a barrier to trade. Tragically, we do not see that there are proper safeguards to prevent the same thing happening under NAFTA.

Since this action was taken, we have been working with the USTR in an effort to resolve potential conflicts between trade and the environment. We will continue to work with the Administration to develop a comprehensive U.S. policy, consistent with U.S. law, with respect to the use of trade measures to advance wildlife conservation and animal welfare goals.

In the meantime, we urge you to reject this NAFTA agreement unless the Clinton Administration obtains a binding commitment from our NAFTA partners that process standards are explicitly permitted pursuant to NAFTA and that therefore our wildlife and animal welfare laws will not be subject to challenge on the basis that they are barriers to trade. NAFTA, or an addendum agreement thereto, should explicitly recognize that animals cannot be protected unless countries are able to regulate the ways in which they are utilized or made into products. Without such explicit protection of our wildlife and other animals, The HSUS cannot support NAFTA. To do so would contravene the very purpose of our organization and our obligation to our members, constituents and society at large.

I have enclosed a brief paper which details how wildlife and animal welfare laws may violate NAFTA. If you have any questions, please do not hesitate to contact me or Leesteffy Jenkins, HSUS Legal Advisor on Trade and International Affairs.

Sincerely yours,



Patricia A. Forkan
Executive Vice President

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I. WHY THE HUMANE SOCIETY OF THE UNITED STATES CARES ABOUT THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

For over forty years, The Humane Society of the United States (HSUS) has worked to establish federal, state and local laws to promote wildlife and animal welfare. In recent years, international trade agreements, including NAFTA, have expanded the scope of their dispute resolution processes to include review of wildlife conservation and animal welfare regulations which conflict with international trade policy. As a result of the threat to some of our most valued conservation and animal welfare laws, The HSUS has become more active in reviewing the impact that international trade policy will have on our domestic laws.

The potential threat to U.S. wildlife conservation and animal welfare policy became a reality in 1991. In September of 1991, a GATT panel consisting of three unelected trade officials, ruled that the Marine Mammal Protection Act (MMPA) violated the rules of GATT because it prohibited the importation of dolphin deadly tuna, in violation of the non-discriminatory provisions of GATT. For political reasons, Mexico, the country that initiated that dispute, agreed to suspend the panel's decision prior to its adoption by the GATT Council. Had the panel decision been adopted by the Council, the United States would have been required to revoke the offending regulation or would be subject to trade penalties so long as the regulation remained in force. **NAFTA incorporates either directly or by reference many of the same technical prohibitions contained in GATT.**

II. THE PROBLEMS WITH NAFTA CANNOT BE RESOLVED IN THE IMPLEMENTING LEGISLATION

Many of NAFTA's proponents claim that whatever problems arise domestically because of NAFTA can be remedied in the implementing legislation. Some issues undoubtedly can be partially addressed in the implementing legislation, however, our wildlife conservation and animal welfare concerns simply cannot be resolved in that manner.

NAFTA is essentially a compilation of technical legal rules that govern the way in which three countries may engage in trade in goods, services and investment. Those technical legal rules govern the means by which countries may or may not restrict or inhibit the free flow of goods, services and investment across borders. Wildlife and natural resources are considered goods under the agreement. NAFTA's technical legal rules prohibit a country from restricting the importation or exportation of wildlife, natural resources, and other products on the basis that they are produced in a way which harms wildlife, natural resources or the environment.

Although U.S. domestic law may prohibit an Agency of the United States from acting upon a decision by a NAFTA tribunal, under NAFTA rules, the United States cannot prohibit our trading partners from

bringing a claim against one of our laws, nor can the United States prohibit a NAFTA tribunal from determining that the contested law is a violation of NAFTA's technical legal rules. Once such a determination is made, the United States will be required under NAFTA's rules to either eliminate the offending law or be subject to trade penalties so long as the regulation is enforced.

Moreover, any such provision in U.S. implementing legislation may itself be considered a violation of U.S. NAFTA obligations. Article 27 of the Vienna Convention on the Law of Treaties provides that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." In addition, Article 31 of that Treaty provides that a party shall abide by its treaty obligations in "good faith." Forbidding implementation of an adverse NAFTA ruling in U.S. implementing legislation would not be considered an act in good faith and would be in direct conflict with U.S. policy to abide by our international commitments. Thus, the only solution is to ensure that NAFTA's technical rules do not imperil our conservation and animal welfare laws in the first place.

III. THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION FAILS TO PROTECT WILDLIFE CONSERVATION AND ANIMAL WELFARE LAWS

At the core of HSUS concerns about NAFTA are the numerous provisions in the agreement that directly conflict with or otherwise undermine existing domestic and international wildlife conservation and animal welfare measures. This issue was never addressed in the supplemental negotiations although it was brought to the attention of the Clinton Administration beginning in March, 1993 before supplemental negotiations began.

A. NAFTA May Undermine Existing International Environmental Agreements

At present, only three multilateral environmental agreements are given some limited measure of protection under NAFTA: CITES, the Montreal Protocol, and the Basel Convention. We strongly believe that all NAFTA parties must possess the ability to implement and enforce any international agreement by imposing trade restrictions, if such restrictions are an effective way to secure complete compliance with the agreement in question. Therefore, we urge the Clinton Administration that all present and future international environmental, conservation and animal welfare agreements, to which

¹ NAFTA Article 104 provides that countries may take the least trade restrictive domestic measures to enforce those three agreements and that such measures would be protected even if they conflicted with NAFTA's rules. Besides not including many international environmental agreements, this provision puts domestic measures at risk of challenge if they cannot be shown to be the least trade restrictive method to enforce the international agreement.

any NAFTA party is a signatory, should have been given protection from NAFTA challenge. As well, we would argue that domestic measures to implement such agreements not be subject to the requirement that a NAFTA panel be the final arbiter of what constitutes an "equally effective" environmental measure.

B. NAFTA May Adversely Impact Federal Wildlife Conservation and Animal Protection Laws

The side agreements do not protect U.S. wildlife and animal protection laws from being challenged under NAFTA. If challenged, most of these laws would be found to violate NAFTA.

The laws at risk are: the Marine Mammal Protection Act (MMPA), The High Seas Driftnet Fisheries Enforcement Act, the Sea Turtle Act, the Wild Bird Conservation Act, the Humane Slaughter Act, the African Elephant Conservation Act and the Lacey Act.

Each of these laws regulates the way in which products to be imported into the United States are produced. For instance, the Driftnet Act says that if a fisherman uses fishing nets which exceed the length agreed upon by the United Nations, the fish caught in that net cannot be imported into the United States for sale. Similarly the Humane Slaughter Act specifies that meat which is produced using inhumane methods of slaughter may not be sold in or imported into the United States. Each of the above-referenced laws regulates the method by which animals are caught, harvested or killed.

In trade terminology, such type of regulation is called a "process standard". A process standard is presumptively a "technical barrier to trade," and thus not permissible according to GATT. Article 903 of NAFTA incorporates by reference the GATT doctrine on this issue.

The 1991 GATT panel ruling on the Marine Mammal Protection Act is a good example of the peril the above-referenced laws face if challenged under NAFTA. In that decision, a GATT panel held that the United States may not distinguish between two cans of tuna whose physical characteristics are identical (called "like products" in trade terminology) but which were harvested in drastically different manners, i.e., one was harvested using a technique called encirclement netting that kills large numbers of dolphins.

Neither NAFTA nor the environmental side agreement contain any technical provisions which would mitigate or change the outcome of the GATT tuna-dolphin decision if such dispute were brought before a NAFTA dispute resolution tribunal.

C. NAFTA May Adversely Impact State and Local Laws to Protect Wildlife and Animal Welfare

Although states are not a party to NAFTA, the legal prohibitions in NAFTA apply equally to state, local and federal laws.

The U.S. Government is obligated pursuant to Article 105 of NAFTA to "take all necessary measures...to give effect...to this Agreement, including their observance...by state and provincial governments." Trade jurisprudence on this issue suggests that federal governments may be required to employ all constitutionally permissible means to encourage compliance by states. Under U.S. law, this could include preemptive legislation, suits for compliance, or even withdrawal of federal benefits.

Thus, although technically speaking NAFTA does not "preempt" state and local law because it does not automatically override such laws, a state law which violates NAFTA's legal rules, if challenged, would subject the United States to trade penalties if not repealed. NAFTA, therefore, can force states to modify or repeal U.S. state laws as it obligates the U.S. Government to use rather draconian means to encourage states to change or repeal laws which may be perceived as impeding free trade.

Nothing in the environmental side agreement exempts state and local laws from NAFTA's legal requirements. Thus, state laws which protect animals or restrict imports of threatened species of wildlife, or protect the marine environment in a manner that is prohibited by NAFTA, if challenged, would be at risk under NAFTA.

D. The Commission's Review Process Excludes Most Wildlife Conservation and Animal Welfare Laws

Of primary concern to The HSUS is the fact that the Commission may only review the nonenforcement of existing environmental laws. Thus, the Commission could not resolve major environmental problems caused by the lack of environmental laws in NAFTA countries.

In addition, the North American Agreement on Environmental Cooperation explicitly provides that the Commission may not review or resolve disputes which arise as a result of nonenforcement of resource management laws. Most U.S. wildlife conservation laws would fall into this category. Thus, today's most controversial issues concerning trade and the environment are left to be resolved through the NAFTA or GATT dispute resolution procedures.

IV. CONCLUSION

In conclusion, for the reasons we have set forth herein, The HSUS is concerned that the Administration's proposed NAFTA package may imperil U.S. wildlife conservation and animal welfare laws. Unfortunately, the North American Agreement on Environmental Cooperation does nothing to eliminate or even mitigate the problems created by NAFTA. The Humane Society of the United States therefore urges Congress to reject this NAFTA when it comes to a vote this fall.