

CONSTITUTIONAL IMPLICATIONS OF NAFTA: PERSPECTIVES FROM CANADA, THE UNITED STATES, AND MEXICO

Donald G. Lenihan and Will Kymlicka

Robert Howse

Mark Tushnet

Carla Huerta and Alonso Lujambio

Patricia E. Perkins

Charles E. Reasons

Sharon Venne

Marjorie Benson

David Schneiderman

CONSTITUTIONAL **FORUM** CONSTITUTIONNEL

Centre for Constitutional Studies/Centre d'études constitutionnelles

Volume 5, Numbers 3 & 4

Spring and Summer 1994

Edmonton, Alberta

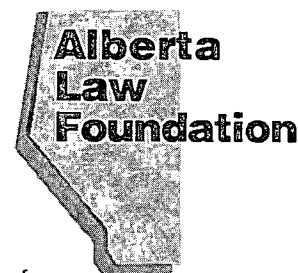
CONSTITUTIONAL
FORUM
CONSTITUTIONNEL

Editor:

David Schneiderman

Layout & Typeset:

Christine Urquhart



Constitutional **Forum** Constitutionnel is a quarterly publication of the Centre for Constitutional Studies / Centre d'études constitutionnelles published with the financial support of the Alberta Law Foundation.

Centre for Constitutional Studies

Management Board / Conseil administratif

Bruce P. Elman, Chair

Timothy J. Christian

Gerald L. Gall

Roderick C. Macleod

Kenneth Norrie

David Taras

Fil Fraser

Susan Jackel

J. Peter Meekison

June Ross

Allan Tupper

David Schneiderman, Executive Director

Christine Urquhart, Executive Assistant

Advisory Board / Conseil consultatif

Paul Bender

Lise Bissonnette

Alan C. Cairns

Mary Eberts

Pierre Foucher

Peter W. Hogg, Q.C.

Andrée Lajoie

James MacPherson

David Milne

Richard Price

Peter H. Russell

Richard Simeon

David E. Smith

Ronald L. Watts

Thomas R. Berger

Henri Brun

Michael Crommelin

Thomas Flanagan

William Henkel, Q.C.

J.D. House

Norman Lewis

Geoffrey Marshall

Jean-Luc Pépin

A. Kenneth Pye

Campbell Sharman

Jeffrey Simpson

Katherine Swinton

John D. Whyte

The opinions expressed herein are those of the individual contributors only. Contributions and replies are invited in either official language. Notes and articles should be limited to 3,000 words in length. The Editor and Management Board reserve the right to edit any submissions. Inquiries and contributions should be directed to the Editor, David Schneiderman, 459 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5 or by telephone at (403) 492-5681 or Fax (403) 492-4924.

Associate Memberships to the Centre for Constitutional Studies are available at \$35.00 per year (entitlements are: newsletter, notification of Centre publications, lectures and events.) Retroactive memberships are still available for an additional fee. Retroactive membership for 1989-90 Volume 1 (3 issues) \$10.00; Retroactive membership for 1990-91 Volume 2 (4 issues and Index) \$10.00; Retroactive membership for 1991-92 Volume 3 (4 issues) \$10.00; and Retroactive membership for 1992-93 Volume 4 (4 issues) \$10.00. Make cheques payable to: The Centre for Constitutional Studies.

Constitutional **FORUM** Constitutionnel is indexed in: **Index to Canadian Legal Periodical Literature**, **Index to Canadian Legal Literature** and **Current Law Index**.

ISSN: 0847-3889

CONSTITUTIONAL IMPLICATIONS OF NAFTA: PERSPECTIVES FROM CANADA, THE UNITED STATES, AND MEXICO

TABLE OF CONTENTS

REFORMING OUR POLITICAL DISCOURSE: THE NATIONAL INTEREST IN A TRANSNATIONAL WORLD Donald G. Lenihan and Will Kymlicka	49
NAFTA AND THE CONSTITUTION: DOES <i>LABOUR CONVENTIONS</i> REALLY MATTER ANY MORE? Robert Howse	54
NAFTA AND FEDERALISM IN THE UNITED STATES Mark Tushnet	60
NAFTA: RECENT CONSTITUTIONAL AMENDMENTS, SOVEREIGNTY TODAY, AND THE FUTURE OF FEDERALISM IN MEXICO Carla Huerta and Alonso Lujambio	63
NAFTA AND THE FUTURE OF ENVIRONMENTAL REGULATION Patricia E. Perkins	68
NAFTA AND INEQUALITY: A CANADIAN PERSPECTIVE Charles E. Reasons	72
ABORIGINAL PEOPLES AND NAFTA: COLONIZATION CONTINUES TO RUN AMOK Sharon Venne	78
THE NAFTA DURUM DISPUTE AND THE <i>CANADA GRAIN ACT</i> : A CASE STUDY IN INSTITUTIONAL DEVELOPMENT Marjorie Benson	81
CANADIAN CONSTITUTIONALISM AND SOVEREIGNTY AFTER NAFTA David Schneiderman	93

REFORMING OUR POLITICAL DISCOURSE: THE NATIONAL INTEREST IN A TRANSNATIONAL WORLD

Donald G. Lenihan
and Will Kymlicka

THE CHANGING FACE OF FEDERALISM

The modern nation-state is the result of a link forged between two originally distinct concepts: "the nation" and "the state." The underlying idea is that each nation has its own history, language and culture, and hence its own "national interest." Moreover, nations have a "natural right" to protect and promote their interest, that is, to exercise their *sovereignty*. In theory, then, the nation-state is the home of a culturally and linguistically homogeneous nation; it is a sanctuary in which the group can collectively pursue its shared aims, values and interests without interference.

However, modern states rarely fit this model of a "nation-state." Many are linguistically, ethnically, and regionally diverse. Canada is a case in point. The adoption of a federal system in 1867 can be viewed as an attempt to reconcile the theory of the nation-state with the various forms of diversity in the new country.

When drafting the BNA Act, the Fathers of Confederation apparently thought those interests related to diversity were (more or less) local, identifiable and separable from those that citizens of the new state would hold in common. They concluded that they could draft a division of legislative powers between Parliament and the provincial legislatures which would adequately reflect this division of interests. Each of the two orders of government would be sovereign in its own sphere. Classical federalism was thus based on a distinction between a national interest (to be promoted by the federal government)

and a more local or regional one (to be promoted by provincial and local governments).

What appeared in 1867 to be a relatively tight compartmentalization of responsibilities and powers has become transformed over the years into a complex web of policies and programs entangling federal and provincial governments. In response, observers began to view federalism as a dynamic system in which a constant balance must be struck between two different, and often competing, sets of social and political forces: the centralizing ones of national integration; and the decentralizing ones of local integration. The national-local distinction thus becomes relative and mutable rather than static.

Even though views of it evolved over the years, the national-local distinction has remained the normative basis of Canadian federalist discourse. However, this discourse may be on the threshold of a new development.

There is currently much speculation about the way globalization is reshaping social and political life in western democracies.¹ In federal states like Canada, one consequence seems to be that the terms of political debate no longer fit comfortably into the traditional categories of local and national. A new third category of what we can call *transnational interests* seems to be evolving.

In its original context — that of international trade and banking — globalization refers to the free circulation of goods and capital without the intervention of states. But a second set of global forces is now emerging. These are often collected together

under the label "new social movements." Such movements include international environmental groups like Greenpeace and the Sierra Club, human rights groups like Amnesty International, and the women's movement. (Such organizations are not entirely new, of course, but they are entering a new phase, as we discuss below). The objectives, political logic and degree of influence of these two sets of forces are very different. Indeed, many of the new social movements distrust the trend toward economic liberalization, which they see as a potential threat to the environment, and to the traditional livelihood of the least well-off in many countries.

Nonetheless, the two groups share at least two features. First, the emergence of both the "new economy" and the "new social movements" as global forces is a result of the communications revolution of the past two decades. Remarkable leaps in computer and telecommunications technology — including everything from fax machines, e-mail and Internet to the Cable News Network and international banking systems — have made it possible to develop and maintain what are sometimes called "virtual communities." These communities are composed of individuals from around the globe who are linked together by common economic or social interests.

The new technology has provided the infrastructure for an international communications network that has vastly improved the organization of such communities and thus allows them to function as (relatively) cohesive political units, responding to day-to-day events in countries around the world.² In the past, these international groups communicated by mail, telegraph or cable-based long-distance telephone calls. As a result, geography alone kept them diffuse and disorganized and prevented their members from becoming effective political actors outside of their immediate political surroundings.³

Second, from the point of view of governments, the interests around which these groups coalesce have a peculiar and important feature: they are essentially indifferent to the political boundaries that define nation-states. By definition, they transcend national boundaries. Indeed, the promotion of these interests inclines toward the elimination of such boundaries, or at least a reduction in national sovereignty. As a result, advocates are placing increasing pressure on governments to cease treating issues involving these interests as though they were the internal affairs of this or that nation-state, the way most view, say, decisions on how to structure social programs or set income tax rates.

British Columbia provides a convenient example of how certain kinds of transnational interests are changing the way we view Canadian politics. In the past, if one wanted to understand the political life of that province, there were two directions in which to look. One could look at the state of its relationship with other governments and regions in the Canadian political community. Thus one would ask about such things as the interplay of local and national economic policy; relations with Quebec; interprovincial trading relationships; and conflicts over jurisdiction. Or one could look at "local issues" within the province's borders. Thus, one might look at regional disparities; the level of unemployment; the state of economic infrastructure, such as highways and airports; and the availability of natural resources.

Nowadays to understand B.C. politics one must also look beyond its borders to the Pacific Rim; nor can one ignore such things as, say, environmental issues in Brazil or Europe. This is not to say that external relationships were hitherto unimportant to B.C. That province has always been heavily involved in trade; and international movements have been around as long as the province. Transnational interests, as such, are certainly not new. But they may be crossing a critical threshold. What seems to be changing is the way British Columbians identify with them. Thus trade and environmental issues are assuming a profile in that province that is often only awkwardly described as national or local. Increasingly, those who promote such interests view themselves as agents and members of a larger, transnational movement or "community of interest." Moreover, the intended audience often lies outside Canada.⁴

Accordingly, political issues are increasingly framed in global terms. One hears of the need to "respect common human values," to be "internationally responsible" and "open to change," to show concern for "future generations" and to adopt attitudes and practices appropriate to life in the "global village." As the linkages with organizations and movements beyond our national borders evolve, new transnational loyalties and commitments are forming. As a result, a new global political culture is emerging based upon the promotion of transnational interests. In a province like B.C., the new loyalties and commitments that will arise could soon rival — even surpass — in importance many of the traditional ones which British Columbians feel as members of Confederation.⁵

This globalization of political discourse is not simply the accidental or contingent result of economic and technological change. It also reflects the logic of our prevailing liberal-democratic ideology. Liberalism has always leaned toward cosmopolitanism. That is, liberals have tended to assume that an (objective) account can be given of the general needs and interests of persons on which to base certain universal principles of justice, freedom and equality. Globalization is giving new life to this idea.

We believe that Canada's traditional bipolar political discourse is not rich enough to explore the logic of these new relationships. The existing discourse must be restructured around a *trilateral division of interests*, to allow Canadians to better distinguish transnational from national and local interests, assess how they interact, and debate how an appropriate balance might be struck between them. In the remaining space, we will look briefly at how this trilateral division might affect the way the concept of the national interest is used in Canadian political discourse.

DEFINING THE NATIONAL INTEREST

In recent years, the "national interest" has been invoked to justify a host of actions, including international trade agreements; deregulation of airlines; bailing out of bankrupt industries; distribution of emergency funds to farmers and fishermen; participation in international relief and peace-keeping operations; and changes to the fiscal transfer system.

The concept of the national interest is basic to Canadian political discourse. Indeed, the assumption that there *is* a national interest underwrites the legitimacy of the decision-making process and the authority of the federal government. Were there no distinctly national interests, there would be no reason to maintain a national level of government. If we had only local and transnational interests, then the political powers which are currently exercised at the national level could be either devolved to the provincial or municipal level so as to better promote local interests, or transferred to the transnational level, to such institutions as the United Nations or GATT, so as to better promote transnational interests.

Of course, the federal government does promote transnational interests in the environment, human

rights, and free trade. But these transnational interests are not inherently tied to the current boundaries, or even to the very existence, of the Canadian state. Given the increasing importance of international social movements, trade agreements and human rights bodies, these transnational interests might not be harmed if Canada were to become absorbed into another country (or if Canada were to divide into two or more separate states). Hence, these interests cannot provide the rationale for the Canadian state, or serve as the basis for national unity within Canada. It only makes sense to maintain Canada as a distinct political entity on the assumption that we have genuinely national interests, in addition to our local and transnational interests.

Yet many current discussions of the "national interest" do not clearly distinguish between national and transnational interests. Under a trilateral scheme, to say that certain interests are "national" would be to claim that they are distinctive to Canada, and hence make a special contribution to maintaining the sense of national identity and unity. National interests are the interests which Canadians share *as Canadians*.

What are these "national" interests? They include a particular way of sharing natural resources (ie. regional equalization), the maintenance of common cultural practices and the development and enjoyment of common languages (ie. multiculturalism within a bilingual framework), and a particular international role (ie. as a small-power peace-broker within the United Nations, with special ties to the Commonwealth and *la francophonie*). As "national objectives" these reflect certain distinctive interests which the citizens of Canada share with one another, beyond the transnational interests we share with the citizens of countries around the world.

It is these interests which would be most seriously jeopardized if Canada were to be absorbed into another country, or subdivided. The fact that the Canadian state is uniquely positioned to promote these interests enables it to fill a special 'niche' in terms of the identity and interests of its citizens.

To say that certain interests are "national," then, is to claim that they make a special contribution to maintaining the sense of community in, or the political viability of, the Canadian state. This is to be contrasted with the political, economic and moral logic of transnational interests which, as we have seen, is largely indifferent to the boundaries of existing

political communities. The promotion of freer trade, respect for human rights, and care of the global environment are supported by international networks and an emerging international political culture. These "global objectives" will continue to be promoted whether or not Canada exists. However, many genuinely *Canadian* interests — such as linguistic duality, provincial autonomy, and regional equalization of services — will not.

By separating out national and transnational interests, we force ourselves to define more clearly what special role the Canadian political community plays in the lives of its citizens; what genuinely "national" objectives it is uniquely positioned to promote.

We believe that there are important national interests which underwrite the existence of the Canadian state, and that the viability of the country depends upon the state's power to play a positive role in promoting these objectives. But this raises an important question: what if the promotion of transnational interests conflicts with state-sponsored measures aimed at protecting the Canadian community? There is no reason to think that promoting national objectives will require any violation of human rights. But there may be conflicts between national objectives and our transnational interests in trade, mobility and environmental protection.

For example, the promotion of free trade may conflict with government policies regarding subsidies to cultural industries. The United States views these policies simply as a form of unfair subsidy for domestic Canadian industries, and so has sought to prohibit them under GATT and NAFTA. Yet many Canadians believe that the promotion of a common culture is a legitimate — indeed essential — part of our "national interest." Similar debates have arisen over regional equalization policies: are they an unfair subsidy of domestic industries, or a legitimate national interest?

As the debate over NAFTA shows, views are already polarized between those who think policy should be shaped more by global objectives, and those who think it should reflect national ones. But the debate is not likely to stop there. As globalization advances, a similar debate is likely to arise in a wide range of areas, including immigration, the environment, economic policy, peace-keeping commitments, language and social policy. Policy-makers and jurists will be forced to make important

choices regarding how national and transnational interests are to be integrated and balanced.

Consider immigration. Suppose the United Nations sponsored a debate over what criteria ought to govern immigration policy. The arguments advanced would likely fall into two broad categories. On the one hand, some would urge that a just approach should be firmly anchored in human rights and universal principles of freedom and justice. This would generate a pretty liberal "open-doors" policy. For one thing, immigration is one way to achieve greater equality of opportunity among the world's poor and oppressed. Moreover, open borders increase individual mobility for all people. Our transnational interests and principles, therefore, support open borders.

On the other hand, some (including, one expects, most western nations) would urge that such a policy must be firmly anchored in a respect for national sovereignty. They would insist that a country's policy must also reflect the "national interest" of the receiving country. For example, attempts to maintain English and French as common languages in Canada might be unsustainable if we had fully open borders.

This raises the question: to what extent are Canadians willing to forego transnational interests in individual mobility and freer trade in order to maintain a common culture, common languages and regional equality in Canada? An uncritical tendency to elevate global objectives above national ones could undermine the sense of community on which a large, regionally, culturally and linguistically diverse country like Canada rests. On the other hand, the importance of promoting "global objectives" should, by now, be clear to all. The difficult task will be to find the right balance.⁶

CONCLUSION

The need to clarify these trade-offs is greater than ever. Before the era of globalization, a very robust conception of national sovereignty assured that the responsibility for promoting both national and transnational interests was the prerogative of the state. In practice, this meant that the state could always retreat from certain transnational goals if they jeopardized national objectives. As imbalances in policy-making became evident, trends could be reversed or shifted one way or another to balance out the promotion of various types of interests. This sort of flexibility was crucial to maintaining the sense of community in diverse countries like Canada.

However, this approach is no longer viable. The more interdependent the world becomes, the more governments are committing themselves to international norms and organizations. This reduces the scope for national governments to reverse long-term policy-making trends to which they have become committed at the supra-national level. This means it will be more difficult to compensate later on for present failures to adequately promote national objectives crucial to the sense of community.

Drawing a clear distinction between transnational and national interests certainly will not solve all the problems. But, in placing the burden on political leaders, policy-makers, jurists and advocates to clearly explain how their proposals affect the interests of *Canada*, it may help us to see more clearly what exactly is at stake in some of these conflicts and hence to better evaluate the options. □

Donald G. Lenihan

Director of Research at the Canadian Centre for Philosophy and Public Policy at the University of Ottawa.

Will Kymlicka

Research Associate, Canadian Centre for Philosophy and Public Policy, University of Ottawa.

Endnotes

1. See, for example, Michael Walzer, "Between Nation and World" *The Economist* (11 September 1993) at 49-53.
2. Of course, the degree of cohesion within these movements can be exaggerated. These movements seek to build coalitions across national borders, but some people worry that this globalization of issues often involves a misleading "decontextualization" of issues. The women's movement, for example, has been divided over the "essentializing" of women's issues which ignore race, class, and linguistic differences. Differences in race, language and culture make coalition politics difficult, and the likelihood of such conflict is enhanced when geographic boundaries are crossed.
3. One thinks, for example, of religious missionaries or of the international communist movement.
4. For example, during the recent demonstrations against logging in Clayquot Sound, many of the protesters weren't British Columbians, or even Canadians. Conversely, B.C. environmentalists are often more concerned with influencing European public opinion than with lobbying Victoria or Ottawa.

5. One thinks of B.C.'s response to the Charlottetown Accord and of its support for the Reform Party in the last federal election.
6. Again, there is no suggestion here that Canadians should compromise their respect for human rights, either domestically or abroad. The question is what, in a free and democratic society, counts as a reasonable limit on individual freedoms, e.g., to what extent do considerations of the "national interest" justify limiting, say, the free movement of capital, goods, services and labour either within the country or across its national borders?

SUBSCRIBE TO:

REVIEW OF CONSTITUTIONAL STUDIES
REVUE D'ÉTUDES CONSTITUTIONNELLES
Volume 1, Number 2, 1994

Philip Resnick on "The Crisis of Multi-National Federations: Post-Charlottetown Reflections"

Mary Eaton on "Patently Confused: Complex Inequality and *Canada v. Mossop*"

Kennan Hohol on "The Draft Constitution of Ukraine: An Overview"

June Ross on "Nude Dancing and the Charter"

F.C. DeCoste on "The Academic and the Political: A Review of *Freedom and Tenure in the Academy*"

Book Reviews

Published in association with
the Alberta Law Review

Write to:
Centre for Constitutional Studies
Room 459 Law Centre, University of Alberta
Edmonton, Alberta T6G 2H5
Fax: (403) 492-4924 or 492-9959
Telephone: (403) 492-5681

NAFTA AND THE CONSTITUTION: DOES LABOUR CONVENTIONS REALLY MATTER ANY MORE?

Robert Howse

By virtue of the Crown prerogative, the federal government has the power to negotiate and enter into binding international agreements.¹ Where, however, the *performance* of obligations under international agreements requires domestic legislation, such legislation must nevertheless be within the legislative authority of Parliament.²

Since the NAFTA purports to be an international trade agreement, the natural beginning point of a constitutional analysis is to consider the scope of the federal government's trade and commerce power, as set out in section 91(2) of the *Constitution Act, 1867*. Early jurisprudence on the trade and commerce power resulted in the bifurcation of this power into two "branches": the power to regulate international and interprovincial trade and commerce, and "the general regulation of trade affecting the whole dominion."³ We will consider each of these branches separately.

INTERNATIONAL TRADE AND COMMERCE

It is rather obvious that, taken as a whole, the NAFTA is an agreement that concerns the regulation of international trade and commerce. However, many of the matters covered by NAFTA, and the corresponding actions that may be required to perform NAFTA obligations, would not traditionally have been considered as part and parcel of the regulation of international trade and commerce — for instance, NAFTA contains strictures on product standards, the domestic regulation of service industries, policies on investment, monopolies, and expropriation.

Early jurisprudence on the international and interprovincial branch of the trade and commerce power tended to confine narrowly its scope to direct regulation or control of the transboundary "flow" of goods.⁴ More recent decisions have suggested that the regulation of international or interprovincial trade and commerce may encompass internal non-border measures, where these are incidental to regulation of flows of goods across provincial or national boundaries.⁵ Nevertheless, it seems that such non-border measures (for instance, commodity marketing schemes or product standards) must be targeted at, or at least their impact must be largely confined to, products that cross provincial or national boundaries.

As a student of international trade law, I would have little hesitation in characterizing even those provisions of NAFTA that deal with non-border measures as an integral part of the regulation of international trade and commerce in our times. The NAFTA addresses these issues from the perspective of their impact on *international trade*. Successive rounds of GATT negotiations having succeeded in substantial tariff reductions and strict limitations on many other border measures, it is entirely natural that more recent trade negotiations — both regional and multilateral (i.e. the Uruguay Round) — would focus on internal policies that have effects on trade.

As a student of Canadian federalism, however, I cannot feel entirely comfortable with the notion that the scope of the federal trade and commerce power is infinitely expandable, depending on how broadly the trade negotiating agenda is cast at a given point in time. This would mean that the division of powers in the Canadian constitution would, in significant

respects, be at the mercy of factors beyond the control of Canadians. At the same time, the federal Government's ability to exercise the *traditional core* of the trade and commerce power, i.e. to negotiate and conclude agreements concerning border measures, would be seriously attenuated if the government could not also make credible commitments with respect to the new agenda items that implicate an increasing range of domestic policies, both federal and provincial.⁶ One response would be that the federal government can still exercise the power, but where provincial jurisdiction is implicated, must obtain the cooperation of the provinces. However, this kind of rider on the exercise of legitimate federal powers forms no part of the existing constitutional architecture of the Canadian federation, however dear it might have been to some of the architects of the recently failed "Canada Round" constitutional proposals.

In my view, the best answer to the dilemma is not to freeze the "pith and substance" of trade and commerce at an earlier period of international economic relations, but rather to protect the federal balance through an approach that bears close affinities to the "subsidiarity" concept in the law of the European Community. Under this approach, federal action pursuant to the trade and commerce power would only be deemed constitutional where it trenched on provincial jurisdiction to the minimum extent necessary to achieve the trade objectives in question.

This kind of approach has already been deployed by the Supreme Court in its jurisprudence concerning the "general" branch of the trade and commerce power.

THE GENERAL TRADE POWER

In *General Motors*,⁷ Dickson C.J. (writing for a unanimous Court) elaborated the following criteria for determining whether a federal regulatory scheme that infringes provincial jurisdiction can be sustained as "a general regulation of trade affecting the whole dominion": 1) the legislation must be part of a general regulatory scheme; 2) the scheme must be monitored by a regulatory agency; 3) the scheme must not constitute the regulation of a single industry or trade; 4) the matter of the legislation must be such that joint action by the provinces would be constitutionally impossible; 5) refusal of one or more provinces to participate in a joint federal-provincial regulatory effort would put the whole scheme in jeopardy.

Once a legislative scheme has met these criteria, the court must consider the extent of the intrusion into provincial jurisdiction and its justification in terms of the scheme's objectives. In *General Motors*, Dickson C.J. distinguishes between minor and major intrusions into exclusive provincial jurisdiction. In the case of a minor intrusion, the federal Government would be required only to show that a rational fit existed between the interference with provincial jurisdiction and the national purposes reflected in the regulatory scheme as a whole. By contrast, where an intrusion could be considered as "major," a close fit would be required between the particular intrusive feature of the scheme being impugned and the national purposes of the whole scheme. This evokes the notion that a significant intrusion into provincial jurisdiction must be strictly necessary to achieve the national objectives at issue.

One way of addressing the constitutionality of federal action to implement NAFTA would be to accept a broad scope for the *international* branch of the trade and commerce power, but impose the kinds of limits with respect to intrusiveness into provincial jurisdiction adopted in *General Motors* with respect to the *general* branch of the trade and commerce power. Alternatively, the courts could limit the *international* branch to its traditional scope — i.e. to border measures or measures closely connected to flows of products (including both goods and services) across borders — and instead consider whether performance of NAFTA obligations that entails domestic regulatory change could be sustained under the *general* branch of the trade and commerce power.

Each approach carries with it certain risks or drawbacks. Broadening the *international* branch of trade and commerce would be largely unproblematic in the case of federal action, for instance, to ensure that regulatory measures do not treat other NAFTA Parties less favourably than they treat Canadian nationals (the "National Treatment" standard). Here the regulatory changes in question are clearly targeted at traded products, i.e. imports and exports (whether of goods, services, or capital). However, other NAFTA obligations may entail changing domestic regulations that apply both to domestic products and to imports. For instance, there is an obligation to ensure that standards do not constitute an unnecessary obstacle to trade and that new standards be based on scientific risk assessment. In theory, these obligations apply only to measures affecting imports from NAFTA partners. However, a two-tier system, where a

different (and perhaps more onerous) set of standards is imposed on domestic actors than on NAFTA partners, could unduly penalize or disadvantage domestic industry. So, the only realistic avenue is to adjust standards as they apply both to traded and non-traded products. Here, an obstacle is created by earlier jurisprudence on the international branch of the trade and commerce power, which suggests that the international branch cannot be used to sustain domestic regulation *as applicable to non-traded products* even when the overall purpose of the scheme is the regulation of traded products.⁸

With respect to the alternative of sustaining such federal action under the general trade power, there may be difficulties in meeting some of the five criteria enunciated in *General Motors*. While it might be plausible to characterize the NAFTA on the whole (or, alternatively and perhaps more precisely, the framework for federal implementation) as a regulatory scheme, the NAFTA is not, in the traditional sense, under the control of a regulatory agency, although at the transnational level it does entail an institutional framework for monitoring and enforcement. Some of the other *General Motors* criteria seem more obviously applicable, especially provincial incapacity. The provinces, either individually or together, simply lack the constitutional capacity to conclude binding agreements on international trade. It is also easy to see how a failure of one or more provinces to participate could undermine an approach to trade negotiations based upon federal-provincial cooperation. If a particular province or provinces were able to opt out of a trade agreement, the value of concessions to our trading partners would be reduced, resulting in fewer benefits to the opt-in provinces (i.e. in the form of reciprocal concessions from trading partners).⁹

PEACE, ORDER, AND GOOD GOVERNMENT

Another possible basis for sustaining comprehensive federal implementation of NAFTA would be the "national concern" branch of the Peace, Order, and Good Government power (POGG), as revived in the *Crown Zellerbach*¹⁰ decision. In *Crown Zellerbach*, the Supreme Court found that the POGG power could be invoked by the federal government to deal with a matter of national concern. According to LeDain J. for the majority:¹¹

[f]or a matter to qualify as a matter of national concern . . . it must have a

singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.

In clarifying the concept of "singleness, distinctiveness and indivisibility," LeDain J. placed emphasis on the consequences of "a provincial failure to deal effectively with the control or regulation of the intra-provincial aspect of the matter" (provincial incapacity). In addition, LeDain J. established an apparently strict test for the intensity of federal intervention: "a national dimension justifies no more federal intervention than is necessary to fill the gap in provincial powers."¹²

In *Crown Zellerbach*, the issue was the constitutionality of federal legislation regulating marine pollution in *intraprovincial* waters. While existing constitutional doctrine permitted the federal government to regulate pollution within the province to the extent necessary to prevent the flow of pollution between provinces,¹³ the legislation in question was much broader than this in scope, extending as it did to all intraprovincial marine waters.

What then would be the "extraprovincial effects" of a provincial failure to regulate *all* intraprovincial marine pollution, if the federal government possessed in any case sufficient authority (apart from the POGG power) to regulate actual spillovers or externalities across provincial boundaries? LeDain J.'s response hinged upon the fact that marine pollution is treated as a single, indivisible subject in an international convention of which Canada is a member (*The Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter*).¹⁴ By implication, the failure of any province to regulate intra-provincial pollution of marine waters could compromise Canada's adherence to the obligations of this international agreement, which benefits the entire country.

Just as in the case of the general branch of the trade and commerce power, it is clear that a strong argument for provincial incapacity to regulate international trade could be made under the national concern branch of POGG. With respect to singleness and indivisibility of subject-matter, it is true that full performance of NAFTA obligations could potentially result in changes to dozens of federal and provincial statutes that deal with a wide variety of subject

matters. However, these subjects are treated together within a single international agreement (a seemingly decisive factor in *Crown Zellerbach*) and from a unified perspective — that of effects on trade.

GAUGING THE EXTENT OF IMPACT ON PROVINCIAL JURISDICTION

A plausible *prima facie* case can thus be made for sustaining federal action to perform NAFTA obligations under either the international branch of the trade and commerce power, the general branch of the trade and commerce power, or the national concern branch of the POGG power. Whichever of these quite broad heads of power is invoked to sustain implementation of NAFTA, the federal government should have to show that provincial jurisdiction is impaired to the minimum extent necessary to achieve the national objectives. As we have seen, such a minimal impairment test is already implicit in the concern about “fit” in *General Motors* and, in *Crown Zellerbach*, is explicitly set out with respect to the “national concern” branch of POGG. Such a test would also be appropriate to protect the federal balance were the Court to broaden the scope of the international branch of the trade and commerce power to encompass the wide sweep of the contemporary trade agenda (extending, as it does, even into areas like environmental regulation and labour rights).

A logical beginning point for gauging the impact of the performance of NAFTA obligations on provincial jurisdiction is to consider the extent to which the federal government is bound, by the terms of NAFTA itself, to assure provincial compliance. Article 105 of NAFTA states that “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 in this Agreement, by state and provincial governments.” On its face, this provision is stronger than the comparable GATT obligation to take “such measures as may be available” to ensure compliance of sub-national governments.¹⁵

Article 105 is, however, not the whole story. Various particular provisions of NAFTA contain exceptions to this rather strict requirement to ensure provincial compliance. For instance, in the case of investment, services in general and financial services in particular, sub-national governments are able (albeit

through a federally-coordinated mechanism) to lodge reservations with respect to existing measures that may be in conflict with NAFTA. This is subject to the requirement that such measures not become more trade-restrictive in the future. In the case of government procurement, “parties shall endeavour to consult with their state and provincial governments with a view to obtaining commitment on a voluntary and reciprocal basis to include within this chapter procurement by state and provincial government entities and enterprises.” (Art. 1024(3)). This clearly falls far short of the general Article 105 obligation to take all necessary measures to ensure provincial compliance.

In the case of the labour and environmental side-agreements to NAFTA, Canada is to provide a list of provinces that are to be bound under these agreements “in respect of matters within their jurisdiction.” However, unless declarations are forthcoming from a substantial number of provinces, representing a significant part of the Canadian workforce or economy, Canada’s ability to make complaints against other Parties under the side-agreements will be significantly limited.¹⁶

The federal *NAFTA Implementation Act* is almost exclusively concerned with ensuring the compliance of federal statutes, regulations and administrative action with the obligations in NAFTA. The one clear exception is contained in the provisions on alcoholic beverages, where the federal government does assert the authority to override provincial measures where necessary to ensure compliance with NAFTA obligations.

It is clear that, with respect to the vast majority of NAFTA obligations that affect the provinces, the federal government does not intend to pursue a strategy of pre-empting provincial jurisdiction. Instead, the federal government will wait until provincial measures are found by a dispute panel to be in violation of the NAFTA, and at that point seek to obtain from the provinces agreement to a solution that is satisfactory from the perspective of the complaining Party or Parties (this is precisely what has happened in the recent past with respect to provincial violation of GATT and FTA provisions on alcoholic beverages). Ultimately, should a province fail to agree, the complaining Party may, under NAFTA, be authorized to retaliate against Canada by withdrawing trade concessions to Canada. It would usually be in the complaining Party’s interest to withdraw concessions

so as to have a maximum impact on the economy of the offending *province*.

Much of the pressure for provincial compliance with NAFTA will, therefore, only come on a case-by-case basis, and may result more from the ultimate threat of retaliation than from explicit attempts to override provincial jurisdiction through federal legislative or regulatory action.¹⁷ On the whole, then, the federal government's current approach to provincial compliance seems to constitute a genuine effort to minimize the extent to which unilateral federal action is needed to ensure performance of NAFTA obligations. It is certainly far removed from any sweeping attempt to use NAFTA as a pretext to gratuitously pre-empt provincial jurisdiction or to occupy provincial fields.

This being said, the impact of NAFTA on provincial jurisdiction may, in the long run, nevertheless prove to be quite substantial, as individual instances of non-compliance cumulate or as provincial policy options are narrowed or constrained by the concern to avoid retaliation. One cannot ignore the fact that, as a consequence of the federal government's adherence to NAFTA — as opposed to any domestic legislative or regulatory action to *implement* the agreement — the possibility of trade retaliation hangs over future provincial policy-making in a wide variety of areas. Of course, it might be argued that trade retaliation could be directed against individual provinces even in the absence of NAFTA, through the use of unilateral trade remedy laws. This abstracts from the fact that the NAFTA *invites* and *legitimizes* such retaliation in the case of non-compliance with its strictures. If one subscribes to the general juridical principle that what cannot be done directly cannot be done indirectly, then the impact on provincial jurisdiction from exposure to retaliation should somehow be taken into account in applying the "minimum impairment" test, *even if this impact results from adherence to NAFTA itself rather than from any federal implementing legislation*. This would be tantamount to saying that the federal government may not use its treaty-making power (derived from the Crown prerogative) to circumvent the division of legislative powers in the constitution.

Yet even if the broader, cumulative impact on provincial jurisdiction through the threat of retaliation were taken into account, I am far from certain that the overall federal approach would fail the "minimum impairment" test. Here, there are two important factors that may loom large in a judicial analysis of

the level of impairment of provincial jurisdiction. The first is that the provinces were extensively consulted throughout the NAFTA negotiations. They had regular, formal opportunities to comment on issues that implicated provincial jurisdiction. And, if there are instances where the federal government chose to override their concerns, or reject their suggestions, these have certainly not been widely publicized. The second factor, which may in part explain the relatively quiet stance of the provinces during the negotiation of NAFTA, is that the NAFTA's vision of liberal trade is not in collision with an alternative, inward-oriented "province-building" strategy with broad salience among the provinces. This is quite different from the clash of "province-building" and "nation-building" visions behind some of the division of powers litigation in the 1970s and early 1980s. As it is, the provinces traditionally most aggressive in their assertion of adequate jurisdictional space for province-building, Alberta and Québec, seem entirely comfortable with NAFTA. British Columbia and Ontario, the two provinces that appear to be considering a constitutional challenge to NAFTA's implementation, are themselves aggressively pursuing a vision of provincial economic development that emphasizes the importance of foreign trade and investment (witness the forays of Premiers Harcourt and Rae on trade missions to Asia and elsewhere). Finally, if there were no NAFTA, many of the same constraints on provincial policies would be entailed in the Uruguay Round GATT, which deals with a largely similar range of new-era trade issues. And Premier Rae, at least, has spoken in praise of the achievements of the Uruguay Round.

This is not to say that more fundamental conflicts might occur in future between federal and provincial visions, particularly if there is a move towards comprehensive trade constraints on the use of spending instruments such as subsidies or on cultural policies.

The underlying issues of constitutional principle raised by the potential impact of trade liberalization on provincial autonomy are sufficiently important for Canadian constitutionalism that addressing them in a court challenge at the present juncture would seem premature and, even from the provincialist perspective, may well be counter-productive. Faced with a challenge to NAFTA that may appear to have the character of a symbolic posture for a political audience, and does not at any rate reflect a deep and immediate clash of visions about the future of Canada, the Supreme Court is likely only to reinforce the tendency in its recent decisions to take an expansive

view of the appropriate scope of the federal general powers in an era of global economic interdependence. □

Robert Howse

Faculty of Law, University of Toronto.

On the issues discussed in this paper I have learned much from work by Ivan Bernier, Doug Brown, Scott Fairley, Armand de Mestral and John Whyte.

Endnotes

1. See, generally, A. Gotlieb, *Canadian Treaty-Making* (Toronto: Butterworths, 1968).
2. *A.-G. Can. v. A.-G. Ont.*, [1937] A.C. 326, 1 D.L.R. 673 (P.C.) [hereinafter, *Labour Conventions*].
3. *Citizens Insurance Co. v. Parsons* (1881-82), 7 A.C. 96 (P.C.). It would be more than a century later, however, before federal legislation was sustained by a majority of the Supreme Court entirely on the basis of the second branch of the Trade and Commerce power. See the discussion of *General Motors*, *infra*.
4. *The King v. Eastern Terminal Elevator*, [1925] S.C.R. 434.
5. *Murphy v. C.P.R.*, [1958] S.C.R. 626; *Caloil v. A.G. Canada*, [1971] S.C.R. 543.
6. I have developed this theme further in R. Howse, "The Labour Conventions Doctrine in an Era of Global Interdependence: Rethinking the Constitutional Dimensions of Canada's External Economic Relations" (1990) 16 Can. Bus. L.J. 160 at 170-171.
7. *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641.
8. See, generally, *Dominion Stores v. The Queen*, [1980] 1 S.C.R. 844.
9. See R. Howse, *supra* note 6 at 182.
10. *R. v. Crown Zellerbach*, [1988] 1 S.C.R. 401.
11. *Ibid.* at 432.
12. *Ibid.* at 433.
13. See *Fowler v. R.*, [1980] 2 S.C.R. 213.
14. 26 U.S.T. 2403, T.I.A.S. No. 8165 (December 29, 1972).
15. However, in recent GATT Panel jurisprudence, the provision in question has been interpreted as imposing a rather stringent obligation on the federal government. See, for example, *Canada — Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies (United States v. Canada)* (1992), GATT Doc. DS17/R, 39th supp. BISD (1991-92) 27.
16. The actual provisions are quite technical and cannot be discussed here in detail. See Annex 46 of the labour side-agreement (*North American Agreement on Labour Cooperation*, 13 September 1993) and Annex 41 of the environmental side-agreement, (*North American Agreement on Environmental Cooperation*, August 1993).
17. Here, I have benefited from remarks by my colleague Michael Trebilcock: see M. Trebilcock, Address (Canada in an Interdependent World: Panel on International trade and the Constitution, Conference on Law and Contemporary Affairs, University of Toronto, February 1994) [unpublished].

Review of Constitutional Studies / revue d'études constitutionnelles

The *Review of Constitutional Studies* is the Centre's bi-annual journal. The *Review* publishes scholarly works of an interdisciplinary nature on issues of constitutional concern as well as review essays and book reviews. Formerly published as an annual supplement to the *Alberta Law Review*, the *Review of Constitutional Studies* continues to be published in association with the *Alberta Law Review*.

A Sampling of Contributions to the Centre's Review

"In a democracy understood as communal government by equals, each person must be offered a role that allows him to make a difference to the character of political decisions; and the force of his role — the magnitude of the difference he can make — must not be structurally fixed or limited by assumptions about his worth or talent or ability."

Ronald Dworkin, "Equality, Democracy, and the Constitution: We the People in Court"

"If liberalism tends in the direction of an aggressive individualism, republicanism may tend in the direction of intolerant totalitarianism."

Mark Tushnet, "The Possibilities of Interpretive Liberalism"

"Instead of pushing ourselves to the point of break-up in the name of the uniform model, we would do ourselves and some other peoples a favour by exploring the space of deep diversity."

Charles Taylor, "Can Canada Survive the *Charter*?"

"Rights debated in terms of relationship seem to me to overcome most of the problems of individualism without destroying what is valuable in that tradition."

Jennifer Nedelsky, "Reconceiving Rights as Relationship"

NAFTA AND FEDERALISM IN THE UNITED STATES

Mark Tushnet

Writing even a brief note on the implications of NAFTA for federalism in the United States is onerous. Probably all that needs to be said is this: NAFTA confirms the nearly complete dissolution of federalism as a significant feature of U.S. constitutionalism.

Constitutional federalism is an element of constitutional design aimed at restricting the power of the central government. It has two aspects. First, it can be seen as a design element that the courts may enforce, just as they enforce other elements — like the Bill of Rights — aimed at restricting governmental powers.

Even before NAFTA this aspect of federalism had been reduced to an almost symbolic role. After the New Deal the Supreme Court withdrew from any effort to restrict national power to act directly on the people of the United States. According to the Court, Congress can impose whatever obligations it chooses on the people, without regard to the desire of some or even all states to regulate their residents differently, or not at all.

Not much was then left of judicially enforceable federalism. The Court's most recent confrontation with the problem, in *New York v. United States*,¹ suggests a discomfort with allowing Congress to regulate the states as states — that is, in their governmental capacities, or with respect to their “fundamental” operations, or something like that. I am deliberately vague here because I doubt that the doctrine that will emerge over the next decades from *New York v. United States* is likely to be much more precise, or more satisfying, than alternatives the Court has already abandoned as unworkable.² Judicial enforcement of federalism will soon be a mere stylistic

ornament on the Constitution, serving no particularly useful function except perhaps to remind people in the U.S. that we once had a federal system.

The reasons for the degeneration of judicially enforceable federalism bear on the subject of this essay. The Supreme Court abandoned its effort to preserve a sphere within which states could freely act because it came to believe that the national economy was so interconnected that Congress could not be denied the authority to impose regulations of whatever sort it wanted, wherever it wanted to. States could not be free to regulate in the face of Congressional desires because the Court believed the economic system was fundamentally national, not local.

NAFTA is symptomatic of the further transformation of the U.S. economy. Now the U.S. economy is global, not national. If the Court refused to help the states resist the exercise of national authority in a national economy, it surely will not help them resist the exercise of supra-national authority in a global economy.

The globalization of the U.S. economy affects the second aspect of federalism as well. Federalism is part of the *political* structure of U.S. government.³ States as states, and as representatives of particularly localized interests, still have some influence on the development of national policy. With respect to important economic issues, however, that influence has decreased significantly. In part, this results from the nationalization of the economy: no longer are many particular interests peculiarly localized; “interest groups” have national rather than local constituencies, and organize nationally to influence Congress.

NAFTA and the globalization of the U.S. economy, for which it is a metaphor, further reduce the importance of federalism as a political element in U.S. government. Multinational corporations are more important political actors, with respect to the matters that concern them, than state governors. NAFTA itself may be only a minor contributor to the erosion of political federalism, but globalization is not.

One small doctrinal area of U.S. constitutional law may illustrate the broader issues I have raised. The U.S. Constitution authorizes Congress to regulate interstate and foreign commerce. For over a century the Supreme Court has interpreted this authorization as having a negative implication: states may not regulate interstate and foreign commerce in ways that interfere with that commerce. The Court has identified two kinds of interference. Some state laws may impermissibly *discriminate* against interstate and foreign commerce, while other laws may impermissibly *burden* that commerce.⁴ In recent years the Court has been working its way toward the conclusion that all facially discriminatory laws are unconstitutional, and that it will invalidate facially neutral laws which have been challenged as unduly burdensome only in extreme cases.

The reasons for this conclusion are many, but I wish to focus on only one.⁵ Everyone agrees that Congress has the power to override state laws that either discriminate against or excessively burden interstate or foreign commerce. The localistic impulse to raise money, or improve the competitive position of local industries, is so widespread, however, that no one can realistically expect Congress to override state laws at all systematically. The courts are a convenient administrative mechanism for striking discriminatory or burdensome laws from the statute books.

The Supreme Court's judgment in recent years has been that nondiscriminatory but burdensome regulations of *interstate* commerce are not a serious problem for the national economy. Precisely because the economy has become nation-wide in scope, relatively few such regulations are adopted; the interests that are adversely affected have enough political clout within each state to make it difficult for such statutes to be enacted. The political protection for out-of-state interests against discriminatory legislation, in contrast, is much weaker. Almost by definition, the interests adversely affected by discriminatory laws are located outside the state and have no significant representation in it. And, given the burdens on

Congress of supervising state laws, the Court appears to have concluded that it should persevere in its traditional role to invalidate discriminatory laws.

The Court must soon decide what it should do about state laws that, without discriminating against *foreign* commerce, nonetheless impose substantial burdens on it.⁶ Two paths are open to the Court, but they lead to the same conclusion.

- (1) The Court might apply to foreign commerce the same relatively abstentionist tests it has developed in connection with interstate commerce. Recent decisions do little more than hint that the doctrinal rules governing foreign commerce are different from, and more stringent than, those governing interstate commerce. On this path the Court would reject any distinction between interstate and foreign commerce. It would then invalidate facially discriminatory laws and uphold laws with a merely disparate and burdensome impact.
- (2) The Court might distinguish between interstate and foreign commerce, finding the threat that states would adopt laws burdening foreign commerce significantly greater than the threat that they would adopt laws burdening interstate commerce. It could then maintain its abstentionist doctrines where interstate commerce is involved, but vigorously police state laws that burden foreign commerce.

In either event states are unlikely to come out of the process with the ability to exercise significant regulatory authority. If the Court becomes more vigorous, that conclusion follows almost directly: state regulatory authority will be subject to constant and intense scrutiny by the national courts.

If the Court remains abstentionist, the argument needs some additional steps. Although the national courts would not supervise states, the chances are large that *Congress* would. The reason is, again, that multinational corporations are likely to have significant influence in the national political arena even if they are weak in particular states. They will lobby to get Congress to override local laws they find unacceptably burdensome. And, because foreign trade and therefore foreign policy are implicated, Congress is likely to be responsive to the appeals of these multinationals. In the end, authority will have flowed to the central government.

My argument can be summarized in this way: just as the economy's *nationalization* led to the centralization of governing authority, so too will the economy's *globalization*. The continuing restriction on local power to resist multinational corporations may be regrettable, but it is inevitable. The remedies, if they exist, lie somewhere other than with concern for federalism. □

Mark Tushnet

Georgetown University Law Centre, Washington, D.C.

Endnotes

1. *New York v. United States*, 112 S.Ct. 2408 (1992).
2. See *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985). For my comments on *New York v. United States*, see Mark Tushnet, "Why the Supreme Court Overruled National League of Cities" *Vanderbilt L. Rev.* (forthcoming).
3. Indeed, the most prominent advocates of judicial withdrawal from the enterprise of enforcing federalistic limitations on national power support their position in part by asserting that the nation's political structure provides sufficient protection to state interests. That argument is criticized in a forthcoming article by Larry Kramer in the *Vanderbilt Law Review*.
4. The Court has distinguished between state laws that discriminate on their face against interstate or foreign commerce and state laws that have a discriminatory impact. The distinction functions as the reason the Court invalidates only some "discriminatory impact" laws as unduly burdensome while allowing states to enforce other "discriminatory impact" laws with other unduly burdensome, although arguably not discriminatory, laws.
5. A second important reason is the resurgence of the argument that relatively formalistic doctrines, like the anti-facial discrimination rule, are more suitable for courts to apply than are more functional ones that, for example, focus on whether a regulation's burdens are excessive compared to its benefits.
6. The underlying issue is raised in the pending *Barclay's Bank* case, involving a constitutional challenge to California's imposition of a tax based on the world-wide operations of a multinational corporation with some operations in California.

Centre for Constitutional Studies Resources

Constitutional Studies / études constitutionnelles 1989, 1990, 1991

The Centre for Constitutional Studies' annual supplement to the *Alberta Law Review*.

Points of View / Points de vue

The Centre publishes *Points of View*, an occasional paper series. This series permits the timely publication of scholarly papers of current constitutional interest to both Canadian and international audiences. To date, four issues of *Points of View* have been published.

Social Justice and the Constitution

This collection of essays provide a timely forum for a number of provocative and stimulating arguments about the extent to which a social charter is desirable or feasible. This volume contributes to scholarship in philosophy, law, political studies and social policy, not just in Canada, but beyond.

Conversations: Women and Constitutional Reform

In October 1991, a conference was sponsored by the Centre for Constitutional Studies to explore ways in which the differing perspectives of women could be brought to bear upon the process and substance of constitutional reform. The papers presented address such topics as: representational and institutional reform; health issues; feminization of poverty; and equality issues.

Freedom of Expression and The Charter

The papers collected here were presented at the Centre for Constitutional Studies' Third National Conference in April 1990. This book covers such topics as: freedom of expression and court proceedings; obscenity and the promotion of hatred; defamation; commercial expression; and demonstrations and picketing.

Language and The State / Langue et État

In view of the recurring linguistic tensions which predominate the Canadian constitutional scene, the Centre for Constitutional Studies devoted its second national conference on the constitution to the issue of language and the state. This book covers topics such as: Language Rights; Recent Constitutional Developments; Language and Culture; and Constitutional claims for Other Linguistic Groups.

The Canadian Senate: What Is To Be Done?

The proceedings of the Centre for Constitutional Studies first national conference on Senate Reform are collected here. The book represents a record of the proceedings including papers on foreign and domestic models of reform and conflicting regional aspirations.

NAFTA: RECENT CONSTITUTIONAL AMENDMENTS, SOVEREIGNTY TODAY, AND THE FUTURE OF FEDERALISM IN MEXICO

Carla Huerta and
Alonso Lujambio

INTRODUCTION

This essay is divided into two parts. The first is juridical, both in approach and language. It explains the way in which the Mexican legal apparatus — not only the Constitution, but mainly a variety of secondary laws — has been adapted to NAFTA. At the end of part one, we briefly discuss the implications of NAFTA on Mexico's sovereignty. The second part is more politically oriented; it attempts to explain the indirect impact that NAFTA might have on the nature and features of Mexican federalism. It also addresses the difficult challenge that Mexico will face in terms of regional development due to the new economic growth that NAFTA will bring to the country.

I. SECONDARY LEGISLATION AND SOVEREIGNTY

It is not an easy task to outline briefly the consequences of the ratification of NAFTA within the Mexican legal framework — owing principally to the fact that, in recent years, numerous amendments have been made to the country's legal code. We cannot necessarily attribute these modifications to NAFTA, but they are closely connected to it.

We should start by saying that the Mexican legal system does not require constitutional amendment when an international treaty is concluded. It is sufficient that a treaty only not contravene the Constitution in order for it to become a fully valid rule, provided that the procedures established in

Article 76, subsection I (Senate approval) and Article 89, subsection X (general principles of foreign policy) of the Constitution are followed.¹

We may state, then, that policies which have been implemented following the procedures set out in the Constitution, as in the case of international treaties, are presumed to be valid and are constitutional (at least formally). In the case of a violation of individual rights, the contents of a treaty may be reviewed by the Mexican Supreme Court of Justice. This is not only because all acts of authority in Mexico are subject to review through the constitutional procedure called "*juicio de amparo*," but also because, according to Article 15 of the Constitution, "when [international agreements or treaties] ... alter the guarantees and rights established by this Constitution for the individual and the citizen," the Executive Power is limited in its capacity to conclude international treaties.

This does not imply that if the international treaty contains a provision which violates Article 15 of the Constitution it will automatically be declared null and void. Rather, the Mexican legal system precludes a declaration of general invalidity of a rule or policy through the process of *amparo*. Only an injured party can seek a declaration of invalidity through the process of *amparo*, and the declaration can only have the effect of redressing that particular complaint. This system presents serious drawbacks; first, there is no mechanism for prior review of constitutionality and, second, there is no legal remedy established which provides for the elimination of rules from the legal order once they have been declared unconstitutional.

In accordance with Article 133 of the Mexican Constitution, international treaties become part of the legal order as the supreme law of the nation. This does not mean that an international treaty, such as NAFTA, is on the same level as the Constitution and has the same rank and non-derogable force, but, rather, that it will take precedence, within the regulatory hierarchy of Mexican laws, over secondary legislation within the federal sphere. Because it is hierarchically subordinate, such secondary legislation must conform to the text of an international treaty. It would be illogical to think that, in a system such as ours, the supreme law of Mexico must conform to an international treaty, since the Constitution itself, in establishing the process for becoming a signatory to a treaty, figures as the basis of validity for the treaty.

The constitutional reforms carried out by the present legislature (1991-1994) amount to a total of 29 plus one addition. Nevertheless, the matters referred to by these reforms are very diverse in nature and not all relate to NAFTA; some deal with the indigenous populations, labour matters, penal procedure, the political organization of the Federal District and the integration of the two chambers of Congress. But, if we cannot say with certainty that the Constitution has been reformed expressly to accommodate NAFTA, we can indeed say that two recent constitutional reforms have important economic implications: the reforms to Articles 27 and 28.² Article 27 concerns property rights, with constitutional reform focusing on changes to rural property rights with a view to increasing productivity. Article 28 concerns trade. Both articles are found within what could be termed the "economic chapter" of the Constitution.³

There are no well-founded reasons to think that there will be future changes to the Constitution because of NAFTA. We insist that because NAFTA is a policy whose formal and material validity depends on the Constitution, it is NAFTA which must be adapted to the supreme policy in order to be applicable, and not the Constitution to NAFTA. It is important to note that the majority of the far-reaching changes made to the Mexican legal order in order to make NAFTA applicable have been carried out at the level of secondary legislation. The reforms made to the Constitution arose from requirements of internal order which go beyond NAFTA, that is to say, real problems which were essential to resolve. Thus, there have also been numerous changes, related to secondary trade legislation, effected to permit the application of NAFTA and to prevent possible conflict between trade policies and the treaty. The most important changes have been made to the federal law

on *Economic Competition*, the law on *Foreign Trade*, and the new law on *Acquisitions and Public Works*. These reforms have incorporated provisions from NAFTA, detailing different procedures which permit its effective application.⁴

In regard to the question of whether NAFTA affects the internal sovereignty of Mexico in any way, we believe that the concept of sovereignty must be understood from a normative perspective. NAFTA should be analysed, then, from a perspective that it is a free trade agreement and not a constitutive agreement for economic or political union. For these purposes, we can contrast NAFTA with the Treaty of Rome which, although initially a treaty designed to achieve only economic union, had the longer term objective of the political unification of Europe. This objective accentuates the differences rather than the similarities between these two agreements: NAFTA does not have similar political effects in the sense of altering the sovereign status of the signatory states through the process of political integration. It is for these reasons that we believe NAFTA can have no effect on the internal sovereignty of Mexico.

It is a principle of international law that a state party to an international treaty is not entitled to interfere in the internal affairs of another signatory state. Similarly, it is not acceptable to think that internal political decisions could be altered or determined externally. The most important principles which govern Mexican international relations are provided for in Article 89, subsection X. As previously mentioned, the principles are essentially those of "self-determination of nations" and "non-intervention." Such principles should be interpreted in two ways: both as a prohibition against Mexico's intervention in the internal affairs of other countries, and, more fundamentally, as an obstacle to other states interfering within the domain of Mexican jurisdiction.

For this reason, it can be stated that, if the signatory states are bound by the conditions of NAFTA, it also is true that these principles of international law cannot be transgressed, and that no rule can be interpreted which might in any way permit interference with Mexican national sovereignty. If this were not the case, a remedy could be sought through the process of *amparo*, as has already been explained.

On the other hand, and from a strictly political perspective, it is clear that the concept of national sovereignty, which has been dominant throughout the Mexican post-revolutionary period, must change in the face of Mexico's commercial integration with the United States and Canada. It is a bit absurd to pretend that the armed conflict in the state of Chiapas, the

continuation of fraudulent practices by the Institutional Revolutionary Party, or violations of human rights will go unnoticed by our neighbours and trading partners — that these things will remain confined to the “Mexican village.” Last February, for example, when the situation in Chiapas was discussed in the American Congress, it provoked vigorous protests by all Mexican political parties against interventionism into our domestic affairs. It is unthinkable to continue to promote the old idea of political sovereignty: by joining commercially with the United States and Canada, Mexico has consented — implicitly, if one wishes, but in an unequivocal manner — to be evaluated politically by the same criteria that these countries use.

The end of Mexico’s economic isolation also means, in a sense, the beginning of its political globalization. The Mexican government must now not only fight with domestic public opinion, which for years it has tried to scorn, but with the opinion of other countries, who will judge harshly the Mexican practices of human rights violations and electoral fraud. By no means do we wish with these arguments to legitimize interventionist practices which would violate Mexico’s sovereignty. Nevertheless, we believe that the Mexican government must, in the future, promote more open and democratic political practices, not only for domestic reasons, which are the strongest, but also for reasons of international prestige. Finally — and in accordance with the ‘law of anticipated reactions’ — the most effective way to avoid having other countries proffer their opinions concerning undemocratic political practices is simply not to engage in such practices.

II. NAFTA AND THE FUTURE OF MEXICAN FEDERALISM

Neither NAFTA nor the constitutional reforms to adapt the Mexican legal framework to NAFTA have a direct and explicit impact on the nature or features of Mexican federalism. Nevertheless, it is necessary to clarify that this trade agreement bears relation, at least in two ‘contradictory’ senses, to the future of the Mexican federal arrangement. On the one hand, NAFTA will help to pluralize the political life of the country and, consequently, will strengthen the federal institutional arrangement; on the other hand, because it does not include clauses on regional development, this agreement may seriously accentuate the great differences in economic development between the

states of the Mexican federation. We shall develop both of these arguments.

The main factor which has explained the weakness of Mexican federalism is not an administrative one; nor has it anything to do with the centralism of the distribution of fiscal resources. On the contrary, it has a strictly political character: the most important variable which explains the precariousness of post-revolutionary Mexican federalism is the hegemonic, rather than competitive, party system.

A hegemonic party system and a federal system are two things which, like oil and water, simply do not mix. In 1968, Harry Kantor, an American specialist on Latin American politics, wrote that the presence of a hegemonic system was the most important obstacle to the full functioning of Mexican federalism.⁵ William Riker, doubtless the most penetrating scholar on federalism, has insisted upon the same point: the most important variable for defining the political relevance of a federal system is found in the nature of its party system and in its competitiveness.⁶

A widely-held view in Mexico is that the decentralization of administrative powers and fiscal resources would strengthen federalism. Perhaps decentralization would help attain the goal of renewing federalism. Nevertheless, as long as governors cannot be re-elected and owe their mandate not to their constituencies through competitive elections, but to the central power, and as long as they consider the president their political boss — who is simultaneously the leader of the hegemonic party — federalism will never reach its full potential, no matter how many administrative duties, policies, and resources are decentralised. Maintaining *ceteris paribus* responsibilities and resources, federalism may be better strengthened in the partisan diversity of the central power and the federative entities, and in the decentralization of the parties, given that this latter variable is the one which will confer political dynamism to the relationship between the central power and the states. This might allow all of the other issues on the federal agenda (who collects which taxes, who implements which public policies, who spends which resources, who focuses on which responsibilities) to be tackled and discussed by a ‘plurality’ of political forces.

In our opinion, NAFTA will contribute — along with other strictly domestic variables — to the

development of this plurality. In the past, the Institutional Revolutionary Party (PRI) could monopolize state governorships thanks to, among other things, the use of fraudulent practices against the opposition. But NAFTA will make the continuation of such political practices increasingly difficult. Unfair elections at all levels — national, state and municipal — will be viewed very poorly by Canada and the United States, Mexico's new trading partners. The political costs which the PRI will pay for continuing to commit fraud against opposition parties will be greater than the costs of tolerating, once and for all, the existence of opposition state governments. The presence of opposition parties in state governments will, in turn, clearly strengthen the political dynamics of Mexican federalism. In this sense, it is foreseeable that NAFTA will contribute to the strengthening of the Mexican federal arrangement in the short term, since it will encourage the government and the PRI to respect the triumphs of its competitors at all levels, including the state level.

NAFTA will also contribute to the achievement of this objective in the long term. The new economic growth which this trade agreement will bring to Mexico will speed up the country's modernization process (its industrialization, urbanization, and so on). During the last 30 years, the relationship between industrialization-urbanization and the vote for the PRI has been systematically and strongly negative. The more modern the population, the less support the revolutionary party receives. In the long term, NAFTA will diversify the sources of political and economic power while, at the same time, liberating social forces which will demand institutional stability and democratic rules. If a new modernizing impetus brings greater political and social plurality and, with it, fraud ceases to be practised in Mexican politics, then NAFTA will contribute in the long term not only to the development and modernization of Mexico, but also to its political plurality and, accordingly, to the strengthening of Mexican federalism. On the other hand, and contrary to what happened during the 1940-1980 period when there were high economic growth rates under the Import Substitution Industrialization (ISI) model, the role of the Mexican government in the promotion and control of new economic growth will decrease forthwith. The market will operate much more freely than in the past. The government will have fewer means of political control at its disposal — price controls, large semi-public enterprises, subsidies, etc. — to abate the increasing political plurality of the country. NAFTA implies the abandonment of the ISI model and, therefore, of the excessive interventionism of government in Mexico's economic and political life.

This will affect the political life of the country in a definitive manner: it will encourage the political plurality of the electorate and, consequently, of the municipalities and states of the Mexican federation.

Perhaps we ought not to be so optimistic. The impact of NAFTA on federalism will be ambiguous. NAFTA signified an extraordinary opportunity, which was uselessly squandered, to strengthen 'regional development' and the Mexican federal arrangement. Mexico displays marked disparity in the development of its regions and states. The northern states and some central regions show levels of economic and social development which are incomparable to the backwardness that characterizes southern Mexico — which is more reminiscent of Central America than of the rest of the country. If the new economic growth which NAFTA will bring follows traditional patterns of economic concentration seen since the 1940s, perhaps we shall begin to speak of two countries: "Northern Mexico" and "Southern Mexico."

Undoubtedly, the aspect of NAFTA which will be most criticised is the absence of clauses on regional development — clauses which are found in the European treaty. When Spain entered the European Community, redistributive clauses immediately came into effect to prevent, in the long term, the "Africanisation" of the already lagging Andalusia (in the South) and the "isolated Europeanization" of the Basque region and Catalonia (in the North). The European Union tries to consolidate, in the long term, a homogeneous Europe in terms of social development, thus avoiding having the market operate in such a way as to accentuate the disparities between member countries and between different regions within them. We find nothing in NAFTA regarding the important matter of regional development. It is not surprising that the National Zapatista Liberation Army (EZLN), which operates as a guerilla force in the southern state of Chiapas, decided to make its armed uprising coincide with the entry into force of NAFTA on January 1, 1994, arguing that this trade agreement represents a "death certificate" for an extensive number of social groups in this state. It is obvious that federalism will not be strengthened by means of weapons and war, but there is, in the EZLN's discourse, a demonstration of how the impact of Mexico's arrival — with economic growth very regionalized and poorly distributed — into the "First World" is viewed in the South of the country.

There are two possible reasons for the absence of regional development clauses in NAFTA. Perhaps, in the first place, the impact in terms of regional

development which the United States and Canada will experience as a result of NAFTA are minimal when compared with that which Mexico is going to experience. This fact may explain the relative lack of concern, on the part of Americans and Canadians, regarding this matter and, consequently, its exclusion from the negotiation agenda and from the treaty itself. In the second place, NAFTA is an agreement on "free trade," comprised of arrangements which will gradually eliminate customs restrictions and other trade barriers between the countries party to the agreement. That is, NAFTA has no "common market" status, much less, one of "economic union." The latter is a more advanced form of treaty which implies not only the elimination of trade barriers, but the free circulation of goods, persons, services, and capital — the adoption of a unified economic and social policy. This would necessitate the harmonization of a large range of policies (finance, transportation, immigration, health, etc.), which would make the the formation of an "economic union" not only an economic process, but also a political and social one.

As NAFTA is a treaty on "free trade," and not a treaty for the constitution of an "economic union," there was no need to address regional development in the agreement. However, this argument tends to extrapolate mechanically the European experience to that of the North American treaty. The differences between Spain and France in terms of social development cannot be compared with those that are found between the United States and Mexico. Even if the United States and Canada were not concerned about the matter, the Mexican government certainly should have been. The adaptation of the Mexican legal framework to NAFTA could have involved regional development clauses which, at least, could have operated only in Mexico. It is difficult to believe that Mexico can now convince its new trade partners to establish regional development compensation funds to benefit states excluded or affected by the operation of NAFTA, financed trilaterally (according to the degree of national development), and giving priority to the least favoured states in the three federal systems. Nevertheless, it should be one of Mexico's highest priorities to try to avoid — with explicit policies agreed upon between the states of the Mexican federation — the deepening of developmental disparities between regions. The presence of a guerilla force in the south of the country — something entirely new in post-revolutionary Mexican history — with an anti-NAFTA discourse and a distressing complaint about the oblivion into which the south has fallen, is a

warning signal to the Mexican government. The absence of an aggressive policy of regional development to redistribute new economic growth between the states of the federation is going to have serious political consequences for Mexico. □

Carla Huerta

Professor of Mexican Constitutional Law,
Autonomous Technological Institute of Mexico, ITAM.

Alonso Lujambio

Professor of Comparative Politics, Autonomous
Technological Institute of Mexico, ITAM.

Translated by E. W. Montgomery, University of Alberta.

Endnotes

1. Article 76 Subsection I establishes that it is the exclusive power of the Senate "to analyze the foreign policy developed by the federal Executive power based on the annual reports of President of the Republic and the Secretary of the respective office to Congress; also, to approve the international treaties and diplomatic agreements that the Executive office of the Union concludes." For its part, Article 89 Subsection X establishes that one of the powers and duties of the President is "to guide foreign policy and to conclude international treaties, submitting them for the approval of the Senate. In the management of such policy, the holder of the Executive Power will observe the following ruling principles: the self-determination of nations; non-intervention; the peaceful solutions of disagreements; a ban on threats or the use of force in international relations; the legal equality of states; international cooperation for development; the fight for international peace and security."
2. The latest reforms to Article 27 were approved in January, 1992, and those to Article 28 in June, 1990 and August, 1993. We must not forget that NAFTA was not approved until December, 1993.
3. Articles 25 and 26 are also included in this "economic chapter," along with Article 131 which contains the extraordinary powers which the President of the Republic may exercise as part of his responsibility to legislate on matters of foreign trade.
4. These laws were published in the *Diario Oficial de la Federation* on December 24, 1992, December 22, 1993 and December 30, 1993 respectively. The regulations on the *Law of Foreign Trade* was published on December 30, 1993.
5. Harry Kantor, "Latin American Federalism" in Valerie Earle, ed., *Federalism: Infinite Variety in Theory and Practice* (Itasca: Peacock, 1968).
6. William Riker, *Federalism: Origin, Operation, Significance* (Boston: Little & Brown, 1964).

NAFTA AND THE FUTURE OF ENVIRONMENTAL REGULATION

Patricia E. Perkins

While NAFTA contains more “green” language than any previous trade pact, the agreement is also unprecedented in the freedom it allows investors and the extent to which it curtails government policy flexibility — important areas of concern for the environment. Especially in Canada, where environmental policy is primarily a provincial responsibility, questions have arisen about the workability and constitutionality of federally-negotiated international agreements like NAFTA which may have broad impacts on the ability of provincial governments to regulate and set environmental policy. Without embarking on constitutional questions in detail, this paper briefly explores some of the environmental policy issues raised by NAFTA.

In order to facilitate trade in goods, NAFTA sets out limitations on the types of standards which countries may legitimately use to ban the import of goods for health, safety, or other reasons. NAFTA’s rules apply to all standards that “may, directly or indirectly, affect trade in goods or services” between the NAFTA countries (Article 901). Many environmental regulations fall into this category — both those relating to traded products themselves (such as allowable levels of pesticides on fruit) and to production processes (such as smelter emissions standards), since compliance with these environmental standards affects the producers’ costs and the price of the traded goods.¹

Jurisdictions are expected, under NAFTA, to base their standards on international ones, and to work toward harmonizing their standards with those in the other NAFTA countries (Articles 905 and 906). This may lead, in principle, to pressure on jurisdictions to accept a lowest common denominator as the acceptable

standard, despite language designed to reduce the downward impact of standards harmonization. Currently, a wide range of types of environmental regulation exist in different jurisdictions for a variety of ecological, political, and historical reasons. Adoption of international standards could set back hard-won environmental and health advances in some countries. Such provisions also threaten the progressive evolution of environmental policy, since any jurisdiction which takes the lead in a particular regulatory direction could be more likely to face a trade challenge.

In the event of a standards-related trade dispute, the onus would fall on the country with higher standards to prove that they are intended to meet a legitimate objective, that they do “not operate to exclude imported goods which meet that legitimate objective,” and that they do not discriminate between foreign and domestic firms (Articles 904 and 301). A NAFTA panel of trade experts decides any dispute which may arise, and if a standard is deemed to violate NAFTA, it must be rescinded or revised, or else the offending jurisdiction faces trade sanctions approved by the NAFTA panel (Articles 2004, 2018 and 2019).

NAFTA states that, like the standards themselves, jurisdictions are to harmonize their standards enforcement procedures. The agreement sets out detailed rules concerning how standards should be enforced (Articles 906 and 908). The North American Agreement on Environmental Cooperation similarly focuses on national enforcement of national laws and regulations, and on procedures for harmonizing rules and their enforcement. Thus, many aspects of the operations of government agencies charged with

overseeing compliance with environmental regulations may also be affected by NAFTA's implementation. This has a wide range of budget implications and could skew government allocation of funds for environmental protection.

More than previous trade agreements, which deal almost exclusively with trade in goods, in general NAFTA emphasizes investment, trade in financial and other services, "intellectual property" rights, and access by individual investors to dispute settlement procedures. Investment shifts associated with NAFTA are likely to bring environmental protection measures under increasing pressure in all NAFTA countries.

NAFTA's Investment Chapter contains a provision which states that the three NAFTA countries should not waive or weaken their existing environmental measures as a means of attracting investment (Article 1114). This clause is the principal attempt in NAFTA to address the possibility that investment shifts following NAFTA's implementation could lead to the growth of "pollution havens" (jurisdictions with relatively lax environmental laws, where costs are lower but goods can be freely exported to the other markets). The non-binding language used in Article 1114 gives it little clout. Moreover, it does not address pre-existing differences in the environmental policy framework among the NAFTA countries.

Any increase in trade associated with NAFTA implies that more goods are transported farther than before. Increased transport of goods places new strains on existing transportation infrastructure and causes increased energy use, pollution, resource depletion, waste generation, and climate change. It also increases political pressures for the development of transportation infrastructures, and decreased regulation and taxation of transportation. For similar political reasons, wider demand for raw materials may set back conservation initiatives and/or lead to more rapid depletion of resources.

International environmental agreements often use trade sanctions against non-signatories to encourage compliance. NAFTA permits several such pacts — including the Montreal Protocol on ozone-depleting substances, the Basel Convention on waste transfers, and the CITES agreement regarding endangered species — to supersede NAFTA if conflicts arise. All NAFTA parties would have to agree before any future international environmental agreements would be allowed to take precedence over NAFTA (Article

104). This, effectively, could allow any one NAFTA party to veto its trading partners' flexibility to become active partners in future agreements designed to address global environmental issues (e.g. biodiversity, forestry, climate change, or Arctic pollution).

NAFTA's energy chapter, from which Mexico negotiated an exclusion, prohibits nearly all quantitative restrictions on energy exports (Articles 603 through 607, and Annexes to Chapter 6). The "proportionality clause" of the Canada — U.S. Free Trade Agreement is continued in NAFTA (Article 605). This clause states that even in an energy supply emergency, NAFTA countries must continue to export an amount proportional to the average of exports to total energy production during the three preceding years. All NAFTA parties but Mexico may thus be prevented from acting to meet domestic needs first in an energy crisis. Other goods, apparently including water, are covered by the same rules (Article 315).

Government action is central to virtually all efforts to internalize environmental costs of production and implement the widely-accepted "polluter pays" principle, thus making economies more sustainable. In Canada, it is primarily provincial governments which face this challenge. The chilling of progressive environmental policy because of fiscal contraction and fear of trade disputes may be NAFTA's broadest and longest-term negative environmental legacy.

The argument that trade-induced economic growth will make more financial resources available to devote to environmental protection has been contested by many environmentalists, who argue that tax revenues are unlikely to rise in Canada due to competition for investment dollars and to declines in personal income tax revenues.²

Instead, NAFTA weakens the capacity of governments to impose regulations on private investors — such as environmental taxes, standards, and emissions controls — since firms can play jurisdictions off against each other in new ways, producing in and exporting from the jurisdiction where production costs are lowest. NAFTA disciplines go beyond those of GATT in restricting the use of traditional trade sanctions to defend standards and other environmental regulations against erosion.

As an example, let us consider a hypothetical provincial regulation concerning allowable lead emissions from a smelter, as measured in parts per

million of lead detected at a high-volume air filter near the smelter over a certain period of time. In Canada, regulations of this type are enacted pursuant to a provincial *Environmental Protection Act*; some federal standards and regulations pursuant to the federal *Environmental Protection Act* may also apply to smelter emissions. In very general terms, a challenge to either the federal or the provincial regulation could arise under NAFTA on any of several different grounds (relevant references from the texts of NAFTA and the North American Agreement on Environmental Cooperation are listed in footnotes to each):

- 1) If it were regarded as lenient in comparison with emissions standards in effect in some other NAFTA jurisdiction, the lead regulation could be cited as a government incentive for metal exports or a discouragement of imports from other countries where lead standards were more stringent.³
- 2) On the other hand, if the regulation were regarded as stringent in comparison with other NAFTA jurisdictions, the provincial standard could be challenged as a restriction on metal exports.⁴
- 3) Again, if it were regarded as relatively stringent, the regulation could be cited as a deterrent to investment in the Canadian province because, for example, it might require the prospective investor to employ pollution control equipment or technologies not used in the investor's home jurisdiction or in other NAFTA jurisdictions.⁵
- 4) The regulation, whether relatively lax or stringent, could be viewed as constituting a disguised restriction on trade in goods or services.⁶

It remains to be seen, of course, whether any of these positions would be found convincing by a NAFTA dispute panel or investment tribunal (composed of experts in international law and investment).

As noted, a defense of the provincial emissions standard under NAFTA would have to show that the standard is adopted in pursuit of a "legitimate objective" (Article 904.2) and that its implementers avoid "arbitrary or unjustifiable discrimination against goods or services" (Article 907.2), and/or that the regulation is based on relevant international standards, affording other NAFTA countries national treatment and most-favoured nation status.⁷

In contrast to the Canada-U.S. Free Trade Agreement, which specifically exempts provinces from the standards chapter, NAFTA states that the federal government must "seek, through appropriate measures, to ensure observance" of the bulk of the standards chapter by provincial and state governments and by non-governmental standardizing bodies. It is unclear what the federal government would need to do to satisfy a NAFTA panel that it had complied with this provision, in the event of a challenge by another NAFTA party involving a Canadian provincial measure.

In none of the situations cited above would the North American Agreement on Environmental Cooperation be particularly relevant. That agreement sets out dispute proceedings for use when domestic laws are not being effectively enforced by local authorities, but does not address dispute resolution in cases where different jurisdictions simply have different regulations.

In conclusion, NAFTA's effects on the future of environmental regulation may be summarized as follows:

- 1) The ambiguities in NAFTA regarding allowable types of environmental regulations and enforcement procedures make challenges likely as dispute settlement precedents are established. This can be expected to have a chilling effect on jurisdictions' creativity and initiative in making environmental policy.
- 2) Private firms have new options for challenging or evading government policy due to NAFTA's emphasis on investment and financial services. This has implications for both government fiscal capacity in general and environmental policy in particular.
- 3) The allocation of government funding for environmental protection may be skewed by NAFTA's requirements, especially those regarding harmonization of standards and enforcement procedures.
- 4) Transportation and primary materials development subsidies are likely to receive an impetus, influencing overall environmental policy strategies away from conservation and throughput-reduction.

- 5) NAFTA parties have less flexibility than other countries to comply with international environmental agreements which include trade measures as an enforcement mechanism.

Taken together, these considerations cast a significant pall on the statement in NAFTA's preamble that the parties see NAFTA as a way to "promote sustainable development" and "strengthen the development and enforcement of environmental laws and regulations." □

Patricia E. Perkins

Faculty of Environmental Studies, York University.

Endnotes

- Many environmental standards are also covered by NAFTA's section on "Sanitary and Phytosanitary Measures," or policies covering the safety of foods and animal feedstuffs, as well as pest and disease control measures. NAFTA's rules in this regard, found in Chapter 7, Section B of the agreement, are somewhat different than the Standards rules.
- Bruce Campbell, "Globalization, Trade Agreements, and Sustainability" in Canadian Environmental Law Association, *The Environmental Implications of Trade Agreements* (Toronto: Ontario Ministry of Environment and Energy, 1993) at 60-61.
- NAFTA Articles 1902.1, 901.1, 904.4, 309, 315, 905, 907, Annex 2004, and NAAEC Article 3. GATT rules, in contrast, as found in the Technical Barriers to Trade agreement, apply to characteristics of traded goods themselves (not to production process standards). The GATT panel decision on the tuna-dolphin case underscores this distinction. See Sandra L. Walker, *Environmental Protection versus Trade Liberalization: Finding the Balance* (Brussels: Publications des Facultés universitaires Saint-Louis, 1993) at 87-96.
- NAFTA Articles 309, 315, 904.4, 905, 907, and Annex 2004. GATT contains no similar language regarding investment or financial flows.
- NAFTA Articles 1106, 1108, and Annex 2004.
- NAFTA Articles 904.2, 907.2, and Annex 2004.
- The dense language of the Standards chapter makes it likely that disputes will proliferate until some clarity is provided by successive dispute panels. This, in turn, may discourage jurisdictions from exploring creative new environmental policy approaches or simply from making progressive improvements in their regulations to maintain or improve environmental quality.

Centre for Constitutional Studies Centre d'études constitutionnelles Subscription Form 1994/95

Name: _____

University/
Firm: _____

Address: _____

Constitutional Forum constitutionnel (Volume 6, No. 1-4)
Review of Constitutional Studies (Volume 2, No. 1 & 2)

- ☐ Individual Associate Membership \$35.00
includes *Constitutional Forum constitutionnel*
- ☐ Institutional Associate Membership \$35.00
includes *Constitutional Forum constitutionnel*
- ☐ Individual subscription \$32.10
to *Review of Constitutional Studies*
- ☐ Institutional subscription \$48.15
to *Review of Constitutional Studies*
- ☐ Individual Associate Membership \$56.40
includes *Constitutional Forum constitutionnel* PLUS
Subscription to *Review of Constitutional Studies*
\$35.00 and \$21.70 (save \$10.70)
- ☐ Institutional Associate Membership \$77.80
includes *Constitutional Forum constitutionnel* PLUS
Subscription to *Review of Constitutional Studies*
\$35.00 and \$42.80 (\$5.35)

METHOD OF PAYMENT

- ☐ Payment included
- ☐ Please invoice
- ☐ Purchase Order

Please make cheque or money order (Canadian funds) payable to the Centre for Constitutional Studies. GST Registration No. R108102831.

Write to: Room 456 Law Centre
University of Alberta, Edmonton, Alberta
T6G 2H5 or
Phone: (403) 492-5681 / Fax 492-4924

NAFTA AND INEQUALITY: A CANADIAN PERSPECTIVE

Charles E. Reasons

"It was the best of times, it was the worst of times" — this classic quotation from Dickens' *A Tale of Two Cities* seems to be quite appropriate for characterizing the consequences of free trade generally, and specifically, of the recently instituted North American Free Trade Agreement (NAFTA). This article will focus upon the ways in which NAFTA continues to foster inequality between countries party to the agreement, and inequality within these countries, with particular attention to Canada's place in the "new world order." As one professor of economics has observed:¹

It is abundantly clear that NAFTA will give rise to a major redistribution of income and wealth — not so much from country to country, as from one socioeconomic class to another. More specifically, NAFTA will undoubtedly redistribute income from wage and salary workers to the propertied elite in Mexico, Canada, and the United States. We know this already from the recent experience of Mexico with its corporate *maquiladores* and investment "reform," and from the effects of the Free Trade Agreement between the United States and Canada. This alone would constitute a success for the architects of NAFTA. In the final analysis, it is not the countries or corporations, but rather the propertied elite in all three nations who are the driving force behind this agreement — and who will be NAFTA's ultimate and perhaps only beneficiaries.

Even though NAFTA does more than merely expand the application of the Canada-U.S. Free Trade Agreement (FTA) to Mexico, it is helpful to review briefly the effects of the FTA upon inequality within Canada.

CANADA-U.S. FREE TRADE AGREEMENT

The FTA represented one of the most fundamental shifts in Canadian public policy since Confederation. It was passed and became law in January 1989 after a divisive federal election campaign in 1988. The pro-free trade movement was led in Canada by the federal government and most provincial governments, aligning with business organizations and interests to form the Canadian Alliance for Trade and Job Opportunities. The anti-free trade forces were centred amongst nationalists, unionists, environmentalists, and women's rights activists involved in an umbrella organization entitled the Pro-Canada Network.²

Basically, those for the FTA argued that with the increasing "globalization" of the economy,³ reducing trade barriers would only benefit Canada since it would open up large U.S. markets, entice capital investment and, thus, increase employment. Those opposed to the FTA saw the deal as leading to the elimination of many high-paying union jobs, while increasing low-paying service sector employment, reducing or eliminating the social programs which are a proud aspect of Canadian identity and well-being, giving up more political autonomy to the United States and transnational corporations, and leading to a lessening of health, welfare, and environmental standards under the banner of the new Social Darwinist imagery of "global competition." The period leading up to the 1988 federal election was a classic example of class politics, in which governments and business were aligned against most working people. While the majority of Canadian voters cast ballots for the two major opposition parties, the

Conservatives won the election and, thus, free trade became law.

TRICKLE DOWN

What do we know about the effects of free trade? Canada has lost more than 300,000 manufacturing jobs, or 13% of its total manufacturing employment since the FTA was signed.⁴ These jobs cannot be replaced and were largely unionized, high-paying, and entailed good benefits. The FTA appears to have increased the bifurcation of the labour market which was already occurring in the 1980s. It has helped to bring about a larger proportion of low-wage jobs, part-time jobs, and jobs such as those in the service industry which tend to be non-unionized and without basic employee benefits.⁵ Labour economists call this a dual labour market: one type of labour market being relatively high-paying and unionized, with job stability, promotional opportunities, while the other labour market is low-paying, non-unionized with dead-end jobs, lacking job stability.⁶ What this has meant is not only a loss of many high-paying secure jobs, but also a loss of the tax base from those jobs and those industries. This has meant the furthering of the fiscal crisis of the state in terms of collecting taxes and being able to provide health care, education, unemployment benefits, social security, and other benefits to those who are increasingly marginalized to the labour force.

This reduction in tax income from individuals and from companies who have moved south for cheaper labour, has exacerbated the fact that the Canadian government has shifted its taxation policies over the last decade to rely more and more upon individual taxpayers. This has been in line with neo-conservative thinking which aims to buttress corporations, company and business people, while making taxpayers pay more. Ironically, the loss of high-paying jobs and manufacturing industry to the United States has weakened this tax base, necessitating in part the reduction in transfer payments to the provinces for the provision of social services. I am not saying that the free trade agreement created this tax situation, but it highlighted the contradiction of an increasingly regressive tax policy redistributing income to the rich from working people.⁷ The Free Trade Agreement also heightened the traditional dependency of Canada upon exports, and increased regional inequalities within Canada.⁸ Finally, the FTA, while reducing high-paying, unionized, largely manufacturing jobs, has increased the demand for office sector and service

sector jobs which tend to be largely "female ghettos," part-time, non-unionized, and part of a marginalized work force which is unable to survive on the meagre wages and lack of adequate benefits.⁹ Unemployment has increased in Canada under the FTA, as have food banks and other forms of "voluntary" social assistance.

Hundreds of companies have left Canada to relocate in the U.S. sun belt and northern Mexico due to cheaper wages and fewer regulatory, environmental, and other restrictions. For example, manufacturing wages are one-third lower in Tennessee than they are in Ontario. There is no minimum wage in Tennessee, little spent on social programs, and no personal income tax collected. Unions are not welcome in that state: it is one of many southern states that have "right to work" laws.¹⁰

NAFTA: MORE OF THE SAME

The North American Free Trade Agreement continues the inequities promoted by the Canada-U.S. Free Trade Agreement, extends them to Mexico, and includes many new provisions to expand the nature of items within its purview. As has been noted for many years, the Canadian economy is a dependent economy which is mainly an exporter of raw materials, and largely under the control of multinationals primarily based in the United States.¹¹ The major thrust of NAFTA and its predecessor, the FTA, is to provide for the mobility of capital between the trading partners. This means essentially that the multinational companies can move their plants and other aspects of their business to any of the respective countries where they can make the most money via lower wages, non-unionized workers, lower regulatory, health and safety, and environmental standards, lower taxes, amongst other "inducements." With the ability of multinational giants to invest and divest with a minimum of restrictions in the three countries which are parties to NAFTA, wages will become directly subject to competitive pressure on a continental basis.¹²

With weakened unions in all three countries, real wages in the pockets of workers have barely changed for more than a decade. While there are significant differences between Canada, the U.S., and Mexico, and between the different sectors of the labour market, the overall pressures on wage movement are downwards. Wages are much more vulnerable to competitive pressures than ever before. And the social

wage is also shrinking. The entire industrial wage-setting mechanism has to incorporate wage pressures that are no longer primarily local but now starkly global. In these circumstances, a social wage for all Canadians is seen as an impediment to competitiveness rather than as a benefit integral to its society with a high performing economy.

Not only wages, but standards of living, social services, and other benefits which we have in Canada will likely follow this logic. Both provincial and federal powers have been ceded to transnational corporations in a number of areas which make it problematic to stem these negative effects. More specifically, the national treatment provisions of NAFTA (Article 102) place no limits on its application to services, investment and exports as well as imports. This gives foreign companies, particularly U.S. transnationals, the right to compete and operate in Canada on an equal basis with any Canadian companies, whether they be Crown or private. National policies concerning use of Canadian workers, use of Canadian products, keeping capital in the country, or other such conditions for operating in the provinces or the country have been eliminated. Furthermore, NAFTA makes it impossible for the government to operate new monopolies for Canadians by competing directly with these transnationals or other private companies unless they compensate the private sector (Chapter 15).

NAFTA has greatly impeded democratic rights in Canada, particularly efforts by provinces to control and direct their economies, environmental policies, and social benefits.¹³ Under NAFTA, corporations will have the option to challenge both federal and provincial laws in Canada before a new body, the International Centre for the Settlement of Investment Disputes, which is not accountable to the very public affected by its decisions.

Furthermore, national treatment rights for most of Canada's resources have been given to the United States and Mexico. Of particular significance is the national treatment of water, which means that the federal government or provinces cannot place restrictions on the export of water to the United States or Mexico. Such a policy means that Canadian governments, federal or provincial, may not give preference to Canadians in times of restrictions and shortages of important natural resources such as water.¹⁴ Also, NAFTA extends the FTA's provisions allowing for the privatization of Medicare and various types of medical services. According to Mel Clark,

one of Canada's leading trade authorities at the GATT Tokyo Round:¹⁵

Canada cannot continue as an independent nation if it remains in the FTA/NAFTA. It is much more than a trade agreement. The essence of FTA/NAFTA is that it cedes to the U.S. and corporate sector vital powers, that provincial, as well as federal governments, have used to build an independent and humane Canada and, to this end, moderate, curb or redirect market forces. Policy in the ceded jurisdiction is being established by the U.S. and/or the corporations. Canada's outer shell may survive for many years, but alternatively it may disintegrate because Canadians will notice the important decisions are made in Washington and conclude their interests would be better served by being represented in Congress and the White House than in Ottawa and provincial capitals ... the practical consequences of ceding these powers include losing the right to ensure that Canadians have sufficient water, natural gas, oil, electricity, copper or any other goods to sustain their physical, economic, social and environmental well-being; forgoing the right to policies directed to processing and manufacturing exports; a substantial increase in U.S. countervailing dumping actions and loss of exports, production and jobs; the privatization and Americanization of Medicare; and the Americanization of our culture.

HARMONIZE: TO THE BEAT OF A DIFFERENT DRUMMER

The "harmonization" of wages amongst the three nations will be followed by harmonization of social programs. Harmonization of social programs occurs through general pressures that employers and governments use to make Canadians comply with free trade objectives, and through specific pressures on broad-based social policies such as unemployment insurance and social welfare.¹⁶ NAFTA and the globalization "bandwagon" have helped both governments and employers argue that there needs to be a reduction in the income security and social services provided to Canadians and also a reduction in wage compensation and tax rates. Based on the erroneous assumption that there is now a "level playing field," many leaders argue in business and government that we have to make massive reductions and cutbacks to meet global competition. While the "playing field" may be level, the players are not

equal. Like a peewee hockey team playing the *Canadiens*, it is not the playing field that is of importance but the ability, size, skill, and experience of the players. To apply equal rules to unequal players makes little sense, unless you are the most skilled, largest, most powerful, and most experienced of the unequal players.

What this cry of harmonization due to globalization means is that Canadians should be prepared to accept lower wages, less job benefits, more unemployment, more part-time employment, and social services and social benefits on a reduced scale similar to the southern United States and, ultimately, to Mexico. NAFTA provides for the private management of social services, medical and hospital services, and other such traditionally public sector services. While NAFTA gives some passive protection to public initiatives and social welfare, child care and related public services, there will be increasing pressure to privatize and contract out child care and social services. Furthermore, government procurement and social subsidies in areas such as education and health care, will increasingly be open to the "private sector." As mentioned, NAFTA will increasingly open up health care areas for privatization. The federal government is phasing out its financial participation in medicare, which increasingly will put pressure on provincial governments, who have a reduced tax base and increased social service dependent sector, to privatize and make "for profit" the areas of medicare. This is already being evidenced in cutbacks in services and coverage under provincial medical plans.

The groups hardest hit by these "free trade" initiatives will be those who are unemployed, the elderly, the working poor, and the new unemployable due to the FTA and NAFTA. Given the heightened mobility of capital, the reduced power of provinces and the federal government to control transnational corporations, and the decreasing tax base, the increasing demand for unemployment insurance and social services will be harder to meet. Provincial governments will have to make tough decisions about cuts in basic social assistance, employment, environmental and regulatory regimes, while incrementally instituting free enterprise, privatization, and user-pay principles.

GLOBALIZE: THE "NEW" IDEOLOGY

Like the history of colonization, imperialism and colonial expansion and exploitation, the "new globalization" will have a positive benefit for some and a negative benefit for many. Whether it is good or not depends on from where you are viewing it. If you are viewing it as a highly paid professional, a corporate executive, a large shareholder in a multinational corporation, or a member of the political/corporate/professional elite of the respective countries, it is the best thing since sliced bread. However, if you are part of the other 80%+ of the population in these respective countries, then it is less likely to be beneficial for you. As noted in a recent book about Canada and the global economy:¹⁷

Globalization as it is currently understood involves large multinational companies pulling strings in different parts of the globe with puppets dancing to produce whatever it is they can do most cheaply and efficiently. We are supposed to like this because it means that we as consumers get low-priced, varied and high-quality goods. How we fit in as workers and producers is more ambiguous. We are told we have to raise our productivity or lower our living standards. If investment decisions were taken purely on grounds of efficiency, we might be more approving. But investment does sometimes go where labour or environmental standards are close to non-existent, where taxes can be avoided or evaded, or where businesses and governments offer each other the most extravagant bribes. Just as property rights tend to favour those who own property, free trade tends to favour those who control the factors of trade.

As I began this essay pointing out that the elite of the respective countries have the most to benefit from NAFTA, it needs to be emphasized that this is also applicable to Mexico. The richest 10% of Mexicans share approximately 38% of the national income, while the poorest 40% of Mexicans share about 13% of the national income. Nearly two-thirds of Mexicans make no more than twice the minimum wage, *i.e.* \$200 per month, while price levels in Mexico are approaching those in the United States.¹⁸ As one Mexican academic has noted:¹⁹

Many in the United States nonetheless believe that economic integration and NAFTA have moved jobs on a "fast track" to a modernizing Mexico. In fact, the country's disparities are deepening. Ever more dispossessed accompany the growing number of Mexican "yuppies." The loud "sucking noise" of American jobs going south that U.S. presidential candidate Ross Perot ominously announced last Fall is, from the Mexican side of the border, singularly difficult to hear.

MEXICO: WHO WINS, WHO LOSES

If the *maquiladores* portend the future of conditions for Mexican workers, then the Mexican workers are going to evidence a significant reduction in the standard of living. The border *maquiladores* pay less than the average manufacturing wage in Mexico, and in Asia. Furthermore, they have fewer regulations regarding environmental and working conditions than is found in the rest of Mexico.²⁰ Largely due to the biases of Canadian and American presses, and the lack of democratic rights and a free press in Mexico, many Canadians and Americans were under the impression that all Mexicans wanted NAFTA. However, in my visit to Mexico City to attend a conference on NAFTA and Constitutions in September of 1993, I discovered that there existed a great deal of opposition to the agreement from many sectors of Mexican life. Not surprisingly, this opposition included women's groups, union organizers, human rights activists, democratic lawyers' associations, amongst others. The extent of concern about retribution for speaking out against NAFTA was impressed upon me when, after hearing a speech by a top constitutional expert in Mexico on how NAFTA violated the Mexican constitution, I asked him if I could have a copy of his speech. He somewhat sheepishly told me that he could not give me a copy of it, he did not have a written copy of it, and he does not want authorities to get a hold of a copy of it. As Jorge Castaneda has written:²¹

Mexico is not a modern country. True, over the past half century it has witnessed dramatic change. An inward looking, illiterate and agrarian land has become an urban, partly industrialized nation with a growing middle class and a nascent civil service. But Mexico's underlying problems persist. It remains a largely corrupt and unchallenged state that possesses only the merest trappings of the rule of law. The enduring obstacles to Mexico's modernization — its repeated failure to transfer

power democratically or to remedy the ancestral injustices of its society — remain and will require Mexico to continue to change itself, with or without a trade accord.

In a more prophetic observation this author notes:²²

But if Mexico profoundly differs from its neighbours in any way besides overall wealth, it is in the absence of the rule of law and the regulatory framework that characterize developed market economies. The Mexican judicial branch is totally subservient to the executive; regulatory agencies have no independence whatsoever; corruption is egregious. By omitting both supranational mechanisms for enforcement of norms and rights — on the environment, labour, consumer protection, due process — and any demand for the overhaul of Mexico's political and legal system, NAFTA's signatories ignored a fundamental facet of the Mexican reality.

The reality of the divisiveness of NAFTA in Mexico was dramatically brought to international attention on January 1, 1994. There was a rebellion of indigenous peasants in Chiapas. It was not a coincidence that the rebellion occurred on January 1, 1994 — the day that NAFTA became law. By opening up Mexico to agribusiness, more and more peasants would be unemployed and forced to seek low-paying factory work, or go illegally to the United States. The Chiapas revolt dramatically underscores the fact that Mexico is a divided nation:²³

... Mexico is at least two nations; the one present at the NAFTA coming-out parties in Washington, and the one that reared its head in San Cristobal de las Casas on New Year's Day.

The carefully crafted image of modern Mexico and NAFTA fostered by the multinational PR firm of Burson-Marsteller was directly contradicted by this rebellion.²⁴ The other Mexico had arisen, and it was not through millions of dollars of public relations brochures, trade shows, and other fancy hype. The crisis in Mexico and the perilous nature of its "democracy," was further solidified with the assassination of Mexican president Carlos Salinas' hand-picked successor in Tijuana in late March of 1994. As observed by Canada's national magazine, *Maclean's*, this assassination cast doubts about the country as a safe trading partner for the United States and Canada.²⁵ Prime Minister Chrétien was visiting President Salinas at the time of the assassination: he

quickly reassured members of the Canadian Trade Fair (which was taking place in Mexico City) that they had nothing to worry about regarding business in Mexico. Initially, Mexico's media characterized the assassin as a lone, crazed gunman, much as others who have been political assassins are characterized. This, of course, is an attempt to negate any political and conspiratorial aspects of such a murder. However, within a week of the assassination, the Mexican Attorney-General's Office announced at least seven people were involved.

In the short period during which NAFTA has been in place, it is already evident that the negative consequences of NAFTA will not be shared equally by the three "partners." Mexico and Mexicans will bear the brunt of the fallout from the deal. Workers, the unemployed, the elderly, and those in the marginal labour force in Canada and the United States will also be less well off due to NAFTA, but not in such a dramatic and profound way. Trade has never been "free," but always has costs and related consequences. NAFTA extends and deepens inequities within and between the three nations. □

Charles E. Reasons

Staff lawyer at the British Columbia Public Interest Advocacy Centre, Vancouver, B.C.

Endnotes

1. Melvin Burke, "The Human Cost of NAFTA" *The Humanist* (September/October 1993) at 7.
2. For an overview of the politics of the emergence and subsequent passage of the Canada-U.S. Free Trade Agreement see G. Doern and B. Tomlin, *Faith and Fear: Free Trade Stories* (Toronto: Stoddart, 1991).
3. For an insightful analysis of the new buzz word of the 1990s — globalization — see Robert Chodos, Rae Murphy & Eric Hamovitch, *Canada and the Global Economy* (Toronto: James Lorimer, 1993).
4. Burke, *supra* note 1.
5. Arthur W. Donner, "Recession, Recovery, and Redistribution: The Three Rs of Canadian State Macro Policy in the 1980s" in Daniel Drache and Meric S. Gertler, eds., *The New Era of Global Competition: State Policy and Market Power* (Montreal: McGill/Queens University Press, 1991) at 26-48.
6. Paul Phillips, *Canadian Political Economy: An Economic Introduction* (Toronto: Garamond Press, 1990) at 55.
7. Neil Brooks, "The Changing Structure of the Canadian Tax System: Accommodating the Rich" (1993) 31 *Osgoode Hall L.J.* 138.
8. Marjorie Cohen, "Exports, Unemployment, and Regional Inequality: Economic Policy and Trade Theory" in Daniel Drache and Meric S. Gertler, eds., *The New Era of Global Competition: State Policy and Market Power* (Montreal: McGill/Queens University Press, 1991) at 83-102.
9. Henry Veltmeyer, *Canadian Class Structure* (Toronto: Garamond Press, 1986).
10. For a listing of plant closures in relationship to free trade, see Theresa Healy, "Selected Plant Closures and Production Relocations: January 1989-June 1992, Ontario" in Duncan Cameron and Mel Watkins, eds., *Canada Under Free Trade* (Toronto: James Lorimer, 1993) at 287-294.
11. Maude Barlow and Bruce Campbell, *Take Back the Nation 2: Meeting the Threat of NAFTA* (Toronto: Key Porter Books, 1993) at 34-38. Also see Henry Veltmeyer, *Canadian Corporate Power* (Toronto: Garamond Press, 1987) at 76-109; and Paul Phillips, *supra* note 6 at 112-120.
12. Cameron and Watkins, *supra* note 10 at 273-274.
13. Mel Clark, *Restoring the Balance: Why Canada Should Reject the North American Free Trade Agreement, Terminate the FTA and Return to GATT* (Toronto: Council of Canadians, 1993).
14. *Ibid.* Also see Michael W. Dunleavy, "The Limits of Free Trade: Sovereignty, Environmental Protection, and NAFTA" (1993) 51 *U.T. Fac. L. Rev.*; Canadian Environmental Law Association, *The Environmental Implications of Trade Agreements* (Toronto: Ontario Ministry of Environment & Energy, 1993); Michael Gregory, "Environment, Sustainable Development, Public Participation in NAFTA: A Retrospective" (1992) 7 *Journal of Env. L. & Litigation* 99.
15. Clark, *supra* note 13 at III-V.
16. Canadian Centre for Policy Alternatives, *Which Way For the Americas: Analysis of NAFTA Proposals and Impact on Canada* (Ottawa: Canadian Centre for Policy Alternatives, 1992).
17. *Supra* note 3 at 173-74.
18. Jorge G. Castaneda, "Can NAFTA Change Mexico?" (1993) 72 *Foreign Affairs* 66.
19. *Ibid.* at 73.
20. *Ibid.* at 68.
21. *Ibid.* at 75-76.

Endnotes continued on page 80

ABORIGINAL PEOPLES AND NAFTA: COLONIZATION CONTINUES TO RUN AMOK

Sharon Venne

On the last day of 1993, the Zapatista Army of National Liberation began the most recent Indigenous Peoples' campaign in the five hundred year battle against the colonizers. In the case of the Mayan, the defensive was against the Mexican Government of President Carlos Salinas de Gortari.

The irony of the last day of 1993 is not lost on Indigenous Peoples. The United Nations had proclaimed 1993 the International Year of Indigenous Peoples, but then undertook to allocate no funds towards the celebration of that year. In fact, 1993 was a "consolation prize" to the Indigenous Peoples who had lobbied hard to have 1992 set aside as the International year, being five hundred years after Columbus' arrival. However, Western state governments including Spain, Portugal, Italy, the United States of America and other states of the Americas did not want to draw attention to surviving Indigenous Peoples. The struggle of the Mayan Peoples in the state of Chiapas, Mexico drew the world's attention to the struggle of Indigenous Peoples. The question is: what propelled the Zapatista to act? Furthermore, what are the effects of the uprising upon the struggle of the Indigenous Peoples of Canada and the United States of America?

In the communiqué issued by the Zapatista, they attribute their actions as a reaction to the coming into force of the North American Free Trade Agreement (NAFTA) on January 1, 1994. NAFTA, which created one large free-trade zone, from Mexico in the south to the Arctic Ocean in Northern Canada, certainly was going to have detrimental effects upon the lives of the Indigenous Peoples. But what is the link between NAFTA and the Mayan Indigenous Peoples?

When the governments of Canada, the United States of America and Mexico signed the Free Trade

agreement, they hailed the agreement as a great victory for free enterprise and trade. For the sake of money, the three populations would be combined to build a huge pool of consumers. In order to bring the agreement into legal force on January 1st, Mexico was required by its trading partners to have amended a few of its laws. One of the principal laws which required amendment was the Mexican constitution, which guaranteed, in Article 27, that Indigenous Peoples could hold their lands communally. By amending its Constitution to remove Article 27, the communally-held lands would be open for access and Mexico would be in legal conformity with its trading partners to the north. The Indigenous lands, which had previously been held communally, would now be open to taxation, private sale, and foreign ownership. As one former Prime Minister of Canada commented: as Canada was open for business so, too, would Mexico be open for business.

Across the Americas, Indigenous Peoples have traditionally held their lands on a communal basis. Communal holdings of land are not conducive to good mainstream business practices — the usual preference is to deal with one owner in order to purchase land and resources. Communally-held lands are a wrench in the machine of industry. The Mexican Government agreed with this proposition and amended its basic governing law, hence, no more communal lands. What are communal lands to the Indigenous Peoples? They are lands held in trust by everyone, and can belong to no one individual. The land is for the future generations. As one Dene Elder has said: "The land does not belong to us, we belong to the land." In saying this, the Elder is not diminishing the effect of the trust which is placed in the hands of the Indigenous Peoples to protect the land. It is merely a different way of viewing the relationship to the land.

The Mayan Peoples, which make up about seventy percent of the state of Chiapas' two and a half million people, made a subsistence living by growing corn and coffee on their communal lands. If their communal lands were taken away from them, their poverty and living conditions would get even worse. The price for their corn and coffee was already low, but with the passage of NAFTA, the large corporations could make the prices drop further. Subsistence living would not even be a possibility for the people. Starvation or moving away from the land would be the only remaining option. The Mayan Peoples chose to survive in the only way they knew how — already having survived five hundred years of colonization.

The Mayan had moved from the coast and lowlands of Mexico to the highlands in order to survive. But now, even this area was not safe for them. It has been widely reported that the highlands are rich in oil reserves. There had been a testing program carried on in the region by PEMEX, the state-owned petroleum company. When NAFTA came into effect, together with the amended Constitution, oil could be extracted to fuel the economy of Mexico. It was necessary to remove the barriers to this exploration and exploitation. In an interview with Subcomandante Marcos, the military leader of the Zapatista Army, it was reported that:¹

[T]hey [the Zapatistas] believed the federal army, with the trade deal in hand, was set to launch a major offensive against them on Jan. 10 or 11. Says Marcos: 'We know because we have infiltrated the federal army.'

Thus, the Mayan peoples had no choice but to act first to protect their lands and lives against such an action.

In addition to the amendment to Article 27 of the Constitution, the Mexican government has plans to enact legislation which would allow for the appropriation of Indigenous lands. The enactment of such legislation would bring Mexico into line with Canadian and American legislation on the exploitation of Indigenous Lands for public purposes. For example, section 35(1) of the *Indian Act* of Canada allows for the taking of land for public purposes. The section reads as follows:²

Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest

therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.

As can be seen, this section permits any level of Government, and even corporations, to take Indigenous lands without the consent of the Indigenous Peoples. When Indigenous Peoples fought back to keep their lands and took governments to court, the legislatures changed the rules to "legalize" the governments' and corporations' actions. This is the case of the Lubicon, who attempted to have a *caveat* registered in order to protect their lands. The government of Alberta enacted retroactive legislation to prevent the registration of such a *caveat*.³ The Mohawks at Oka had to resort to blockades to prevent a golf course expansion in the pines and over their burial ground. A golf course, oil and gas development, dam building, road building, and any number of other projects can be used to justify the unilateral taking of Indigenous lands for the "public good." Which public? What kind of good? Who defines that good? It seems that the "public" has a greater right to our lands and resources than do the Indigenous Peoples — a philosophy which has perpetuated the machinery of colonization for the last five hundred years.

In the United States of America, an act of Congress can extinguish title to the lands of Indigenous Peoples. The Americans, being more "democratic," pass the legislation piece-by-piece in their Congress. But, on many occasions, where no such act existed, the Government acted just the same. As a brief example, take the Western Shoshone, who signed the Ruby Valley Treaty with the United States government in 1863. This Treaty was for peace and friendship, providing both a right-of-way for California-bound gold seekers and recognition by the United States of the homeland boundaries of the Western Shoshones' approximately 24.5 million acres. Their lands formed part of the present states of Nevada, Utah, Idaho, Wyoming and Colorado. There never was a legislative act of Congress expropriating their lands but, nonetheless, the United States has taken their lands without consent and has used the lands for "public" purposes. Part of the Western Shoshone lands form the most bombed-out areas of the United States. More than 650 atomic blasts were set off at the Energy Resource and Development

Administration's Nevada testing site within the territory of the Western Shoshone. The national interest and public good of the United States of America overrode the Ruby Valley Treaty, as well as concern about the health risks of such testing to the Indigenous Peoples, who were exposed to much nuclear contamination.⁴

There is, within the terms of NAFTA, a procedure to settle issues related to the taking of lands and resources. An "independent" NAFTA tribunal may settle any disputes arising from the sale of the Indigenous Peoples' lands and resources. How independent? How fair? Can Indigenous Peoples veto any decision made by this tribunal? No, they cannot. This tribunal is set up to protect the interests of the parties to NAFTA. Indigenous Peoples are not signatories to NAFTA; our lands and resources are merely the fuel for the machine — Indigenous Peoples must be removed to make way for "development." Five hundred years and the struggle continues. The Mayan peoples, through their Zapatista Army of National Liberation, brought home to the world the continuing struggle of Indigenous Peoples to maintain their lands and resources against colonization.

The populations of Canada and the United States feel that NAFTA is not responsible for the actions of the Mayan Indigenous Peoples. NAFTA is only business; it is only making money. But the wealth and use of Indigenous lands means Indigenous peoples will have to step aside or be destroyed. The Mayans chose neither. They are fighting for the future generations and the next five hundred years. They are fighting for survival, as are all Indigenous Peoples. □

Sharon Venne

Citizen of the Blood Tribe within the Treaty Seven area of Canada.

Endnotes

1. *Edmonton Journal* (16 April 1994).
2. *Indian Act*, R.S.C. 1985, c.I-5, s.35(1).
3. *The Land Titles Amendment Act, 1977*, S.A. 1977, c.27.
4. This information was provided at the World Uranium Hearings held in Salzburg, Austria in September, 1992. The author of this article was present at the hearings.

Charles Reasons / NAFTA and Inequality / Endnotes continued from page 77

22. Jorge G. Castaneda, "The Other Mexico Reveals Itself" *The Vancouver Sun* (6 January 1993) A13.
23. Joyce Nelson, "Chiapas Crisis Unleashes NAFTA Damage Control" *The Georgia Straight* (28 January-4 February 1994) at 7ff.
24. Marci McDonald, "Gunned Down: An Assassin Kills Mexico's Heir Apparent" *Maclean's* (4 April 1994) at 24-26.
25. AP, "Seven Were Involved in Assassination of Presidential Candidate, Officials Say" *Vancouver Sun* (5 April 1995) A6.

Police Powers in Canada The Evolution and Practice of Authority Edited by R.C. Macleod and David Schneiderman

(Forthcoming University of Toronto Press, August 1994)

What do we want from our police? The essays in this volume set out to explore topics such as the Police Powers and Citizens' Rights; Police Organization and Minority Representation; and Police Accountability in Crisis Situations and more. Contributors include:

DeLloyd J. Guth	Harish C. Jain
Greg Marquis	James C. Robb
R.C. Macleod	David E. Smith
Roger A. Shiner	Philip C. Stebbing
Don Stuart	Jean-Paul Brodeur
M.L. Friedland	Louise Viau
Curt T. Griffiths	Chris Braiden

Cloth 0-8020-2863-2 \$50.00
Paper 0-8020-7362-X \$24.95

THE NAFTA DURUM DISPUTE AND THE CANADA GRAIN ACT: A CASE STUDY IN INSTITUTIONAL DEVELOPMENT

Marjorie Benson

Durum, a high-yielding grain and the main ingredient in pasta, has been the subject of a five-year trade invective against Canada by United States western farm representatives in Washington, D.C.. During ratification proceedings of the Canada-U.S. Free Trade Agreement (FTA)¹ in 1987, a group led by Senators Max Baucus (D-Montana),² Kent Conrad (D-North Dakota) and Conrad Burns (R-Montana) claimed that the Canadian Wheat Board was manipulating the price of durum so as to undercut the U.S. domestic price. In November 1993, President Clinton needed 218 votes in the U.S. House of Representatives to pass the North American Free Trade Agreement (NAFTA).³ He had 186 votes, while 206 were opposed and 42 were undecided. In return for NAFTA votes,⁴ President Clinton agreed to threaten trade sanctions against Canadian durum entering the U.S.

This paper compares the "durum dispute" to the evolution of the *Canada Grain Act*⁵ at the beginning of the century to suggest what might lie ahead in the development of effective transnational agricultural institutions. Part I describes the dispute, Part II presents a brief history of the *Canada Grain Act*, and Part III develops a model of statutory development at the domestic and international level and attempts to place NAFTA on this continuum.

THE DURUM DISPUTE

The United States produces approximately 2 million tonnes and consumes 2.3 million tonnes of durum annually. In 1985-86, Canada produced approximately 2 million tonnes of durum, virtually none of which was sold into the U.S. In 1991-92,

Canada produced 4.6 million tonnes and sold 400,000 -500,000 tonnes into the United States, constituting 20 percent of the U.S. domestic market. Sales by Canada of all grains to the U.S averaged 1 million tonnes from 1990 to 1992, and increased to 2.5 million tonnes in 1992-93. In 1993-94, Canada sold 747,800 tonnes of all grains into the U.S by the end of the first four months in the crop year, making it Canada's second largest customer.⁶

In May, 1992, following the implementation of the FTA on January 1, 1989,⁷ the U.S. requested an Article 1807 Binational Panel⁸ to investigate Canadian durum sales under Article 701.3, which states:

Neither party, including any public entity that it establishes or maintains, shall sell agricultural goods for export to the territory of the other Party at a price below the acquisition price of the goods plus any storage, handling or other costs incurred with respect to those goods.

The Panel issued its report on February 8, 1993.⁹ The Parties had agreed on the questions the Panel should examine in determining whether Canada had breached Article 701.3. The main issue was whether "acquisition price" included only the initial price paid to farmers by the Canadian Wheat Board on delivery, or whether it also included interim and final payments. The Panel concluded that Parties' understandings, as well as a purposive interpretation of the Agreement,¹⁰ required that the price of acquisition include only initial payments because interim and final payments constituted profits. It asked whether "storage and handling" included the \$2.00 per tonne Canada Grain Commission costs for inspection, weighing and

certification costs, concluding that it did not. It also asked whether fixed administrative costs of the Canadian Wheat Board should be included, and held that they should not.

Finally, the Panel examined whether "other costs incurred" included the federal government's \$20.00 per tonne contribution to the cost of rail transportation through the "Crow Benefit."¹¹ FTA Article 701.5 prohibits Canada from applying this "Crow Benefit" subsidy on grain moving to United States through West Coast ports. But, the subsidy is not prohibited on grain moving through Thunder Bay, some of which moves southward into United States, on the grounds that it is a domestic subsidy.¹² The Panel noted that the only export subsidy explicitly excluded is the West Coast movement, and no domestic subsidies are prohibited,¹³ despite Article 701's expressed goal of "achiev[ing] on a global basis the elimination of all subsidies which distort agricultural trade."¹⁴

The Panel concluded that its ruling on the interpretation of Article 701.3 constituted a declaratory judgment in favour of Canada, but that a final ruling on the matter could not be made until the Parties resolved "information-sharing" disputes to reveal the actual selling price. The Canadian Wheat Board offered to open its books to annual audits retroactive to January 1, 1989, subject to a U.S. promise of confidentiality. The Parties agreed, with Canada offering to pay half the auditing costs. The Panel recommended the establishment of a working group under Article 1802.4 to oversee external auditors.

Nonetheless, the U.S. farm lobby against Canadian durum continued and led to the November NAFTA vote deal. President Clinton agreed that the U.S. would consult with Canada for sixty days (until January 16, 1994), and that if no agreement was reached the U.S. would launch an investigation by the Department of Commerce International Trade Commission (ITC).¹⁵ Under the 1933 *Agricultural Adjustment Act*, if the ITC finds that imports "undermine the American support programs for farmers,"¹⁶ the President may impose quotas and tariffs. Section 22 of that *Act* also permits the President to impose such restrictions on an emergency basis without waiting for the results of an investigation. President Clinton also agreed to require Canadian shippers to obtain end-use certificates¹⁷ in response to allegations that Canadian grain is being blended into American grain and sold under the Export Enhancement Program (EEP).¹⁸

Following the NAFTA vote, U.S. Secretary of Agriculture Mike Espy and Canadian Minister of Agriculture Ralph Goodale began negotiations. The sixty days ended January 16, 1994, with no agreement. The ITC launched its investigation; hearings were to be held in April,¹⁹ with a report expected in late summer. Prime Minister Chrétien reported in March that he had written to President Clinton and spoken to him twice about the matter, as well as to Vice-President Al Gore once, "stress[ing] the importance of wheat sales to Canada's economy"²⁰ ... [and seeking] to minimize damage to Canadian durum farmers who face the loss of a valuable market."²¹ Mr. Clinton expressed his preference for a negotiated settlement. Messrs Espy and Goodale met again March 21, 1994, with no agreement. By March 29, Canada said it would take counter measures if U.S. imposed sanctions against Canadian durum.²² Talks continued the week of April 11-16 in Marrakesh, Morocco,²³ but they ended without agreement, with the U.S. saying it intended to move April 22 to "some unilateral decisions that must be made to protect our producers," and Canada saying that it would "defend itself and do so very vigorously."²⁴

Newspaper reports during negotiations fleshed out the respective positions.²⁵ The Senators believe that Canadian Wheat Board selling practices of bulk contracts, rather than daily quoted street prices used by the U.S. market, allow it to manipulate the price below its U.S. rivals,²⁶ and that Canada subsidizes its exports through the Crow Benefit.²⁷ A spokesperson for the National Association of Wheat Growers in Washington said "the monopoly powers of the Canadian agency are contrary to the American way of doing business ... If they want to play in our market, they should play by our rules."²⁸ Montana and North Dakota farmers demonstrated outside local elevators saying that the Canadian grain is "driving down the price of [our] grain."²⁹ At the U.S. ITC hearings in April, Senator Baucus called the Wheat Board a "secretive nationalistic cabal" which manipulates the market.³⁰

What we have in wheat is not free trade with Canada. The flood of imports is not a natural result of open trade — it is artificial and the deliberate result of Canadian government policy ... [the Canadian Wheat Board] acts as a barrier to imports by refusing to buy U.S. grain, and it acts as a source of export subsidies through predatory pricing in the United States and other markets ... 83 Canadian grain trucks cleared

customs north of Shelby [Montana] each week last November. By December it was 149 trucks a week. By January, 223 a week ... The flood has driven down prices. That in turn has triggered higher 'deficiency payments' made to farmers by Washington when market prices fall short of a target. Those have totalled about \$600 million over the last four years. Meanwhile, much of the unsold U.S. crop goes into storage, where it could upset market conditions later.

Senator Burns argued that the Canadian Wheat Board is a corporation created by government, making it an unfair trading institution.³¹

Our farmers make their sales decisions as individuals. Canadians sell into the pool, which then makes a sale as a government decision. That's not a level playing field ... That's not free trade and it's certainly not fair trade.

Canadian Wheat Board Chief Commissioner Lorne Hehn said that Canadian grain is sold at full domestic prices into the U.S. market and that American millers like the Canadian grain for other reasons:³²

Previous investigations have shown our practices are consistent with what we've said they are. There is no significant difference between our sales price to U.S. millers and the price they'd have to pay for U.S. durum of similar quality ... American millers like the consistency of Canadian wheat ... they are willing to pay a premium for Canadian grain because we offer other things ... They can buy now and we'll deliver later, we guarantee supply and we have a quality system that is second to none in the world.

Canada argues that the "billion-dollar" EEP has made the export market so attractive for buyers of U.S. grain that there is a shortage for domestic purposes, creating a demand for the Canadian grain. Canada points to a sale to China in which American export companies were eligible for subsidies of up to \$66.61 per tonne. International pasta producers can buy the subsidized American grain, produce pasta, and sell it back into the U.S. market at a price lower than American pasta makers can purchase the grain domestically and process it.³³

Reports during the negotiations were that Canada offered to limit exports to the U.S. to current levels of

2.5 million tonnes/year, to reduce tariffs on ice cream and yogurt in return for the U.S. ceasing to subsidize grain exports to Mexico under EEP, and to end transportation subsidies on western grain shipped to United States via Thunder Bay.³⁴ Senator Baucus said that to be acceptable, a negotiated settlement "must limit Canadian grain exports to a level sufficient to end interference with our farm program," a level he placed at 500,000 tonnes of Canadian grain in total, an 80 percent reduction.³⁵ Former Wheat Board Minister Charlie Mayer said that for Canada to offer voluntary limits would not only be contrary to the spirit of free trade but would also be "foolhardy" in a fast-changing world wheat market. He called the American moves "a dangerous mix of ignorance and politics" and encouraged Canada not to capitulate.³⁶

The Americans still do not understand how the wheat board operates ... It's always been the American attitude that if someone beats them, they're cheating ... Let's go for a panel ...

As the negotiations progressed, Canada began to say that it would "defend itself"³⁷ and was "making a provisional list of U.S. products to attack with retaliatory penalties."³⁸ By the end of the negotiations, Canada is reported to have refused to place a limit on grain exports to the United States.³⁹

The auditor investigating Canadian Wheat Board sales pursuant to the Binational Panel reported in March, 1994. Of the 105 sales contracts into the U.S. after January 1, 1989, the auditor found 102 in compliance with the FTA, with selling prices exceeding acquisition, storage and handling costs by \$28.25 per tonne.⁴⁰ The three sales found not in compliance were during the transitional period.

Despite the logical inference that the auditor's findings, combined with the declaratory judgment of the Binational Panel, exonerate the Board of Article 701.3 infractions, Senator Baucus called the audit report a "smoking gun evidencing Canadian subsidies."⁴¹ Senator Conrad threatened emergency action under Section 22.⁴²

What Canada needs to know is that the pressure is relentless in this country. It is not going to stop ... Offers and counter-offers have been rejected, with the latest being a proposal to limit Canadian imports to an average of the last three years' volume. That's not acceptable ... that would reward Canada's previous bad behaviour ... Espy

and [U.S. Trade Representative] Mickey Kantor favour the [emergency] penalties, but others in the administration resisted ... After a three-week 'blitzkrieg' against the holdouts, the White House is now united on an approach to end unfair subsidies.

The Senators say "the White House has agreed to file notice under GATT's rules if there is no deal by April 22."⁴³

EVOLUTION OF THE CANADA GRAIN ACT⁴⁴

Since 1801, the grain industry in Upper Canada had been developing standardized weights and grades, as well as a system of grade inspection.⁴⁵ In 1874, the new Dominion of Canada adopted weights, standards and an inspection regime for all of Canada.⁴⁶ Parliament continued to revise the legislation until the turn of the century.⁴⁷

Canadian Pacific Railway, the only shipper for grain from Western Canada, shipped the first export grain from Winnipeg to Port Arthur in 1883 in bags. After Canadian Pacific opened two grain terminals at Port Arthur in 1884, it shipped grain in box-cars to its terminals. Across the prairies, local entrepreneurs built flat covered warehouses at trackside. At harvest, farmers hauled their grain by horse-drawn wagons to the warehouses. The merchants ordered rail cars and shovelled the grain into box-cars when the railways "spotted" them. Canadian Pacific wanted U.S.-style "elevators," which employed gas, steam or blinded circling horses to operate "cup conveyers," a technology which reduced the loading time for cars and achieved faster "turnaround" on the cars. Rather than invest its own capital, Canadian Pacific offered free leases on track-side property and a monopoly on box-cars to companies willing to build elevators. During the 1890s, regional companies such as Parrish and Heimbecker, Ogilvie, Paterson, and Richardson built aggressively, and there were often five or six competing modern elevators at each prairie point. By 1897, Canadian Pacific ignored the flat warehouses operated by local merchants, refusing to respond to their orders for rail cars.

The elevator companies began to buy and sell grain as well as handle it as a way of increasing profits. Farmers believed that many agents cheated in weighing, grading and deducting for weed seeds (dockage), and discriminated as to whose grain they

accepted. Prices varied dramatically across the year, and farmers suspected price-fixing.

In 1898, James M. Douglas, a farmer-cleric M.P. from Brandon introduced a private members' bill⁴⁸ to prohibit fraud in weights, grades and dockage and to require the railways to honour common carrier responsibilities to accept all business, including orders from flat warehouses. The Bill was withdrawn when the railways agreed to provide cars to individual farmers on order. They did not, however, agree to supply cars to warehouses. Douglas re-introduced his Bill in 1899,⁴⁹ including provision for a Chief Inspector to enforce fair dealing by elevator agents.

Unwilling to accept a private member's bill, but conscious of the power of the western protest movement, the government sent the Bill to Parliamentary Committee. The Committee recommended legislative action. The House of Commons accepted the Chief Inspector provisions, but not the cars-to-warehouses provisions.⁵⁰ In the wake of the resulting storm of protest, the government appointed the first Royal Commission⁵¹ into the grain trade in 1900. After 21 hearings and 238 witnesses, the Commission recommended a regulatory regime similar to that employed in Minnesota,⁵² including anti-fraud provisions in dockage and weighing, and a supervisor of grain handling facilities.⁵³

On the eve of a general election, Sir Wilfred Laurier's government enacted a majority of the Commission recommendations as the 1900 *Manitoba Grain Act*.⁵⁴ The Act required railways to supply cars to warehouses and farmers, and established a Grain Commission to licence elevators, to bond elevator agents and grain buyers, to approve handling tariffs, to inspect records and to settle disputes.

The crop in 1901 was large, and the railways, concerned about efficient use of the rail cars in the few pressured months before freeze-up, again refused to supply cars to farmers or warehouses. Elevators slashed prices. Farmers felt trapped and claimed the elevator companies and railways were blockading their wheat. M.P. Douglas estimated farmer losses at \$5 million. That December, the farmers formed the Territorial Grain Growers' Association and continued to pressure Ottawa.

In 1902, Parliament amended the *Manitoba Grain Act*,⁵⁵ requiring each railway agent to keep a "car order" register recording orders and to distribute cars in strict rotation according to date of registration. The

1902 crop was again large. Canadian Pacific again ignored the car order legislation, and "brawls broke out when cars were delivered."⁵⁶ The Territorial Grain Growers' Association sent a delegation to Winnipeg to advise Canadian Pacific of violations of the Act. When Canadian Pacific failed to take action, the Association filed a formal complaint with the Commissioner under the Act. The Commissioner found for the farmers. The railway appealed and the Supreme Court found for the farmers in the "Sintaluta" case.⁵⁷ Parliament again amended the legislation in 1903⁵⁸ to enforce the procedure and to allocate each producer and warehouse operator one car prior to filling any multiple orders.

The Territorial Grain Growers' Association also alleged that elevator companies were grading wheat more leniently at port terminals than at country elevators. A 1906 Royal Commission verified the allegations, and recommended fifty amendments to the Act. These included making elevator companies liable for damages for weight frauds, requiring samples of all bins to prevent grading fraud, paying farmers for the commercial value of screenings, supervising, cleaning practices at terminals, levying a fee of \$2 per booking to prevent fictitious names in the car order process, prohibiting pooling among country elevators, authorizing the Grain Commissioner to order equitable distribution of cars and to dismiss agents for fraudulent practices. Again, on the eve of an election, Parliament enacted the recommendations in 1908.⁵⁹ The new Act gave the Grain Commission full control of cleaning, binning and shipping of grain from the terminals, and power to inspect terminal records and receipts. In its investigations that winter, the Grain Commission concluded that "promotion of grades by mixing had taken place on a large scale ... two companies were fined and threatened with loss of their licences."⁶⁰ Sir Wilfred Laurier's Liberals won the election in 1908, but lost in 1911.⁶¹ Sir Robert Borden's Conservatives then re-enacted the 1908 amendments as the 1912 *Canada Grain Act*.

After the war, complaints over the handling and purchasing of grain resurfaced.⁶² Yet again, Parliament amended the *Canada Grain Act* in 1919 to require any terminal which had one-quarter of one percent more grain in storage than it showed receipts to sell the surplus and pay the proceeds to the Board of Grain Commissioners.⁶³ In 1921, Parliament appointed another Royal Commission. A terminal which had been charged with overages challenged the constitutionality of both federal regulation of the

elevator system and the Royal Commission.⁶⁴ In 1925, the Supreme Court found the 1921 Commission and government regulations of elevators unconstitutional. The federal government amended the *Canada Grain Act* to declare elevators "works for the general good of Canada" under section 92(10)(c) of the *British North America Act*.⁶⁵ Even before the Supreme Court rendered its decision, new complaints had led to new Commissions⁶⁶ but, following the decision, Royal Commissions were no longer used to investigate the grain trade, and Parliament instead referred complaints to the House Committee on Agriculture and Colonization. Amendments to the Act in 1927 permitted farmers to select at which terminal their grain would be delivered to port,⁶⁷ and 1929 amendments prohibited mixing the top grades of grain.⁶⁸ The Act stabilized in 1930,⁶⁹ and continues to be the basis of Canada's reputation in the world wheat market as a supplier of reliable, clean, consistently graded grain.

Parts of the Act that remained controversial in 1930 became separate legislative regimes. For example, marketing issues proved larger than questions of fraud by elevator companies. Farmers began to question the entire structure of marketing grain. The roots of the struggle which took place within the debate on the *Canada Grain Act* from 1900-1910 led, in the 1920s, to the formation of the prairie co-operative Wheat Pools. The regime evolved through several "temporary" Wheat Boards, and to a "compulsory" Canadian Wheat Board in 1949 with monopoly control over marketing western wheat, oats and barley. The struggle remains underway today. The Board is under active challenge by the U.S., evidenced by the durum dispute and by an earlier insistence that Canada remove Canadian Wheat Board control over imports of wheat, oats and barley.⁷⁰ There is also considerable dispute internal to the western farm community concerning the Board. Some western Canadian farm groups challenge the Board, believing they stand to make greater profits trading individually on the "open market,"⁷¹ while others feel that the Board's powers have already been eroded excessively.⁷²

Similarly, transportation issues proved larger than car-allocation procedures, and became the subject of a seventy-five year struggle, still ongoing, over the "Crow Benefit."⁷³

ANALYSIS

In the domestic context, written legal regimes are termed constitutions or statutes. They are created (in democracies) by elected legislatures and are enforceable by the state. In the transnational context, the terms are those of international law: the regimes are called charters, treaties, conventions, protocols, declarations, or resolutions, and are created by the agreements of sovereign states in voluntary assemblies. These are subject to varying levels of enforcement. Legal regimes in both contexts evolve, and a pattern can be discerned of the stages through which both regimes pass in developing a legal regime on any particular issue. At least four stages are discernible in the evolution of both the *Canada Grain Act* and NAFTA as viewed through the lens of the durum dispute.

The pre-existing state in agriculture is one of no regulation, a market "free-for-all." In the domestic context, farmers, railways and grain companies negotiate a relationship, however unstable, through the instruments of price and supply, competition, co-operation and monopolies/oligopolies. In the international context, sovereign states negotiate relationships, again however unstable, by unilaterally imposing tariffs and import quotas, creating export subsidies, and penalizing each other with countervailing duties. Outcomes are determined on the basis of economic strength.

In Stage One, which might be called the "Recognition" or "Statement of Objectives" Stage, there is a recognition that the matter is an appropriate subject of state intervention, and the state(s) move to control or influence the relationship in some way. In the domestic context, such intervention takes the form of a legislative pronouncement, such as: there shall be a grading regime. In the international context, states agree not to penalize each other for particular (protectionist) behaviour.

In Stage Two, which might be called the "Application" Stage, the state(s) articulate the meaning of the objective when applied to particular contexts. In the domestic context, the railways were ordered to provide cars to warehouses. Regimes move progressively to more specific definitions of application, such as, for example, requiring separate storage for each grade, or establishing a car order registry. In the international context, states agree to specific tasks which will move toward the objective identified in Stage One.

In Stage Three, which might be called the "Enforcement" stage, the state(s) articulate administrative and enforcement mechanisms to ensure that the applications are carried out. In the domestic context, the Canada Grain Commission, inspectors and penalties were established; in the international context, binational panels, ministerial committees and working groups were provided for.

In the domestic context of western democracies, the statutory silence tends not to be broken unless it can be filled with a pronouncement of "hard law," i.e. prohibited or mandated behaviour which is objectively identifiable and enforced by impartial third parties. In the international context, what is called "soft law" plays a much larger role. Scholars agree more on what soft law is not (namely, hard law) than on what it is.⁷⁴ It can be broadly defined as a range of statements of objectives and understandings which do not define objectively identifiable behaviour enforced by impartial third parties. Such statements contained within legal instruments (charters, treaties, conventions, protocols or resolutions) are termed "legal soft law," and are seen to have some degree of enforceability among states having accepted the instrument. States who have not accepted the instrument and thus cannot be held accountable in relation to the instrument are said to be subject to "non-legal soft law."⁷⁵

The striking difference between the *Canada Grain Act* and FTA/NAFTA as legislative instruments is the inclusion of "soft law" at each of the Stages in the latter texts. In both the FTA and NAFTA, the Parties commit, for example, to work toward a reduction in agricultural subsidies through the GATT negotiations (Articles 701 & 705 respectively), and to work toward improving market access (Articles 703 in both). NAFTA adds a commitment "to take each other's interests into account in export subsidies to third countries" (Article 705.5), and "to work toward domestic support measures that have minimal or no trade distorting or production effects" (Article 704).

From a "hard law" perspective, such statements are mere "hortatory" statements, perhaps useful as a guide to interpretation, but lacking the application and enforcement mechanisms which make law "law." Missing is the institutional power of domestic courts to create application and enforcement mechanisms even where none are specified in the legislation. For example, in the *Canada Grain Act*, once Parliament declared that the railways must allocate cars to farmers, a court faced with litigation on the issue assumed its task was to articulate both a means and an

enforcement procedure. Over time, the Stage Two applications and Stage Three enforcement mechanisms tend to become enshrined in legislation. The *Canada Grain Act* continued to evolve over 130 years through these stages. Descriptions of grades, for example, were modified for thirty years (1863-1899) to achieve a Stage One description that satisfied the various interests in the industry. Car allocations applications were revised for a decade (1900-1910) before workable Stage Two definitions emerged, and Stage Three administrative and enforcement mechanisms in both anti-fraud and anti-discrimination provisions took repeated revisions over thirty years (1900-1930). The *Grain Act* did not begin to “live as the “Magna Carta”⁷⁶ of prairie grain farmers until the statute included Stage Two and Stage Three provisions.

Soft law advocates argue that even absent institutional mechanisms to fashion implementation and enforcement strategies, soft norms are legally significant in a bilateral and multilateral context because they articulate a negotiated relationship among diverse cultural, economic, political and legal sovereigns. Hortatory commitments, they argue, “create expectations” of state behaviour, to “delegitimize” a previous norm, and to “overcome deadlocks”:⁷⁷

Soft laws avoids or resolves disputes; first by addressing the basic question of when subjects are international in nature; and second, by providing a guide for conduct, a mechanism for considering disputes, and a basis upon which discussions can be carried out.

One author cautions that in the agricultural context, United States has historically deployed soft law commitments to create the appearance of following trade liberalization while continuing to practice protectionism.⁷⁸ From this perspective, NAFTA’s reservation of domestic jurisdiction over “changes to domestic support measures” (Article 704), and “countervailing duties [on] subsidized imports” (Article 705(7)(b)) are hard law clauses which have the effect of undermining such soft law commitments eliminating all tariffs between the countries within ten years (FTA, Art. 401).

FTA and NAFTA do contain some Stage Two application commitments. In the FTA, the Parties made a start on specifying aspects of their relationship in agricultural trade in which they agreed not to operate in the mode of unilateral barriers and

retaliatory countervails. The Parties agreed to prohibit export subsidies on bilateral trade (Art. 701), and to refrain from imposing countervailing duties on meat (Art. 704) and on fruit and vegetable imports for 20 years (Art. 702) in all but specified circumstances. The U.S. agreed not to retaliate for Canadian import quotas on poultry and eggs (Art. 706) and to loosen slightly quotas on sugar products entering the U.S. (Art. 707). Canada agreed to eliminate transportation subsidies on grain moving to the U.S. through West Coast ports and to eliminate import licence requirements for wheat, oats and barley (Art. 705). In NAFTA, Mexico agreed to respect Canada’s import quotas on supply-managed products (Annex 703.2 Sec. B), and Mexico and United States agreed to permit specified amounts of sugar to cross each other’s borders without penalty for fourteen years (Annex 703.2 Sec. A). The Parties agreed in FTA to develop joint accreditation, training and use of inspectors to implement Stage One commitments to harmonize technical regulations and standards (Art. 708), and NAFTA includes more extensive commitments in a stand-alone agreement (“Sanitary and Phytosanitary Measures”: Art. 709-724).

Institutional mechanisms in NAFTA have more hard law characteristics than do those in FTA. In the FTA, the dispute resolution sequence is consultation (Art. 1804), a meeting of the Ministerial Commission (Art. 1805), and recommendatory Binational panels (Art. 1807), with binding arbitration available in very limited situations (Art. 1806). In NAFTA, the circumstances in which mandatory arbitration can be invoked are expanded, and a Party may suspend participation in the Binational process if another Party refuses to follow Panel recommendations (Art. 2019). Nonetheless, Parties retain the right to choose between dispute resolution provisions under NAFTA or GATT (Art. 2005).

The durum dispute reveals a struggle over whether the hard law or soft law norms should govern in the trans-national agricultural agreements. The U.S. actions reflect a preference for the hard-law approach, where “hortatory” statements are not legal obligations.⁷⁹ The Binational Panel, on the other hand, obtained the U.S.’s agreement to employ the Vienna Convention on the Law of Treaties⁸⁰ in interpreting Article 701.3 of the FTA, and the U.S. agreed in the NAFTA Agreement on Dispute Resolution to be bound by the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitration Awards (Art. 2022).

Movement from Stage to Stage in the domestic regime involved political struggle. Legislators moved off the pre-existing unregulated market to Stage One statutory objectives only when those who felt disempowered by the status quo organized and pressured to get on the political agenda. Stage Two operational strategies required more political pressure. Governments acted only after individual farmer complaints, M.P. Douglas' private member's bills, the organization of the Territorial Grain Growers' Association, a litany of Royal Commissions, and fear of electoral defeat. Stage Three administrative and enforcement mechanisms often only emerged after litigation. Railways and grain companies avoided Stage Two enactments until sued by the Territorial Grain Growers' Association. Legislators then amended enforcement provisions to patch the gap litigation had exposed between the law and practice.

The durum dispute also reveals a political struggle. The U.S. Senators demanded protectionism as the price of their votes on behalf of trade liberalization.⁸¹ The *Agricultural Adjustment Act* is a self-proclaimed protectionist Act. Some experts regard the U.S. farm program, its marketing system, and the EEP as constituting the most "socialist" system in the world.⁸² The Binational Panel and the auditors cleared the Canadian Wheat Board of dumping infractions in durum sales, and the Crow Benefit to Thunder Bay is by the U.S.' own acknowledgment a domestic subsidy, which the U.S. did not want on the table during FTA negotiations.

The emergence of transnational agreements in agriculture introduces old political questions in new ways. In Canada, interprovincial trade disputes which remained submerged under the guise of a common "enemy" are now directly exposed.⁸³ Provincial influence over matters directly influencing local economies is diminished.⁸⁴

Further, in a context where the political actors are nation-states, it is less clear how interest groups can have an effective voice. Farmers found that electoral clout was essential to achieving statutory reform. Domestic electoral pressure remains available, but agriculture's electoral voice has diminished significantly over the century⁸⁵ and, even if present, influences only one party in the relationship. Do interest groups need to "internationalize" in order to have a political voice capable of being heard by both parties? For example, pasta makers and consumers in both Canada and the United States will pay higher prices if the U.S. imposes penalties on Canadian durum and Canada retaliates with penalties on pasta.⁸⁶

Interest groups also become responsible in a new way for the spin-off effects of positions they advocate. States link agriculture to other aspects of the state-to-state relationship,⁸⁷ or do not.⁸⁸ What if, as some suggest, NAFTA leads to human rights violations,⁸⁹ or to environmental degradation beyond the scope of the side agreements?⁹⁰

In conclusion, the introduction of soft law norms create possibilities for respecting the sovereignty of multiple groups and interests which the unilateral nature of domestic statutory regimes precludes. The treatment of agriculture in the FTA and NAFTA suggests that, except for the lack of domestic-style state coercion in Stage Three enforcement regimes, the transnational regimes also are moving toward the hard law end of the spectrum.⁹¹ Given the greater complexity of the legal process, as well as the complexity of jurisdictions, economic situations and cultures, there is no reason to believe that stable transnational regimes will not require long periods of time and continuing experimentation.

Agriculture, with its highly protectionist past, its entrenched interests and its domestic political bite, provides a graphic site of the conflicts and possibilities presented by the emerging transnational legal order. The Agreements already evidence enriched institutional possibilities relative to those developed at the domestic level in Canada. They include not only hard law dimensions which could develop the same clarity, precision, and detailed accountability that permit the *Canada Grain Act* to pinpoint breakdowns in a complex system accurately and efficiently and to apply an immediate remedy. They also contain soft law dimensions recognizing mutual sovereignty, providing alternative dispute resolution paths, and articulating common understandings which permit diverse interests to arrive at consensual co-existence. The durum dispute suggests, that given the evolution of the transnational agreements in agriculture, the realization of those new possibilities will not be borne without a great deal of time, experimentation, and a re-definition of political involvement on the part of citizens and interest groups. □

Marjorie Benson

College of Law, University of Saskatchewan. I am deeply grateful to Donna Greschner, David Schneiderman and Don Buckingham.

Endnotes

1. 27 I.L.M. 288 (1988).
2. Senator Baucus is chair of the Senate finance subcommittee on International Trade.
3. 32 I.L.M.297 (1993)
4. Specifically, those of Rep. Glenn English (D-Okla), Rep. Bill Brewster (D-Okla), Rep. Bill Sarpaluis (D-Tex), and Rep. Larry Cambert (R-Tex).
5. *Canada Grain Act*, S.C. 1970-71-72, c.7, now R.S.C. 1985, c.G-10.
6. Only Brazil purchased more, at 897,500 tonnes. "Canadian Wheat Sales to U.S. brisk" *The Star Phoenix* (14 January 1994). In the two decades since Russia became a major grain importer, it had become Canada's largest grain customer. Until the late 1980s it paid cash, but after switching to credit accumulated a \$1.5 billion debt; in 1992-3, Canada refused further credit. Russia has announced that it does not intend to import grain in 1993-4. "Yeltsin Says 'Nyet' to Grain" *The Star Phoenix* (10 March 1994). China, Canada's second largest customer during the 1980s, has cut back imports as it makes dramatic steps to self-sufficiency. "Brazil Tops List of Wheat Buyers" *The Star Phoenix* (5 January 1994).
7. *Canada-United States Free Trade Implementation Act*, S.C. 1988, c.C-10.6.; *United States-Canada Free-Trade Agreement Implementation Act of 1988*, 100 PL 449, 1988 HR 5090, 102 Stat.1851.
8. Each country appoints two panel members, with the Chair agreed on by both Parties.
9. *Interpretation of Canada's Compliance with Article 701.3 With Respect to Durum Wheat Sales*, F.T.A.D. [1993] No.2, CDA-92-1807-1, Canada-U.S. Free Trade Panel, Feb 8, 1993.
10. In the preamble, Canada and United States resolve, *inter alia*, to "ensure a predictable commercial environment for planning and investment."
11. *Western Grain Transportation Act*, S.C. 1980-81-82-83, c.168.
12. The parties agreed that an export subsidy is one "conditional" on export, i.e. a subsidy that is only available if goods are exported to another country, and that every other form of subsidy is a "domestic subsidy" even though, in fact, goods which are exported may have benefitted from the subsidy. Panel Judgement, *supra* note 9 at par. 29. Some of the grain moving to Thunder Bay moves to export markets through the St. Lawrence, some moves southward to the U.S., and some moves into domestic markets in Central and Eastern Canada.
13. Deputy U.S. Trade Representative Alan Holmer explained in May, 1988 that the reason the Crow Benefit on grain moving to Thunder Bay was not prohibited was that "the subsidies that are provided to the wheat going east are not contingent upon export. They are, therefore, under the rules of domestic subsidies, and we did not want to put our domestic subsidies on the table with their domestic subsidies as part of these negotiations." Canada's submission to the Panel, *supra* note 9 at par. 54.
14. *Canada-U.S. Free Trade Agreement*, *supra* note 1, Article 701.
15. "Clinton Targets Wheat" *The Star Phoenix* (16 November 1993).
16. 7 U.S.C.S. c.26 § 601 (Law. Co-op. 1993).
17. A documented order for grain from the importer indicating destination and use.
18. Under the Export Enhancement Program, United States pays grain companies a bonus of up to \$60.00/tonne for grain sales into designated countries. The effect of the program is to lower the international price and make U.S. grain more attractive to countries in which the U.S. wishes to build or maintain market share.
19. The International Trade Commission held two days of public hearings in Bismarck, North Dakota, April 6-7, 1994.
20. Canadian Press, "PM, Clinton Trade Letters About Trade" *The Star Phoenix* (30 March 1994).
21. "Durum Dispute on Chrétien's Agenda" *The Star Phoenix* (5 March 1994).
22. "Durum Fracas Could Lead to Trade War: Goodale Says Canada Prepared to Take Tough Defensive Posture" *The Star Phoenix* (29 March 1994).
23. "Trade Talks Planned on Agricultural Dispute" *The Star Phoenix* (2 April 1994).
24. "Canada-U.S. Talks on Wheat Imports Collapse" *The Star Phoenix* (16 April 1994).
25. Citations here are to a provincial daily newspaper, the *Saskatoon Star Phoenix* to reflect the extent to which the stories can be pieced together from sources that are accessible to both the lay and urban person.
26. Specifically, the concern seems to be that the classification of initial payment as "acquisition costs" and final payment as "profit distribution" permits the Canadian Wheat Board to transfer money from initial payment to final payment and, hence, arrive at a lower selling price. The Binational Panel had found that such a possibility was commercially unfeasible.
27. Vern Greenshields, "Durum Fairly Traded: Goodale" *The Star Phoenix* (17 November 1993).

28. "CWB Won't Apologize For Sales in U.S." *The Star Phoenix* (17 November 1993).
29. "Montana Farmers' Wheat Blockade Raises Stakes" *The Star Phoenix* (14 January 1994); "Farmers Resume Grain Blockade" *The Star Phoenix* (19 January 1994); "U.S. Farmers Protest Grain Imports" *The Star Phoenix* (3 February 1994).
30. "Wheat Board 'Cabal' cost U.S. \$600 million: Montana Senators" *The Star Phoenix* (9 April 1994).
31. *Ibid.*
32. "CWB Won't Apologize for Sales in U.S." *The Star Phoenix* (17 November 1993); "Brazil Becoming Largest Customer" *The Star Phoenix* (5 January 1994).
33. "Durum Limit Foolhardy: Mayer" *The Star Phoenix* (20 January 1994).
34. "Goodale, U.S. Counterpart Set to Discuss Durum Issue" *The Star Phoenix* (7 January 1994); Vern Greenshields, "Canada-U.S. Durum Deal Near: Trade Action Over Wheat Exports May Be Avoided, Say Sources" *The Star Phoenix* (18 January 1994). Dan Zakreski, "Biting Image Sums Up Power Equation In Wheat War" *The Star Phoenix* (19 January 1994).
35. Canadian Press, "Senator Seeks 80% Wheat Import Cut" *The Star Phoenix* (25 January 1994).
36. *Supra* note 33.
37. Agriculture Minister Goodale in "Durum Fracas Could Lead to Trade War: Goodale Says Canada Prepared to Take Tough Defensive Posture" *The Star Phoenix* (29 March 1994).
38. "Consumers in both countries would likely pay more for pasta if no agreement is reached. Canadians could face higher prices for a variety of prepared foods from the United States, from breakfast cereal to frozen entrees, depending on how extensive the crossfire of duties becomes" in "Canada, U.S. Push Hard to Concluded Trade Deal" *The Star Phoenix* (6 April 1994).
39. "The talks disintegrated when [Canada's Trade Minister] MacLaren and Agriculture Minister Ralph Goodale would not agree to [U.S. Trade Representative] Kantor's demands to cap Canadian wheat exports" in "Canada-U.S. Talks on Wheat Imports Collapse" *The Star Phoenix* (16 April 1994). "Goodale Fears Trade War" *The Star Phoenix* (18 April 1994).
40. Vern Greenshields, "Audit Clears Canadian Durum Sales: But Montana Senator Still Sees 'Smoking Gun' For Dumping Penalties" *The Star Phoenix* (12 March 1994). The auditors were Arthur, Anderson and Company.
41. *Ibid.*
42. Canadian Press, "Rhetoric rising in U.S.-Canada Trade Dispute" *The Star Phoenix* (17 March 1994).
43. "Canada, U.S. Push Hard to Conclude Trade Deal" *The Star Phoenix* (6 April 1994).
44. Classic historical sources are: John Archer, *A Saskatchewan History* (Saskatoon: Western Producer Prairie Books, 1980); Royal Commission on Agriculture and Rural Life, Volumes 1-14, of which the most important for this essay are the volumes entitled, respectively, *Farm Income, Land Tenure, Agricultural Markets and Prices, Agricultural Credit, Crop Insurance, Home and Family in Rural Saskatchewan* (Regina: Queen's Printer, 1955); Gary Fairburn, *From Prairie Roots: The Story of The Saskatchewan Wheat Pool* (Saskatoon: Western Producer Prairie Books, 1984); Vernon Fowke, *Canadian Agricultural Policy* (Toronto: University of Toronto Press, 1949); Seymour Martin Lipset, *Agrarian Socialism*, 2d ed. (New York: Anchor Books, 1960); Charles F. Wilson, *A Century of Canadian Grain* (Saskatoon: Western Producer Prairie Books, 1978).
45. Flour inspectors were legislated in Upper Canada in 1801; their powers enhanced in 1820: *Amendment to Act to appoint Inspectors of Flour*, 1 Geo. IV, Chap. V, 1820. In 1835, legislation was passed standardizing the measure of a bushel on the basis of its weight rather than its volume, with a bushel of wheat declared to weigh sixty pounds, barley forty-eight, and oats thirty-four pounds. *An Act to establish a Standard Weight for the different kinds of Grain and Pulse, Statutes of the Province of Canada*, 5 Wm. IV, Chap. 7, assented to 16 April, 1835. In 1853, other crops were similarly standardized. *An Act to establish a Standard Weight for the different kinds of Grain and Pulse, Statutes of the Province of Canada*, 16 Vict., 1853, c.CXCIII. The first grades for wheat were established in 1863, 26 Vict., Cap III, assented to 5 May, 1863. (Extra Spring, for example, was to be "sound, plump and free from admixture of other Grain, and weigh not less than 61 lbs per bushel"). Provision was also made for inspectors to approve grade samples, to enforce standards and arbitrate disputes.
46. "An Act to make better provision, extending to the whole of the Dominion of Canada, respecting the Inspection of certain Staple Articles of Canadian produce." S.C. 1874, c.45.
47. In 1886, Canada added Boards of Examiners for each of the main grain cities to appoint inspectors, and a federal Chief Grain inspector to arbitrate disputes. In 1889, separate samples were developed for Western Canada; S.C. 1889, c.16. In 1892, provision was made for years in which there were no standard samples due to weather, S.C. 1891, c.48. Inspection procedures were also enhanced: *ibid.* 1892, c.23. In 1899, the wording of grades were revised, and provision was made for all grain grown in the Western Division must be inspected at Winnipeg. S.C. 1899, c.25.
48. Bill No. 19, February 14, 1898.
49. Bill No. 15, 1899.
50. S.C. 1899, c.25.

51. Canada, Royal Commission on the Shipment and Transportation of Grain. A Royal Commission is a group of citizens appointed by government to investigate and report to government on controversial matters of public interest.
52. By the end of the nineteenth century, the U.S. had developed an elaborate regime to regulate "corporations affected with a public interest," most notably public utilities. See M. Horowitz, *The Transformation of American Law* (Cambridge: Harvard University Press, 1977).
53. *Report and Evidence of the Royal Commission on the Shipment and Transportation of Grain* 63 Victoria, Sessional Paper No.81a, March 19, 1900.
54. S.C. 1900, c.39 (assented to 7 July 1900).
55. S.C. 1902, c. 19 (assented to 15 May 1902).
56. L.A. Wood, *A History of Farmer's Movements in Canada* (Toronto: Ryerson, 1924) at 178-79.
57. See discussion in Wilson, *supra* note 44 at 35 and Archer, *supra* note 44 at 123.
58. *Amendments to Manitoba Grain Act*, S.C. 1903, c.22.
59. *An Act to Amend the Canada Grain Act*, S.C. 1908, c.36 & c.45 (assented to 20 July 1908).
60. Wilson, *supra* note 44 at 41.
61. The issue was the Reciprocity Agreement with United States. Western farmers supported free trade but eastern industrialists opposed it.
62. The litany of complaints resembled earlier charges, that the Grain Exchange was driving down prices; that agents were selling producers' grain that had been consigned for storage; that elevator companies were charging excessive carrying fees; that private terminals were mixing grades of grain. See Wilson, *supra* note 44 at 192.
63. *An Amendment to the Canada Grain Act*, S.C. 1919, c.5.
64. *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 464, aff. [1924] Ex.C.R. 167.
65. *Canada Grain Act*, S.C. 1925, c.33. Mr. Justice Duff in *Eastern Terminal* had suggested that this would be a valid constitutional way for the federal government to control elevators.
66. The Turgeon Commission, *Report of the Royal Inquiry Commission* (Ottawa: King's Printer, 1925). For a fuller description of the Commission see Wilson, *supra* note 44 at 205ff.
67. *An Act to Amend the Canada Grain Act*, S.C. 1927. This provision was in response to pressure by the co-operative Wheat Pools which were formed in 1923-24 in Saskatchewan, Manitoba and Alberta to market members' grain.
68. *An Act to Amend the Canada Grain Act*, S.C. 1929, c.53.
69. *Canada Grain Act*, S.C. 1930, c.5. The Act was consolidated and updated in 1970. *Canada Grain Act*, S.C. 1970, c. G-16.
70. Canada removed import licences in 1989 as per Article 705 of the FTA.
71. In 1991, members of the Western Barley Growers Association sued the Canadian Wheat Board, alleging that the Board's practice of off-setting revenues from sales of high quality grain with revenues from sales of lower quality grain in determining whether there had been a net loss in the pool accounts (which should be made up by the Government of Canada) was discriminatory to high quality producers. The Court did not agree. *Lacey et al v. Canada* (1991), 127 N.R. 312 (F.C.A.) In contrast, in 1993, the prairie wheat pools challenged federal regulations removing barley from the jurisdiction of the Canadian Wheat Board as *ultra vires*. In an unpublished judgment July 20, 1993, Scheibel J. of the Saskatchewan Court of Q.B. found the regulations valid. The Saskatchewan Court of Appeal held that the Queen's Bench court did not have jurisdiction. The Federal Court found that although the *Canadian Wheat Board Act* provided authority to deregulate barley sales, it did not provide authority to partially deregulate sales as was done by Section 15 and 16.1 of Canadian Wheat Board Regulations, Order in Council PC 1993-1399, June 21, 1993. *Saskatchewan Wheat Pool v. Canada* (Attorney General), [1993] F.C.J. No. 902. The federal government withdrew the regulations. The judgement has been appealed to the Federal Court of Appeal. Meantime, the Court denied an injunction to prevent the federal government withdrawing the regulations. *Canada (Attorney General) v. Saskatchewan Wheat Pool*, [1993] F.C.J. No. 943 (F.C.A.); (Cargill Limited and United Grain Growers Limited, Intervenor).
72. *Saskatchewan Wheat Pool v. Canada* (Attorney General), [1993] F.C.J. No.902 (F.C.A.).
73. Current provisions are included in the *Western Grain Transportation Act*, S.C. 1980-81-82-83, c.168.
74. The literature on "soft law" is large, including I.Seidel-Hohenveldern, "International Economic Soft Law" (1979) 1982 II *Recueil des Cours* 182; and in Canada, R.R. Baxter, "International Law in 'Her Infinite Variety'" (1980) 29 *Int'l and Compar. L.Q.* 549; T. Gruchalla-Wesierski, "A Framework for Understanding Soft Law" (1984) 30 *McGill L.J.* 37; Johnathon Carlson, "Hunger, Agricultural Trade Liberalization and Soft International Law: Addressing the Legal Dimensions of a Political Problem" (1985) 70 *Iowa L. Rev.* 1187; and more recently, Oscar Schacter, "United Nations Law" (1994) 88 *A.J.I.L.* 1; Geoffrey Palmer,

"New Ways to Make International Environmental Law"
86 A.J.I.L. 259.

75. T. Gruchalla-Wesierski, *ibid.* at 66.
76. H.S. Patton, *Grain Grower's Co-operation in Western Canada* (Cambridge: Harvard University Press, 1928) at 30.
77. T. Gruchalla-Wesierski, *supra* note 74 at 48.
78. Jonathon Carlson, *supra* note 74.
79. Perhaps this attitude reflects a consciousness illustrated by advice from a former Vice-President of Cargill to Canadian farmers: "The Yankee trader is a formidable opponent ... it is the fine print, not grand talk, is what really counts in such deals. Integrity and the spirit of intent are worthless words." "Farmers Must Learn Trade Game: Grain Trader" *The Star Phoenix* (8 January 1994).
80. *Vienna Convention on the Law of Treaties* (1969) 1155 U.P.N.T.S. 331, In Force 1980. Specifically, Section 3, Articles 31 and 32.
81. "There are some in the U.S. who would appear to be operating on the assumption that they are quite at liberty to take whatever punitive or restrictive action against Canada. They seem to believe their conduct would have no consequences for them," according to Minister of Agriculture Goodale. See "Durum Fracas Could Lead to Trade War: Goodale Says Canada Prepared to Take Tough Defensive Posture" *supra* note 22.
82. A. Schmitz, a University of California Agricultural Economist, says: "What scares me is comparing the American market with free enterprise. It's one of the most socialistic markets ... the richest farmers in America believe in co-operatives." "Monopoly: The Wheat Board Game" *The Star Phoenix* (25 February 1994). Other academic authors agree. See, for example, C. Carter, A. McCalla & A. Schmitz, *Canada and International Grain Markets: Trends, Policies and Prospects* (Ottawa: Economic Council of Canada, 1989) at 40: "Canada has historically not subsidized grain production to nearly the same extent as the United States or the European Community. It has been more 'market-oriented' — as much because of budget constraints as philosophical commitments."
83. As GATT ends supply management, fragile inter-provincial truces on the sharing of the Canadian market in dairy, eggs and poultry, threaten to disintegrate into bitter disputes among producing provinces. "Alberta Minister Threatens Trade War Against Saskatchewan" *The Star Phoenix* (19 April 1994); "Provincial Trade Barriers Thorny Issue" *The Star Phoenix* (19 April 1994).
84. Saskatchewan Premier Romanow's public response to the durum dispute has been limited to one comment: "I can't expect any more than what is in fact happening, which is namely [Prime Minister] Chrétien is speaking out hard with the U.S. people on this issue and that's A
- O-K with me." "Durum dispute on Chrétien's agenda" *The Star Phoenix* (5 March 1994).
85. The combined rural and urban population of Saskatchewan constitutes only four percent of the population of Canada.
86. Canadian pasta makers might be helped; however, Canadian consumers would pay the price of "double" tariffs. An American import quota would make durum more expensive to U.S. pasta makers. A Canadian retaliatory tariff on pasta coming in to Canada would further increase the price of pasta in Canada. "American Pasta Entering Sask. Vexes Minister" *The Star Phoenix* (10 March 1994); "Canada, U.S. Push Hard to Conclude Trade Deal" *The Star Phoenix* (6 April 1994).
87. Prime Minister Chrétien, in his letter to President Clinton, referred to "Canadian participation in cruise missile testing and in the international space station." *Supra* note 24.
88. Prime Minister Chrétien's state visit to Mexico in March focused on trade issues and the benefits of investment, "PM Just 'Rubbing Shoulders' with Mexican People" *The Star Phoenix* (26 March 1994) despite the fact that the country's presidential heir-apparent, Luis Donaldo Colosia, was assassinated the day Mr. Chrétien arrived. "Assassination in Mexico: Presidential Candidate Gunned Down in Tijuana" *The Star Phoenix* (23 March 1994).
89. See, for example: "Theology and Revolution in Mexico" (1994) 23 *Sojourners* 9; Jim Carlton, "Not-So-Jolly Green Giant Casts a Long Shadow" *The Globe and Mail* (24 September 1992) C5.
90. See, for example: "NAFTA spurs fear of pollution nightmare: Babies Born Without Brains Are Thought to be a Result of Industrial Contamination" *The Star Phoenix* (9 October 1992); "Public Must Look at Ecology Issues Ignored by NAFTA" *The Star Phoenix* (24 February 1994); "Poor Not Biggest Victims of NAFTA" *The Star Phoenix* (20 January 1994).
91. The December 1993 GATT, signed April 15 in Marrakesh, Morocco, goes further in both these areas than either the FTA or NAFTA in creating specific obligations to reduce domestic and export subsidies. *Agreement on Agriculture*, Article 6 specifies domestic subsidies which are subject to reduction commitments, and commits Parties to an individualized total support level and reduction schedule, from which developing countries are exempted. Articles 8-12 commit Members to reduction commitments on all export subsidies, dumped commodities, supply management, and transportation subsidies. Members agree to disciplines to govern export credits and international food aid.

CANADIAN CONSTITUTIONALISM AND SOVEREIGNTY AFTER NAFTA

David Schneiderman

Just as national political authority has been contested by the power of transnational capital, so has the notion of sovereignty been embattled. By sovereignty, I mean the idea that political communities are self-determining in regard to those fundamental subjects around which their legal and political communities are organized: that "political authority within a community has the undisputed right to determine the framework of rules, regulations and policies within a given territory and to govern accordingly."¹ The power of transnational capital together with international trade agreements are seen as having undermined the relevance of sovereignty and also domestic constitutional arrangements, as a manifestation of sovereignty. In a recent series of articles, for example, Stephen Clarkson has argued that the recently enacted free trade agreements can be likened to a "new economic constitution."² For Clarkson, they should be "more properly understood as constitutional documents as important for the future of the northern dominion's political system as the Constitution Act of 1982."³ According to former Attorney-General of Ontario, Ian Scott, "whether or not the [U.S.-Canada free trade] agreement amounts to a constitutional amendment in any formal sense, it represents *de facto* constitutional change — and a constitutional change of very significant magnitude."⁴ Similarly, Bruce Doern and Brian Tomlin have written that "FTA is now one of Canada's *de facto* constitutional pillars, lodged in the political pantheon alongside federalism, Parliamentary government and the Charter of Rights and Freedoms."⁵

If the North American Free Trade Agreement (NAFTA) can be likened to a new economic constitution, NAFTA poses a serious challenge to

sovereignty and domestic constitutionalism. While Canadian sovereignty always has been qualified by the economic power of its major trading partners, NAFTA consolidates and makes material the power of transnational capital by legalizing free trade in a charter of economic conduct. NAFTA may have the effect, then, as have constitutions, of disabling governments from acting in a wide variety of legislative domains. This is a direction contrary to Canadian constitutional thinking prior to 1982. Strongly influenced by the British Parliamentary tradition,⁶ Canadian state power was potentially limitless — jurisdictions were divided between two levels of government which, between them, shared complete authority. In the traditional view of Canadian federalism, "there is *no* sphere of human life that is immune from ... intervention"⁷ by the state. The entrenchment of the *Canadian Charter of Rights and Freedoms* in 1982 substantially changed the character of Canadian constitutional design from one of general unboundedness to one of constitutional limits. Similarly, NAFTA, and the U.S.-Canada Free Trade Agreement (FTA) which preceded it, continue to transform the character of Canadian constitutionalism into one primarily concerned with limits on legislative power. In the first part of this essay, I will inquire into how NAFTA may be analogous to domestic constitutional law and why it may be useful to think of it in those terms.

A second interesting parallel between FTA, NAFTA and the *Charter* is that the free trade agreements have been justified and defended by resorting to 'rights' discourse, namely, the idea of equality. The "principle" around which both FTA and NAFTA have been organized is that of "national

treatment.” This principle requires that each party to the agreement treat the nationals of the other member states no less favourably than its own nationals — being largely a formal statement of the idea of equality. State practices are measured against the standard that the nationals of all party states are to be treated equally, but no particular standard is mandated. This principle of equality, argues Richard Lipsey in regard to FTA, provides much continued room for legislative manoeuvre. In the second part of this essay, I will inquire briefly into this argument to suggest, on the contrary, the national treatment principle in NAFTA impinges significantly on the ability of governments in Canada to regulate their local and national economies. This is achieved not only by the ostensibly neutral principle of “national treatment” but also by NAFTA provisions which disable legislative initiatives more directly.

NAFTA AND CONSTITUTIONALISM

NAFTA is an international treaty concerning trade, entered into by the Government of Canada, and is rescindable with six months notice. It would seem curious, then, to characterize NAFTA as constitutional in nature or effect. Important parallels, however, can be drawn between some characteristics of NAFTA and those of domestic constitutions as they are ordinarily understood.⁸ A few of those parallels below are set out below.

(a) NAFTA, like most domestic constitutions, commits the federal government (and the provinces, although they are not signatories), to a model of legislative behaviour in which the Canadian state (meaning both the federal and provincial governments) is disabled from pursuing certain legislative initiatives. This is what Stephen Holmes usefully characterizes a “precommitment strategy,” whereby one generation disables itself and future generations from acting contrary to goals articulated by constitution framers.⁹ Thus, as a strategy of precommitment, constitutionalism disables by denying present and future legislative majorities the choice of pursuing certain of their chosen objectives. NAFTA, in a similar way, commits the Canadian state to not discriminate legislatively against the nationals of other member states when it comes to matters concerning economic resources.

Holmes argues that precommitment strategies not only disable (the traditional view), but also enable

democratic decision making. They enhance democratic power by checking abuses of legislative and executive power and by facilitating democratic discussion at the point at which the checking function is exercised.¹⁰ Some would argue that NAFTA serves an enabling function as well: as Richard Posner has argued in regard to the U.S. Constitution, prohibiting rent-seeking and other forms of discriminatory commercial practices, makes government more efficient and democratic politics more stable and predictable.¹¹ Posner’s appeal to democratic politics is commendable but problematic in this instance.¹² Democratic politics would seem to require the opportunity to deliberate upon those very matters which Posner would prefer to have removed from public discussion — matters which are legitimately contestable within a democratic polity.

(b) Is the Canadian state disabled under NAFTA as it is under the Canadian constitution? There is no comparable provision in NAFTA to section 52 of the *Constitution Act, 1982*, which declares that laws inconsistent with the constitution are “of no force and effect.” Rather, NAFTA commits the parties to respect the obligations encompassed in the agreement: the parties are required to complete the “necessary legal procedures” in order to honour the agreement (Art. 2203),¹³ further, the parties must “ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance...by state and provincial governments” (Art. 105). No permanent mechanism of governance is established, but a free trade commission is established to supervise implementation and to resolve disputes arising out of the agreement (Art. 2001) as well as a secretariat to assist the Commission and “otherwise facilitate the operation” of the agreement (Art. 2002). As well, a number of committees and working groups are established to assess the operation of the agreement in a number of specific sectors.¹⁴ Dispute settlement mechanisms are a mix of consultation and arbitration.¹⁵ The agreement throughout declares that dispute mechanisms are “binding” on the parties. In the case of a trade dispute, parties can seek resolution from an arbitration tribunal, who can make recommendations to resolve disputes. If the party whose measure has been found to contravene NAFTA fails to comply with the arbitration board’s findings and recommendations, the complaining party is empowered to take retaliatory measures of “equivalent effect” (Art. 2019). Economic coercion, bolstered by juristic fiat, are generally the means of enforcement. In this way, national sovereignty is impaired by a mix of both functional and formal mechanisms.¹⁶

This is clearly the case in disputes involving private investors. Should a measure breach NAFTA's investment rules (Chapter 11), an investor from one of the member states (rather than simply the member state) can seek to enforce NAFTA obligations before an arbitration tribunal (in accordance with rules established by the World Bank's International Center for the Settlement of Investment Disputes [ICSID], the ICSID's Additional Facility, or the U.N. Commission on International Trade Law [UNCITRAL]).¹⁷ Decisions of the tribunal are "binding" (Art. 1136.1) and the parties are obliged to ensure that these awards are enforceable within their territories (Art. 1136.4). Federal and provincial laws presently provide for the enforcement of such international arbitration awards before domestic courts.¹⁸ NAFTA provisions which protect the rights of investors, ultimately, are enforceable within domestic courts of law and are constraining in the same way as are other self-binding commitments. And, unlike most domestic statute law, the NAFTA provisions concerning investment are designed not to facilitate government activity but to suspend it altogether.

(c) As they are mechanisms which bind present and future generations, constitutions should be less amenable to change than ordinary legislation. According to the *Constitution Act, 1982*, a high degree of consensus is needed amongst provinces and the federal government to amend most provisions of the constitution, and an extraordinary degree of consensus (namely, unanimity) is required for a few provisions. Significantly, most *Charter* rights and freedoms can be overridden by ordinary legislative enactment for renewable five year periods.

NAFTA, of course, is not as difficult to change as is most of the Canadian constitution. While a high degree of consensus likely is required (unanimity) to modify the terms of the agreement (Arts. 2202), a less onerous process is established to have other countries accede to the agreement (although consent of a member state is required for a new Party to enforce NAFTA's terms against that state: Art. 2205), and, as mentioned, any one party can unilaterally withdraw upon six months notice (Art. 2205). Nonetheless, as the *Charter* experience has shown, commitments which are capable of circumvention may still be sufficiently authoritative to be binding functionally. Moreover, NAFTA's effects may be difficult to undo — NAFTA, like constitutions, may "set in motion irreversible processes which, in turn, necessarily box in future generations."¹⁹

As Ian Robinson argues, some of the gains which the Mulroney government sought to achieve within Canada via the process of constitutional reform — such as the guarantee of the free movement of goods, persons, services, and capital across provincial boundaries — will have been realized through FTA and NAFTA: "These gains have been entrenched in the quasi-constitutional form of an international agreement that will be difficult if not impossible for subsequent national governments to amend in these areas, and more costly to abrogate with each passing year."²⁰ As capital increasingly becomes mobile, and as economies of scale necessitate that firms invest in production facilities outside of Canada, irreversible losses to the Canadian economy likely will result, at least in the short to medium term.²¹ In this light, NAFTA's six month notice period for withdrawal looks more like a binding mechanism than a convenient escape clause. The period of withdrawal would be too short a time within which to make adjustments and, hence, would be too disruptive for the Canadian economy.

To sum up, I have attempted to demonstrate that NAFTA exhibits characteristics typical of constitutions: (a) it is a type of precommitment strategy; (b) it is binding politically and, in some circumstances, also legally; (c) it is not easily amended because its effects are not easily reversed. In these ways, NAFTA can be understood as a constitutional document of a sort and its implications discussed in terms similar to those which constitutions are understood.

NAFTA, EQUALITY, AND CANADIAN SOVEREIGNTY

If it is correct to argue that trade agreements, like constitutions, disable domestic legislative initiatives, to what extent does NAFTA impair the ability of the Canadian state to regulate economic and social life? Usually this question is asked: to what extent is Canada's *sovereignty* impaired by continental trade agreements? Critics reply that sovereignty is impaired significantly. As federal and provincial governments lose their capacity to regulate economic and social welfare, Canadians will have more reason to turn to Washington, rather than to Ottawa, as the *situs* of political struggle. Even worse, sovereignty could shift entirely out of the domain of political authorities to a

"small coterie of financial and industrial giants."²² Robert Reich, in *The Work of Nations*, argues that the transnational corporation is no longer the citizen of a host country but, rather, a global citizen whose output is the combined product of value added from anywhere, at any time.²³ Hence, nation states are less capable now, than ever, of influencing the social welfare function of capital. Supporters of the continental agreements agree that sovereignty may be impaired to some degree — all such agreements have this effect — but they do not agree that Canadian sovereignty is impaired in the manner and to the extent of which critics have argued.

Richard Lipsey, writing about FTA, argues that Canada's sovereignty, in its ability to both *regulate* a wide variety of economic interests and to *retain* a national system of social policy, is not impaired.²⁴ Canada's sovereignty remains intact, Lipsey writes, due to the use of the principle of "national treatment." This principle, found in both FTA and NAFTA, requires not that Canada refrain from legislating in the areas covered by the agreement, but that Canada refrain from using legislative power to discriminate against nationals of the other parties, either in intention or in effect. According to Lipsey, this means "that Canada is free to follow policies that are completely different from those followed by the United States on any matter whatsoever as long as it applies these policies equally to Canadian and U.S. [and now Mexican] firms operating in Canada."²⁵

As mentioned, the principle of national treatment requires that "goods, services, or investors of one party to the agreement are to be given treatment no less favourable within the territory of another party than the treatment which the party accords to its own goods, services, or investors."²⁶ Nationals of the member states to the agreement are required to be treated equally and without discrimination. Using this form of 'rights' discourse, Ronald Wonnacott argues that:²⁷

If Canada ratifies the NAFTA, trade liberalization would be on track in the creation of a hemisphere *free of discrimination*, one in which all countries would have free and *equal access* to the markets of all others. Canada and any other participant could hope to look out someday over an *equal opportunity* hemisphere.

This discourse of equality and freedom from discrimination may be more than coincidental. As the

recent rounds of Canadian constitutional reform suggest, the language of equality is a powerful rhetorical instrument with which to advance one's claims. But, a very formal notion of equality — equality or similarity in treatment — is being offered. It is one familiar to readers of Adam Smith: "To hurt in any degree the interest of any order of citizens, for no other purpose but to promote that of some other, is evidently contrary to that justice and equality of treatment which the sovereign owed to all the different orders of his subjects."²⁸

Even accepting that equality rights discourse is fitting in these circumstances, a more sophisticated equality argument can be advanced in contrast to the formal notion of equality currently employed by free trade proponents. A more complex version of equality, where equality can mean not only equality in treatment, but also differing treatment, has been articulated by equality rights theorists.²⁹ It has also been invoked by others, such as the Government of Canada during the Charlottetown Accord referendum, as it sought theoretical justification for granting distinct or differing status to the province of Quebec.³⁰ This contextual approach to equality requires that, in some circumstances, equality mean not sameness, but difference.³¹

This fuller notion of equality can apply in the context of international trade. While formal equality in treatment (sameness) may be called for in some circumstances, in other situations a contextual approach to equality, mandating differential rather than similar treatment, is appropriate. For economically depressed regions of a country, a policy other than formal equality may be justifiable, shielding certain industries or economies from the pressures of economic restructuring — pressures which result from the lower wage and less-taxed jurisdictions to the south. Government procurement practices, which prefer local goods, services and industries for example, are not entirely dysfunctional; they act as a form of regional development, however economically inefficient such practices may otherwise be. Government expenditures within regional economies can help to promote the welfare of those most proximate to voters, those within local communities of concern.³² There also are good socio-cultural reasons for preferring local services, as in the areas of public school examinations³³ or in the provision of publicly funded child-care services.

Performance requirements dictate that there be local content, domestic purchasing or technology

transfer to the host country (Art. 1006). NAFTA's investment chapter prohibits the use of performance requirements in relation to investments which nationals of a Party (and even a non-Party) have an interest. As Jim Stanford explains, these kinds of requirements have been an effective tool of industrial policy in both Mexico and Canada.³⁴ Barred from relying on these strategies, NAFTA will make it more difficult "to influence the nature of investment and thus promote long-run industrial and regional development goals."³⁵ While some provincial policies which do not conform to the investment chapter will be protected if included in a list of non-conforming measures (Art. 1108), the formal equality of national treatment generally fails, as an "operating principle," to be sensitive to these concerns.³⁶

The analogy to formal equality, reflected in the principle of national treatment, does not capture the scope nor magnitude of NAFTA's reach into Canadian sovereignty. Lipsey, Schwanen, and Wonnacott, writing about the ostensible neutrality of NAFTA in relation to sovereignty, argue that:³⁷

Among other misconceptions about the NAFTA's supposed encroachment on Canada's ability to pursue independent policies, it is worth noting that the NAFTA does not prevent Canadian government from adopting any fiscal or monetary policy they wish — to subsidize firms (for example, in return for specific investment or research commitments), to extend research and development contracts to anyone they choose, to nationalize industries or set up public monopolies in any sector or to set any standard they wish (for example toward sustainable development objectives).

If the authors mean to say that NAFTA does not prohibit these activities unconditionally, they are correct. To the extent that the agreement prohibits most of these activities expressly and sanctions the use of economic coercion should Canada pursue offending policy objectives — either through the threat of trade retaliation or by the payment of damages to injured investors — the authors are not being faithful to the text. Consider, for example, how NAFTA's limits on (a) the nationalization of industries, and (b) the setting of technical standards, move beyond the requirements of formal equality. In both these areas something more than respect for the national treatment principle is required of the parties. In this way, the agreement

provides for more substantive, rather than merely procedural, criteria with which to scrutinize legislative conduct. I will discuss briefly each of these areas.

(a) As regards the nationalization of industry, NAFTA's investment chapter forbids the Parties from "directly or indirectly" nationalizing or expropriating an investment of an investor of another Party or from taking measures "tantamount to" nationalization or expropriation. Such actions are permitted if they are done (a) "for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with the due process of law and Article 1105 (1); and (d) on payment of compensation ..." (Art. 1110.1). Article 1105.1 requires that each Party accord to investments and investors of another Party "treatment in accordance with international law, including fair and equitable treatment and full protection and security." The NAFTA expropriation section builds on similar provisions found in FTA (Art. 1607) by enabling investors to sue member states for alleged takings. There may be little objection to the principle that the state pay fair market value for property which it seizes outright, but the prohibition is wide enough to catch a variety of reasonable social policy mechanisms.

Recently, for example, the American tobacco company Phillip Morris threatened a claim for compensation "for hundreds of millions of dollars" under NAFTA's investment chapter should the Government of Canada legislate the plain packaging of cigarettes.³⁸ According to the legal opinion obtained by Phillip Morris and R.J. Reynolds from Carla A. Hills, who acted as U.S. Trade Representative for NAFTA, the imposition of plain packaging "would amount to expropriation of a lawfully registered trademark in violation of Article 1110(1), giving rise to massive compensation claims."³⁹ Jean-Gabriel Castel has disputed Hill's opinion, arguing that a general health exception applies to such intellectual property (Art. 2101), as does the more specific exception relating to performance requirements found in the investment chapter (Art. 1106.2).⁴⁰ Assuming these are investments under Chapter 11, the challenge facing supporters of plain packaging is that no specific health exception is mentioned in the expropriation section. Assistance may be found, however, in the more general requirement that takings be for a "public purpose." Whichever interpretation is most correct, the investment chapter prohibitions on nationalization and expropriation may inhibit severely the attainment of Canadian state objectives, like the plain packaging initiative.

(b) In addition, NAFTA prohibits the use of technical standards as barriers to trade, except when they are measures related to safety, the protection of human, animal or plant life or health, the environment or consumers (Art. 904). The use of technical standards as "unnecessary obstacles" to trade are forbidden. Standards are deemed to be "unnecessary" where "the demonstrable purpose of the measure is to achieve a legitimate objective" and the standard does not also operate to exclude the goods of another Party (the "national treatment" principle) (Art. 904.4). Not only does the "legitimate objective" test open up to substantive scrutiny most technical standards, but, according to one commentator supportive of NAFTA, the legislating Party will also have to show that the standard was the "least restrictive" trade measure available to achieve the desired objective.⁴¹ As the Canadian experience under the *Charter* suggests, less restrictive means can almost always be devised.⁴² The branch of the *Oakes* test (which assists in determining whether limits on Charter rights are reasonable)⁴³ concerned with least restrictive means has been the most often invoked in striking down legislation.⁴⁴ It is also because of the onerous standard set by the least restrictive means test that the Supreme Court of Canada has moved to relax this part of the *Oakes* test.⁴⁵ The prospect that there will be review of the substantive policy objectives of national and sub-national units is high, while the test for justification, at least with respect to technical standards, may be difficult to satisfy.

CONCLUSION

As Doern and Tomlin note, viewed broadly as an economic constitution for North America, "free trade leaves Canada forever changed."⁴⁶ The principle of national treatment, as a statement of formal equality, potentially disables member states from pursuing desirable social policy objectives. Furthermore, NAFTA also disables party states from pursuing policy objectives which offend the operation of a free trade zone and not simply the principle of 'equal opportunity.'

NAFTA's effects, then, on the democratic idea of representation are profound, the implications of which I will only allude to, given this short space. Suffice it to say that what the trade agreement takes away from local governments, at both the national and sub-national level, it does not give to a supra-national institution. Although the NAFTA sets up an apparatus of some eighteen standing committees, as well as *ad hoc* committees, panels and tribunals, it does not

provide for representation at the continental level in any meaningful way. If, as Reg Whitaker has argued, Canadian federalism is agnostic about community,⁴⁷ NAFTA is, in many ways, antagonistic to community. Although some are hopeful that continental free trade will cultivate political allegiances which transcend national boundaries, fostering new alliances and coalitions, these political forces will have no where to turn to give effect to their political agendas. As Piven and Cloward have demonstrated, historically, social change has been achieved by social confrontation⁴⁸ — who are social movements to confront in the new transcontinental arena? While a variety of differing, and contradictory, allegiances may be fostered, including a sense of belonging to a North American community, this new plurality of actors will have, in the words of Donald Smiley, fewer forums with which to engage in the "ongoing process of democratic debate, persuasion and pressure."⁴⁹□

David Schneiderman

Executive Director, Centre for Constitutional Studies.

I am grateful to Claude Denis, Gord Laxer, Erin Nelson, Pratima Rao, and Bruce Ziff for their helpful comments.

Endnotes

1. David Held, "Democracy, the Nation-State and the Global System" (1991) 20 *Economy and Society* 138 at 150. On the disutility of the concept of sovereignty see Jacques Maritain, "The Concept of Sovereignty" in W.J. Stankiewicz, ed., *In Defense of Sovereignty* (New York: Oxford University Press, 1969) 41 and Harold J. Laski, *Studies in the Problem of Sovereignty* (New York: Howard Fertig, 1968).
2. "Disjunctions: Free Trade and the Paradox of Canadian Development" in Daniel Drache and Meric S. Gertler, eds., *The New Era of Global Competition: State Policy and Market Power* (Montreal & Kingston: McGill-Queen's University Press, 1991) at 116.
3. "Constitutionalizing the Canadian-American Relationship" in Duncan Cameron & Mel Watkins, eds., *Canada Under Free Trade* (Toronto: James Lorimer, 1993) at 12.
4. Ian Scott, "A Constitutional Challenge" (1988) 10:2 *The Facts* (Canadian Union of Public Employees) 25 at 26.
5. G. Bruce Doern & Brian W. Tomlin, *Faith and Fear: The Free Trade Story* (Toronto: Stoddart, 1991).
6. Exemplified by William Blackstone and A.V. Dicey.
7. Patrick Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 34 *U.T.L.J.* 47 at 84.

8. Trade agreements generally may be seen to exhibit some of these same characteristics. NAFTA, however, goes much further in limiting state action than do most trade agreements. As Mel Clark argues in regard to FTA: "It is evident that while vital national powers are protected under GATT, the same can not be said of FTA." See Clark, "Canadian State Powers: Comparing FTA and GATT" in Cameron and Watkins, eds., *supra* note 3, 41 at 43.
9. Stephen Holmes, "Precommitment and the Paradox of Democracy" in Jon Elster & Rune Slagstad, eds., *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988) 195.
10. See Holmes, *ibid.* at 225ff. and Cass R. Sunstein, *The Partial Constitution* (Cambridge: Harvard University Press, 1993).
11. "The Constitution as Economic Document" (1987) 56 Geo. Wash. Law Rev. 4.
12. See discussion in Cass R. Sunstein, "Constitutions and Democracies: An Epilogue" in Elster & Slagstad, eds., *supra* note 9 at 341.
13. See Stephen A. Scott, "NAFTA, the Canadian Constitution, and the Implementation of International Trade Agreements" in A.R. Riggs & T. Velk, eds., *Beyond NAFTA: An Economic, Political and Sociological Perspective* (Vancouver: The Fraser Institute, 1993) 238.
14. See Isaac Cohen, "Beyond NAFTA: The Institutional Dimension" in Rod Dobell & Michael Neufeld, eds., *Beyond NAFTA: The Western Hemisphere Interface* (Lantzville: Oolichan Books, 1993) 86 at 98-100.
15. On the dispute settlement mechanisms in NAFTA, see Armand de Mestral, "NAFTA Dispute Settlement Panels: Theory and Practice" in Riggs & Velk, eds., *supra* note 12 260. On the experience under FTA see Donald McRae, "International Dispute Settlement Under the Canada-United States Free Trade Agreement" in William Kaplan & Donald McRae, *Law, Policy, and International Justice: Essays in Honour of Maxwell Cohen* (Montreal & Kingston: McGill-Queen's University Press, 1993) 186.
16. See John D. Whyte, "The Impact of Internationalization on the Constitutional Setting" in Institute of Public Administration of Canada, *Think Globally, Proceedings of the 42nd Annual Conference* (Toronto: Institute of Public Administration of Canada, 1991) at 470, and Joseph A. Camilleri, "Rethinking Sovereignty in a Shrinking, Fragmented World" in R.B.J. Walker & Saul H. Mendlowitz, eds., *Contending Sovereignities: Redefining Political Community* (Boulder and London: Lynne Rienner, 1990) at 24.
17. See Gary Clyde Hufbauer & Jeffrey J. Schott, *NAFTA: An Assessment* (Washington: Institute for International Economics, 1993) at 81.
18. See, for example, *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, R.S.C. 1985 and the discussion in Errol P. Mendes, "Assessing the Ultimate Question About International Commercial Arbitration: The Enforcement of Foreign Arbitral Awards" (1993) 5 C.U.B.L.R. 233 at 240-41.
19. Holmes, *supra* note 9 at 223.
20. Ian Robinson, "Neo-Conservative Trade Policy and Canadian Federalism: Constitutional Reform By Other Means" in D.M. Brown, ed., *Canada: The State of the Federation 1993* (Kingston: Institute for Intergovernmental Relations, 1993) at 217.
21. Although Duncan Cameron argues that, given the already unfavourable impact of free trade upon Canada: "any costs accrued from termination would not be very onerous. The prospect of regaining powers ceded by the FTA far outweigh the costs of termination." See Cameron "Renegotiation and Termination" in Cameron & Watkins, eds., *supra* note 3, 277 at 282.
22. Robert Chodos, Rae Murphy & Eric Hamovitch, *Canada and the Global Economy* (Toronto: James Lorimer, 1993) at 46.
23. (New York: Alfred A. Knopf, 1991) at 12.
24. Richard G. Lipsey, "The Free Trade Deal and Canada's Sovereignty: Are the Fears Justified?" *C.D. Howe Institute Trade Monitor* (November 1988) No.8 at 2.
25. Lipsey, *ibid.* at 2. Also see Richard G. Lipsey, "The Free Trade Agreement in Context" in Marc Gold & Douglas Leyton-Brown, eds., *Trade-Offs On Free Trade* (Toronto: Carswell, 1988) 67.
26. Richard G. Lipsey, Daniel Schwanen, & Ronald J. Wonnacott, "Inside or Outside the NAFTA? The Consequences of Canada's Choice" *C.D. Howe Institute Trade Monitor* (June 1993) No.48 at 16.
27. Ronald J. Wonnacott, "Hemispheric Trade Liberalization: Is NAFTA on the Right Track?" *C.D. Howe Institute Commentary* (June 1993) at 17 [emphasis added].
28. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Vol. 2 (Indianapolis: Liberty Classics reprint of Oxford University Press, 1976) at 654.
29. See, for example, Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990).
30. This argument can be found in the Government of Canada pamphlet on the Charlottetown Accord delivered to every Canadian household in October 1991: "We want a country in which everyone is equal. But no one wants a country in which everyone is the same." See, in addition, Judy Rebick, "The Charlottetown Accord: A Faulty Framework and a

- Wrong-Headed Compromise" in Kenneth McRoberts & Patrick Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: McGill-Queen's University Press, 1993) at 102-04, and Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal & Kingston: McGill-Queen's University Press, 1994) at 233-34.
31. Take for example the case of a woman seeking pregnancy leave. Equality as sameness would require that no special benefits be available for pregnant women — she could qualify for regular "disability" benefits as would other disabled employees. Equality as difference would require that the differences between pregnancy and sick leave be recognized and accommodated to suit the needs of the pregnant employee (requiring different amounts of leave, spousal leave, etc.). See discussion by Dickson C.J. in *Brooks v. Canada Safeway*, [1989] 1 S.C.R. 1219 and Sheilah L. Martin, "Persisting Equality Implications of the 'Bliss' Case" in Sheilah L. Martin & Kathleen E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 195.
 32. See Arne Johan Vetlesen, "Why Does Proximity Make a Moral Difference?" (1993) 12 *Praxis International* 371.
 33. The case of B.C. contracting for the delivery of grade twelve examinations to a firm outside of the country is discussed in Matthew Sanger, "Public Services" in Cameron & Watkins, eds., *supra* note 3 at 190.
 34. Stanford, "Investment" in Cameron & Watkins, *ibid.* at 166.
 35. *Ibid.*
 36. A more attentive balancing of the public interest is offered in Robert Howse, *Economic Union, Social Justice, and Constitutional Reform: Towards a High But Level Playing Field* (North York: York University Centre for Public Law and Public Policy, 1992).
 37. Lipsey *et al.*, *supra* note 26 at 17-18.
 38. Letter dated May 5, 1994 from William H. Webb, President and Chief Executive Officer, Philip Morris International Inc., to the House of Commons Standing Committee on Health.
 39. Legal opinion dated May 3, 1994 from Carla A. Hills to R.J. Reynolds Tobacco Company and Philip Morris International Inc. filed with House of Commons Standing Committee on Health at 18.
 40. Legal opinion dated May 11, 1994 from J.-G. Castel to Fasken Campbell Godfrey filed with the House of Commons Standing Committee on Health. Also see Castel, Letter to the Editor, *Globe and Mail* (30 May 1994) A18.
 41. Bradley J. Condon, "Constitutional Law, Trade Policy, and the Environment: Implications for North American Environmental Policy Implementation in the 1990s" in Riggs & Velk, eds., *supra* note 13 at 224.
 42. See Joel Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 *Osgoode Hall L.J.* 123 at 165-66 and Peter Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 878-882.
 43. *R. v. Oakes*, [1986] 1 S.C.R. 103.
 44. See David Beatty, "The End of Law: At least as We Have Known It" in Richard Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond-Montgomery, 1991) at 395.
 45. Andréé Lajoie & Henry Quillinan, "Emerging Constitutional Norms: Continuous Judicial Amendment of the Constitution — The Proportionality Test as Moving Target" (1992) 55 *Law and Contemporary Problems* 285.
 46. Doern & Tomlin, *supra* note 5 at 305.
 47. Reg Whitaker, "Federalism and Democratic Theory" in Whitaker, *A Sovereign Idea* (Montreal & Kingston: McGill-Queen's University Press, 1992) at 198.
 48. See Frances Fox Piven & Richard Cloward, *Poor People's Movements: Why They Succeed and How They Fail* (New York: Vintage, 1977), Frances Fox Piven & Richard Cloward, *Regulating the Poor: The Functions of Public Welfare* 2nd ed. (New York: Vintage, 1993) and Bryan Turner, "Outline of a Theory of Citizenship" in Chantal Mouffe, ed., *Dimensions of Radical Democracy* (London: Verso, 1992) 33 at 38.
 49. Donald Smiley, "A Note on Canadian-American Free Trade and Canadian Policy Autonomy" in Gold & Leyton-Brown, eds., *supra* note 25, 442 at 443.