the art of the state

Volume II no.1

Thinking North America

Pathways and Prospects

Thomas J. Courchene

The European Union Perspective

Peter Leslie

An American Perspective

Jeffrey J. Schott

The Search for North American Institutions

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A Trilateral Approach to North American Integration

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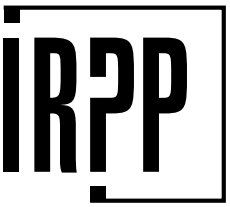
IRPP



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The Art of the State II

Thinking North America

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Daniel Schwanen, editors

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1
Foreword

3
Thomas J. Courchene
Thinking North America: Pathways and Prospects

49
Peter Leslie
The European Union Perspective

69
Jeffrey J. Schott
An American Perspective

77
Debra P. Steger
The Search for North American Institutions

91
Ma Isabel Studer Noguez
A Trilateral Approach to North American Integration

THIS YEAR MARKS THE 15TH ANNIVERSARY OF THE CANADA-US FREE TRADE Agreement (FTA) and the 10th anniversary of the North American Free Trade Agreement (NAFTA) coming into force. While these anniversaries would rather naturally have led to increased interest in ways to broaden and deepen our North American trading relationships, the tragic events of 9/11 have added homeland security as a complicating issue to the already full free trade agenda. With this in mind, in October 2003 the IRPP convened its second "Art of the State" conference around the theme "Thinking North America: Prospects and Pathways." Outstanding experts from Canada, Mexico and the United States came together to explore new ideas, new instruments and new processes for enriching our North American experience in ways that at the same time preserve Canada's freedom to manoeuvre. We attempted to remedy gaps in the public discourse and understanding of how three proud and sovereign nations could advance common causes and manage their increasing interdependence. In this context, it is a pleasure to acknowledge our partner in this endeavour, the Canadian Institute for Research on Regional Development at the University of Moncton.

The concrete result of this conference is the series of papers of which this folio is an integral part. The contributions will be released individually, but together form a collection that will explore a wide range of North American issues, including:

- The trade and economic dimensions of the Canada-US relationship
- The pros and cons of an enhanced institutional structure, including the possibility of a treaty for a revitalized community of North Americans
- The deep determinants of integration; whether a North American "citizenship" can evolve from current relationships; and whether new rights should be extended to private parties to give direct effect to commitments by governments
- The management of environmental issues
- The role of states and provinces in any future trilateral relationship
- How efforts at making North American integration work better should be seen in light of other international agendas being pursued by the three nations, in particular that of the Free Trade Area of the Americas

On behalf of the IRPP, I want to express my sincerest thanks to the many contributors to these volumes and to extend my appreciation of their efforts to develop their ideas to new levels of depth, clarity and relevance to policy. This is due in no small part to the diligence of the three co-chairs of the second "Art of the State" conference and editors of this collection: IRPP Senior Scholar Thomas Courchene, Senior Fellow Donald Savoie and Senior Economist Daniel Schwanen. It is their hope and mine that this series will be useful to all those involved in the multifaceted North American relationships and that, mindful of potential pitfalls ahead, this work will also help train our eyes on the rewards that the three nations could reap from improving those relationships.

Hugh Segal
Montreal, March 15, 2004

Thinking North America: Pathways and Prospects

Introduction

THE 10TH ANNIVERSARY OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) among Canada, the US and Mexico and the 15th anniversary of the Canada-US Free Trade Agreement (FTA) have triggered a veritable flurry of conferencing and research activity in all three countries directed not only toward reviewing and evaluating the performance of these agreements, but also, and perhaps primarily, toward focusing on how they might evolve in terms of further broadening and deepening North American trade and economic integration. Any such historical review of NAFTA/FTA would surely assign high marks for increasing trade and, arguably, low marks for the handling of a number of associated issues, some of which are long-standing and even predate the FTA (softwood lumber) while others are more recent (mad-cow crisis). It would have been most interesting to see how these pros and cons of the NAFTA/FTA experience would have played out in terms of forging approaches for renewing NAFTA. But this was not to be because of the horrific events of 9/11 and the consequent rise of "homeland security" as the pre-eminent American societal goal. For the foreseeable future, homeland security will be uppermost for the US, and if the movement of persons, vehicles and goods across its border compromises US security, then the border/trade arrangements will be altered accordingly. While 9/11 created a difficult new set of border and trade problems, it also created a window of opportunity for pursuing common security and economic concerns. As Thomas d'Aquino, president of the Canadian Council of Chief Executives (CCCE) has noted, "[t]he events of September 11 provided a powerful catalyst. Homeland security and economic security quickly became cross-border rallying cries" (2003, 1). Mr. d'Aquino further suggests that

the two principles that will underpin any new strategy are that "North American economic integration is *irreversible*" and that "North American economic and physical security are *indivisible*" (2003, 3; emphasis added). While this is admittedly more of an assertion than an inevitable reality, it is nonetheless the case that, in sorting out the potential pathways and prospects for North American integration, trade and security will have to go hand in hand.

Within this framework, the role of this overview is to provide a retrospective and prospective assessment of the evolution of the FTA/NAFTA, as reflected in the papers in this second volume of the IRPP's series The Art of the State. This "volume" is actually a series of eight separate folios presenting a selection of the proceedings of the symposium "Thinking North America: Prospects and Pathways," held at Château Montebello in October 2003. The complete list of the papers in the volume appears at the end of this folio, and a summary of the contents of each folio appears on their respective inside back covers.

Rather than providing a folio-by-folio summary, the approach taken here is thematic. Thus, this paper is divided into 10 separate sections, corresponding to issues that will loom large in any further integration of North America. The overview will then draw on the ideas and proposals from all the folios as they apply to the various themes. To ensure that the letter and the spirit of the authors' views are faithfully reported, this overview uses direct quotations as often as possible, and much of the remainder of the text is a précis of the author's words. To assist the reader, references to each paper are to the page number in the folio where it appears, for example: (Schwanen, folio 4, 35).

The first section, "North-South Integration," reviews the dramatic increase in post-FTA Canada-US trade then discusses some of the implications that flow from this enhanced trade dependency, most particularly the marked shift from an east-west (domestic) trading axis toward a series of north-south (cross-border) trading axes. The second section, "Challenges Arising from the Operations of NAFTA," focuses on some of the principal challenges and opportunities that have appeared in the Canada-US trading relationship, especially those associated with border concerns, regulatory differences, NAFTA's institutional weaknesses, and the old chestnut of contingency protection, especially in the resource sector. This set of opportunities and challenges serves to frame much of the analysis in the ensuing sections of this paper.

The third section, "Toward a New Accommodation with the United States: The 'Big Idea' Movement," begins with Michael Hart's enthusiastic case (folio 2), based in

part on a trade-security nexus, for broadening and deepening NAFTA across a wide range of fronts. It is fair to say that Hart is representative of a high-profile group of analysts/players that recommends pursuing strategic bargains or bold initiatives with the US (e.g., Allan Gotlieb, Wendy Dobson and the CCCE, among others).

The expansiveness articulated by Hart does not go unchallenged, however. The next section, "NAFTA and Political Deepening," begins with John McDougall's questioning of whether Canada-US economic integration is already eroding our sovereignty (folio 7), with more likely to come as we offer concessions to the US to keep the post-9/11 borders open to seamless trade. Robert Wolfe offers a different yet complementary perspective (folio 6), while I weigh in with a contrasting NAFTA-as-sovereignty-enhancing view (folio 6).

In the fifth section, "Does NAFTA Deepening Require a North American Citizenship Regime?" the discussion shifts away from viewing North American integration largely in terms of deepening the trading relationship and toward the vision of deepening the North American "community." Jennifer Welsh wrestles with the issue of whether NAFTA can meaningfully deepen in the EU direction without first moving in the direction of developing the idea or ideal of North American citizenship (folio 7).

Informed by these sovereignty and citizenship challenges, this overview then presents several models that aim to deepen North American integration beyond the trade dimension and even beyond the current reality where NAFTA is "owned," as it were, by Washington, Ottawa and Mexico City. The sixth section contains the first of these, giving "direct effect" to NAFTA, as advocated by Armand de Mestral and Jan Winter (folio 6). The authors' argument is that the result of giving direct effect to selected provisions of NAFTA would be that citizens would be able to challenge their governments in their courts if they deem that these governments have failed to implement or to adhere to these provisions.

The following section, "A Treaty for North America," broaches the most far-reaching vision for the evolution of North America, that of Daniel Schwanen (folio 4). Although based on the idea of a "community of North Americans" rather than an EU-style North American community, Schwanen's concept of a treaty does go a considerable way toward the EU model, albeit in a cautious manner and fully respectful of existing processes that work well now.

Thus far, all the arguments for deepening NAFTA and/or North American integration have been "top down." The eighth section, "Pluralism,

Subsidiarity and NAFTA: Creating a Community of North Americans from the Bottom Up," takes the opposite approach. Robert Wolfe (folio 6) recognizes that while NAFTA is the most important agreement relating to North American trade, there are hundreds of other cross-border agreements and literally thousands of less formal arrangements, all of which act as a living and growing "constitution" of North America. If such agreements and arrangements can be viewed as decentralizing North American integration, then, following my argument (folio 6), the principle of subsidiarity can be called upon to decentralize NAFTA itself by bringing the subnational governments more fully and more formally under the NAFTA umbrella. Rounding out this section, Earl Fry (folio 3) provides further perspective on the role of subnational governments in North American integration.

The ninth section, "NAFTA and the Environment," presents the paper by Scott Vaughan and the commentary by Debora VanNijnatten (folio 5). Here the issues addressed range from whether NAFTA is creating pollution havens or overseeing environmental "races to the bottom," to whether the environmental institutions associated with NAFTA are sufficiently robust to become a platform for a North American environmental-management regime, and even whether environmental management is best accomplished on a regional rather than a pan-NAFTA basis.

The final thematic section of this thematic overview, "NAFTA and the Global Trading Order," focuses on NAFTA in the general context of multilateral trade agreements, the subject of folio 8. Maryse Robert traces the history of Canada's role in trade relations in the Western Hemisphere. This serves as a convenient entrée into Jaime Zabludovsky's paper, which assesses the prospects for a successful completion of the negotiations with respect to the Free Trade Area of the Americas (FTAA). At the more global level, Sylvia Ostry offers a rather pessimistic assessment of the progress so far of the WTO's Doha Round, with little optimism for any meaningful progress in the near future. Alan Alexandroff provides an assessment of these three papers to round out the folio.

Two further sections complete this overview. One of them simply calls attention to four individual "perspectives" on future prospects for North America, by Peter Leslie, Jeffrey Schott, Debra Steger and Isabel Studer, which appear in the current folio. The last section, "The Road Ahead," presents some personal reflections on the prospects and pathways relating to the evolution of North American trade and integration.

North-South Integration

Over the 15 years since the FTA, the increase in Canada-US trade has been nothing short of spectacular. From Hart:

> In 1980, two-way bilateral trade in goods and services represented about 40 percent of Canadian gross domestic product (GDP). Two decades later, that figure nearly doubled to reach about 75 percent, valued at some C$700 billion annually or C$2 billion every day. Two-way flows of foreign direct investment have similarly reached new highs: in the early 1980s, the value of annual two-way flows averaged under C$10 billion. By 2000, they had reached C$340 billion, and reflected a much greater balance between US- and Canada-originating flows. In 2002, some 11 million trucks, or about 30,000 per day, crossed the border to carry much of this trade; the Ambassador Bridge between Windsor and Detroit alone handles over 7,000 trucks a day, or one every minute in each direction, 24 hours a day; about 100,000 passenger vehicles also cross the Canada-US border every day, in addition to millions of tons of freight carried by planes, railcars, ships and pipelines. Over 200 million individual crossings now take place at the Canada-US border annually, an average of more than half a million every day. On average, 15 million Canadians — of a population of 31 million — travel annually to the United States for visits of more than one day to conduct business, break up the long winter, visit friends and relatives or otherwise pursue legitimate objectives, while slightly fewer Americans visit Canada for similar reasons. (folio 2, 25-26)

Hart goes on to note that this dramatic increase in trade has created deep, and asymmetrical, dependence by Canadians on the US market (15-16). For example, shipments to the US constitute in the neighbourhood of 80 percent of our exports, whereas US sales to Canada made up only one-quarter of their exports. Along similar lines, our imports from the US account for roughly one-third of our consumption, whereas US imports from Canada represent only 3 percent of their consumption. This asymmetry can be expressed in more aggregate terms as well: the US economy is 13 times the size of the Canadian economy, but bilateral trade is about 18 times more important to the Canadians than to the Americans.

However, it is at the provincial level that north-south trade dependencies and asymmetries are most evident. In 1989, exports from all provinces to the US were 18.6 percent of GDP, whereas interprovincial exports were larger, at 22.9 percent of GDP. By 2001, the opposite relationship prevailed: interprovincial exports had fallen to 19.7 percent of GDP while exports to the US had mushroomed to 37.6 percent (Courchene, folio 6, table 1). And at the individual province level, 9 of the 10 provinces (all except Manitoba) exported more to the US in 2001 than they did to

their sister provinces, whereas this was true for only 2 provinces in 1989, the year when the FTA took effect (see Boychuk, folio 3, table 1). Not surprisingly, the implications of this shift from a east-west trading axis to a north-south trading axis are far-reaching. While the Canadian domestic economy is more effectively and fully integrated than is the cross-border economy (Helliwell 1998), the reality is that, in terms of gross flows and economic dynamism, the NAFTA economic space is progressively where the trading/economic future of Canada's provinces will be unfolding.

Earl Fry's paper, "The Role of Subnational Governments in North American Integration" (folio 3), provides valuable perspective on why Canada's north-south trade has grown so rapidly. This perspective is contained in his "GDP map" of North America (table 1), in which the US states and Canadian provinces are replaced with nation-states that have an equivalent dollar value of GDP. Hence, California becomes France; New York becomes Italy; Texas is Canada; Florida is Brazil; Ohio is Australia; Michigan is Russia; Massachusetts, Virginia and North Carolina all become Switzerland; and so on. One of the many insights to be drawn from this "GDP map" is that it provides a rationale, apart from mere geography, for why our trade with the US is so large — we have the GDP equivalents of most of the global trading nations right at our doorstep, as it were.

This caveat aside, the intensifying north-south integration means that one of the world's most decentralized federations is becoming not only further decentralized, but as well more policy-asymmetric as the provinces attempt to orchestrate their respective futures in NAFTA economic space. Intriguingly, this FTA/NAFTA-induced reconfiguring of Canada's economic geography has provided the needed impetus to free up our *internal* markets; in particular, the 1994 Agreement on Internal Trade (AIT) relating to the free flow of goods and services across provinces and the 1999 Social Union Framework Agreement (SUFA) relating, *inter alia*, to the removal of impediments to the transfer of qualifications/credentials across provincial boundaries are welcome initiatives in this regard.

The obvious benefits of this deepening US trade/economic integration have been accompanied by a heightened degree of north-south trade dependence. The events of 9/11 brought this home to Canadians, as addressed by Hart (folio 2) and me (folio 6), among others. For example, the border-traffic interruption associated with 9/11 cost just-in-time automobile manufacturers thousands of dollars per minute. More generally, the longer-term implications of unpredictable border slowdowns and closures may well wreak havoc with much of Canada's manufacturing and export

sector. Focusing again on just-in-time manufacturing, Canadian-based firms will be tempted to consider relocating to the US, and incoming North American foreign direct investment will arguably tend to discount Canadian locations. Not only is this trade/border dependence asymmetrical between Canada and the US, it is also asymmetrical across the provinces. For example, the softwood lumber issue affects British Columbia, but not New Brunswick. This means that it is likely to be more difficult for Canada to develop a unified and uniform response that satisfies all provinces. In the event, pressures may develop for the province or provinces in question to redesign their policies to be more in line with US demands/designs. This anticipates the later discussion of John McDougall's contribution (folio 7), namely, that the intensification of Canada-US economic integration will lead to the reduction of political/policy differences between the two countries. In terms of the issue at hand, the deepening dependence on US markets could bring about the reworking of selected provincial policies to be more consistent with those in the US.

Trade Diversification

This degree of trade dependence has led some Canadians to be concerned that too many of Canada's trading eggs, as it were, are in the US basket and that, as a result, we are foregoing lucrative trading opportunities elsewhere in the world. The arguments for greater trade diversity run the gamut from the likelihood of sharply diminishing returns to openness beyond some degree (Helliwell 1998, 124), to the McDougall-type claims that our degree of trade dependence on US markets is undermining our political independence (folio 7). Hart addresses these concerns head-on:

> Some Canadians are concerned about Canada putting all its eggs in the US basket and failing to pay attention to Canada's many interests around the world. They miss the point. It is not Canada, but Canadians, who are driving the process of deepening bilateral integration. Canada, the country, does not trade despite frequent claims to the contrary by ministers and their officials. Trade flows from the impact of billions of discrete and seemingly unrelated decisions by individuals in their daily decisions about what to eat, wear, drive, read and otherwise spend their resources. Overwhelmingly, those choices favour North American products. US markets and suppliers are now the overwhelming preference of Canadian firms and individuals, and Canadian markets and suppliers have assumed a growing importance to US firms and consumers. The pace of this process accelerated perceptibly in the 1980s, to the benefit of both Canadians and Americans, creating the conditions that underpinned deepening integration in the 1990s.

> Calls for "diversifying" Canada's trade relations fly in the face of these emerging patterns and make little economic sense...Ever since Prime Minister Trudeau pursued his failed "third option" of trade diversification in the 1970s, a small segment of Canadians have continued to be worried by the "threat" of Canada's growing integration into the North American economy. As a matter of fact, Canadian trade — exports and imports — is already highly diversified. The range of products and suppliers vying for consumer attention has increased dramatically over the past decade, while Canadian producers service millions of customers. Most of them happen to be in North America, because that is where the most profitable opportunities are to be found…
>
> There is, of course, an alternative. The Canadian government could start telling businesses where to trade, investors where to invest and consumers what to buy. Other governments would have to act in the same way by interfering in the choices of their consumers and investors — the United States, for example, by throwing up barriers to Canadian exports, and the Europeans by lowering their remaining obstacles to Canadian trade. The result would inevitably be more diversified trade, but at considerably diminished volumes that generated fewer jobs and lower incomes. (folio 2, 23-25)

The bottom line here, for Hart at least, is that even though there may well be some negative spillovers associated with our export dependence on NAFTA economic space, this is a *market-driven dependence*. Arguably, however, the trade-diversification issue will begin to fade away now that China has become a major trading nation and an increasingly important trading partner for Canada, with India, among others, likely close behind.

By way of a final observation on Canada-US trade intensities, the much greater relative dependence of Canada on US markets should not be taken as evidence of US lack of interest in further trade and economic initiatives. Not only is Canada the number-one trading partner for the US, but we are also the largest foreign supplier of energy to the US market. And as of 2002, at the subnational level, 38 US states had Canada as their number-one export market, with 6 of the remaining states having Mexico as their top trading partner and another score of states having Mexico in second place. Overall, US trade with its NAFTA partners exceeds US trade with the EU, and this will surely grow as Mexico's economy begins to live up to its potential.

This, then, is an important part of the trade and economic integration backdrop that has generated the earlier-noted flurry of conferencing and research celebrating the anniversaries of NAFTA and the FTA. There is another important part, however, one that focuses on addressing the various problems and challenges that have arisen either because of the manner in which selected provisions

of NAFTA have been implemented or interpreted or because NAFTA has been unable to accommodate new developments in the global or North American environments. While several excellent analyses of NAFTA's shortcomings in these regards are available to draw from, in the context of *Thinking North America* the appropriate detail is again found in Michael Hart's paper.

Challenges Arising from the Operations of NAFTA

Hart divides the trade and economic challenges arising from the operations of NAFTA into four main areas — border administration, regulatory differences, institutional capacity and contingency protection/resource pricing. By way of an initial general observation that draws on all four areas, in an earlier paper, Hart and Dymond comment as follows:

> The response of the two economies to the challenges posed by freer bilateral trade and investment has been both remarkable and positive. Nevertheless, the results have created new bilateral tensions, challenges, and opportunities. The growing web of economic linkages joining the two countries, the result of the cumulative impact of billions of discrete daily decisions by consumers and producers alike, point to the need for policy responses on both sides of the border that will have an important bearing on the quality and pace of further integration. Deepening interaction is exposing policies and practices that stand in the way of more beneficial trade and investment. Cumbersome rules of origin, discriminatory government procurement restrictions, complex antidumping procedures, intrusive countervailing duty investigations, burdensome regulatory requirements, vexatious security considerations, onerous immigration procedures, and other restrictive measures remain in place, discouraging rational investment decisions and deterring wealth-creating trade flows. (2001, 3)

While some of the items in this listing are substantive, many serve to create what Hart and Dymond appropriately call "the tyranny of small differences" (2003, 32).

Turning now to the first of the four enumerated problem areas, namely, *border administration*, Hart notes that "administration of the physical border continues to involve a dense array of laws and procedures conditioning trade and investment decisions, including the costs of compliance and potential costs created by delays" (folio 2, 33). However, as Dorval Brunelle (folio 7) reminds us, addressing these border issues need not take the form of reworking NAFTA: they can be dealt with

outside of NAFTA, as demonstrated by the December 2001 US-Canada Smart Border Declaration and the associated 30-Point Action Plan and subsequent updates. While the declaration was signed a few months after 9/11 (by Homeland Security Director Tom Ridge and Deputy Prime Minister John Manley), it was in preparation well before September 11, 2001. The four key pillars of the 2001 declaration relate to the secure flow of people, the secure flow of goods, secure infrastructure, and coordination and information-sharing. The more detailed proposals were a mixture of enhancing security and facilitating trade, and among the latter were expediting frequent travellers across the border and the preclearing of goods away from the border. The 2002 30-point Action Plan is tilted more in the security direction, focusing as it does on biometric indicators, seaports/container security, visa/refugee/immigration issues, terrorism, etc., although trade-related issues like preclearance away from the border are also revisited. The underlying message here is twofold. First, homeland security on the one hand and the role of the border in terms of the flow of goods, services and people on the other are closely related, and, while aspects of both can be addressed within a reworked NAFTA, it is more likely that this will occur under a homeland-security umbrella. Second, the more that Canada-US security issues are addressed in the form of security declarations/accords, the less likely it is that Canada (and/or Mexico) will be able to leverage these security issues to obtain concessions with respect to deepening NAFTA, assuming that this would be viewed as a desirable strategy in the first place.

In terms of the second problem area, *regulatory differences*, while growing interdependence has led to considerable convergence and has narrowed regulatory differences, it has "neither eliminated existing differences nor discouraged new, often small, differences in regulatory design, objectives, and implementation and compliance from emerging, imposing costs and maintaining distortions in the operations of the two economies" (Hart, folio 2, 35-36). In effect, this is where much of the earlier-alluded-to "tyranny of small differences" can wreak havoc. Where feasible, the solution lies in the mutual recognition of national regulatory systems and in focusing on achieving harmony or "equivalencies" rather than on seeking uniformity, since the latter would, almost by definition, lead to the adoption of US principles and practices.

In terms of the third challenge, *institutional capacity*, "managing deepening integration and an increasingly complex relationship requires that the two governments assess the capacity of current institutional and procedural frameworks to iron out differences, reduce conflict and provide a more flexible basis for

adapting to changing circumstances" (folio 2, 36). However, institutional infrastructures and institutional capacity is precisely what NAFTA does not possess, i.e., NAFTA is institutionally shallow. Elaborating somewhat and drawing from Bélanger (2002), international agreements like NAFTA have to strike a balance between comprehensiveness and precision on the one hand and delegation and self-governance on the other. NAFTA fares extremely well in terms of the former:

> NAFTA is among the most highly detailed international trade agreements ever negotiated between governments...NAFTA is broader in scope of coverage...than the WTO agreement, and it is comparable in the level of detail to the WTO agreement. NAFTA was drafted at a level of detail substantially higher than the EC treaty. (Abbott, quoted in Courchene, folio 6, 19-20)

But, while NAFTA scores highly on comprehensiveness and precision, this is not the case for self-governance. Indeed, NAFTA was drafted to *avoid* any bureaucratic or supranational institutions. Rather, the core of the agreement is intended to be implemented by each government. Hence, its dispute-resolution mechanisms have neither the power of a tribunal nor the ability to internally update NAFTA to accommodate new challenges. This is in sharp contrast to the EU, which has a "relatively imprecise charter coupled with a high degree of delegation that may promulgate secondary legislation with more precise content" (Abbott, quoted in Courchene, folio 6, 20). Thus, the European Court of Justice can trump national courts. Given the long-standing US concern about yielding sovereignty to international bodies and the overwhelming power imbalance in NAFTA, it should come as no surprise that NAFTA has effectively no ability to adapt and adjust *from within*, since this sort of delegation would lead to the erosion of US sovereignty.

Two important observations flow from this. The first is that while both Canada and the US benefited initially from the specificity and scope of NAFTA, over the longer term the US, because of its sheer size and power, can bear more easily than can Canada the costs and frustrations of the emerging trade problems and irritants that arise in part because NAFTA itself cannot resolve them. The second is that NAFTA is institutionally shallow by design, not by happenstance (Bélanger 2002). The obvious corollary is that proposals for deepening NAFTA are not likely to be successful unless US self-interest changes significantly. Equally obviously, 9/11 raised the possibility that linking homeland security and economic security might be the very key to appealing to US interests and, therefore, to deepening NAFTA institutionally.

Finally, Hart recognizes that *contingency protection and resource pricing* have proven difficult to resolve in many sectors (softwood, wheat, beef). Among the potential approaches here are to treat more industries as a single transborder market; to resolve some of these issues in the multilateral (e.g., WTO) context; or to attempt to resolve them in the context of a major new security/trade initiative.

To these four problem areas arising from the decade-long experience with NAFTA, one must add the new challenges, such as the need to broaden NAFTA visas (TN visas) to workers other than professional workers in order to accommodate the expanding services trade, and to do so in a manner that does not compromise security concerns.

Against this backdrop, the analyses in the next five sections focus in turn on four very different approaches to reworking the Canada-US free trade arrangements. The first is a security/trade composite proposal by Michael Hart. The second is the approach taken by Armand de Mestral and Jan Winter that would give "direct effect" to selected provisions of NAFTA. The third is Daniel Schwanen's recommendation for and elaboration of a "Treaty of North America." The fourth vision of the evolution of North American integration draws primarily from the legal-pluralism perspective and is articulated by Robert Wolfe. Interspersed in the discussion of these alternative models are John McDougall's concerns that deepening NAFTA will serve to undermine our political independence, Jennifer Welsh's view that deeper integration needs to be based on some version of a common North American citizenship, and Earl Fry's documentation of the role of NAFTA's subnational governments in international integration. This is an incredibly rich agenda, both policy-wise and analytically, and although the various models face very different political hurdles, in tandem they represent a major contribution to the research and thinking related to the evolution of Canada-US and NAFTA economic and even political space.

Toward a New Accommodation with the United States: The "Big Idea" Movement

THE THRUST OF MICHAEL HART'S PROPOSAL, "A NEW ACCOMMODATION WITH THE United States: The Trade and Economic Dimension" (folio 2), is straightforward:

> A comprehensive Canada-US bilateral trade, investment and security initiative would provide a unique basis for resolving a wide range of issues between Canada and the United States that will strengthen Canada's attractiveness as an investment location to serve the Canadian, North American and world markets, while addressing the urgent need to buttress security against terrorist and other transnational threats. Failure to tackle these issues will have a subtle, harmful impact on investor confidence in the Canadian economy — at home, in the United States and abroad — and on US security interests. (folio 2, 16-17)

Note that in the bilateral nature of this proposal (as distinct from a trilateral arrangement) Hart is following an apparent Canadian consensus (among those who favour combining security and trade issues) that the requirements of accommodating the Canada-US relationship are very different from those relating to the Mexico-US relationship, so that a bilateral agenda is the way to proceed, at least initially.

Another aspect of this consensus is Canada cannot negotiate piecemeal with the Americans:

> [F]or any initiative to succeed, it must meet a number of conditions. It must be bold, it must come from Canada and be espoused at the highest level. It must be comprehensive so as to allow trade-offs and broad constituencies to come into play. It must address the US agenda as well as ours. Incrementalism won't work. (Gotlieb, cited in Hart, folio 2, 39)

Following Dobson (2002), we can refer to this as the "big idea" approach to negotiating with the US. One such big idea on the economic integration side would be a customs union. Bolder yet would be a common market. But these do not address the US security interests. Accordingly, Dobson has proposed a pragmatic "strategic bargain":

> Canadian initiatives would be required in areas of interest to the United States, specifically border security, immigration, and defence. Energy security is another key area where Canada should build on its existing strengths. In exchange for these initiatives, Canada should seek customs-union- and common-market-like arrangements that achieve deeper integration but recognize deep attachments to political independence and distinctive national institutions. (2002, 1)

The CCCE position paper "Security and Prosperity: The Dynamics of a New Canada-United States Partnership in North America" (d'Aquino 2003) embeds Dobson's energy security proposal within a broader "North American resource security pact," encompassing oil, gas, electricity, coal, uranium, metals, forest products and agriculture. What the CCCE hopes to accomplish is to trade off resource security for the resolution of long-standing issues and irritants relating to pricing, subsidies and regulatory practices in selected resource products (e.g., lumber). Note that this CCCE

approach is in effect designed to address most of the four problem areas of NAFTA highlighted in the previous section, which re-emphasizes the fact that Hart is very representative of the consensus view of those who favour a new trade initiative.

Hart builds on these ideas and proposals (including his previous work with Dymond) to develop a proposal embracing the following building blocks:

- Attaining a common external tariff on as many items as possible, which would be made easier if both countries also simplify their tariff regimes and lower tariffs toward other trade partners
- Overcoming the small but costly differences in nontariff treatment of imported goods, including prohibited and restricted goods
- Drawing on the successful historical precedent of alcoholic beverages in Canada-US trade to address areas of contention in agriculture
- Finding an acceptable way to deal with politically motivated trade sanctions against third parties
- Reducing the importance of antidumping and countervailing duties by a combination of exempting certain sectors from bilateral action and applying joint remedies against third-country imports in these sectors, and by directly addressing resource pricing issues that create friction in other sectors
- Opening government procurement markets to cross-border competition on a sector-by-sector basis
- Working through various well-established strategies, such as mutual recognition, toward regulatory convergence where existing differences are more a matter of detail and implementation than of fundamental design
- Building on the NAFTA provisions for temporary entry of business travellers, while addressing any additional security questions that this may raise
- Accelerating the adoption of technologies and ways of cooperating that reduce or eliminate the need for controls at the physical border itself
- Building on the Smart Border Declaration to ensure a more secure perimeter and also moving toward convergence in matters such as cargo and passenger preclearance systems, law enforcement programs of all types and immigration and refugee determination procedures
- Creating institutional arrangements like joint commissions or requiring better coordination of existing regulatory agencies to enable joint decision-making and problem solving in areas where high levels of trust and cooperation already exist, while maintaining overall political oversight

Hart concludes on a positive, but speculative, note — namely, that the US has a vital interest in its relationship with Canada and that this US interest would carry the day if a Canadian initiative with sufficiently wide implications were advanced.

NAFTA and Political Deepening

While a majority of Canadians now appears to support the FTA and NAFTA, it is not obvious that a majority would also approve of a further deepening of NAFTA. Indeed, a significant number believe that Canadian integration with the US has already gone too far. In "The Long-Run Determinants of Deep/Political Canada-US Integration," John McDougall presents a historical, theoretical and currently relevant analysis of the relationship between economic integration and political integration (folio 7). His concluding sentence is in fact the best introduction to his analysis: "[T]he long-term prospects for Canada as a distinct and internally cohesive community seem more tentative with every step toward deeper North American integration" (29).

McDougall's analytical starting point is the core hypothesis of the communications approach to integration, associated with Karl Deutsch (1957), which posits that the intensification of transactions of all kinds between two or more societies will, over time, bring about a positive political reorientation of those societies toward one another in the form of increased mutual responsiveness and support for the advancement of common goals. His analysis is devoted to making the case that this theory may well be playing out in the context of Canada-US trade deepening. He correctly warns his readers not to become to complacent by comparing North American political integration with that in the EU, since this comparison may mask the underlying reality. Specifically:

> Within North America, both the academic and political debates about the relationship between economic and political integration have been severely hampered by the identification of political integration with the highly institutionalized version of it taking place in the European Union. In fact, the reduction or elimination of barriers to the movement of economic factors is largely independent of any specific form of international institutional arrangements. In other words, moves toward international economic liberalization do not require the creation of common decision-making structures, certainly not ones with the scale and scope of those found in the European Union. Theoretically,

> therefore, economic integration could be fully accomplished through mutual but independently enacted adjustments to national policies that do not involve significant transfers of authority from national to international levels. That is to say, deep integration, which is generally deemed to be an intensification of economic integration, is essentially about reducing political differences between countries — differences between national policies, regulations and standards that restrict the ease and efficiency with which goods, capital and people move between national jurisdictions. The substitution of common, "supranational" policies for existing national policies is certainly one way of removing such barriers, but it is not the only way. (folio 7, 15-16, emphasis in the original).

From McDougall's perspective, one test of this Deutschian model of international political integration would be to focus on Canada's policy reaction in the consequences flowing from 9/11:

> For them [Canadians], one of the most tangible consequences of those attacks — many kilometres of trucks backed up behind border-crossings into the United States — was an unsettling reminder of the extent to which their country's economic fortunes had come to depend upon smooth and uninterrupted access to the American market and, worse yet, the degree to which such access might require the closer alignment of a wide variety of Canadian domestic and foreign policies with those of the United States. In light of Americans' enormously heightened sensitivity to possible security threats emanating from Canada, Canadians' continued enjoyment of the economic benefits of their extensive economic interdependence with the United States seemed increasingly contingent, as economic nationalists have feared all along, on their willingness to pay whatever political price might be necessary to reassure Americans that Canadian policies across a broad front were not adding to the security problems confronting the United States. (4)

And in the set of such policies, McDougall would include the antimissile defence system.

One of the several observations-cum-conclusions contained in McDougall's thoughtful thesis is the following trade-off, which will surely be critical to our future evolution in the upper half of North America:

> [T]he next round of trade liberalization, focused as heavily as it is on trade in services and investors' rights, is likely to cut much closer to the bone of Canadian national identity and independence than the previous "trade in goods" rounds have done. On the other hand, there can be no question that deeper levels of integration are necessary to realize yet higher levels of continental prosperity. Accordingly, the stage appears to be set for an even more contentious divide between the champions of integration and the defenders of the national idea in Canada as the agenda for deeper integration is carried forward. (13)

Robert Wolfe, in "Where's the Beef? Law, Institutions and the Canada-US Border" (folio 6), also takes a dim view of a Hart-type grand strategy or strategic bargain to deepen NAFTA. While Wolfe is not in principle against efforts to deepen our relationship with the Americans, he views the proposals for institutional and legal deepening that would be required as feasible only if these institutions were designed in line with Washington's priorities and, as well, were located in Washington. Moreover, his view is that it is misleading for Canadians to dream of an overarching agreement within which the relations between Canadians and Americans can be subsumed in a strong state-to-state framework with a single set of coherent policy tools:

> In single-point diplomacy, state-to-state relations are the responsibility of ambassadors and foreign ministers, but power is everywhere in the United States, not just in the White House or on Capitol Hill. I claim that no central institution can be created to manipulate such diffuse power on Canada's behalf. Canadians do not vote in US elections, and nothing we can say in the domestic political arena will make much difference. And our difficulties with the US Congress cannot be solved by creating more legal texts, let alone by trying to codify the North American "constitution" that we already have. (72)

Wolfe buttresses his argument by focusing in informative detail on the BSE, or "mad cow," crisis, concluding that a deepened and more centralized NAFTA would have been of little help in sorting out this crisis. He ends his paper with a view that is closely linked to some of the ideas in the McDougall essay:

> Proponents of grand schemes should be clear on which "Canada" they have in mind. We need to distinguish the Canada that wants to be rich from the Canada that wants its own administrative law traditions. Analysts should avoid the temptation to say "we" will benefit from a policy of deeper integration with the United States when their desired outcome is merely reduced transaction costs for business. Many Canadians hold other values more dearly. To be clear, I am not counselling inaction; rather, I am arguing that Canadians, be they private citizens or prime ministers, should be using all the institutions of North American integration that already exist, whether formal legal agreements or the informal ones created in the course of the millions of daily interactions between Canadians and Americans. We must not be complacent, but we do not need to bundle everything into one framework. (93)

Note that Wolfe's "pluralistic" vision, as reflected in the above quotation, will be the focus of much of the discussion below on deepening North American integration from the bottom up.

In my own contribution, "FTA at 15, NAFTA at 10: A Canadian Perspective on North American Integration" (folio 6), which served as a background

document for the Montebello symposium, I take issue with the accepted notions that North American integration and the free trade agreements are serving to erode Canadian sovereignty. To be sure, this is not quite the same issue as the economic-integration/political-integration linkage dealt with by McDougall, but it is in the same ballpark. One of the hallmarks of the FTA and NAFTA is that the underlying operating principle is "national treatment" — Canada can legislate or regulate more or less as it wishes, provided only that it treats Canadian and American and Mexican agents/enterprises operating in Canada in the same way. This is "sovereignty enhancing," or at least "sovereignty preserving," in comparison with the operating principle in the EU, which in many areas is based on a single-market or a home-country-rule principle. Under national treatment, an American firm can do in Canada exactly what a Canadian firm can do in similar circumstances, while under home-country rule an American firm would be able to do in Canada what it could do in the US. Obviously, the latter approach leads in the direction of uniformity and the need for greater supranational coordination, which in the EU takes the form (in part) of hundreds of "directives" emanating from Brussels. In the NAFTA context the EU approach may well imply US rules. Clearly, national treatment is the way to accommodate policy diversity/sovereignty.

One can go beyond this in principle at least and assert that what Canadians want and need from the Americans is access to their market. With respect, we do not want their institutions or their values or their politics. Indeed, it was precisely over the period when Canada became more integrated economically with the US that we began to carve out our own identity in the upper half of North America. And given that the FTA and NAFTA deliver the US market to Canada, we have more freedom to continue to pursue our desired futures.

There is a further point to be made about the relationship among integration, sovereignty and free trade agreements in the era of globalization and the information revolution. It is clear that the "ultra mobility" of capital is impinging on the ability of nation-states to control key aspects of policy even within their own borders, which, in turn, is reducing national autonomy and sovereignty. This ultra mobility of capital is best viewed as creating a "global economic commons" that has more or less the same implications as the English grazing commons or the environmental commons, namely, that unless one assigns property rights, the various commons will be overgrazed or overpolluted or, in the case of the capital-mobility commons, domestic-policy overwhelmed. Environmental agreements

do restrict what nations can do but, in the process, they *enhance* effective sovereignty because nations will now have the ability to exert control over the environment. Likewise, ultra capital mobility does reduce the sovereignty of national governments. But free trade agreements, in principle at least, can allocate property rights and provide rules and regulations that allow nations to exert some control over capital flows, and in this sense they are reclaiming some of the sovereignty they lost because of global capital mobility. I summarize as follows:

> Castells (1998) applies this "global commons" analytical framework to the evolution of the EU when he observes that European integration has succeeded in part because the European Union does not supplant existing nation-states. On the contrary, it enhances their survival in spite of the forfeiture of some sovereignty by ensuring their greater say in region and world affairs in the age of globalization. Phrased differently, "nationalism, not federalism, is the concomitant development of European integration." (folio 6, 29)

It may well be the case that NAFTA has design weaknesses that serve to inhibit its potential for reclaiming lost sovereignty, but that is a separate issue from the principle embodied in Castells's quotation, which, arguably, also has relevance for Canada.

The analysis now takes leave of this emotive issue of the potential erosion of political sovereignty/independence as a consequence of deepening economic integration only to address another sensitive issue, this time in the explicitly trilateral or North American context: Can NAFTA be meaningfully deepened without the emergence of North American solidarity or of a North American identity?

Does NAFTA Deepening Require a North American Citizenship Regime?

In "North American Citizenship: Possibilities and Limits," Jennifer Welsh focuses on the potential "legitimacy gap" that is arising because deepening North American integration appears to be premised on the notion that North American producers, consumers, employees and investors need not at the same time be North American *citizens* (folio 7). In other words, can NAFTA deepen in the direction of an EU-type integration on the economic front without some

increase in North American citizen rights? And if the answer is no, are there ways that North America can work toward enhancing North American citizenship as a prelude to market deepening? Not only is Welsh's contribution to be welcomed in its own right, but it is also the ideal entrée into the later analyses of alternative avenues for "thinking North America" and deepening NAFTA.

Welsh begins with a comparison between Europe and North America. The driving force behind the formation of the post-war European Community was largely political — "a desire to avoid another catastrophic war on the European continent by tying Germany to the fate of its European neighbours" (36). According to the preamble to the Treaty of Rome, the original six signatories were "determined to lay the foundations for an ever closer union among the peoples of Europe." In contrast, Welsh notes that there is "no comparable grand purpose" in North America. Rather, the preamble to NAFTA pledges to "create an expanded and secure market," to "reduce distortions to trade" and to "enhance the competitiveness of their firms" (36). These commitments are more contractual than they are communitarian.

Welsh then reviews aspects of the manner and process that the EU took to embed citizens rights — direct universal suffrage as of 1976 for EU parliamentary elections and the move in 1981 to a uniform EU passport, which in turn served to facilitate the coming to fruition in 1992 of the single European market. She notes that even with these initiatives there was still a view that the EU discourse "had become too firmly rooted in economics — i.e., a 'businessmen's Europe' — and needed to take account of the dimensions of a 'people's Europe'" (37). Accordingly, the 1993 Maastricht Treaty's provisions relating to the Euro were twinned with further advances on the European citizenship front, e.g., the creation of new rights, including the right of citizens to communicate with any of the EU institutions in their chosen language. These are part and parcel of *les acquis communautaires*, which again have no equivalent in North America.

Intriguingly, the message that Welsh draws from this for North American integration embodies more hope than the reality itself might suggest:

> In short, the very notion of a North American identity is problematic. The collective framework necessary to make it meaningful simply doesn't exist. But...the existence of a single European people, or demos, has not been a necessary condition for the creation of common European institutions. Instead, the process is working in reverse: it is Europe's common institutions that have kick-started a process of building a shared identity — whose future depth and breadth is still uncertain. I share the view of those scholars of European inte-

> gration who see the requirement of a pre-existing people as a red herring: the EU is not seeking to copycat the sovereign state and therefore does not need the underpinning of a single people for its institutions to function. (43)

By way of elaboration, Welsh asserts that "the evolution of the European Union demonstrates that once rules and institutions are expanded for the purposes of market making, there are strong normative pressures to discuss and provide for democratic values" (folio 7, 40). This is potentially good news, especially when Welsh also notes that "NAFTA space is in some ways reminiscent of Europe prior to Maastricht" in that "it is defined in the technical terms of economic convergence rather than in the language of citizens" (44).

But this begs the question of whether there are alternative ways to confer legitimacy on NAFTA's provisions. In this context Welsh notes that some progress might be made if national parliaments were to become more involved in NAFTA decision-making processes, if there were greater transparency and more options for public participation in NAFTA, and if NAFTA were to follow Europe's lead and enhance the rule of law in North America (which, as an aside, is the subject of the next section). These possible avenues do not alter the fact that not only does "NAFTA lack anything resembling a formal citizenship regime [but] it is even more difficult to locate the possible source of a common North American good or a common set of expectations among North America peoples" (44).

In "NAFTA and North American Citizenship: An Unfounded Debate?" Dorval Brunelle (folio 7) both compliments and complements the Welsh analysis in terms of the EU and then appropriately broadens and deepens it as it relates to North America. It is this latter aspect of Brunelle's analysis that will be highlighted here, because it relates directly to the later analysis on deepening NAFTA "from below." Brunelle begins his discussion of North American citizenship by noting that for a long time now the subnational governments (provinces and states) in all three NAFTA federations have benefited from a great deal of independence in international matters, which, on occasion, leads them to intervene directly at the international level by adopting policies or sanctioning norms that at times contradict those espoused by their central governments. By way of examples he notes that this was the case "when the states of Washington and Oregon adopted policies recognizing the 'two Chinas,' or when about twenty states repatriated their pension funds from South Africa during apartheid, or is still the case when Quebec claims an independent status within the community of francophone countries" (58).

Brunelle derives two observations from this. The first is that "as far as political citizenship in Canada and United States and, to a lesser degree, in Mexico is concerned, a citizen's allegiance to his or her central power represents only one aspect of citizenship, because the individual is also tied, by suffrage, by eligibility and, foremost, by taxation, to the other levels of government: provincial and state, as well as municipal and local" (58). The second is that NAFTA serves to alter this relationship because "it forces infranational governments to adjust their internal regulations to the demands of the agreement, while it excludes these governments from discussions and negotiations surrounding these adjustments" (58-59). This leads Brunelle to conclude that NAFTA has "important *negative* effects on the definition of political citizenship in North America and, if we limit ourselves to that dimension, we would be led to conclude that the future of a project of North American citizenship is uncertain at best" (60, emphasis added).

Brunelle then shifts to another area where the implications for North American citizenship are more benign, namely, the incredibly dense cross-border traffic in goods, services, capital, persons, associations, agreements and the like. He focuses specifically on the associated growth of nongovernmental organizations (NGOs):

> NAFTA has not only played a key role in the creation and formation of an entire network of organizations and associations, but the agreement has, above all, led a number of existing organizations and associations to make NAFTA, as well as other issues related to the two parallel agreements — the North American Agreement on Environmental Cooperation (NAAEC) and the North American Agreement of Labour Cooperation (NAALC) — important recurring themes in the definition of their missions and mandates. This can be verified, of course, for each confederation of trade unions in the three countries, but also for feminist, student and community associations, as well as religious communities and human rights organizations. In turn, the incorporation of these subjects and issues led to the establishment and the reinforcing of transnational relations between organizations and associations, and also led to the creation of coalitions and lateral networks rallying militants from various backgrounds…Nonetheless, this specific aspect of the interventions surrounding NAFTA is far from the only one, since we have to take into account cultural and social exchanges between organizations as varied as universities, colleges, schools, public and private administrations, cities and municipalities, at all levels of civil society; exchanges that contribute to the emergence of a North American civil citizenship from the bottom up, thanks to the reinforcing of social bonds continent-wide. (61)

If this reflects an optimistic note, Brunelle concludes on a pessimistic one by observing that the North American citizenship that may actually be emerging is an extension of American citizenship beyond the US border.

Giving "Direct Effect" to NAFTA

In "Giving Direct Effect to NAFTA: Analysis of Issues," Armand de Mestral and Jan Winter (folio 6) reason that since the first-best approach to deepening NAFTA, namely, an evolution toward supranational rules and institutions, does not appear to be politically feasible, the second-best solution would be to give direct effect to selected provisions of NAFTA. The granting of direct effect to specific provisions of NAFTA would empower citizens to rely upon these provisions as rules of domestic law before their respective courts in situations where they consider that their government has failed to properly respect the agreement. As proposed by de Mestral and Winter, direct effect is only a "vertical" direct effect, limited to relations between government and the governed. It is *not* proposed to give "horizontal" direct effect to NAFTA so as to have it govern interpersonal or intercorporate relations.

This proposal is a radical step in that it would deprive the three signatory governments of sole "ownership" of the agreement. As a result, NAFTA would cease to be purely an intergovernmental document, and would become a document of direct, rather than indirect, relevance to the lives, business decisions, and legal relations of private citizens and companies doing cross-border business vis-à-vis their governments. On the other hand, the authors note that it is also a cautious step in the sense that it implies no substantive change in NAFTA, nor does it require the adoption of supranational rules or institutions. In terms of what direct effect might mean in practical terms, de Mestral and Winter note:

> The first consequence would be that the NAFTA governments would cease to be the only parties having the rights to challenge violations of the treaty. They would be joined by citizens and corporations doing business in the three countries. Secondly, challenges to the compatibility of governmental measures with NAFTA would cease to be made only by governments before NAFTA dispute-settlement procedures, but could be taken by citizens and corporations before the designated domestic courts. Decisions on legality would be taken by judges charged with the interpretation of the general laws of each country. Thus, if a citizen or a company considered a governmental measure (legislative or administrative) to be in violation of a directly effective provision of NAFTA, they could file suit in the designated domestic court, receive a ruling and have that ruling, if favourable, executed like any other judgment. Interpretation of NAFTA would cease to be a political matter.

> A few examples can be given of the potential impact of direct effect. If the rule of NAFTA chapter 3 of no new tariffs were to be directly effective, any border measure, tax or internal charge that resembled a tariff would be subject to challenge. If the rule banning quotas were to be directly effective, any law or administrative decision that operated as an absolute ban on the entry of goods into the domestic market could be challenged...This process can be controversial, but judges in Europe do it every day of the week without serious challenge to their integrity or to the legitimacy of the process. (43)

The authors also note that while the proposal to give direct effect may appear to be little more than legalism, it would be unwise to underestimate the dynamic nature of the concept of legal effect. For example, "in the European Community the concept of direct effect has been the bedrock of legal integration" (folio 6, 44). The original Treaty of Rome required the "direct application" of Community regulations, so that they became equivalent to domestic statutes. However, the critical turning point was the declaration by the European Court of Justice (ECJ) in 1963 that treaty provisions requiring clear positive or negative results must also be given direct effect. Over the years direct effect has been used by the ECJ to strengthen the power of Community law in many respects and to empower Community citizens to play an important role in the process of building and enforcing the community legal order.

De Mestral and Winter also recognize that the process of giving direct effect to selected provisions of NAFTA would be very different across the three countries. At one end of the spectrum is Mexico, where NAFTA was adopted as a treaty duly approved by the president and Congress, and as such it is susceptible to legal effect in the Mexican legal system. At the other end is the US, where for a treaty to have direct affect it must be adopted by a two-thirds Senate vote or be a self-executing executive agreement and designated as such. A "fast-tracking" process, which generated NAFTA, would not suffice. Hence, it follows that giving direct effect to NAFTA would have to face rather severe political hurdles in the US. While not attempting to downplay these hurdles, de Mestral and Winter note that it is possible to make direct effect more palatable politically by singling out only those specific NAFTA provisions that are deemed to be more amenable and acceptable to being given direct effect: "By giving direct effect to a limited number of specifically enumerated provisions in NAFTA, rather than to the whole treaty, it should be easier to predict the consequences and thereby exercise control over the process" (56).

While several of the authors of the "perspectives" in the latter half of the current folio have come down quite hard on the political practicability of the

concept of direct effect (too hard, in my view), the concept nonetheless provides a valuable analytical additionto the proposals/instruments for rethinking the reworking of NAFTA.

A Treaty for North America

GIVEN THE EARLIER ADMONITION THAT PROPOSALS FOR RETHINKING NAFTA NEED TO be along the lines of a Big Idea — bold, broad and creative — it would be hard to top Daniel Schwanen's "Deeper, Broader: A Roadmap for a Treaty of North America" (folio 4). Schwanen's goal in advancing the concept of a treaty is not so much to create a North American community but, rather, a "'community of North Americans' within which governments would facilitate increasingly unencumbered and fruitful relations" (12). Building such a community would require, among other factors, "the involvement of governments and lawmakers at all levels, and it would have to ensure that most individuals, businesses and civil society groups perceive that they have a stake in creating better North American linkages" (12). While this is indeed a bold initiative, it fully respects and builds upon the major accomplishments of NAFTA as well as the many ways and means that the community of North Americans is already expressing itself. In Schwanen's words:

> [S]uch a treaty should be, for the most part, in the nature of a framework agreement. It should be compatible with a step-by-step approach in areas where such an approach is best suited to making progress, and it should not carelessly supersede existing processes and relationships that work well, or stifle existing work ongoing in many areas to map and strengthen these processes and relationships. At the same time, the treaty should impart a new direction to the relationship, toward what I have elsewhere called "full interoperability" among the countries where lack of adaptation to one another's systems and needs in crucial areas — such as economic transactions, security, infrastructure or environmental policy — could entail serious losses. (11-12)

There is really no substitute for reading the text of the draft treaty and Schwanen's elaboration of some of the main tenets. However, the broad outlines of the treaty, together with a selection of one of the principles associated with each of the 10 articles, are presented in box 1.

A Treaty of North America: Selected Provisions

1. *Mutual Support and Cooperation*: Provide mutual support and cooperation in preventing the commission of violent acts on the territory of any of the parties and in apprehending the wrongdoers.
2. *Security:* Commit to the necessary border, intelligence and police resources to deliver on article I.
3. *Fair and Open Commercial Relations*: The signatories agree that the principle of nondiscrimination toward commercial enterprises of another party, meaning treating them no worse than they would treat enterprises of their own party under similar circumstances, is a cornerstone of fair and open commercial realtions.
4. *The North American Transborder Commission*: The Commission would be empowered to intervene under certain circumstances with governments, agencies, regulators, courts, and dispute-settlement panels when it considered that the underlying principles were not being applied.
5. *Economic Citizenship:* The general aim here is to facilitate productive cross-border linkages and not to evoke other aspects of rights of citizenship that would more properly belong to a politically unified North America.
6. *Direct Effect*: As in De Mestral and Winter's paper on direct effect (folio 6) — allows citizens to challenge their own governments with respect to selected NAFTA or Treaty provisions.
7. *Agency and Regulatory Cooperation*: Requires regulatory and other government agencies to adhere to the principles of comity and neighbourliness that underlie the treaty. There is no intention of diminishing the mandate that democratically elected governments give to agencies and regulatory bodies to set standards, etc.
8. *The Cohesion Fund*: To encourage all regions of North America to participate more fully in the benefits of an integrated continental economy.
9. *Future Negotiations*: The Commission (article IV) will present a negotiating text for an enhanced Community of North Americans within eight years.
10. *Adoption, Amendments and Accession*: The Treaty would apply to those subnational governments that have signed on.

Source: Compiled by the author, based on Schwanen (folio 4).

Several novel or distinctive features of the treaty merit elaboration. The first of these is the eloquent and wide-ranging preamble:

> Canada, Mexico and the United States of America, desirous to foster a more prosperous and secure community of North Americans, to strengthen their bonds of neighbourliness on the basis of mutual support, openness and comity, to extend the benefits of their relationship to the greater number of their constituents, to expand upon existing successful cooperation initiatives in place among them and to foster openness toward other regions of the world on the basis of these same principles,
>
> Determined to preserve the integrity of their respective constitutions, to uphold the prerogatives of their legislative bodies, to recognize state and provincial governments as partners in this agreement as befits their respective constitutional roles and to expand the means at their citizens' disposal to express their values in full respect of any differences among them. (37)

A second novel feature of the treaty is the proposed North American Transborder Commission (article IV). It would be a tripartite, independent commission whose role would be to champion certain aspects of the treaty, albeit within the bounds of existing agreements and without exercising new powers over the decisions of governments or existing agencies. The commission would be composed of four US citizens, two Canadians and two Mexicans, with a ninth presiding member rotated across the three countries. Two advisory committees would assist the commission, both composed of 10 members per country. One would be a public advisory group drawn from business, labour, academics and civil society, while the other would be a legislators' advisory committee drawn from federal, state and municipal governments. The commission would not be able to override existing trade-related legislation, but its queries, findings and recommendations would have to be addressed by the respective governments and their agencies.

Third, the proposed "Cohesion Fund" would, in addition to its role as paraphrased in box 1, be involved in five types of investment: transportation and communications infrastructure; environmental infrastructure; education, training and health; security; and rural adjustment and infrastructure. The existing North American Development Bank would be rolled into the Cohesion Fund.

Fourth, via article VI, the treaty embodies "direct effect" between nationals and the respective governments:

> Direct effect...will be implemented only as and when the parties exchange a protocol signifying that proper legislative approval has been accorded in each country to give direct effect to specific dispositions of NAFTA and this treaty. (48)

Finally, the provisions relating to security (article II) include protecting a partner's flank against unintended consequences of changes in some domestic laws or in relations with third parties. This concept would be aided by a permanent trilateral process whereby legislators and independent experts would examine policies that may affect security in a signatory country. The objective in this process would be to ensure a continuing high level of confidence that the deepening of mutually beneficial linkages within North America does not jeopardize the security dimension, while at the same time safeguarding the three countries' sovereignty.

In summary, therefore, Schwanen's Treaty of North America would certainly foster a community of North Americans and in the process would ensure that individuals, businesses and civil society groups have a greater stake in processes and proceeds of broadening and deepening North American linkages. The downside of the treaty is that it may well be an idea whose time has not yet arrived. But this could have been said of the FTA itself when it was first proposed.

However, there is another way that North American integration can be, and currently is being, broadened and deepened, a way that does not run into political interference and to which the analysis now turns.

Pluralism, Subsidiarity and NAFTA: Creating a Community of North Americans from the Bottom Up

THE THRUST OF THIS SECTION IS THAT IN THINKING ABOUT NORTH AMERICAN integration Canadians frequently focus too narrowly on the FTA/NAFTA dimension. Accordingly, in what follows we draw from the contributions of Robert Wolfe (folio 6), Earl Fry (folio 3) and me (folio 6) to argue (1) that NAFTA is only one of many institutions and agreements that underpin North American integration and (2) that NAFTA itself needs to be decentralized. With some degree of misrepresentation we will label these as "Democratizing North American Integration" and "Democratizing NAFTA," respectively.

Democratizing North American Integration

Earlier in this overview I reproduced Robert Wolfe's assertion to the effect that it is misleading to dream of an overarching constitution in which the relations of Canadians and Americans can be subsumed within a strong state-to-state framework with a single set of coherent policy tools. Rather, Wolfe posits that our approaches to Canada-US relations should derive from the theories and practices of legal pluralism. Hence, the appropriate pluralist metaphor is that of a kaleidoscope with its constantly shifting shapes and colours, just like our many shared institutions (Wolfe, folio 6, 71). By way of elaborating on the multifaceted nature of our relations with the US, Wolfe notes that in 2002 there were nearly 300 treaties, agreements and understandings in force between Canada and the United States. Yet this is but the tip of the iceberg of literally thousands of cross-border arrangements — some formal and some informal, some written and some tacit or in the form of conventions, some public and some private — that in Wolfe's view effectively serve as a living and growing "constitution" of North America.

Moreover, this dense network of linkages, formal or otherwise, is expanding rapidly. For example, the number of bilateral cross-border arrangements/agreements that will emerge in connection with the reform of corporate governance and accounting/auditing procedures and principles in the wake of the Enron debacle will surely run well into the hundreds as regulatory agencies, stock exchanges, legal firms, accounting firms, civil society associations and governments on both sides of the border harmonize or otherwise reconcile their approaches to this common challenge. Wolfe would argue that it is this complex and comprehensive web of arrangements that needs to be deepened and broadened in order to advance common interests in North America.

While NAFTA will undoubtedly remain the most important framework for North American integration, the pluralistic nature of the players and the linkages is such that single-point diplomacy will not work:

> Rather, imagine a Swiss Army knife: not a single tool nor even the same tool for every person, but a collection of tools infinitely adaptable to the purposes of millions of users…In Swiss-knife diplomacy, Canada-US relations are everyone's responsibility, not just the prime minister's, and everyone creates their own knife, their own set of tools. Such a metaphor is appropriate in this era of what Salamon calls third-party governance, when the state accomplishes its purposes as often, or more often, through efforts to "negotiate and persuade" rather than "command and control"…Managing Canada-US relations requires the continuous engagement of Canadian officials, legislators, politicians, businessmen, lobbyists and others from all levels of Canadian life…Critics in the business

> community have misunderstood this observation, thinking it means accepting the status quo, or dealing with irritants exclusively on a case-by-case basis, but I advocate no such lassitude with respect to Canada's most important foreign relationship. Rather, I argue that an activist approach to North American security and prosperity can be managed within existing institutions, institutions that are constantly being reshaped by the daily interaction of millions of North Americans. (Wolfe, folio 6, 72-73; emphasis in the original)

Prior to moving from this section on democratizing North American integration to the section on democratizing NAFTA it is important to focus on one of the key links between them, namely, subnational governments.

Subnational Governments and North American Integration

Earl Fry's paper, "The Role of Subnational Governments in North American Integration" (folio 3), contributes to the pluralist approach to North American integration by highlighting (in his table 2) some of the formal cross-border commissions and arrangements among subnational governments. On the Mexico-US border, these include the Border Governors' and Border Legislative Conferences (Arizona, California, New Mexico, Texas, Baja California, Chihuahua, Coahuila, Nuevó Leon, Sonora, Tamaulipas), the Chihuahua-New Mexico Border Commission, the Commission of the Californias (California, Baja California Norte, Baja California Sur) and the Sonora-Arizona Commission. The Canada-US cross-border associations of provinces and states include the Council of Great Lakes Governors (Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, Wisconsin, Ontario and Quebec), the Idaho-Alberta Task Force, the Montana-Alberta Bilateral Advisory Council, the New England Governors and Eastern Canadian Premiers (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island and Quebec) and the Pacific Northwest Economic Region (Alaska, Idaho, Montana, Oregon, Washington, Alberta, British Columbia and the Yukon Territory). Fry comments as follows on the role of subnational governments and their cross-border associations as this relates to democratization of North American integration:

> The 92 major subnational governments in the three member countries constitute an important part of this [pluralistic] institutional framework and are influencing the course of North American economic integration on a daily basis. Ottawa has begun to recognize the importance of linkages in various parts of the United States as it has recently announced that it will open seven new consulates, upgrade two

> to consulates-general status, and appoint 20 honorary consuls in various parts of the United States...Mexico City has had a huge increase in the number of its US consulates, in part to interact more easily with the millions of its citizenry who reside in the United States, and in part to express its point of view to subnational governments and their local business communities. Currently, the Mexican government operates 44 consulates in the United States and three in Canada. (20)

By way of recommending how these subnational governments can further North American integration, Fry offers, *inter alia*, the following:

- Decrease the number of subnational government barriers to free flow of trade and investment;
- Set up a databank showing the areas of interdependence within North America and the types of interactions and number of agreements entered into by state and provincial governments;
- Establish effective and regularized consultations between the national and subnational governments on international and cross-border NAFTA issues;
- Understand that border states and provinces face a special set of challenges different at times from their nonborder counterparts;
- Encourage subnational governments to engage in "foreign affairs" but to avoid "foreign policy." (21-25)

Fry elaborates on the fourth of the above points as follows:

> Regionalism at times trumps nationalism when it comes to ascertaining the best interests of individual states and provinces. The legislatures of Idaho, Oregon, Washington and Alaska each passed resolutions supporting Vancouver's successful bid for the 2010 Winter Olympic Games, even though Vancouver's selection could be viewed as hindering the chances of New York City securing the nomination to host the Summer Olympic Games in 2012…In 1995, a delegation from Baja California flew to South Korea to lobby Daewoo to build a US$270 million television picture tube plant in Tijuana. California's trade and commerce secretary accompanied the delegation and vigorously supported the Mexican state's campaign. Trade officials in Sacramento recognized that no California city could compete with the low wages Tijuana could offer to Daewoo, but that San Diego would still benefit economically by local companies securing selected contracts and by having Daewoo executives work in Tijuana but live in San Diego. Consequently, the strategy was to support the bid of a subnational government in another country over bids made by communities in other parts of the United States. (26)

This is a rather natural implication of the shift toward north-south trade and the resulting cross-border regional economies, and in the present context it is also an integral part of what the democratization of North American integration is about.

Democratizing NAFTA

As these subnational, cross-border linkages increase and intensify, this will lead to proposals to bring Mexican, US and Canadian state and provincial governments more formally and more fully into the operations of NAFTA itself. As Stephen Blank has noted, "the institutions of North America should not be the creation solely of the three national governments: their legitimacy must rest on wider and deeper foundations, [and] must respect the reality and complexity of North America — a mosaic of regions." Blank goes further and argues that the EU principles of subsidiarity and mutual recognition are the appropriate operational instruments for NAFTA (especially since they are inherently federal principles and the NAFTA parties are all federations):

> Europeans found that efforts to harmonize regulations at the EU level were inefficient, expensive and exhausting. The innovation was for each government to recognize regulations that had been put in place by the other governments, i.e., mutual recognition. In fact, our federal systems operate this way. We don't need separate licenses for each state we drive in. My New York State license is recognized not only by other US states, but in Canada and Mexico as well. The second policy is "subsidiarity," by which the Europeans mean that decisions should be taken as close as possible to the level of citizens. The aim is to build in from the beginning what the Europeans learned along the way — that a critical function of the North American community should be to protect and invigorate local and regional identities. (quoted in Courchene, folio 6, 25)

More generally, endowed with a modicum of subsidiarity and mutual recognition, one can easily imagine the subnational governments as the new motors for energizing NAFTA reform. The possibilities are manifold. The many cross-border understandings (the Council of Great Lakes Governors, for example) could be officially recognized under the NAFTA umbrella. States and provinces might be allowed to sign on to various NAFTA provisions. NAFTA might give its imprimatur to cross-border/subnational arrangements, obviously subject to some overarching NAFTA principle. These and other cross-border initiatives may well provide the lead in terms of highlighting provisions that ought to be considered in future NAFTA negotiations.

The overall message here is that there is much to be learned and earned from encouraging a "bottom up" or pluralistic vision of NAFTA — both by democratizing North American integration and by democratizing NAFTA itself. While most of the attention has focused on the role of subnational governments and their cross-border linkages, the role of individuals and civil society should

not be neglected — both the de Mestral/Winter and Schwanen papers focus on "direct effect" to involve individuals more directly in the framework of NAFTA and its governments, where the latter are intended to include states and provinces. Finally, the encouraging reality is that these dense webs of cross-border arrangements among governments, businesses and civil society alike are growing daily and, therefore, are working toward the creation of a community of North American economic and institutional interests and, indeed, a community of North Americans that will serve and already is serving as a catalyst and even a vehicle for deepening and broadening North American integration.

This completes our *tour d'horizon* of the various models for thinking about the possible evolution of North America and NAFTA. The remaining two thematic sections relate to the environment and to the overall global trading context within which North American integration is situated. These will be addressed in turn.

NAFTA and the Environment

In "Thinking North American Environmental Management," Scott Vaughan (folio 5) describes and assesses the performance of NAFTA's side agreement — the North American Agreement on Environmental Cooperation (NAAEC) and its associated commission, the North American Commission on Environmental Cooperation (NACEC) — with the goal of addressing two related issues. The first is whether the NAAEC and NACEC have been successful in countering the possible regulatory and environment-quality "rollbacks" that were predicted by some to flow from deepening economic integration. The second is whether the NAAEC and NACEC are adequate bases upon which to mount a coherent pan-North American environmental management regime.

In terms of the first question, the issue boils down to whether NAFTA has created pollution havens that could in turn trigger the proverbial "race to the bottom." Vaughan concludes that although some problems have arisen (Canada became a pollution haven for US hazardous waste, for example), "there is no evidence that any widespread pattern of pollution havens has occurred, and certainly not because of NAFTA" (7). Moreover, with the cost of complying with environmental regulations in the range of 1.5 percent to 2 percent of total capital

and operating costs, "environmental compliance costs are seldom sufficiently high in themselves to affect, or become the main factor in, company decisions to locate" (7). Nonetheless, Vaughan does highlight a problem with respect to the effects of trade on environmental quality, which is concisely summarized by Debora VanNijnatten in her commentary on Vaughan, "Trilateralism versus Regionalism in North American Environmental Management":

> [Vaughan] argues that trade growth has had scale effects and significant environmental impacts as a result of increased poverty and income disparities within countries, particularly Mexico. The problem, however, is that the safeguard mechanisms included in the NAFTA and NAAEC were designed, Vaughan convincingly argues, to deal with a nonexistent (at the very least minimal) regulatory threat rather than the more threatening pressures associated with income and scale effects on environmental quality. He concludes that these mechanisms are "badly drafted and ill-conceived," "run counter to cooperative traditions contained in virtually all international environmental regimes" and "have their 'sticks' or punitive measures pointing in the wrong direction." (folio 5, 29-30)

Unfortunately, concludes Vaughan, "there is no environmental equivalent to the trade-adjustment provisions, including in the US, to absorb the job losses directly attributable to NAFTA, [and the NAAEC] is too diffuse and underfunded to make a meaningful dent in the poverty-environment cycle" (folio 5, 18).

In terms of Vaughan's second concern — whether NAAEC and NACEC are creating a coherent North American environmental management regime — there is both good and bad news. In terms of the former, the NACEC was conceived to help overcome the democratic deficit that civil society often associates with free trade. However, the gap between the expansive vision set out in NAAEC and the paltry budget of the NACEC (fixed at US$9 million annually) is far too wide to address the initial concerns let alone the new priority areas that have arisen over the decade. In spite of this, there have been some impressive results:

- NACEC has become a world model in establishing methods to harmonize environmental data and indicators related to toxic pollutants.
- NACEC has made important steps in common reporting criteria for air pollution emissions, including CO_2 emissions.
- NACEC has been a leader in coordinating biological diversity protection and is improving the methodology necessary to undertake robust environmental reviews.

The bad news is that the requisite link between the NAAEC/NACEC and NAFTA's Free Trade Commission is weak or nonexistent. This is an institutional shortcoming that merits highlight:

> NAFTA is significantly behind the WTO in formalizing relations with environmental agencies. The WTO and UNEP have formally adopted a memo of understanding specifying cooperative work, while a number of secretariats of multilateral environmental agreements have observer status in the WTO Committee on Trade and the Environment. By contrast, despite the unambiguous language of Article 10(6) of the NACEC, which requires the council to cooperate with the Free Trade Commission, a decade later, only one procedural meeting between the two groups has occurred. Even then, extremely tepid recommendations calling for information-sharing between the NACEC and FTC have not been adopted…Despite efforts from several nongovernmental organizations to seek the involvement of the NACEC council in environment-related trade disputes involving NAFTA Chapter 11, each request has been turned down despite the clear authority in Article 10(6) mandating cooperation in this area. Despite the commitment of three council meetings that a joint trade-environment ministerial meeting would take place, to date no such meeting has ever been held. (Vaughan, folio 5, 22)

Vaughan concludes that in the energy-environment area, NAAEC and NACEC do not appear to be proving to be an appropriate platform on which to build a North American vision of environmental management:

> Although evidence of continent-wide cooperation is underway in electricity-related policy areas, notably the emergence of continent-wide energy efficiency standards and labels for appliances, the core issue of the energy-environment interface — notably climate change and the prospects of the Kyoto Protocol — reveals a fundamental splintering or divergence of the NAFTA partners. The future of the Kyoto Protocol and probable divergence of the United States from Canadian and Mexican involvement in formal and legally binding climate policies are certain to overshadow almost all other North American environmental management programs. The split over the Kyoto Protocol exposes, more than the underfunded NACEC, how far we remain from creating a robust North American environmental management regime. (5)

In her commentary, VanNijnatten identifies three developments that suggest that the collision between climate change and energy policy is at the regional rather than the national level. First, and contrary to popular wisdom, governments in the US have taken far more significant action to reduce GHG (greenhouse gas) emissions than have Canadian governments. Moreover, and importantly, the US is lending tangible support and regulatory room for state-level innovation in this area. Second, interprovincial and interstate climate

change policies' differences are greater than differences at the national (Canada-US) level. Indeed, a few US states are leagues ahead of other states and Canadian provinces in terms of testing and implementing a wide array of instruments to reduce GHG emissions. Third, some states and provinces are engaged in trans-boundary cooperative efforts to reduce GHG emissions.

VanNijnatten's conclusions with respect to all of this merit quotation in full:

> So, rather than an environmental management regime that is pan-North American, perhaps we are witnessing the development of multiple environmental management regimes rooted in what might be called the "constituent regions" of North America where economic, energy and environmental ties are strong, but defined in particular ways by that (cross-border) region. One might expect similar developments in the US-Mexico border area.
>
> With respect to the prospects for North American environmental institutions and policies, the NACEC's orientation as a trilateral institution may in fact be hindering its ability to effectively address what is primarily a set of (alternatively overlapping and distinct) regional problems. As Vaughan implies in the case of coastal marine conservation, the work of the NACEC has been useful where it builds upon and aids regional and national efforts. Using another example, it might be argued that the NACEC's ability to address long-range pollutant transfer was a success because it built on the efforts of officials that had been successful in addressing problems on a regional basis. A more explicitly regional focus on the part of the NACEC might even serve to dilute the political tensions associated with its trilateral mandate enmeshed, as it is, in sovereignty concerns. (32)

NAFTA and the Global Trading Order

IN FOLIO 8 OF *THINKING NORTH AMERICA*, THE FOCUS SHIFTS FROM NAFTA ITSELF TO NAFTA's position within the larger regional and global trading environments. Specifically, in this section I will deal in turn with papers on Canada's role in the Western Hemisphere (Maryse Robert), on the relationship between NAFTA and the FTAA (Jaime Zabludovsky) and on NAFTA and the WTO (Sylvia Ostry), with a brief commentary on the summary paper by Alan Alexandroff.

NAFTA and the Americas

In "Canada and the Americas: Trading beyond the Neighbourhood," Maryse Robert comprehensively traces the history of Canada's trade relations in the Americas.

Drawing all this information together is itself an important contribution. Among the recent milestones highlighted are: the Canada-US FTA in 1989; Canada's becoming a member of the Organization of American States (OAS) in 1990; the launching of the FTAA process in 1993, with Canada chairing the first phase of negotiations (1998-99); NAFTA in 1994; the first Summit of the Americas in Miami in 1994, the second Summit of the Americas in Santiago, Chile, in 1998, and the third Summit of the Americas in Quebec City in 2001; the public release at the Quebec summit of the preliminary FTAA draft agreement (a Canadian initiative and a first in the history of trade negotiations); and so on. To these initiatives must be added Canada's bilateral free trade agreements (Chile, 1997; Costa Rica, 2002) and several ongoing arrangements (negotiations are underway with the E4 — El Salvador, Guatemala, Honduras and Nicaragua — and with the Dominican Republic, and likely soon with the Andean Community as well as the Caribbean Community and Common Market, or CARICOM). Robert notes that Canada's achievements in the Americas have not been confined to the trading sphere:

> [D]emocracy is one area where Canada's voice has been heard and listened to. The establishment of a unit of promotion of democracy in the OAS and the inclusion of a democratic clause in the Quebec Summit Declaration which was followed by the adoption of the Inter-American Democratic Charter in Lima on December 11, 2001, are tangible examples of the key role played by Canada in other fields than trade. (4)

As an important part of Canada's relationship with the Americas, Robert devotes some attention to the FTAA (Free Trade Area of the Americas). By way of an introduction to the FTAA, with 34 countries, a combined population of 800 million and an aggregate (1992) GDP of roughly US$14 trillion, the FTAA represents an unrealized potential on both economic and development grounds, and, as such, NAFTA and its partners have an incentive, if not an obligation, to realize this potential. For example, the EU membership (replete with market access, the common currency, structural funds, etc.) has grown from the original six to more than two dozen countries and counting. Pressures may well develop for NAFTA to play a similar role in the Americas. However, NAFTA and the FTAA could well get caught up in the European dilemma — deepening NAFTA initially may preclude meaningful broadening to the FTAA, and initial broadening may inhibit deepening.

Within this context Robert offers both an optimistic and a pessimistic scenario for hemispheric trade. Intriguingly, part of the optimistic scenario (and one

that anticipates the later discussion of the relationship between NAFTA and the FTAA) would be a free trade agreement between the EU and Mercosur (Argentina, Brazil, Paraguay and Uruguay):

> [Such an] agreement would give a real boost to hemispheric free trade in the Americas because the issues at stake are very similar to those in the FTAA. Mercosur is interested in securing access to the EU agricultural sector, whereas the EU is demanding Mercosur countries to open their markets to Europe in the areas of investment, services and government procurement, all three sectors being of utmost importance for Mercosur's FTAA partners, including the United States and Canada. (24)

For Robert, the least optimistic scenario would be a breakdown in multilateralism in the hemisphere and a move toward a hub-and-spoke arrangement, with the US being the hub and with the spokes represented by the bilateral FTAs. This is also a concern developed further in the following discussion of the paper by Jaime Zabludovsky. Robert's final observation merits highlight:

> Beyond any scenario that one may imagine, one issue rings true when trade liberalization is mentioned in Latin America and the Caribbean. Although trade is perceived positively by many, there is no doubt that the single most important challenge facing the hemisphere remains poverty reduction. To reap the benefits of trade liberalization, Latin American countries, in particular, will have to undertake important reforms related to investment in human capital, governance, the rule of law, public sector transparency and other determinants of institutional strength. Canada, through CIDA and its support to the inter-American system, could play a key role in such an endeavour. (26)

NAFTA and the FTAA

In "Hemispheric Integration — Implications for North America" (folio 8), Jaime Zabludovsky looks at the FTAA and its relationship to NAFTA. The core of his contribution is contained in his creative and highly informative table 1, which he entitles "The FTAA Lockshop." This is a matrix of countries/country groups (the US, Canada, Mexico, Chile, Central America, Mercosur, the Andean Community and the Caribbean) along one axis and various trade issues (market access, agriculture, investment, services, government procurement, intellectual property, antidumping and countervail duties [AD/CVD], competition and dispute settlement) along the other (see folio 8, 34-35). Each cell contains from zero to three "keys," and also from zero to three "locks"; keys are indicative of what Zabludovsky refers to as "offensive" interests and locks are associated with "defen-

sive" interests. Another way of viewing this is that keys relate to a desire for openness or competition, while locks signify a desire to be closed or for protectionism.

Even a cursory glance at Zabludovsky's table reveals why FTAA negotiations are currently at a standstill. The Americans want openness in eight of the nine trade-negotiating areas, but they also want to protect two areas: agriculture and AD/CVD, where the agriculture concern relates to preserving subsidies on selected products (sugar, tobacco, citrus fruits, peanuts, etc.) while favouring competition elsewhere in agriculture, and where the AD/CVD concern relates to sovereignty and internal US politics. The problem is that these two areas are the very two that Mercosur wants to be opened up. Indeed, as the table indicates, all countries or country groupings are lined up against the US in terms of AD/CVD. Thus, the US-Mercosur standoff is clear. The Americans want Mercosur to dismantle its high industrial protection and more generally the US wants South America to adopt appropriate regimes for intellectual property, investment, services and government procurement. But because the US is already relatively open in these areas it cannot offer a corresponding quid pro quo. Therefore, Mercosur is pressing for breakthroughs in AC/CVD and agriculture, which the US will not grant. Zabludovsky zeroes in on the US dilemma here:

> Domestic agriculture-support programs are, by definition, applied regardless of the final destination of the subsidized commodity. Thus, it is impossible to eliminate the subsidy exclusively with regard to its effect on trade within the FTAA, and, therefore, it is not realistic to assume that the US would agree to modify its agricultural support policy in the framework of a regional negotiation. Accordingly, the US has indicated that this issue should be addressed in the WTO and not in the FTAA.
>
> The US reluctance to modify its trade remedies regime is more a political constraint than a technical one. In every recent trade negotiation, the US Congress has expressed opposition to any modification that would undermine the "effectiveness" of the current protection regime. Therefore, in the best scenario, any reform to US antidumping legislation would have to be part of a broader package, ample enough to offset the protectionist interests in the US [that support] the trade remedy legislation. It does not seem that the FTAA could generate such support. Therefore, antidumping is, at best, also an issue to be addressed in the Doha Round. (36)

Given this, it should be clear why Maryse Robert referred to a Mercosur-EU trade agreement as a "dream scenario" for the future of the FTAA, since such a Mercosur-EU deal would have had to sort out the stumbling blocks to the successful completion of an FTAA as noted by Zabludovsky.

Where to now? One option has already been alluded to — the US becomes the continental, even hemispheric hub with the spokes being composed of bilateral FTAs with the US. Among other problems with the hub-and-spoke approach, Zabludovsky notes that it penalizes the spokes because they cannot "accumulate origin" in their exports to the US as they could if the hemisphere were a single market. For example, were Chile to produce a product that drew on imports from Mercosur, this might violate the rules of origin in the US-Chile bilateral agreement, whereas this problem would not occur if Mercosur and Chile were both in a multilateral FTA with the US. This leads to Zabludovsky's concluding comment:

> I believe we should work together to convince the American, Canadian and Mexican governments to negotiate accumulation of origin among the different bilateral arrangements that are already in place or are being developed. We should have, at least in terms of trade in goods, a single umbrella among the Latin American countries that already have a free trade agreement with the US. Otherwise, with the current proliferation of trade agreements, the US would become the strategic hub for trade and investment in the region, undermining the other North American members' ability to take full advantage of the potential benefits of regional integration. (40)

NAFTA and the WTO

"Cancun: Can Can't? Can Do?" (folio 8) is an adaptation of Sylvia Ostry's dinner address to the *Thinking North America* symposium. Her subject matter — the 2003 Cancun ministerial meeting — focuses in part on the failure of Cancun to re-energize the Doha Round but in larger measure on the fact that Cancun triggered an "axial shift in the political economy of policy-making that would require a fundamental reorientation of the players and the game" (43). By way of elaboration, prior to the Uruguay Round (which gave birth to the WTO), the GATT club was run by the US and the European Community, with developing countries being largely ignored. What made the WTO process, culminating in Cancun, so different were two related developments.

The first was the emergence of a coalition of "southern countries," especially the so-called G-21, which included the big three of Brazil, India and China plus nearly a score of smaller southern countries. As Ostry notes, the G-21, along with others, rejected the US-EU agenda of "Singapore issues" (investment, competition policy, government procurement and trade facilitation) and were intent on refocusing the Doha Round on development issues as well as on agriculture. In the event, the G-21 held firm on their demands, and the Cancun meeting abruptly ended in confusion.

The second and related development was the marked increase in the number and activities of the Internet-driven NGOs. They became what Ostry calls a "virtual secretariat" for the emergent southern coalition and the NGOs also generated much in the way of proposals related to the substance and process needed for the evolution of the trade environment so that "the market for policy ideas is now contestable and the dynamics of policy-making are being transformed" (45).

Ostry expresses concern that one consequence of Cancun could be the marginalization of the WTO as a talking shop and as a forum for airing and ironing out various disputes. The irony here, as she points out, is that one of the important objectives of the NGOs, namely, their emphasis on reducing inequality and on promoting development as appropriate goals of the WTO, may also become marginalized as a result of the fragmentation of the global trading system into bilateral and regional blocs. In addition, Ostry notes that the opposing positions of Brazil and the US are likely to be carried over to the FTAA: "[T]he impact of Cancun on the FTAA is already apparent [in that] Brazil is trying to narrow the agenda, and the US is trying to isolate Brazil" (47). Presumably, part of the process of isolating Brazil involves the spate of US trade bilateral agreements with countries in Central and South America.

Ostry concludes by agreeing that the WTO process is in need of some reform but that the NGO calls for greater democracy in the operations of the WTO are not wholly relevant because the WTO is a member-government-driven organization that is under the ultimate control of these member governments. Accordingly, she says, "[t]he demand for democracy and legitimacy should begin at home. The NGOs can help by exerting pressure on their home governments to establish 'ownership' of the trade policy process at home" (50).

The final paper in folio 8, "Grand and Not-So-Grand Strategy-Making," by Alan Alexandroff, is a commentary on the contributions by Maryse Robert, Jaime Zabludovsky and Sylvia Ostry. As such it represents a summary perspective that ought to be viewed as a stand-alone assessment and not "reinterpreted" in this overview. Nonetheless, Alexandroff's conclusion (presumably influenced by the pessimism about the prospects for a grand breakthrough in the global trading order) questions whether what we need now is a full-blown WTO deal and, as such, merits quotation:

> [T]he administrative structure of the WTO seems addicted to endless negotiating. Yet there is much else to be done by the WTO, including technical assistance, where the current structure is largely incapable of providing effective support and evaluative and assessment capabilities for the global

> trade system. A willingness to forego endless grand negotiating, or at least a willingness to accept a limited end to the current round, and look to the built-in agenda for the carry-forward issues may be the best strategy for the multilateral system in the near term. The multilateral trade structure, notwithstanding the critics, is more of a success than the deafening voices of criticism would suggest. The system is apt to deliver economic growth and growing prosperity without a grand multilateral negotiating process for the immediate future. Let the system work. (67)

Thinking North America: Four Perspectives

AS PART OF THE DEBATE AND DISCUSSION OF THE ALTERNATIVE APPROACHES TO rethinking North American integration, we invited four recognized experts to provide their perspectives on one or all of the proposals, issues and processes addressed by the conference papers. Their perspectives constitute the second half of the current folio. They are quite different from each other, reflecting the complex and controversial nature of the political economy of deepening North American integration. In "An American Perspective," Jeffrey Schott reviews the Hart, de Mestral/Winter, and Wolfe proposals and comes down, on balance, on the side of Hart's argument, with the proviso (among others) that the US Congress will likely require a trilateral approach to reworking NAFTA. This proviso is front and centre in Isabel Studer's "A Trilateral Approach to North American Integration," which argues that — for reasons that go well beyond trade concerns and embrace democracy and identity issues in the Mexican context — reworking NAFTA must proceed on a trilateral basis. Peter Leslie, in his wide-ranging analytical reflections ("The European Union Perspective"), draws lessons for NAFTA from from the experience of EU integration. One of the key lessons is that political integration (or at least the existence of common institutions) and economic integration must go hand in hand, the implication being that without the former, progress on the latter may well be difficult. This provides a convenient entrée for Debra Steger's "The Search for North American Institutions," which makes a passionate plea for developing common North American institutions. Because this view runs counter to what is deemed to be either desirable or doable, her final paragraph merits repetition:

> In order to move toward a rules-based system, especially in a relationship characterized by significant asymmetries of power, common institutions are needed to facilitate joint decision-making, to provide legal authority and legitimacy for the rulings of the of the dispute-settlement panels, and to ensure that all parties, regardless of their size and influence, abide by the rules. Institutions and dispute-settlement mechanisms are essential parts of the architecture of any regional agreement. An agreement is only a collection of rules — it is not a rules-based system — without institutions to administer and enforce those rules. Serious thought must be given to these difficult issues in developing a bold new vision for North America. (folio 1, 88)

Conclusion: The Road Ahead

MUCH OF THE FOCUS IN THIS OVERVIEW HAS BEEN ON THE RICH VARIETY OF "pathways" toward NAFTA reform, with lesser attention directed to the "prospects" for reform. Indeed, to the extent that prospects were addressed, the tone tended to be rather pessimistic. This is certainly true in terms of the short-term expectations for progress in the FTAA and the WTO's Doha Round, both of which would have spillover effects for NAFTA. On the US front, the focus of overall policy will continue to be dominated by Iraq and, more generally, homeland security. Beyond this, President Bush appears intent on spending much of his time and political capital on a series of domestic issues such as social security reform, budgetary issues and Supreme Court appointments. And on the trade front, the reality is that China, not NAFTA, tops the US agenda.

On Canada's part, the response to the spate of US bilateral trade agreements (which are serving to erode our privileged trade position as well as our ability to compete in the US market), appears to be to pursue bilateral trade agreements of our own, the most recent of which are the January 2005 agreements with China. Arguably, such bilateral agreements will provide Canada with markets, investment capital, technology and cost-effective production locations, which in turn may shore up our competitiveness in NAFTA economic space.

None of this amounts to much in the way of progress in terms of "thinking North America." Nonetheless, it is possible to fashion a quite optimistic scenario for rethinking and reworking NAFTA, at least over the near term. First of all, Canada's relations with the US, and even with Mexico, have improved considerably under Paul Martin's tenure. Of special note here is the appointment of

Frank McKenna as ambassador to the United States. As a Liberal premier of New Brunswick, McKenna was a strong supporter of the free trade agreements even though the federal Liberals were not, and he will presumably carry this perspective with him to Washington. Second, the recent visits to Canada of both President Fox and President Bush led to bilateral agreements relating to trade and prosperity. In particular, the undertaking announced by the US and Canada during the Bush visit, entitled "Common Security, Common Prosperity: A New Partnership in North America," lays out a broad economic and security agenda aimed at updating the 2001 Smart Border Accord, reducing the burden relating to rules of origin, advancing logistics infrastructure, renewing the NORAD agreement and pursuing new approaches to standards and regulation with an eye toward enhanced efficiency and competition. Relatedly, in December 2004 the US and Canada implemented the Safe Third Country Agreement, which develops a common approach to refugee-status claims from nationals from third countries.

A third development, highlighted by Alexandroff (folio 8), is even more encouraging, namely, the striking of a trilateral, blue-ribbon and independent Task Force on the Future of North America (TFFNA). The sponsoring organizations are the CCCE, the Mexican Council of Foreign Relations, and the prestigious US Council of Foreign Relations. The co-chairs of TFFNA are Canada's former deputy prime minister John Manley, former Massachusetts governor William Weld and former Mexican finance minister Pedro Aspe, with additional high-profile members drawn from the three NAFTA countries. Beyond this, the task force has received the blessing of all three governments. The TFFNA is charged with creating a "NAFTA-plus" vision, namely, a "road map toward a continent-wide customs-free zone with a common approach to trade, energy, immigration, law enforcement, and security that would virtually eliminate existing national borders" (Fife 2004, A1). In somewhat more detail, the mandate of the TFFNA is to review five fields: deepening economic integration; redressing the development gap; harmonizing regulatory policy; enhancing security and devising better ways to manage conflicts that inevitably arise from integration; and exploiting opportunities for collaboration. The TFFNA will report to the US Council on Foreign Relations, perhaps as early as spring 2005.

The fourth, and related factor, is that this TFFNA initiative has been given a special boost by the recent announcement that President Bush will play host to

Prime Minister Martin and President Vicente Fox in March 2005; the announced purpose of the meeting is to kick-start the NAFTA-plus process.

Even without knowing what the task force will propose in terms of a NAFTA-plus vision, one can confidently predict that it will trigger a flurry of further debate, discussion and proposals, likely including parliamentary hearings. Moreover, one can also be confident that some of these resulting proposals will meet the criteria for attracting the attention of the Americans stated earlier, i.e., they will be bold, broad and creative.

Given, therefore, the near-term optimism for the "prospects" of a creative window of opportunity for "thinking North America," it seems appropriate by way of a concluding comment to redirect attention back to "pathways." The objective in designing *Thinking North America*, the second in the IRPP series *The Art of the State*, was to provide a rich menu of analyses of the challenges and choices for updating, deepening and broadening North American integration. We trust that we have achieved this objective.

All that remains is, on the part of the editors and the Institute for Research on Public Policy, to express our gratitude to the authors and to invite our readers to absorb, assess and enjoy their reflections on this second volume of The Art of the State.

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The European Union Perspective

In discussions about North American integration, comparisons with Europe and the European Union (EU) seem always to be up front or, at the very least, lurking in the background. We have seen this in various contributions to the *Thinking North America* folios, even when the supposed analogies are merely implicit. My intent is to make them explicit, because only then can the lessons of European experience be drawn.

I believe it is important for those who wish to evaluate NAFTA, or to propose its revision or extension, to inform themselves about the course of economic and political integration in Europe. The suggestion is not an unusual one and does not originate with me or with any of the papers in this series. For example, Canada's former ambassador to Washington, Allan Gotlieb, has suggested that, for Canada, the EU should be an inspiration but not a model. He implies that it is possible for Canada to achieve a more advantageous economic relationship with the United States and Mexico (extending the benefits of NAFTA, for all three signatories) without creating institutions and processes that will unnecessarily impair or reduce our political independence. Gotlieb is far from alone in seeking to achieve this doubly advantageous outcome — with an appropriate initiative from Canada, we get the economic benefits of EU-style integration without its political costs. Can we pull that off? It's a question that demonstrates the importance of comparative analysis.

A full treatment of the subject would require analysis of similarities and differences between the course of integration (that is, its speed and density) on two continents. Here, we can afford merely to highlight a few points. I do so by asking two basic questions, and looking for lessons from Europe. The first con-

cerns the necessary linkages between economic and political integration. To what extent have the EU states found it necessary to give up powers or policy-making capacity they previously had in order to achieve joint economic goals? This is partly a matter of institutional arrangements set up for the governance of the EU. The second question has to do with the implications or consequences of differences in size among the states involved in (perhaps drawn into) the integration process. New sets of power relationships have arisen between the EU and its neighbours (of which 19 have, over the years, joined the original 6, and others have become linked to the EU-25 by treaties of association). How do we describe these evolving power relationships, and how do we explain them?

Having addressed these questions, we will be better positioned to know whether substantial advances in levels of economic integration in North America could be achieved only through borrowing (while necessarily also adapting) European institutional innovations and processes of economic governance. Can similar results be achieved on the two sides of the Atlantic, but through entirely different methods? If they can, then it may be necessary to lower our sights on the economic-integration front, because the necessary political arrangements seem, apparently to everyone, to be undesirable or unattainable or both.

Necessary Linkages between Economic and Political Integration

In Europe, the great watershed in the integration process occurred with the publication of the European Commission's 1985 White Paper "Completing the Internal Market," and with the passage, the following year, of the *Single European Act* (see below). Subsequent treaties — Maastricht in1992, Amsterdam in1997 and Nice in 2000 — went further; Maastricht in particular was more radical, and of course, if the "Constitution for Europe" now approved by European leaders is ratified and implemented, that will be a dramatic and significant new step forward along the political integration road. I find its ratification an iffy prospect, but that's not relevant to our present discussion. What is highly relevant is that it was very nearly 20 years ago, with the 1985 White Paper, that European leaders took stock of a basic fact that to achieve the levels of market integration (removal of

barriers) promised in the founding treaties during the 1950s, it would be necessary to develop a wide range of policies in common. More than that, it would be necessary also to create an institutional framework sufficiently powerful to actually approve and implement the required policies. The realization that this was so was what provided the impetus for the *Single European Act*.

The *Single European Act* was a constitution-like treaty that amended in one "go" all three founding treaties of the European Communities. It introduced new voting rules under which member states in a relatively small minority position could nonetheless be required to implement policies they disagreed with, on pain of being found by the European Court of Justice to be in violation of their treaty obligations. Subsequent treaties, beginning with Maastricht, more clearly laid out penalties to be imposed on member states if they failed to meet those obligations. Moreover, with each new treaty amendment, the range of matters decided through "supranational" institutions was extended, and the powers of the European Parliament were increased, placing it more nearly on a par with the Council of Ministers (composed of delegates of the governments of the member states).

The institutional structures that were actually put into place, and the range of policies that by now have been developed in common among the EU states, need not be reviewed here. There is no space, and to do so would even obscure the main point, which is that already in the 1957 Treaty of Rome, which established the European Economic Community, the six founding member states committed themselves to creating a fully integrated market. Goods, services, capital and labour would move freely within the borders of the Community. In addition, the Community would adopt a common external tariff, and a common agricultural policy would be developed, also elements of a common transportation policy. Other treaties provided also for policies to develop and regulate the coal and steel industries, and the nuclear energy industry. Such policies could be negotiated among the governments of the member states on the basis of a unanimity rule (no dissenting votes), and indeed, over the years that ensued, a number of joint policies were put into place, though as regards transportation and nuclear energy the results were slim.

European industrialists and political leaders were forced, during the years of poor economic performance during the 1970s, to take cognizance of the fact that with the myriad of state regulatory activities and an extensive role for governments in managing national economies, there was noticeable backsliding on the most basic principle of the Community: the unimpeded movement across

national borders of goods, services, capital and labour. It was clear that the states were unwilling simply to abjure their involvement in managing the economy, notably in regulating products and markets in the public interest. They recognized, accordingly, that the broad outlines of regulation and economic management had to be transferred to the European level. Common policies had to be developed. This is what the white paper proposed, and this is what the *Single European Act* made institutionally possible. In short, it was discovered that economic integration and political integration had to go hand-in-hand, and steps were taken to ensure that this was done.

Several contributions to the present series either deny or disregard the idea that the political preconditions of economic integration — seen as compelling by the leaders of European states in the mid-1980s — have any relevance in North America. I disagree. I think that in this respect, European experience carries vitally important lessons for us on this side of the Atlantic. I do not mean that we should try to track European experience here, creating joint political institutions on an EU model. None of the contributors to this series has suggested such a thing, but some have argued that a fully integrated North American market can be created on a very slender institutional base. I think a far more rigorous examination is needed.

Let's consider first the argument of de Mestral and Winter (folio 6) that many provisions of NAFTA can and should be given "direct effect" through modifications to the treaty, but none that create any new institutions at all. The task of applying the NAFTA rules would, then, fall to the national courts of each of the three parties; de Mestral and Winter do not regard it as necessary to create a joint judicial authority of any kind. I think this is fatal to their proposal, and that the history of the EU shows this.

During the first decade or so of the existence of the European Economic Community, the European Court of Justice (ECJ) — created by the Treaty of Rome, 1957 — established the principle of the superiority of European law over national law. What is remarkable is that national courts, by and large, accepted this doctrine.[1] They took guidance from the ECJ. The practice is by now well established, that when European law is invoked in argument in proceedings in national courts, national courts will take guidance from the ECJ on the interpretation of European law, through the issuance of "preliminary rulings" which, authoritatively, apply European law to the dispute at hand.[2] That is how a common body of European law is developed.

De Mestral and Winter do not recommend anything like this for North America. They imply (or logically must presume) that a coherent body of NAFTA law (my term, not theirs) will take shape as domestic law, created by national courts in the three parties, without any need for the establishment of common principles or doctrines by a single, overarching court. (My concern about the consistency with which courts will apply NAFTA principles as domestic law is additional to the concern expressed by Wolfe, in his contribution to this series, who questions whether handling essentially political issues through a judicial process is desirable in principle.)

Underlying the proposal of de Mestral and Winter is the notion that citizens should be able to challenge the regulatory, restrictive role of governments. They endorse economic freedoms that can be claimed against governments at any level. For this reason, de Mestral and Winter are attracted to the enunciation of basic market principles in a document — constitution or treaty — that governments cannot interfere with. It then becomes up to the courts to apply those principles. In the absence of political commitment to create supranational institutions, which they consider desirable but unrealistic at least for now, the courts could have the effect of building public support for creating a common economic space. Thus, if governments could be persuaded to amend NAFTA to give direct effect to many of its provisions, this would have positive effects in both the short and the long term.

In the short term, direct effect would give citizens a lever with which to challenge governments that become overintrusive in their management of the economy, and force them to live up to in-principle commitments they have already made under NAFTA. Courts being thus empowered by an international treaty, markets would be able, say de Mestral and Winter, to operate extensively and efficiently, and integration would proceed to a level beyond that to which governments would, without judicial limitations and proddings, be willing to go. In effect, governments would be backed into a corner and find themselves unable to interfere with free trade or (because greater international mobility of labour is, for de Mestral and Winter, an important goal) common market principles.

A further, hoped-for consequence of giving direct effect to NAFTA provisions would be to build public support for creating a common economic space in North America. This would generate a hitherto lacking momentum for further steps along the integration road, perhaps including the establishment of new

supranational institutions. But de Mestral and Winter acknowledge that neither the public nor governments are anywhere near ready, at present, to take such a step. It is this absence of commitment to a dynamic process of integration that leads them to propose, for now, a much more limited innovation in the form of direct effect.

To bring this about, NAFTA has to set out basic rules with a degree of precision and detail that is not found in the founding treaties of the European Community, now the European Union. In fact, NAFTA, with its many sectoral chapters, already does this. By contrast, the EC/EU treaties establish basic objectives and principles, and create machinery through which those objectives and principles can be incorporated into policy through cooperative action among governments in the Council of Ministers, and through the agency of the European Commission. Both these institutions, it should be noted, are complemented and to a degree controlled by the European Parliament. As such political machinery is lacking in (or under) NAFTA, NAFTA has to say it all. It must supply all the substantive rules that can and should be applied by national courts, without the supervision or legitimation provided by a putative supranational (NAFTA-wide) judicial authority or any political mechanism analogous to the EU's Council of Ministers. (Under NAFTA, consultations among governments at the political or ministerial level are provided for, but joint decision-making is not.) The proposal by de Mestral and Winter has, then, to be set in a context that only public opinion can supply: an attitude that is mistrustful of governments and political processes and prefers to see the judiciary play a significant and open policy-making role. De Mestral and Winter believe these conditions do obtain in North America, enabling the courts to take the process of integration beyond a level that governments actually want. (Is that desirable? I'm dubious.)

For his part, Hart (folio 2) wants Canada and the United States to negotiate a "deep integration" agreement that would nudge the two countries a considerable distance along the track already followed in Europe, with potential for extending this bilateral agreement, in the longer run, to include Mexico. Hart endorses the standard "stages of integration" theory, according to which the establishment of a free trade area may lead on to the creation of a customs union and perhaps a common market (free movement of labour and capital, as well as of goods and services), and eventually an economic union "involving a common currency and common approaches to macroeconomic policies" (30). While stating that the later or more advanced stages of integration "require sufficiently

robust institutions to implement the detailed rules required to govern these arrangements" (30), he does not ask himself what such institutions need look like, or what powers they need have. In fact, he attributes institution-building within the EU not to economic objectives, but to the political objectives of the integration process, with governments leading the way toward a highly institutionalized form of integration in order to promote peace and democracy. It has been a top-down process. By contrast, Hart affirms, in North America institutional requirements are much more modest because here "integration has been largely driven by the pull of market forces: proximity, consumer choice, investment preference and firm behaviour" (31). In this situation, government policy has been "largely responsive," though frequently, in Hart's view, inadequately so. Still, the two federal governments "have [already] established a dense framework of formal and informal networks and relationships that ensures a high degree of convergence in the design and implementation of a wide range of rules and regulations" (30), including informal macroeconomic concertation.

Hart proposes further steps in building up these networks on the basis of a comprehensive agreement to complement NAFTA and other bilateral treaties and agreements created over the course of almost a century. The reason for wanting such an agreement is that "barriers to the efficient cross-border movement of capital, technology, services, goods and people continue to exist" (33). Significant regulatory differences remain and, because of this, the border too remains "heavily administered" (4), in consequence of which efficiencies expected under NAFTA have been only partially achieved. To do better, governments need to negotiate a new, multifaceted agreement that would accomplish much of what in Europe has been accomplished under the EU. The agreement would, among other things, promote further regulatory convergence, pave the way on a sectoral basis toward a common trade remedy policy vis-à-vis third countries (thus leaving bilateral trade unencumbered by countervail and antidumping suits or the threat of such suits), and free up cross-border movement of persons (made possible by establishing a common security perimeter). The goal: new cooperative arrangements "providing better governance of the Canada-US economy" (52).

These are ambitious goals, requiring, Hart declares, "a much higher level of cooperation, coordination, and even joint decision-making" (49) than now exists. But the institutional requirements for achieving these objectives are not set out, other than to say that existing institutions and officials could be assigned new

tasks, consultative mechanisms should be employed and recourse might be had to bodies similar to the present-day International Joint Commission, which is responsible for advising governments on policies relating to cross-boundary or international waters (49-52).

Here, Hart evades essential questions. It is simply not credible to suggest that European experience regarding the institutional requirements of deeper integration should not be relevant in a North American setting on the grounds that the history and the motivations have been different on the two continents. In fact, Hart neglects the extent to which the *Single European Act* and subsequent treaties have been geared to achieving economic objectives — objectives that are actually rooted in globalization and the goal of making European economies more competitive internationally. It is widely agreed among scholars of European integration that a large part of the impetus for creating the *Single European Act* lay in the activities and demands of a major business group, the European Round Table of Industrialists. In some other aspects of the integration process, notably as regards enlargement or the accession of new member states, political motives have certainly been present, and probably determining. Enlargement has, in turn, driven some of the more recent institutional reforms. However, the fact remains that two decades ago the leaders of the European Community (precursor of the present-day EU) gained new understanding of the whole subject of necessary linkages between economic and political integration. I can see no sign that this has happened yet among proponents of deeper integration in North America, and Hart's paper is a dramatic illustration of this.

With reference to such matters, Wolfe offers a far more realistic appraisal of the relevant issues. Mainly, he cautions that it will be necessary to lower our sights as regards the extent to which the Canada-US border can be made irrelevant economically. For that to be achieved, Canada would have to integrate politically with the US through institutions that necessarily would be headquartered in Washington and dominated by US interests and political leaders. Even if such arrangements were welcomed in Washington, which is more than dubious, they would not be acceptable in Canada. One should not infer that Wolfe adopts an economic-nationalist position. On the contrary, at times he adopts language that is barely distinguishable from Hart's.

In fact, there is really only one significant difference between Wolfe and Hart. Both want to "improve the governance of our shared continent" (Wolfe, folio 6, 71),

or achieve "better governance of the Canada-US economy" (Hart, folio 2, 52), or design "a cooperative or coordinated approach to governance of the market" (28). Hart declares that "officials have [already] developed a dense network of informal cooperative arrangements" (46) and Wolfe, drawing on the history of the BSE-induced disruption of cross-border movement of beef, observes, "Canada got the border open again, for processed products, because of the close networks among officials, but [and?] those networks are predicated on common objectives" (folio 6, 90). Both Wolfe and Hart are fully cognizant of the extent to which business interests on both sides of the border are intertwined and for that reason want to keep the border as open as political conditions allow (even though there are exceptions to this, resulting in various trade disputes). Both also see officials co-operating with each other as fully as their political masters will let them. Both emphasize the multiplicity of institutions and agreements stretching back over a period of decades, and both propose keeping the existing, complex machinery in place, enabling officials to work together ever more closely. With so many similarities one has to ask, also of Wolfe, "Where's the beef?" His answer: "It is misleading to dream of an overarching constitution in which the relations of Canadians and Americans can be subsumed in a strong state-to-state network" (folio 6, 71). Later on, he writes: "And our difficulties with the US Congress cannot be solved by creating more legal texts let alone by trying to codify the North American 'constitution' that we already have" (72). And then: "My most important complaint about the Hart paper is his advocacy of a centralized institutional framework...he seems to think that what we now need is a top-down formal treaty aimed at requiring officials to do what they have been doing for decades" (80-81).

It's all a bit bewildering. I do not read the Hart paper this way. Hart, like Wolfe and indeed like de Mestral and Winter, thinks that integration in North America proceeds from the bottom up, and that there are political obstacles to how far integration has been allowed to go, or will in future be allowed to go. The point of difference, as I interpret the papers, is that Hart and de Mestral and Winter believe that a new agreement (the agreements they envision are, of course, radically different) would help remove political obstacles, and Wolfe does not view any new agreement as potentially having such an effect. Hart also believes (as noted above) that a new agreement would have to mandate the creation of some new institutions, though not the replacement of existing ones. He is also evidently far more confident than Wolfe that a new political agreement, especially if comprehensive

(e.g., including security arrangements), could go a long way toward eliminating existing barriers that impede day-to-day movement of goods and persons (and to a lesser extent of capital and services) across the international boundary. Hart is an optimist, and Wolfe is a realist. And on this, I must say, I side with Wolfe.

Neither Hart nor Wolfe looks to the creation of comprehensive institutions with legislative or executive powers, on a European model, and Wolfe draws what I think are the appropriate conclusions: that without such institutions and political agreement to back them up, the border will remain economically significant, especially in moments of crisis. Both believe a fair amount can be accomplished by continuing to build networks; they differ in that Wolfe regards any broad political agreement as ineffectual and thus superfluous (perhaps also dangerous for Canada?), whereas for Hart such an agreement could go a long way toward promoting easier, quicker cross-border transactions.

The Schwanen proposal is the one most clearly inspired by the EU model. Not that he suggests creating new institutions with legislative and/or executive powers; he explicitly does not (folio 4, 14). However, he does propose a broad agreement on principles that would more closely integrate the continental market. He envisions a "treaty of North America" that would aim to build "a community of North Americans" rather than to establish "a 'North American community' formed of three inherently unequal countries" (12). Such a focus on people rather than on their governments and interaction among them is not EU-like, but a treaty that sets out principles and objectives, with the idea of putting them into practice over time through subsequent agreements and commitments, is very much in line with the process and methods of European integration.

Paradoxically, the institutional structures that Schwanen recommends are a sort of pale image of those in the EU. He proposes the establishment of a "North American Transborder Commission" that, as in the EU the Commission does, will function independently of the governments of any of the parties and will be assigned the task of suggesting measures that will advance the objectives, or apply the principles, contained in the treaty. Complementing the Commission, Schwanen wants to see the creation of a "public advisory committee" and a "legislators' advisory committee," institutions that are reminiscent of the Economic and Social Committee and the Legislative Assembly (precursor of the European Parliament) that were established in 1957 under the auspices of the Treaty of Rome. As envisioned in the early days of the European Communities, these

institutions could be expected to have a certain moral authority, but were not integral to the decision-making process at the EC/EU level, a development that in the case of the European Parliament occurred much later. (The Economic and Social Committee, even now, remains a drone.)

The main question at issue with the Schwanen proposal, to my mind, is how much political weight or momentum could be created if the NAFTA states made an essentially moral commitment to certain goals or principles and established a set of advisory bodies to prod future governments to live up to earlier promises. In fact, there is a prior question: Why would governments wish to create a set of institutions whose job is to embarrass them if they violate principles to which they have made a commitment? I think the answer has to be that politicians will do that only if they want to build up political support for various objectives (policies to implement, practices to avoid) in the face of public opposition. Having an external watchdog makes it easier to blame unpopular measures on others. This appears to have been one of the motives for the Eurozone states having entered into the Stability and Growth Pact, under which the states adopting a common currency in 1999 committed themselves to fiscal orthodoxy, though the main reason for the pact was undoubtedly that Germany made commitment to it a condition of its agreeing to monetary union in the first place. Under the Stability and Growth Pact, a state that runs "excessive" public sector deficits (more than 3 percent of GDP) are publicly criticized by the Commission, and may ultimately be fined (on the initiative of the Commission) by decision of the Council of Ministers. However, the pact has never functioned as anticipated, partly because Germany itself was an early offender. As its budgetary difficulties mounted, it had no compunction about ignoring rules it had earlier insisted be put into place and thought up all kinds of reasons why it should violate them. And the Council of Ministers was cautious, because the various ministers of finance were fully aware that their countries might be next, and anyway, how can the largest member state in the Union be sanctioned in this way? Greece, maybe, but Germany?

All this emphasizes what an intensely political process the business of living up to past commitments is and that governments' concerns and electoral calculations as these develop over time easily override earlier statements of principles and goals. An analysis of the "Lisbon process" under which the EU states have promised each other that they will act to strengthen the competitiveness of EU producers on world markets, for example by removing restrictive rules on the operation of labour markets, points to exactly the same conclusions. It

involves a "naming and shaming" exercise under which the European Commission, supported by expert advisers, rates the relevant governments' policy performance, creating bad publicity for those states that do not perform. A recent report by a former prime minister of the Netherlands suggests a ratcheting-up of naming and shaming procedures, which is presumably an indication that the process is not living up to expectations.

Overall, I am a believer in strong political institutions to support processes of economic integration. "Strong" here means having some form of legislative or executive or judicial authority, or a mixture of these. If it is not possible, or perhaps judged not desirable, to create such institutions, one must expect some market barriers to remain and to become more intrusive or burdensome in times of crisis, economic or otherwise. I see no reason why the lessons that European leaders drew from the proliferation of barriers to cross-border movement of goods and factors during the 1970s and early 1980s were either erroneous in their own case, or irrelevant to integration processes elsewhere, including in North America.

Differences in Size among the States

As already noted, Schwanen describes the relationship among the three federal states of North America as "inherently unequal," but he also affirms that "in many of the daily interactions across their borders…the respective size of the three nations and other differences among them play only a secondary role" (folio 4, 12). Other contributors to this series seem tacitly to take the same view — though Wolfe is more attentive than the others to the implied exception — that at times "daily interactions" and the task of keeping the border open may well get blown away, as, in the US, immediate and pressing concerns grab the attention of Congress and the administration. Routine matters may be handled by networks of officials who tend to operate below the political radar screen, but issues inevitably do arise that are not routine. Here Canada and Mexico are undeniably vulnerable. That's an important aspect of the North American reality, but on this matter it is doubtful — for reasons set out below — that there are lessons to be drawn from analyzing the institutions and policy processes of the EU, or tracing the bargaining that has led periodically to important treaty revisions.

Analysis of bargaining processes among the member states of the EU is scarcely relevant to an understanding of relationships among the three states of North America. The reason is simple. Even at their founding, the three European communities were composed of six states, three of them of comparable size even though Germany had substantially greater economic weight than either France or Italy. The essential point is that no single country controlled policy-making within the communities, and indeed it was a precondition of the EEC's development that none of its member states was able, in that sense, to dominate. The regionalization process, as regards the original six — and eventually, the EC-9, the EC-12, the EU-15 and now the EU-25 — could appropriately be termed *plurilateral.* This feature of the integration process among the EC/EU states became more solidly entrenched over time, as the membership grew.

However, the story of European integration is not just about the deepening of the EC/EU, or the emergence of a plurilateral regional organization. It has also been about the process of widening, or enlargement, and about the negotiation of a large number of treaties of association with nonmembers. The effect of these two developments has been to extend the boundaries of an economic space that has always had an easily identifiable core (the member states) but somewhat fuzzy edges. The creation of that wider economic space represents a different kind of regionalization, appropriately termed *hegemonic.* The essence of this process was that the EC/EU became the policy-maker for a substantially larger area, and any country that wanted to gain good access (extensive, reliable) to EC/EU markets had to accept its role as leader or hegemon. Indeed, what has made the process of European integration truly unique — and the "European model" extraordinarily difficult to export — is its combination of the two basic forms of regionalization, plurilateral and hegemonic. Each aspect of the integration process has had the effect of driving the other forward as well. The point deserves a little elaboration.

As soon as the European Economic Community (EEC) came into being, it transformed the economic geography of the whole region (continental Europe and the islands nearby, notably Britain). The power of attraction proved irresistible. Accordingly, the neighbouring states were placed at a considerable disadvantage in any form of economic negotiation between them and the Community. One sees this, especially, in the fact that Britain, which had taken the lead in creating the European Free Trade Association (EFTA) as an intended counterweight to the emerging EEC, reversed position and applied for EEC membership as early as

1961, a scant 14 months after the EFTA's launch. It took until 1973, after another 12 years and three successive applications, before Britain was finally allowed in essentially on terms set by the EEC states, with France as the main gatekeeper.

Since the early 1960s the EC/EU, by virtue of its size and economic dynamism (notwithstanding phases of mediocre performance), has dominated the Continent economically; with the end of the Cold War it came to dominate also politically. From the outset in the late 1950s, the EC (and later the EU) was able to dictate the conditions under which neighbouring states would have access to its increasingly integrated market. I have already noted how the process of market integration went along with, and in fact demanded, the creation of a substantial degree of policy-making capacity at the "European" (actually EC/EU) level. As that capacity grew, access to EC/EU markets by neighbouring states was made increasingly conditional on the willingness of those states to incorporate Community/Union policies into their domestic law and economic practice. Those conditions were set out in precise and quite demanding terms in the various treaties of association to which I have already alluded, creating a form of "associate membership." This meant, in practice, that the full-status members became, collectively, policy-makers, and the associate members became policy-takers. Since most associate members (but not all of them — not, for example Norway or Switzerland) have aspired to full-status membership, the EC/EU's policy control over the wider Europe has tended to become all the more pervasive. That control extends deep into the political zone, with the EC/EU demanding adherence to democratic practices and observance of human rights as conditions of associate status and, even more so, of accession to (full) membership. This is another mark of hegemony: the use of economic levers to achieve political goals. Nowhere is the exercise of hegemony more evident today than in relation to Turkey.

While, for several states, membership is the ultimate lure, here we need concern ourselves less with the subject of enlargement than with the question of the conditions imposed on associate members, which by treaty have gained privileged access to EU markets. The treaties of association vary, some offering better market access than others. The better the market access, the more stringent the conditions that are imposed on the associate member. At the top end, we have the European Economic Area (EEA) states: Norway, Iceland and Liechtenstein. Nominally, though not fully in practice, those states are on a par with the member states, as regards free movement of goods, services, capital and (to some

extent) labour. In return for being in most respects a part of the EU's internal market, the EEA states have had to promise to apply market-related EU policies on the same basis as the member states themselves must — though no EEA state, of course, has a seat on the Council of Ministers, or the right to elect members to the European Parliament. On a regular basis, the Commission sends the three governments a letter identifying those directives that they must implement if they are to remain within the "European economic space." No EEA state has ever balked at the Commission's demand. The terms of the directives subsequently imported into domestic law by the national parliaments, and the consistency of administrative practice with the terms of those laws, are subject to supervision by the EFTA Surveillance Authority, which seemingly (but unofficially) takes guidance from the European Court of Justice. The mechanisms and procedures are thus well in place to ensure the application of EU law throughout the EEA.

Such policy control, and the pervasiveness of political demands placed on states that want to become part of the European economic space and ultimately (for most such states) to accede to membership, is far more blatant than anything that the United States attempts to exercise in North America or the Americas generally. On this side of the Atlantic conditionality is not absent, but it is less formally exercised. In this, American trade-remedy laws, which have the effect of defining what trade practices and what domestic policies of other states of the Americas are to be considered "fair," are an essential instrument. No wonder Congress has shown no inclination whatever to lose control of that instrument!

It is in this context that I think we should return now to the position taken by several contributors to this series — specifically Hart, Wolfe and Schwanen — on the emergence of North American networks that are composed of officials who tend to work together, when their political masters will let them, to achieve regulatory convergence and to keep borders open. These authors' emphasis on the bottom-up nature of the integration process in North America leads them also, with good reason, to affirm that private sector players, notably executives in firms with extensive cross-border operations, are either participants in such networks or tend to energize and underpin them. For Hart and for Schwanen, a new bilateral or trilateral agreement/treaty would strengthen and further enable such networks; for Wolfe, such high-profile political involvement is unnecessary and perhaps counterproductive. But where they agree is that they all want better economic governance of the North American continent, not — repeat, not — simply on US terms.

An underlying current in all these papers is the central conundrum of Canadian foreign policy over the past half-century and more: how to minimize the negative consequences, for Canada, of the enormous discrepancy in size between ourselves and the United States. Prior to the negotiation of the Canada-US Free Trade Agreement in 1988, Canada oscillated between multilateralism and, notably in the Auto Pact of 1965, bilateralism. What remains today of the multilateral tradition is the desire by some Canadians to situate NAFTA in a broader global framework, invoking where possible the WTO and supporting its further development.

How efficacious that strategy is or could be is a question of vital importance. None of the papers addresses it. The papers focus instead on bilateral and trilateral relations, and, as I have noted, in that discussion comparisons with the EU have been, at a minimum, lurking in the background. The concept of regionalization to be found in the papers has been, in the sense I have sketched out, plurilateral. The authors are all aware of the fact that a game played by two or three — especially if one of the players (parties) is a giant — is necessarily a very different game from one played by 6 or by 25. This, I presume, is one of the reasons why none of them comes close to suggesting the creation of institutions with legislative or executive powers, such as exist within the EU. The authors are also all aware that historical context can be determining and that the founding of the European Communities was a creative response to centuries of war in Europe that had culminated in the two bloody conflicts of the first half of the twentieth century. The history of European integration was rooted in those conflicts and the determination to avoid their resurgence; integration in its earlier days was also, to a degree, stimulated by the military rivalry of the United States and the Soviet Union, the latter being deeply threatening to the national states of Western Europe. There were thus multiple and very compelling reasons for feeling that integration in North America should not aim to track the process of integration in Europe.

The reasons are far less compelling, though, if one dwells on the other aspect of the integration process in Europe, or the form of regionalization that I have described as hegemonic. What's important here is the sets of relations that have grown up between the EU and the various states that are heavily dependent on access to the EU market. NAFTA is not an analogue of the treaties of Rome, Maastricht, Amsterdam and Nice, or of the draft Constitution for Europe; the analogy that is well worth exploring, rather, is between NAFTA and the treaties of association that link the EU with many of its neighbours.

The differences are obvious; I do not suggest that there is a close parallel. But there is a question here that certainly needs exploring. It is the question of regional hegemony. Heavy dependence on a single foreign market seemingly places huge pressure on a relatively small state to seek ever-closer relations with a giant neighbour. In Europe, the creation and consolidation and institutional strengthening of the EC/EU set up such a dynamic. An important outcome has been that the EU has become the economic policy-maker for Europe; non-member states, linked to the EU by treaties of association, adapt. Such treaties of association are in some ways similar to NAFTA, and vice-versa. The huge difference is that the treaties of association demand adherence, in varying degrees, to EU policies, the *acquis communautaire*, whereas a basic principle of NAFTA is that each of the parties retains its policy independence. Of course, the extent to which they actually do so is not agreed upon and remains a vital subject for enquiry.

Conclusion

If, as I have suggested, integration in North America is primarily in a hegemonic mode rather than a plurilateral one, it is necessary to define research priorities relating to Canada's economic relationship with the United States in that light. The focus, I believe, should be on informal ties and working relationships, exploring the extent to which a nonhegemonic state, which by definition has a rather weak hand, nonetheless may be able to affect the behaviour or policies of a neighbouring economic great power. The latter may be tempted to act hegemonically, becoming policy-maker for a regional grouping of states, thus undermining their policy independence or autonomy. There would appear to be two — probably complementary — approaches open to a nonhegemonic state that seeks to avoid such external policy control. One is to try to embed bilateral relations in a multilateral context, which means working as much as possible within a global, not regional, framework. The other is to look for ways of exercising political influence within the "economic great power" itself (in this, the complexities of policy-making within both the US and the EU are not merely interesting, they probably both impede and facilitate action by the nonhegemonic state — it's hard to get agreements that will "stick," but on the other hand, points of entry are multiple). Neither approach involves the building of joint institutions.

Indeed, one of the features of hegemonic regionalization is that it tends to be only very weakly institutionalized. Linkages between the economic and the political aspects of integration are just as tight as I earlier argued they are, but they cannot be expected to be reflected in institution building. One ought, then, to be skeptical when Hart declares, "In the absence of an active approach to building institutions and procedures for joint governance," Canada may simply "drift toward US-determined default positions on most matters related to the regulation of the market" (folio 2, 5).[3] The difficulty I have with this suggestion is not only his vagueness about the sorts of institutions and procedures that might, to Canada's advantage, be put into place. More fundamentally, my question — which is also Wolfe's question, though we come to it from different routes — is: Why look for institutional solutions at all?

Underlying that question is my concern (again, similar to Wolfe's) that the more formal and institutionalized the relationship between Canada and the United States, the less room to manoeuvre Canada is likely to have. Put it this way: Canada has every reason to avoid remodelling NAFTA along the lines of the EEA Agreement, which links the EU with Norway, Switzerland and Liechtenstein and, in doing so, establishes a clear mechanism of policy control.

Notes

1 However, there may be difficulty formulating this principle in a treaty, as opposed to its being judicial doctrine held to flow from the treaties. Article I-16 of the EU Constitution that was endorsed by EU leaders in June 2004, and that awaits ratification following at least 11 national referendums, reads: "Constitution and law adopted by the institutions of the Union...shall have primacy over the law of the Member States." This article may well provoke a constitutional challenge in one or more member states. A successful challenge would result in the collapse of the EU Constitution project.

2 Or maybe this practice is not at present, after all, really well established. Sweden is now being taken to task by the Commission because in the last year, its courts referred only three cases to the ECJ for a preliminary ruling.

3 The other possibility, to which Hart also refers, is that Canada will assert its regulatory independence, a self-defeating approach for which Canadians would pay heavily.

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An American Perspective

I HAVE BEEN ASKED TO OFFER BRIEF COMMENTS FROM AN AMERICAN PERSPECTIVE ON three lengthy papers that address the desirability of reforming and deepening the institutional framework that governs North American economic integration. The proposals put forward by Michael Hart (folio 2), Armand de Mestral and Jan Winter, and Robert Wolfe (folio 6) offer distinct and often conflicting approaches to the topic. A short commentary cannot do justice to the broad ranging issues covered in their analyses and recommendations, so to simplify, I have subjected the three papers to a taste test — much like Goldilocks with the three bowls of porridge. I find that one bowl is too hot, one bowl is too cold, and one bowl is neither too hot or too cold, but still needs a bit of seasoning.

By way of introduction, it is important to emphasize that North American economic integration has progressed substantially since the inception of the North American Free Trade Agreement (NAFTA). Intraregional merchandise trade has more than doubled, and US direct investment in its NAFTA partners has grown even faster. Of course, reforms induced by NAFTA are only responsible for part of the deepening of North American economic integration, but it is unlikely that each of the three countries could have grown faster than the OECD average for the past decade without the boost from NAFTA. The principal question addressed by these papers is whether this trend can be sustained and augmented without some elaboration of North American economic institutions.

The NAFTA partners now confront real challenges to moving the integration process forward in a way that benefits the citizens of each country. We have seen since September 2001 how security measures can intrude on the free flow of goods, services and people. There is a risk that some of the past gains from

North American economic integration could be reversed in response to new terrorist attacks. Despite the Smart Border initiative between the United States and Canada, and a similar US-Mexico pact, we cannot discount the possibility that new terrorist attacks could prompt the United States to reinstall border barriers that are far more intrusive than the tariffs and quotas that used to exist.

This vulnerability is exacerbated by the fact that the three countries have not invested sufficiently either in transportation infrastructure to facilitate the increasing flows of goods and people, or in upgrades to the distribution networks in the energy sector. To be sure, energy distribution channels are highly developed in the US-Canada market, but they are disjointed in the US-Mexico context due to Mexico's constitutional prohibition on foreign ownership of energy resources. In both, problems persist regarding interconnection of electricity grids and gas pipelines. Blackouts are a regular event for Mexican factories, but they also appear — infrequently but spectacularly — in the United States and Canada (as residents of New York and Toronto can attest). Clearly, complacency is not in order in the United States, in Canada or in Mexico — things could get worse. On top of the problems bypassed or inadequately addressed by the NAFTA partners, economic integration could run afoul of the new security environment of the post-September 11 world.

Let me now turn to the three papers. Again, these brief comments cannot do justice to the complex issues and proposals put forward by the authors. I will only highlight a few important points.

As an economist and former trade negotiator, I must admit to some bias in reviewing the de Mestral and Winter paper, "Giving Direct Effect to NAFTA" (folio 6). I do not have their expertise in international law, but neither do I see the problem that they are trying to remedy by giving "direct effect" to NAFTA provisions (that is, giving them the force of domestic law) so that private persons can "claim rights under NAFTA directly, and courts...empowered to enforce these rights" (36). Simply put, their proposal is a solution seeking a problem.

The authors argue that NAFTA's "legal structures...have proven to be insufficient to create a genuine North American economic space" (36), and that empowering private parties to file suit in domestic courts against their governments to enforce NAFTA obligations would further the integration process. No need for new supranational institutions; let the domestic courts interpret the negotiated deal and compel the national government to comply.

I think they have the argument backwards. Even if politically feasible — which in the US case is highly doubtful — such "reform" would generate perverse results, as rent-seeking litigants obstruct the growth of intraregional trade and investment. In short, their proposal provides a wide avenue for harassment through litigation — not just by private citizens but also by other groups in society, including corporations and nongovernmental organizations. There is a real and really big problem here.

From a US political perspective, the proposal is problematic. The most stunning assertion they put forward is that if private persons could file suit and get rulings from domestic courts regarding the NAFTA legality of governmental measures, then the "[i]nterpretation of NAFTA would cease to be a political matter" (43). I disagree. Court rulings generate strong political responses and often trigger demands for remedial legislation. In a sense, we've had a test case regarding the implementation of NAFTA's obligations on the provision of cross-border trucking services. When the US government finally agreed to comply with its NAFTA obligations, the implementation of US trucking regulations was stalled in US courts by blocking litigation. Hopefully, the trucking problem will finally be rectified after almost a decade of noncompliance by the United States, but the example is instructive, and one would expect that to be the model of what would happen from a "direct-effects test" in the US legal system. If applied more broadly in the future, it is entirely conceivable that the losing side would revive calls for the renegotiation — and thus effectively the revocation — of US participation in the pact. Not the hoped for benefits of empowerment of private citizens that the authors posit.

I cannot conceive of members of Congress providing statutory authority for the direct effect of provisions of trade agreements like the NAFTA. That would call into question whether Congress would have supported the executive agreement if it had been presented to them under the treaty ratification procedures (requiring a two-thirds vote of the Senate) instead of as an executive agreement subject to "fast track" implementing legislation. I would add, albeit speculatively, that there is a 99 percent chance that NAFTA would not pass as a treaty in the US Congress today, even after 10 years of very substantial accomplishments. A majority of that magnitude in favour of economic integration does not exist today in the US Congress. In sum, the de Mestral and Winter proposal is too "hot" and would garner a very hostile US reaction.

Let me turn next to the paper by Professor Robert Wolfe (folio 6). The author argues that, in the US-Canada context, extensive consultations and cooperation

occur on a regular basis among public officials and regulators responsible for specific components of bilateral trade and investment in goods and services — and that this process is constantly evolving to deal with changing conditions in the marketplace. In many respects, I am sympathetic toward Professor Wolfe's piece. In essence, it is the default position: it posits, in effect, "Well, we have a lot of things going on now, and we can take care of it." In half of the cases, he's probably right. For the most important, however, he's far too sanguine.

Wolfe argues that "an activist approach to North American security and prosperity can be managed within existing institutions" (73). In my view, he underestimates the potential disruptive effect on regional economic activity — not just trade — if the United States defends its security perimeter at the US border. The new, broader security concerns pose a challenge to North American relations that is altogether different from what existed in the past. Addressing these problems — and especially the challenge to preempt future attacks and of costly responses to any future attacks — will require a deeper investment of sovereignty than each nation has been willing to share with its neighbours to this point in time.

Granted, the United States and Canada have numerous channels to manage disputes and to consult over regulatory policies that affect trade and investment in both countries. But I question whether the NAFTA partners have the right mechanisms to avoid security-related disputes that cut across trade, investment, energy and immigration issues. The latter issue in particular will have to be given greater prominence. In the past, the discussion of movement of peoples primarily focused on temporary entry of business professionals or Mexican migration to the United States. Since 9/11, however, another big problem has been exposed, that relating to Canadian refugee policy. The issue requires attention by all three countries, and security imperatives point clearly to a trilateral initiative that goes well beyond existing arrangements.

Of the three papers, I find the arguments put forward by Michael Hart (folio 2) to be the most balanced. Fundamentally, he wants to deepen and accelerate the pace of North American economic integration through new rules and "institutions and procedures geared to achieving a much higher level of cooperation, coordination, and even joint decision-making" (49). He suggests that new (mostly bilateral) institutional arrangements are needed to avoid distortions in trade and investment flows that — in a security-driven environment — may tilt the playing field to Canada's detriment toward the United States. In contrast to Wolfe's incremental approach, Hart posits that

uncoordinated initiatives do not prompt sufficient political attention to compel action on the difficult policy reforms facing the three countries.

Overall, Hart's proposal is not too hot, and it's not too cold. I agree with many of his suggestions — especially those that parallel proposals that Gary Hufbauer and I have tabled south of the (Canadian) border. We have learned a lot from Professor Hart over the years; hopefully, he's benefited as well from our writings. Let me note, however, a few points of divergence.

Hart's proposal involves a number of interrelated initiatives and starts with a reasonable yet incremental proposal: development of a common external tariff (CET). A CET is a good idea, but not as easy as he posits. Agreed, the US and Canadian tariff structures are largely comparable, and in many areas the current level of most-favoured-nation tariffs is negligible. In some areas, notably agriculture, it will be difficult to harmonize the high tariffs that remain despite eight previous rounds of GATT negotiations. Such an initiative will have to proceed slowly, over a decade at least, meaning that the major economic benefits to be derived from such tariff reform may be deferred for a while. However, a CET will also help mitigate distortions to trade and investment created by NAFTA's rules of origin, so his basic idea is sound.

As a side note, Hart misjudges the clout of agricultural interests in Congress. Because of the sharp divisions in Congress (especially the House of Representatives), special interests and protectionist lobbies have exceptional leverage at the margin. Since many trade votes are very close, these interests are now even more powerful. The sugar lobby is the best example (forcing the US trade representative to exclude sugar from the free trade agreement with Australia), but there are other protectionist groups that actually now have more power because Congress is so closely divided on trade issues.

Not surprisingly, Hart includes a call for reform of NAFTA trade remedies. Canadian officials have long sought the elimination of antidumping and countervailing duties on intraregional trade. Despite valid economic arguments, political support for such reform in the US Congress is almost nonexistent. Recognizing this fact of US political life, Hart proposes a sensible but low-yield approach: sectoral carve-outs. It is low yield, because the only sectors that would be chosen would be those where there are no problems. He counters that we can start there, build a political comfort zone, and then gradually bring in more and more sectors. Unfortunately, it is going to be a long time before you bring in the main sectors that are subject to antidumping and countervail: steel, lumber, wheat and

pork. Nonetheless, I support the proposal because it will be useful as an incentive for new investment and plant expansion in those sectors once firms and farmers are less exposed to contingent liabilities under unfair trade statutes.

As a practical matter, there are two ways to handle this issue bilaterally. One is to try to encourage less demand — and that is part of the process of economic integration. Once companies have operations on both sides of the border, they don't want the flow of goods and services disrupted by these types of measures — witness, for example, the North American auto industry. I prefer a policy that seeks to reduce demand for protection rather than reduce the supply of protection measures.

The second way to deal with abuse of contingent protection laws is through WTO litigation. To date, there have been a score of cases against the United States alleging that particular procedures in the calculation of dumping or definition of industry, or some other technical aspect of the dumping, countervail or injury investigation, violated WTO obligations. In several cases, WTO panels have ruled against the United States. Compliance with these rulings has resulted in incremental changes in the way the US antidumping law is implemented. That, I think, is a useful way of continuing. While some of the panel rulings have elicited very sharp critiques from members of the US Congress, the response has not yet been so explosive as to politically compel the members to take what they would call remedial action.

One last point: Canadian proposals tend to have what I would call a bilateral bias. In some instances, US-Canada or US-Mexico initiatives may suffice. But for the new security-related problems, I think the initiatives have to be trilateral. There are aspects where much more emphasis will be on the bilateral US-Canada or the bilateral US-Mexico, but politics in the United States Congress argue that if you want to get something significant done, you need the support of a broader constituency base. From a US perspective, without support from the Hispanic caucus, it's going to be very difficult to get the majorities in the Congress to push through even incremental reforms — much less any deeper rule-making or institutional initiatives.

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The Search for North American Institutions

Introduction

CANADIANS HAVE A PROUD HISTORY OF BUILDING INTERNATIONAL INSTITUTIONS. THROUGH enlightened statecraft, we have played key roles in establishing and maintaining many of the international organizations in the world today. I was privileged to be the senior government official responsible for drafting and negotiating the Canadian proposal to establish the World Trade Organization during the Uruguay Round of multilateral trade negotiations. This proposal, made initially by Canada and supported by the European Community and Mexico in 1990, was not part of the original mandate of the Uruguay Round and met with a negative initial response from other countries. The United States was opposed to the idea and only lifted its reservation in the very last minute of the Uruguay Round negotiations in November 1993. The lesson that I learned from that experience is that it is important to develop "big ideas" and to promote those ideas with passion, energy and commitment. It is true of all "big ideas" that they will not likely be immediately popular or marketable. One often hears the criticism, "The United States will never agree to this." While it is important to be realistic, "big ideas" need to be discussed and debated, and one should not be dissuaded from raising them just because they do not appear to be readily acceptable.

I agree with the growing number of commentators[1] that we need a bold new vision, strategy or roadmap for North America in this twenty-first century. The former Canadian ambassador to the United States, Allan Gotlieb, has perhaps characterized the objective best as "a North American community of law, which substitutes the rule of law for political direction, arbitrary and discriminatory action...uniquely designed to meet the North American political context." The North American Free Trade Agreement (NAFTA) has been working remarkably

well; it has done and is doing what it was intended to do. However, NAFTA was an imperfect bargain. Many of the difficult issues among the three parties were not addressed or were left to the multilateral trade negotiations because they were not capable of being resolved within North America. Much has changed since NAFTA came into effect 10 years ago. Predictably, the flow of trade in goods between each of the countries has grown, in some cases, exponentially. What is interesting, though, is that much of the trade between Canada and the United States is now intracompany trade, demonstrating that there has been significant integration of industries and firms across the borders. Surprisingly, the flow of investment and services has not increased as dramatically as trade in goods. While NAFTA has led to greater exports, it has not been the most important factor influencing the economy in North America. Globalization has had a much more significant influence on the behaviour of firms and investors than NAFTA.

I have two key thoughts and one admonition to add to the "whither North America" debate. First, the admonition: it is important to develop a comprehensive, principled proposal that makes sense from a policy point of view, and then think about how to package and sell the proposal later. So often, we are discouraged from developing new policy ideas because of the fear that someone — either another country or the provinces or an interest group — may oppose it. Government officials have been reluctant to develop new strategic policy ideas because they are afraid of potential opposition to those ideas. Canadian trade policy, the past few years, has been characterized by a largely defensive or reactive approach rather than a comprehensive, offensive strategy. In previous trade negotiations, Canada was a leader in developing key proposals based on principles, in promoting and negotiating these proposals with other countries, all the while acting on a strategy designed to sell the results at home. It is good to be pragmatic and realistic, but at the same time it is important to have a strategic plan devised to promote Canada's best interests.

My two thoughts are the following:

1. We need to design new governance structures for the North American economy. NAFTA lacks effective institutions and dispute-settlement mechanisms to manage the relationship and resolve disputes.
2. This new "community of law" will exist within the multilateral trade and economic system. We need to think about how this regional arrangement fits within the broader, multilateral context, including its relationship with the WTO.

The Need for Governance Structures

NAFTA CONSISTS OF A LOT OF RULES, FAR MORE DETAILED RULES THAN THE TREATIES constituting the European Union or other regional agreements. On the other hand, NAFTA has a very weak, fragmented institutional structure. It has, in the words of one negotiator, a "constellation" of at least 13 different dispute-settlement mechanisms. NAFTA does not have effective decision-making mechanisms. There is the Free Trade Commission, made up of ministers who meet at least quarterly, but there is no council of ministers or parliament devoted to North America as such. The Free Trade Commission, moreover, is not supported by a common secretariat. In fact, there is no standing bureaucracy responsible for developing policy ideas and managing the relationship. Instead, there are separate secretariats in each country that act as registries for chapter 19 and chapter 20 panels (but curiously not for chapter 11 tribunals).

The general state-to-state dispute-settlement mechanism in chapter 20 of NAFTA does not function well. The parties have never agreed on a roster of panellists. The United States tends to block or delay the establishment of panels as well as the implementation of panel rulings (as, for example, in the *Cross-Border Trucking* case). As a result, all three parties have taken their complaints against each other to the WTO rather than use chapter 20 of NAFTA.

NAFTA was deliberately designed to not have central institutions or a unified dispute-settlement system because the negotiators thought it would be best to allow maximum flexibility and creativity, relying on diplomacy to further develop the rules and resolve disputes. In retrospect, the negotiators were perhaps a bit naïve. They assumed that having extensive, detailed rules would result in parties automatically complying with those rules. And, as diplomats themselves, they thought that the more opportunities they provided for informal consultations among specialized officials responsible for the same subject, the more problems could be avoided or resolved early. In fact, this has not happened. While there have been many working groups and committees that have met and continue to meet on specific issues, there is often no incentive for these groups to come to decisions or to agree on a course of action.

It was a fundamental mistake to assume that having a detailed set of rules would change the nature of the relationship, would guarantee compliance by the

parties and provide greater security and predictability for North American businesses. Despite its myriad of rules, NAFTA is not a rules-based system, it remains very much a power-based system in which the three parties have influence commensurate with their relative economic and political clout.

The Europeans, when they established their common market, also established common institutions to govern their relationship. These institutions have evolved over time to meet the changing realities. Jean Monnet, the father of European integration, is well known for his prescient words, "Nothing is possible without men; nothing is lasting without institutions." NAFTA has the Free Trade Commission, made up of the ministers of the three parties. It has no president, no commission or secretariat, no parliament and no court. Other authors in this volume have emphasized that North America is not Europe and that it would not be wise to transpose the European model onto this continent. Among the differences, the overwhelming one is the tremendous asymmetry of size and power among the three NAFTA parties as compared with the original member states of the European Community. In North America, we have one "hyperpower" or "hegemon," the United States; one middling power with waning international influence, Canada; and one developing country, Mexico. This is a very different grouping from the original or present composition of the European Union.

Sitting, as we do, next to the giant, it is understandable why so many Canadians are preoccupied with concerns about sovereignty and maintaining regulatory autonomy over policy decisions. Americans, for some inexplicable reason, are also overly concerned with maintaining their sovereignty. Canadians have these concerns because we are worried about invasion of our public policy autonomy by the Americans. Americans, on the other hand, have a deeply rooted cultural view that theirs is the most powerful country on the planet and that they do not need to cede sovereignty to any international body or group. Whereas we fear takeover by the Americans, they fear internationalism in all of its forms. The Europeans, on the other hand, do not fear giving up regulatory authority to supranational authorities, rather, they speak enthusiastically about the concept of "pooling" sovereignty. They understand that, by working together in a common enterprise, they can create an entity that is greater than the sum of its parts.

Even the proponents of deeper economic integration are decidedly negative on the subject of developing common North American institutions. The reasons they cite include the fear of ceding sovereignty to supranational authorities,

which, they say, is prevalent in all three countries. Also, they raise the specter of possible challenges to the constitutionality of supranational mechanisms, without exploring the legal merits of such actions. It is difficult, however, to conceive of developing a "community of North Americans" or a customs union *without* institutions to manage the relationship. Following the NAFTA design, the proponents of further integration advocate developing more rules, but would stop short of creating effective mechanisms for making decisions and resolving disputes.

There are good reasons why we should not ignore the institutional side of the equation in building a better North America. We need common institutions that see it as their mandate to develop policies, take decisions and resolve disputes in the best interests of North America and North Americans. This is a different focus from that of the numerous working groups now functioning under NAFTA. Those working groups are staffed by officials who report to the governments of the NAFTA parties. The allegiance and duty of those officials is to their governments, not to the North American community or the community of North Americans. Perspective and loyalty are important. We need to develop institutions within North America composed of officials who perceive their responsibilities as to the community of North Americans, rather than to individual national governments.

Why is this essential? North America will never become more than the sum of its constituent parts, and will remain fundamentally a power-based system, until and unless there are common institutions to foster and promote a North American community based on the rule of law. Institutions are necessary to guarantee compliance with the rules and to provide mechanisms for ongoing policy- and decision-making. Security of market access and predictability of rules and administrative procedures are not possible — as has been graphically demonstrated in disputes such as those over softwood lumber, pork and beef — without common institutions and authoritative, effective dispute-settlement mechanisms. Independent and impartial adjudicators are necessary for a fair, transparent and effective dispute-settlement mechanism.

Dispute-settlement mechanisms should be designed to provide consistency and coherence over time. The current NAFTA constellation of dispute-settlement procedures is characterized by its ad hoc nature and its flexibility. However, only systems that render high quality, consistent and coherent decisions will garner the credibility and the respect necessary to encourage compliance by the parties. There is a compliance problem with the NAFTA dispute-settlement

mechanisms, in particular chapters 19 and 20. The United States does not appear to have the same respect for the dispute-settlement panels of NAFTA that it does for the panels and the Appellate Body of the WTO. I would argue that NAFTA exerts less "compliance pull" on its parties than the WTO does on its members. This topic is worthy of exploration in another paper.

In thinking of a bold, new vision for North America, we should also think about the architecture needed to manage and protect this "community of law." While there are lessons we can draw from the European experience, it is clear that the European model will not work in North America. Instead, we need to develop a unique North American institutional architecture based on our cultures and traditions. We ignore this difficult and challenging task at our peril.

"Direct Effect" Is Not the Solution

WE CANNOT SIMPLY GET AROUND OUR APPARENT AVERSION TO SUPRANATIONAL institutions by adopting the principle of "direct effect" for NAFTA rules, letting domestic courts, rather than common institutions, enforce its rules. This is a recipe for disaster. The function of the courts is very different from that of policy-making and rule-making bodies, such as bureaucracies and legislatures. Courts should not be thrust into the role of making policies and law. Unfortunately, this can happen when the policy- and rule-making institutions either do not exist or are dysfunctional. One of the major problems is that NAFTA does not have common political institutions. If the domestic courts were to be entrusted with the power to interpret and apply the rules of NAFTA, there would be no checks and balances, because there are no political institutions capable of correcting the courts' actions. In the European Union, there are common political institutions — the European Commission, the Council of Ministers, and the European Parliament — that provide the checks and balances against the power of the courts. The European Court of Justice also is available to check the consistency and coherence of decisions of the national courts on matters of European economic law.

In continental European countries, there is a constitutional tradition of treaties being accepted directly as domestic law. There is no such tradition in Canada and the United States, for the most part. The provisions of international agreements must be transformed into domestic law by an act of "transformation." In Mexico, there are also

steps that the executive and the legislature must take in order to implement the rules of a treaty. Thus, judges in domestic courts in Canada and the United States generally have not had experience with treaties having direct effect as domestic law. Moreover, judges in domestic courts do not have the requisite training and experience to deal with questions of interpretation of NAFTA or international agreements; they are not experts in public international law, nor do they have the culture or the institutional perspective that is required to properly administer NAFTA's rules. Their perspective and their legal training is, understandably, in domestic law, not in international law or in interpreting and applying treaties. There is a world of difference between domestic and international law. It would be a mistake of significant consequence to give the authority to decide important matters under NAFTA to domestic courts; they do not have the training, the culture or the sensitivity to properly interpret and apply its rules.

North American Institutions

In my view, we must continue the very difficult search for appropriate North American institutions that are designed to administer and interpret the rules of this unique community. What kinds of institutions should we consider?

As a priority, we should address the problems with the existing dispute-settlement mechanisms. NAFTA chapter 11 tribunals have come under a great deal of criticism. Each tribunal is established on an ad hoc basis, under different rules and procedures depending upon which NAFTA party is the responding country. Canada is not a party to the ICSID, so in cases against Canada, the United Nations Commission on International Trade Law (UNCITRAL) rules and procedures are usually invoked. The United States is a party to the International Centre for the Settlement of International Investment Disputes (ICSID), so when it is the responding party, the ICSID mechanism is used. For cases against Mexico, the ICSID Additional Facility is typically used. Thus, for each of the three parties, different procedures are used in chapter 11 cases. Needless to say, there is no common secretariat that services the chapter 11 tribunals. As a result, chapter 11 tribunals are ad hoc and have, in the past, made inconsistent decisions. Moreover, there is a perception that the chapter 11 tribunals are not independent and impartial, because the arbitrators appointed to these tribunals are selected from the very small pool of counsel who represent investors and governments in the same types

of investment arbitration disputes. All three NAFTA parties have queried whether an appellate mechanism should be established to review the awards of chapter 11 tribunals. In fact, the United States has included provisions in its recent free trade agreements with Singapore and Chile that allow for the possibility of establishing an appellate mechanism for investment arbitration tribunals.

In antidumping and countervailing-duty cases, chapter 19 panels replace domestic courts in conducting judicial reviews of the final determinations of domestic authorities. There are no common NAFTA rules on antidumping and countervail, rather, the chapter 19 panels are required to apply the domestic law of the importing country, including the standard of review applicable in that country. There is no commonality in the rules that are applied in chapter 19 disputes, apart from the fact that the antidumping and countervailing-duty legislation and practices of all three countries must be consistent with their obligations under the WTO agreements. However, only the WTO panels and the Appellate Body may examine whether or not a NAFTA party's legislation and practices are consistent with the WTO. A NAFTA chapter 19 panel is restricted to examining whether the investigation and determination in question is consistent with the domestic law of the importing country.

An interesting idea was raised in the Canada-US free trade negotiations that is worth considering again at this point in the evolution of North America. The idea was to establish a bi-national agency to conduct the antidumping and countervailing-duty investigations, especially the injury investigations, and to make the requisite determinations. I would go further and recommend that the rules and procedures applied by such a joint agency should be the rules and procedures of the WTO agreements on antidumping and on subsidies and countervailing measures, not American or Canadian or Mexican domestic law. This would have the advantage of having a common agency carry out the analysis required to investigate and make the injury determinations, and of applying WTO law rather than domestic law in making these determinations. By entrusting these investigations and determinations to a joint agency, the tendency for arbitrary, unfair decisions by domestic investigative authorities would be eliminated.

Rather than reforming each of the chapter 11 and chapter 19 dispute-settlement mechanisms separately and continuing with many of their imperfections, it would be worth considering establishing a joint commission with different chambers composed of experts in that field of law, for example, an investment chamber, a trade-remedy chamber, a trade-in-services chamber and a trade-in-goods chamber.

We could also envision creating a common NAFTA secretariat, which could service the joint commission on dispute settlement and the council of ministers. Officials in this secretariat could also be responsible for furthering the work on developing greater harmonization or mutual recognition of technical regulations and standards and licensing requirements, for example. Michael Hart has also recommended, based on the idea discussed in the Canada-US free trade negotiations, that a common secretariat could do the staff analysis in antidumping and countervailing-duty investigations. I would go further, as proposed above, and recommend that the determinations be made by the joint commission, supported by the secretariat staff. There are many other tasks and responsibilities that could be assigned to such a secretariat. It could be the repository for notifications of all types under the agreement, thus encouraging greater transparency and providing a central, independent and neutral place where information can be made available.

Common political and adjudicative institutions are necessary at this stage in the evolution of the North American community of law to ensure fairness, due process, transparency, consistency and coherence in the administration of the agreement. They are also needed to develop greater "compliance pull" of the rules, especially with the superpower, the United States. These institutions cannot be built in a day, and it will not be easy to convince the United States, in particular, of their importance. However, in thinking of the bold new vision of North America, we must also take the time to carefully design the institutions that are needed to oversee this community of law and ensure its coherence and long-term viability.

Relationship with the Multilateral System

One thing that is often forgotten is that NAFTA exists within the multilateral trading system. All three parties are members of the WTO. It is noteworthy that in the WTO, the NAFTA parties never act as a bloc or a group. Rather, whether it is in negotiations or in dispute settlement, each country acts independently, pursuing its own perceived best interests.

This stands in stark contrast to the European Union, which itself is a member of the WTO and is represented in the WTO by the European Commission. While the member states of the European Union are also members of the WTO,

they always act jointly and speak with one voice — that of the European Commission — in the WTO. Other countries, not necessarily parties to a regional agreement, have organized themselves into groups that present unified positions on issues. Examples include the African group and the ASEAN group today, as well as the Latin American group, which was active during the Uruguay Round.

The fact that Canada, the United States and Mexico do not take common positions in the WTO says a lot about the coherence of NAFTA as an economic entity. Observing the three countries from Geneva, one would not be immediately aware that NAFTA existed. This was most pronounced, and surprising, at the end of the Uruguay Round, immediately after NAFTA had been concluded. The positions taken by Mexico on some issues at that time did not seem to have been influenced by its NAFTA commitments.

There are two important points to emphasize in discussing the relationship between NAFTA or the North American community of law and the WTO. The first is that there will always be important issues that can only be negotiated and important disputes that can only be resolved in the multilateral system. That is the political reality. The second is that the proposals for deepening the economic relationship in North America must be examined to see if they are consistent with the WTO obligations of the three countries, in particular, with article XXIV of the GATT and article V of the General Agreement on Trade in Services (GATS). That is the legal reality.

NAFTA does not substantively address some of the most important issues in the trading system, for example, subsidies, agriculture and trade remedies. Agriculture was left to the Uruguay Round negotiators because the United States would not even begin to discuss modifying its own agricultural regime without the European Union and others at the table. Similarly, the United States is not willing to consider amending the trade remedy agreements — antidumping, countervail and safeguards — without the Europeans and other members of the WTO involved. Even then, it is very difficult for the United States to discuss the possibility of changing its antidumping laws. Canada and Mexico clearly do not have enough leverage on these difficult issues. Thus, it is only in the WTO that these issues can be dealt with — either in negotiations or in dispute settlement.

This is also part of the reason why NAFTA has not resolved our differences over the application by the United States of antidumping and countervailing duties in cases such as *Softwood Lumber*, *Live Swine and Pork* and *Wheat*. The substantive

rules that apply are those in the WTO agreements; NAFTA did not change those rules. It only established a binational judicial review mechanism, which replaces judicial review by the courts. To challenge whether the United States has acted consistently with the rules on antidumping and countervail, Canada has to bring a complaint before the WTO. If it wants to challenge whether the US agency has acted consistently with US law, Canada can bring a challenge under chapter 19 of NAFTA. While both types of actions can be pursued at the same time, the remedies in each system are different. This provides some important strategic challenges and opportunities in antidumping and countervailing-duty cases.

Article XXIV of the GATT was drafted almost 60 years ago. It is ambiguous and, until recently, has received little attention in dispute-settlement cases. As a result of an amendment to article XXIV in the Uruguay Round, dispute-settlement cases involving allegations of violation of the obligations relating to free trade areas and customs unions can be brought. Previously, there was some opinion that questions relating to the operation of customs unions and free trade agreements, and their consistency or inconsistency with the GATT, could only be dealt with in the Committee on Regional Trade Agreements or another committee or council in the GATT/WTO. That matter has been resolved in some recent cases, and it is clear that WTO panels and the Appellate Body can deal with questions relating to the consistency of a free trade agreement or a customs union with the provisions of article XXIV of the GATT and article V of the GATS. Furthermore, while there is a review process for regional agreements in the WTO Committee on Regional Trade Agreements, no free trade agreement or customs union has ever been formally approved or disapproved by the GATT or the WTO. This is a delicate area for most WTO members, given the significant number of regional trade arrangements in existence or under negotiation in the world today.

There are two fundamental principles that should be kept in mind when devising proposals for deepening economic integration in North America. First, a legal free trade agreement under the WTO must eliminate “duties and other restrictive regulations of commerce” on “substantially all the trade” among the parties to that agreement. Second, the regional agreement must not result in barriers to trade for WTO members not parties to the regional agreement that are higher or more restrictive than those existing prior to the formation of that agreement. Proposals limited to specific sectors especially call for scrutiny under the microscopes of article XXIV of the GATT and article V of the GATS.

Conclusion

NOTICEABLY ABSENT IN THE PROPOSALS TO CREATE A ROADMAP OR A BLUEPRINT FOR deeper economic integration in North America is any real discussion of what common institutions will be needed for administration and dispute resolution. There is an aversion to this topic because it is thought to be too politically difficult — it raises fears about ceding sovereignty to supranational bodies and threats of constitutional challenges. Proponents are, however, keen to recommend adding new layers of rules on top of the thick set provided already by NAFTA and other bilateral and trilateral initiatives. They see nothing wrong with continuing the practice of setting up more ad hoc bilateral and trilateral working groups and committees of national government officials to deal with specific issues as they arise.

Even with the multitude of rules presently governing the North American relationship, there are some high-profile disputes that deny market access and threaten the viability of certain industries. Why has NAFTA been unable to guarantee access to the American market for Canadian softwood lumber, pork and beef? While it may be true that there are not enough rules, or the right kinds of rules, especially on the application of antidumping and countervailing duties, a more significant problem is that NAFTA does not, and cannot, ensure that the domestic authorities in each country will always act in a fair, transparent and consistent manner. There are no common institutions to oversee the relationship, develop policy and resolve disputes. It is difficult to conceive of how there can be further economic integration without developing stronger, more effective institutions.

In order to move toward a rules-based system, especially in a relationship characterized by significant asymmetries of power, common institutions are needed to facilitate joint decision-making, to provide legal authority and legitimacy for the rulings of the dispute-settlement panels, and to ensure that all parties, regardless of their size and influence, abide by the rules. Institutions and dispute-settlement mechanisms are essential parts of the architecture of any regional agreement. An agreement is only a collection of rules — it is not a rules-based system — without institutions to administer and enforce those rules. Serious thought must be given to these difficult issues in developing a bold new vision for North America.

Notes

1 Including Wendy Dobson, the Canadian Council of Chief Executives, Tom Courchene, Hugh Segal, Michael Hart, Bill Dymond, Daniel Schwanen and Robert Pastor.

A Trilateral Approach to North American Integration

A RICH AND INTELLECTUALLY STIMULATING DEBATE IS TAKING PLACE IN CANADA ABOUT North American integration. It is unfortunate, but also symptomatic, that this debate is not being replicated in the United States or in Mexico. With its large, diversified economy and its status as a superpower, the United States can afford to be indifferent and ambivalent about integration in North America, except when a crisis that directly affects its interests unfolds. In Mexico, discussions about deepening North American integration have been thus relegated to a rather small group of academics and public officials, and have only been given attention publicly because opponents of NAFTA, particularly from the agricultural sector, argue that the Agreement has been unable to address Mexico's unemployment and lack of economic growth.

This paper has two parts. The first discusses the basic assumptions behind the two-speed integration model for North America, which is favoured in Canada. In the second, I offer four reasons why Canada and Mexico should launch a proactive and cooperative strategy to develop a common, trilateral agenda for deepening integration that should be based not on proposals of a European type of integration, but rather on making progress in NAFTA's unfinished business agenda and on strengthening its existing trilateral institutions.

Challenging the Two-Track Integration Model

A BROAD CONSENSUS NOW EXISTS IN CANADA THAT IT IS IN THIS COUNTRY'S INTEREST TO elaborate a two-track integration model, that is, that Canada should favour a

bilateral rather than a trilateral agenda to foster deeper North American integration. While the views may differ in the specific proposals, in general they all suggest that Canada and Mexico should proceed together to negotiate further integration with the United States. The argument is based on two commonly accepted assumptions.

The first assumption is that North America is a set of three relationships, two robust (United States-Canada and Mexico-United States) and one underdeveloped (Canada-Mexico). As a consequence, the trilateral agenda is seen as quite limited, and a trilateral approach to deepen integration is perceived as unjustified.

The second assumption of the two-track integration model is the deep-rooted Canadian fear of a "race to the bottom" in the face of the existing development asymmetries between Mexico and its two northern partners. In this view trilateral approaches or institutions are not only not warranted (because priorities are different) but could actually complicate relations between Canada and the United States, particularly on border and immigration issues. Based on the present realities of North American integration, I contend that the logic of these two fundamental assumptions is flawed. It is built on both the misleading notion that some kind of symmetry is required for an integrated North America and the pre-NAFTA perception of Mexico as a threat to North American standards.

The Underdeveloped Canada-Mexico Relationship

While developing a Canada-Mexico relationship is desirable, it will always look small if compared to any of the other two bilateral relationships in North America. Geography and the existing asymmetries in terms of economic size of the three North American countries irremediably dictate this. Therefore, regardless of what Canada and Mexico do individually or jointly, at least from an economic perspective, the United States will always have the advantage of having a huge market and of having such a market located between its two NAFTA partners. In other words, the US market will always be the hub of two strong bilateral economic relationships. Because of these basic structural factors, the Canada-Mexico relationship will never be as important as any of the other two bilateral relationships. The corollary is that making a trilateral agenda dependent on the expectation that someday the Canada-Mexico relationship is going to be as relevant as the other two is tantamount to rejecting outright the goal of deepening integration on a trilateral basis.

That Canada-Mexico relations are underdeveloped does not signify, however, that these countries are not already part of an integrated North American economy.

For the existence of symmetrical relations is neither a necessary nor a sufficient condition for integration to unfold. Indeed, as some studies have shown, unequal integration and regional agglomeration are natural conditions of not only transnational but also national processes of economic integration. The North American auto industry illustrates this point well. The fact that the bulk of trade and investment in that industry flows generally from the hub (the United States) to the spokes does not mean that a North American system of auto production is not in place. The logic of just-in-time production makes it "irrational" for, and the geography of the United States will simply not allow, trade linkages between Mexico and Canada to develop as much as those between Canada and the United States or Mexico and the United States. Nonetheless, if a stamping plant in the United States goes on strike, production operations stop in Mexico and Canada. A situation like this happened in 1998, when a strike in two GM stamping plants in Flint, Michigan, forced the company to close 27 assembly plants throughout North America. Thus, even if auto trade between Canada and Mexico is still smaller than that between the United States and either of its two North American partners, a true regional, transnational system of auto production, where each country specializes in the production of certain vehicles and parts, exists in North America. Therefore what matters is not that all parts are integrated with each other in a symmetrical way, but rather that a common set of rules regulates the economic space within which the integrated members interact.

Despite disparities in their sizes and levels of development, Canada, the US and Mexico agreed through NAFTA to establish a comprehensive framework for liberalization by which all three countries became subject to some basic, common principles, such as national treatment for goods and capital. They also agreed to proceed at different speeds, so liberalization is applied at different levels. It is not a coincidence that the lists of sectors pending reforms for more liberalization or deregulation are virtually the same in Mexico, Canada and even the United States. What is more, the asymmetries between Mexico and Canada were even more pronounced 10 years ago, and this did not prevent the three countries from enacting NAFTA and agreeing on such a common set of rules.

Mexico: A North American Country

The underlying Canadian fear that, if a common trilateral approach is undertaken, the existing asymmetries in North America would lead to a "race to the bottom," particularly in economic regulations or social standards, is no longer justified. While Mexico

is still a developing country (its per capita income is much lower than that of Canada or the United States, and the distribution of income is very unequal), NAFTA has transformed Mexico in a very significant way, not only from an economic perspective but also politically and even in the way Mexicans identify their place in the world.

Starting with NAFTA, Mexico looked at North American integration not as another foreign policy issue but rather as an intrinsic and fundamental pillar of a new national economic development strategy. It was a way not only to commit internationally to the continuation of trade liberalization but also to anchor the reforms of economic modernization that put an end to statism and the import-substitution model of development. NAFTA was then a key instrument designed by the Mexican government to present clear rules offering certainty and security to producers, exporters, importers and investors from the region. By virtue of NAFTA, Mexico also adopted major pieces of legislation regarding intellectual property rights, foreign direct investment, competition law and even environmental regulations, which were North American by definition. Furthermore, today, in Mexico just as in Canada, there are many examples of how the economic rationale for integration has actually fostered the adoption of better regulations, most often US regulations (which, as Hart argues, "are international benchmarks of minimal performance and best international practice"), thereby enhancing the quality of life for Mexicans.

NAFTA has also had an important symbolic value, projecting both a radical rupture with Mexico's past and a vision of a modern country ready to face the challenges of globalization. Nobody can question that NAFTA played a role, although indirect, in Mexico's transition toward a liberal democracy. Beyond that, with NAFTA, Mexico tacitly accepted having a common future with its two northern neighbours. And, although concerns remain about the erosion of sovereignty due to closer relations with the United States, what is more often heard in Mexican political circles today is a pragmatic approach to sovereignty, where autonomous power to decide from a national perspective is a means to an end and not an end in itself.

Different Priorities under a Common North American Framework

Working toward a common framework of economic rules in North America does not mean that Canada's and Mexico's priorities should be identical, or that the speed at which they commit to deeper levels of integration with the United States should be the same, or even that they should have a common agenda for negotiating all issues with the United States. For instance, it is understandable that pursuing the current Mexican

agenda for a migration agreement with the United States is not in Canada's interest and less so in the post-September 11 context. Many Canadians have expressed the fear that a common, trilateral border agreement might entail a more militarized, Mexican-style border with the United States. But having different priorities should not prevent Canadians from taking a trilateral approach to deepening integration in other issues, particularly those that remain as NAFTA's unfinished business. Some immigration issues could be best addressed from a trilateral perspective, such as the notion of a NAFTA visa for business people and professionals. Canada and the United States could also offer more scholarships to Mexicans to be trained in trades and professions that are highly in demand in the United States and Canada.

Relative Gains Matter

I would argue that if Canada and Mexico decide to follow a two-track approach, the logic of relative gains will nonetheless foster North American integration, but in a way that favours the United States more than it does its smaller partners. Ten years ago, defensive considerations motivated Canada to participate in the NAFTA negotiations. With NAFTA, Mexico and Canada overcame the hub-and-spoke rationale that gives the United States the advantage of exploiting the benefits of not only being the largest economy placed in the middle of its two partners, but also dealing with them separately. The logic of bilateralism could lead Canada and Mexico to react competitively against each other for getting US attention, and they would then lose the opportunity to lead the way in determining the integration agenda in North America.

North American Integration: Do We Need a European Type of Integration?

I AGREE WITH ROBERT WOLFE (FOLIO 6) THAT WE SHOULD NOT BE THINKING OF grandiose schemes nor of creating new North American institutions, even the kinds of "light" institutions proposed by Robert Pastor, such as a trade court or a North American parliament. Although some authors contend that international institutions are a means to reduce the powerful temptation to act unilaterally, as Wolfe argues, if international institutions do reflect the actual distribution of

power, building such institutions in North America would shift the centre of decision-making to Washington, DC.

Canada's and Mexico's interests are better served by maintaining a pluralistic approach where not one single, grandiose scheme tries to regulate everything. I do suggest, however, that a better understanding is required of that pluralistic reality and the silent march of economic, social and cultural integration that is already taking place in North America in spite of what governments do. In order to do so, we need to move away from traditional perspectives of focusing our analyses and research on trade and investment flows or state-to-state interactions, and we should back away from insisting on replicating the European model of integration in North America. After all, as a number of analysts have already demonstrated, today the levels of economic integration, as measured by trade flows, are much higher in North America than in Europe. And we have achieved this without the burden of supranational bureaucratic institutions. Some hints at the implications of this silent integration have been ably discussed in the papers by Hart (folio 2) and Wolfe (folio 6), but we should account more for the transnational or nongovernmental linkages as well as the institutional linkages at different levels that are taking place everyday in North America.

My suggestion, however, is not a recipe for government inaction, as governmental leadership from Mexico and Canada is essential in order to influence the integration agenda in North America. Like Daniel Schwanen (folio 4), I believe that we cannot simply accept a day-to-day approach and an ad hoc response to whatever crisis may arise. I also concur with his idea that security, economic and even social issues, such as migration, should be treated and addressed on their own merits and not as part of a “big bargain” or “big idea.” While no new comprehensive agreement is needed, I would argue that we still need a political initiative to renew the commitments made with NAFTA. In other words, NAFTA should not be the end of a process, but the beginning of one. It should become the core basis of a trilateral framework for deepening integration, for at least four reasons.

First, political support for NAFTA and its associated model of development is fading in Mexico. While Wolfe contends that Canada does not have much to gain from deeper North American integration, and Hart states that NAFTA is now largely of historical interest, the political and economic value of that agreement continues to be quite significant for Mexico. Today, the popularity of this

agreement is low among the Mexican public, and press reports about protectionist measures in the United States (the American refusal to comply with its NAFTA commitments to open the border to Mexican trucks and to remove agricultural subsidies, for instance) have not helped. More and more, the prevalent view in Mexico is that NAFTA has not worked as a model of development. Its detractors argue that trade and investment figures hide the treaty's negative effects on inequality and that the winning sectors of free trade, like the electrical, electronics and auto industries — which jointly represent almost half of Mexico's total exports to the United States and which have experienced the country's highest growth rates — are dominated by multinational corporations that tend to sacrifice workers' wages and benefits to maintain their international competitiveness. Even President Fox has stated that NAFTA is not sufficient to either deal with Mexico's development problems or create enough jobs to stop the continual stream of Mexican workers across the northern border. This is the view underlying his proposal for a European type of integration for North America.

In this political context, NAFTA is at risk of becoming history if no political effort is made to revitalize its unfinished agenda. As Sidney Weintraub once argued, NAFTA can become a model of strong integration under which the full range of its potential benefits will be obtained, or it can turn into just another example of weak integration whose purpose is largely to bestow preferences on member countries without regard to either the general welfare or the welfare of nonmember countries. We therefore need to take NAFTA one step forward, to renew our commitment to achieve the modernization that is still required in Mexico to revamp economic growth and regain international competitiveness. To be sure, this entails working on several domestic fronts. But, as with NAFTA, deepening North American integration could become a driving force, an impetus to undertake pending domestic reforms in fiscal policy and other areas such as energy and labour.

Second, NAFTA continues to be the only politically viable basis for deepening integration in the United States. After witnessing the fierce battle that had to be fought in order to pass it through the US Congress, one can easily understand that NAFTA delimits what is possible in the US political system regarding North American integration. But even this political space may have been reduced. While it has been a decade since NAFTA came into effect, it does not have staunch, unwavering support among the US public, and its supporters have not launched any positive, proactive campaign to extol NAFTA's success. Today, after the tragic events of

September 11, it is clear that it would be impossible to sell President Fox's proposal for a European model of integration in the US Congress, even if such a model is desirable to solve Mexico's problems of development. Rather than a new agreement, an initiative that looks at revamping NAFTA from an administrative point of view seems to be within the realm of the possible in the present US political context.

Third, as Wolfe suggests (folio 6), we need to focus more attention on existing institutions. We know very little about the many institutions that were created by NAFTA — the committees and working groups, as well as the Commission for Environmental Cooperation (CEC) and the Commission for Labour Cooperation (CLC). And here I do not mean studying them from a centralist, positivist and monist point of view, but rather as political and bureaucratic spaces where not only state agencies interact but also nongovernmental groups, including business and nonprofit organizations. For instance, we have paid very little attention to how the CEC, which is the only formal trilateral organization in North America, operates. We need to explain why it has been dominated by conflict rather than cooperation among the three governments, in spite of its tremendous potential for promoting cooperation by using an infrastructure and know-how already developed for the creation of a truly trinational North American environmental community.

And finally, a fourth factor relates to the fact that a North American agenda does exist. Before September 11, which created a sense of urgency in thinking about strategies to keep the border with the United States open, Mexico and Canada shared a list of issues that stood as pending in the trilateral deregulation agenda, including transportation, electricity, telecommunications, financial services and agriculture. In both countries there were also concerns for their overall economic performance vis-à-vis the United States (in Canada, because it lags behind the United States in the new knowledge-based economy and because of its weak foreign direct investment record; in Mexico, for the lack of jobs generated by the new export boom). In Mexico and Canada worries had been expressed about border problems, the cost of rules of origin and the arbitrary use of US antidumping and countervailing-duties legislation. I think Hart's proposal (folio 2) is a pretty good framework for moving forward, but from a trilateral and not a bilateral perspective, as he suggests. I particularly like his sector/industry approach for dispute settlement, and I think this could also be implemented for the establishment of a customs union. The framework that applies to computer industry within NAFTA provides a good example.

Getting the United States Interested: The Main Challenge

I AGREE WITH ROBERT WOLFE'S PLURALISTIC OUTLOOK WHERE CANADA SEES INTEGRATION with the United States as a necessary evil for ensuring economic growth but strives to maintain its national sovereignty (folio 6).The same applies to Mexico. Mexico and Canada are normally so busy fearing the consequences of sharing a geographic space with such a giant that they fail to realize the deep weight that political sovereignty carries in the United States, particularly in the US Congress. September 11 has only aggravated this situation. The real challenge is how to get US attention and interest in constructing a framework for deeper integration. Since the United States will not launch an agenda on its own accord for a more integrated North America, for any progress to occur, Mexico and Canada will need to strategically devise a joint strategy to engage their common neighbour in areas where the three have interests at stake. NAFTA, its institutions and the pending agenda for further trilateral liberalization are the place to start.

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Thinking North America
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Folio 1

Thinking North America: Pathways and Prospects
Thomas J. Courchene
The European Union Perspective
Peter Leslie
An American Perspective
Jeffrey J. Schott
The Search for North American Institutions
Debra P. Steger
A Trilateral Approach to North American Integration
Ma Isabel Studer Noguez

Folio 2

A New Accommodation with the United States: The Trade and Economic Dimension
Michael Hart

Folio 3

The Role of Sub-National Governments in North American Integration
Earl H. Fry
Comments by *Gerald W. Boychuk*

Folio 4

Deeper, Broader: A Roadmap for a Treaty of North America
Daniel Schwanen

Folio 5

Thinking North American Environmental Management
Scott Vaughan
Trilateralism versus Regionalism in North American Environmental Management: Comments
Debora L.VanNijnatten

Folio 6

FTA at 15, NAFTA at 10: A Canadian Perspective on North American Integration
Thomas J. Courchene
Giving Direct Effect to NAFTA: Analysis of Issues
Armand de Mestral and Jan Winter
Where's the Beef? Law, Institutions and the Canada-US Border
Robert Wolfe

Folio 7

The Long-Run Determinants of Deep/Political Canada-US Integration
John N. McDougall
North American Citizenship: Possibilities and Limits
Jennifer M. Welsh

Folio 8

Canada and the Americas: Trading beyond the Neighbourhood
Maryse Robert
Hemispheric Integration: Implications for North America
Jaime Zabludovsky
Cancun: Can Can't? Can Do?
Sylvia Ostry
Grand and and Not-So-Grand Strategy-Making: Comments
Alan S. Alexandroff

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