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Beyond Zero Sum: Trade, Regulation and NAFTA's Temporary Entry Provisions

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Summary

This paper analyzes the NAFTA provisions governing the temporary entry of business persons between Canada, the United States and Mexico. It challenges the conventional view that domestic regulatory activity and international rule-making take place at the other's expense. At the same time, using the example of the temporary entry provisions, the paper argues that there is an ongoing mutual transformation of domestic and international rules. Thus, the two spheres are not as neatly separate as a static reading of the NAFTA would suggest.

The conventional international relations literature and much of the literature specifically concerned with globalization posit that the domestic and international spheres of activity are separate and opposite. States forge and undo deals with each other on the basis of their interests and institutional capabilities, but these interests and capabilities are taken as given, rather than subject to transformation resulting from the interaction of the domestic and international spheres. In this view, when international rules advance, the domestic state is perceived as retreating, and vice-versa. This retreat of the state is seen as good or bad, depending on one's view of the benefits of global rules.

When we see them in the light of this analysis, the NAFTA provisions affecting temporary entry are an attempt to insulate domestic regulations from the impact of the freer movement of persons, which was agreed upon in order to facilitate trade and investment relations. The separation of the domestic and international spheres is maintained through the precedence accorded to each country's immigration laws, and the ability of each country to require visas from temporary workers as they see fit and to refuse entry in certain cases to prevent possible local labour market disruptions.

However, this static reading cannot account for the changing nature of the globalized state, which is characterized by the emergence of new forms of association in which domestic and external rules become mutually constitutive in a field of "unbundled territoriality." This latter concept was developed by John Gerard Ruggie (1998) to identify changes, not linked exclusively to their territorial space, in the ways states cope with their collective existence.

Viewed in this richer light, and within the context of an effective pursuit of common objectives that emerged in the course of the NAFTA negotiations, the detailed implementation of the NAFTA provisions in each country can be seen as affecting the domestic regulatory environment, and vice-versa. For example, some rights and obligations in the domestic market are conferred on some highly skilled individuals from other NAFTA countries (albeit temporary entrants only), eschewing the traditional notions of "presence" or "residence." Thus, most

temporary entrants may have access to social insurance numbers or social security programs, with some of the obligations (taxes) and benefits (e.g. student loans, unemployment insurance, banking or health services) that these may imply. At the same time, governments and professional associations must increasingly grapple with enhancing the benefits and minimizing the costs of facilitating temporary entry. For example, professional standards and criteria for architects in Mexico would need to be modified before that country can join the Canada-US mutual recognition agreement regarding that profession.

While maintaining key elements of traditional territoriality — such as the attribution of permanent residency, and physical security — the state is also operating in a dimension in which the state itself and its territory become unbundled. Domestic and international concerns are jointly addressed in this dimension. In the NAFTA's case, the types of workers to benefit from these provisions would be executives and professionals, as opposed to labourers, and the implications of this separation for the domestic markets and NAFTA as a whole remain to be seen.

The wider policy implications are that trade and regulatory policies must increasingly incorporate each other in order to pursue common objectives and that the costs and benefits of such a mutually constitutive relationship need to be more clearly acknowledged. Furthermore, new options to manage policies that might best be pursued outside the state's traditional territory, such as the NAFTA Temporary Entry Working Group, should be encouraged, concludes the author.

Résumé

Cette étude analyse les dispositions de l'ALENA qui régissent l'admission temporaire, dans l'un des trois pays signataires, de gens d'affaires venant de l'un des deux autres pays-partenaires. L'auteure conteste le point de vue conventionnel suivant lequel la mise en place de règlements nationaux se fait au détriment des règles internationales, et vice versa. Illustrant son propos au moyen des dispositions relatives à l'admission temporaire, l'auteure montre qu'il se produit une interaction continue et réciproque entre les règles nationales et internationales, de sorte que les deux sphères d'activité ne sont pas aussi étanches que pourrait le laisser supposer une lecture statique de l'ALENA.

Dans la littérature classique portant sur les relations internationales, y compris de nombreux ouvrages portant sur la mondialisation, on postule que les deux sphères d'activité sont distinctes et s'opposent. Suivant cette optique, les États concluent ou abrogent des accords en fonction de leurs intérêts et de leurs capacités institutionnelles; on fait l'hypothèse que ces intérêts et ces capacités sont immuables et ne sont pas influencés par l'interaction entre la sphère nationale et la sphère internationale. Lorsque s'accroît l'influence de la réglementation internationale, on pense alors que la réglementation nationale subit un recul, et que l'inverse est également vrai. On jugera que ce recul est bon ou mauvais, selon la perception que l'on a des avantages rattachés aux traités internationaux.

Dans cette perspective, l'adoption des dispositions de l'ALENA relatives à l'admission temporaire est une tentative de protéger la réglementation nationale des répercussions que pourrait avoir le libre mouvement des personnes, qui a fait l'objet d'un accord pour faciliter les échanges commerciaux et les investissements. La séparation des deux sphères d'activité est maintenue grâce à la précédence accordée aux lois sur l'immigration de chaque pays, ceux-ci se réservant également la possibilité d'exiger des visas aux travailleurs temporaires et celle de refuser leur admission lorsqu'ils sont d'avis que leur arrivée pourrait engendrer des perturbations sur le marché du travail.

Cette interprétation statique ne peut toutefois pas rendre compte de l'impact de la mondialisation sur l'État, en particulier l'émergence de nouvelles formes d'association en vertu desquelles les règles nationales et internationales interagissent pour constituer une aire de « territorialité décloisonnée ». Ce concept a été mis au point par John Gerard Ruggie (1998) pour cerner les changements qui se produisent dans la façon dont les États reconnaissent leur existence collective et qui ne sont pas liés exclusivement à l'espace territorial.

Grâce à cet éclairage plus riche, et dans le contexte de la poursuite active d'objectifs communs qui ont vu le jour dans le cadre des négociations de

l'ALENA, la mise en application détaillée des dispositions de l'accord dans chacun des trois pays peut être perçue comme ayant une influence sur la réglementation nationale, et l'inverse est tout aussi vrai. Par exemple, certains droits et devoirs s'appliquant aux acteurs nationaux peuvent être conférés, bien qu'à titre temporaire seulement, à certaines personnes hautement qualifiées venant des autres pays de l'ALENA, ce qui réduit la pertinence des notions traditionnelles de « présence » ou de « résidence ». Ainsi, la plupart des personnes admises à titre provisoire ont droit à un numéro d'assurance sociale ou aux régimes de sécurité sociale, ce qui leur confère certaines obligations (versement d'impôts) et l'accès à certains programmes et services (prêts aux étudiants, assurance chômage, services bancaires, services de santé, etc.). D'ailleurs, il est davantage nécessaire pour les gouvernements et les associations professionnelles d'accroître les avantages et minimiser les coûts liés aux mesures facilitant l'admission temporaire. Par exemple, il faudra modifier les normes et critères professionnels qui s'appliquent à la profession d'architecte au Mexique avant que ce pays puisse adhérer à l'accord canado-américain de reconnaissance mutuelle relatif à cette profession.

Ainsi, tout en maintenant les principaux éléments de la notion traditionnelle de territorialité, tels le pouvoir d'attribution de la résidence permanente et la sécurité physique, l'État exerce également son autorité sur une sphère d'activité qui est dissociée de son territoire national. Les enjeux nationaux et internationaux sont débattus conjointement à ce niveau. Dans le cas de l'ALENA, ce sont les dirigeants d'entreprise et les professionnels, plutôt que les travailleurs non qualifiés, qui bénéficient au premier chef des dispositions sur l'admission provisoire; les incidences de cette séparation pour les marchés intérieurs et pour l'ALENA dans son ensemble restent à déterminer.

Au niveau de la formulation des politiques, il ressort de l'analyse que les politiques relatives au commerce et à la réglementation devraient être intégrées de plus en plus étroitement afin de pouvoir poursuivre des objectifs communs, et qu'on devrait reconnaître plus clairement les avantages et les coûts de cette interaction. L'auteure conclut en affirmant qu'on devrait encourager la définition de nouvelles options pour gérer des politiques qui pour être efficaces doivent être mises en œuvre à l'extérieur du territoire traditionnel de l'État, donnant comme example le Groupe de travail sur l'admission temporaire de l'ALENA.

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Introduction

The inclusion of temporary entry provisions within NAFTA recognizes the fact that mobility of people has become an important component of North American trade. Provisions for temporary entry in NAFTA exist to ensure that this entry takes place in a predictable, transparent and efficient manner. It is not the objective of these provisions to in any way prevent states from regulating temporary entry in terms of security or labour market–related issues. On the contrary, the regulatory powers of NAFTA member states are affirmed in the Agreement where temporary entry provisions are concerned.

It is common within the globalization literature to position the gains to be accrued from international trade agreements as ones that come at the expense of the state's sovereign right to determine and implement domestic regulation. Likewise, it is often considered that the effect of stronger domestic regulation is to limit the reach of transnational capital. The relationship between domestic regulation and transnational capital can thus be positioned as a zero-sum game. Where one gains the other loses, and vice versa. Given the way this relationship is positioned, it is not surprising that the zero-sum discourse is prevalent among those who oppose freer trade (that is, less free trade means a stronger state) and those who support it (that is, more free trade means a weaker state but better global economic management).

The dominance of the zero-sum point of view is linked to the way international relations theory, with its emphasis on positioning the domestic as separate from the international, has sought to explain the state system. However, as this paper will demonstrate by examining the case of temporary entry in NAFTA, such an approach is problematic, not least because it posits a very static view of the relationship between the domestic and the international spheres and the state's place within that relationship. As such, it prevents the development of a more forward-looking or transformative approach to the relations between trade and domestic regulatory policy.

This paper will seek a more dynamic understanding of NAFTA's temporary entry provisions, in particular by constructing a narrative that takes account of the mutually constitutive relationship between trade and domestic regulation — that is, one that identifies the common objectives of these two domains as well as revealing the relationship's costs and benefits and its transformative nature. By challenging the zero-sum view, this exercise allows for a better understanding of the nature of the globalized state. It explains the emergence of new forms of association in which domestic regulation and external relations become mutually constitutive in a field of "unbundled territoriality." This latter concept was devel-

oped by John Gerard Ruggie (1998) to identify changes in the way states cope with their collective existence when these are not linked exclusively to territorial space. Within that field, domestic and cross-border objectives can be seen as reinforcing rather than negating each other.

The paper will first briefly recap international relations theory and its intersection with the globalization literature in order to establish why a zero-sum relationship between domestic regulation and trade policy is often assumed. It will identify how a traditional reading of NAFTA's temporary entry provisions can lead to a zero-sum and static interpretation of these provisions. The paper will then show how a constructivist approach can provide a more useful transformative reading of the relationship between trade and regulation where the temporary entry provisions are concerned. This approach will inform a new reading of NAFTA's temporary entry provisions as mutually constitutive of trade and domestic regulatory policies, in which the identities and interests of states are being transformed by the production of "unbundled territoriality." Finally, the paper will identify some policy implications arising from this more fruitful way of understanding temporary entry in the North American context.

The International-Domestic Separation in International Relations Theory

International relations theory is based on a conceptual separation between the international and domestic spheres. Broadly speaking, this separation arises from the theoretical divide between the world of people (exemplified in such theories as liberalism, cosmopolitanism, functionalism and integrationism) and the world of states (exemplified in such theories as realism, neo-realism, neo-liberal institutionalism and communitarianism). It is in theories concerning the world of states that the separation between the international and the domestic is most obvious in international relations theory.

Here, the international sphere is typically characterized as a competitive anarchy in which the actors — states — compete for survival and where universal moral codes are understood to be "thin" to nonexistent. The domestic sphere is where the "good life" can be pursued, where moral codes are "thick" and the actors — individuals — are organized according to hierarchy rather than anarchy. This separation is reinforced by the fact that international relations theorists, who think about how states relate to one another in the international sphere, do not give consideration to the attainment of the good life as do theorists concerned with the world of people.

Some have argued that theories concerning the world of states are situated within a utilitarian context — that is, "an atomistic universe of self-regarding units whose identity is assumed given and fixed, and who are responsive largely if not solely to material interests that are stipulated by assumption" (Ruggie 1998, 3). As Ruggie argues, this is most obviously the case with respect to the theories of neo-realism and neo-liberalism, which have dominated theoretical and policy thinking about international relations in the past 25 years.

The realists, as exemplified by Hans Morgenthau in *Politics among Nations*, seek to demonstrate how international politics is all about "interest defined as power" in which the "units" (states), in deploying power to achieve their interests, arrive at a self-regulating equilibrium (1948). While realism contains, in a limited manner, a socially textured view of international politics (for example, historical observation about the fundamental differences between the European balance of power and the post–Second World War balance of power, as well as an understanding of human nature as a will to power), this is not so of neo-realism.

Taking their cue from Kenneth Waltz (1979), neo-realists postulate a structure (anarchy) and interacting units (states). Both are presented as given or fully formed. In this way, there is no interaction between the domestic and the international. Social totalities (societies that have their own specific characteristics, formed through association) and the variation they may give the structure are ignored. Ignored as well is "dynamic density," or the diversity of transactions that place pressure on the forms of association that occur among units. These pressures may ultimately result in new societies being formed (Ruggie 1998, 151).[1] The emphasis is therefore on the reproducibility of the system; change or transformation is neither acknowledged nor accounted for.[2]

Neo-liberalism builds on the liberal notion of complex interdependence developed in 1977 by Robert Keohane and Joseph Nye. Here, the utility of state power is constrained by organizational factors, such as regimes, since the costs of disrupting cooperative relationships are too high. Neo-liberal theory gives more emphasis than liberal theory to the primacy of states as principal actors whose identities and interests are given (hence the separation between the domestic and international spheres) and who pursue their interests from the perspective of self-help. Neo-liberals simply demonstrate that there are instances when the state can no longer use the "political market" to purchase a desired outcome without cooperation (Keohane 1984). There is therefore a role for cooperative institutions where common interests exist. Neo-liberals have focused on identifying how the hierarchies present within institutions might be functional in terms of allowing states to achieve the benefits that they would be unable to achieve if they relied only on projecting their power unilaterally. However, like

neo-realism, neo-liberalism does not account for transformation but instead envisions a reproducible and static scenario in which states, as rational actors, cooperate when necessary to achieve desired outcomes, but in which cooperation does not transform states themselves (Clark 1999, 103). No transformation is predicted by this cooperation.

Although analytical differences exist between neo-realism and neo-liberalism (such as the neo-realist focus on "survival and distributional conflict," as opposed to the neo-liberal focus on the "resolution of market failures"), their analytical foundations are similar: an international anarchy is assumed to exist; "states are the primary actors in international politics"; "identities and interests of states are given"; and "states are assumed to be rational actors who maximize expected utilities, defined in such material terms as power, security, and welfare" (Ruggie 1998, 9). Importantly, both separate the domestic from the international by positing the state as given, and neither can account for transformation in international politics beyond recurring bipolarity and multipolarity.

The Zero-Sum Overlay of the Globalization Literature

The dominant perception put forward by neo-realist and neo-liberal theory of the international and domestic as separate domains significantly affects how we understand relations among states. It also helps us to understand how and why important elements of the globalization literature that concerns itself with the international economy arrive at a zero-sum understanding of the relationship between these two domains.

Although there is no consensus in the literature about what constitutes globalization, it is usually described dualistically in attempting to account for its impact on the state. Much of the globalization literature accepts that there are two spheres (domestic and international) as conceived in international relations theory. This is the case with regard to understanding developments in the international economy, but it also occurs with regard to understanding the impact of globalization on sovereignty, security, norms and democracy (Clark 1999). However, this literature does seek to link the spheres using the concept of globalization, all the while reinforcing the idea that the two spheres exist.

Concerning developments in the international economy, this linkage in the globalization literature is often conceived from a critical theoretical standpoint (Cox 1996). This standpoint seeks in particular to explain, through deconstruc-

tion, how prevailing ideologies serve certain interests. In the globalization literature that focuses on the international economy, there is a deterministic positioning of the regulatory state as either retreating from global capital (Strange 1996; Reich 1991) — exemplified by downsizing and the uniform behaviour that it induces — or shoring up its regulatory defences against globalization — by, for example, instituting capital controls or foreign investment review mechanisms (Cerny 1995). In these scenarios, trade agreements either facilitate the reach of global capital at the expense of the regulatory state, or arrest the reach of global capital by shoring up the state's regulatory defences. Either way, the relationship is conceived dualistically and generally in zero-sum terms.

Interestingly, the linkage between the international and domestic spheres set up by the globalization literature also has structuralist overtones reminiscent of neo-realist international relations theory, in the sense that it implies that states are constrained to behave in certain ways, which, in turn, reveals the workings of an international structure. As in neo-realist and neo-liberal theories, the state is reduced to an "outside-in artefact" possessing no identity or political agency that can account for transformation (Clark 1999, 95).

The upshot is that little conceptual space is available for considering political agency and state transformation. This situation significantly affects how we perceive state relations and the options available for transformation.

The Constructivist Approach

In the preceding paragraphs, the dominant perspectives of international relations theory were briefly outlined. The perspective of the globalization literature that concerns itself with the international economy was then overlaid on these perspectives. From this discussion, the prevalent discourse was identified as one based on a conceptual separation of the international and domestic spheres as well as on a zero-sum relationship regarding any linkage to be made between them. It was also argued that this discourse permitted only a static, nontransformative view of the relationship between the two spheres.

To generate a more dynamic and ultimately richer understanding of NAFTA's temporary entry provisions and the relationship between the domestic and international spheres that they illustrate, it is necessary to pay closer attention to ideational and institutional factors. To do so, I draw on an interpretive approach, and particularly for international relations, on a constructivist perspective that allows for an understanding of the identities and interests of states and the patterns of international outcomes.

Many of the varieties of international relations theory discussed earlier rely, from a metatheoretical perspective, on a naturalistic approach to understanding. Naturalism tries to make sense of reality by gathering what the Canadian political philosopher Charles Taylor calls "brute data" from the external world (Taylor 1985b, 41). Using brute data, we can directly observe causal relationships containing separate independent and dependent variables and reduce them to a physical description. All causal relationships are falsifiable because they are based on direct observation undertaken by a disengaged self capable of detached observation (Taylor 1985a, 3-8). By this account, it is possible to develop causal laws about human behaviour by observing regularities in behaviour that occur over time. By concentrating on description rather than on significance, naturalism lays claim to a neutral stance.

As for the globalization literature, and particularly that dealing with the international economy, it often relies on a critical metatheoretical perspective. Here, human life is understood to be composed of ideologies that repress human thought and action. By demonstrating through deconstruction that all theory is composed of ideology, practitioners of this approach endeavour to explain how prevailing ideologies serve certain interests (Braybrooke 1987, 18).

Neither naturalism nor critical theory addresses the question of human intentions, as these cannot be directly observed in the external world and are (therefore) not falsifiable or reproducible. Furthermore, the fact that humans have intentions implies that they are autonomous actors who possess agency. Interpretive metatheory, on which I will draw, aims to understand the significance of human life by focusing on human intentions and the emotions that motivate them.

Gaining access to human intentions is the great challenge faced by interpretive theorists. Methodologically, interpretivists begin by admitting prior ignorance of causation and acknowledging the complexity of lived experience. They then develop an explanation of lived experience (as opposed to an identification of causation) by placing themselves in the position of the "other(s)" in order to recover their stories. Typically, such stories involve ideas and relationships that are expressed through institutions. However, institutions are not conceived of statically, since the actors who animate them — people — possess agency. An institution, then, "is both what it is (structured) and what people are trying to make it into (via human ideas)... It is not the institutions per se which bring about change, it is the shifting emphasis of internal and external ideas which provide the impetus for change. An institution is the product, at any given time, of continuous struggle between its embedded ideas and the propositional ideas contained in it and in its societal milieu. It exists as a focal point in a sea of alternatives." In this way, interpretive analysis accounts for transformation because it

forces us to examine institutions from an evolutionary standpoint and in a way that positions them as an emergent product (O'Reilly 2000, 19).

More particularly with respect to international relations, applying a constructivist theoretical approach to international politics means beginning to see the domestic and international spheres within the same field of forces, thereby creating the globalized state (Clark 1999, 7). This field consists of ideas that lend meaning to individual and collective intentionality and that generate state identities and interests rather than take them as given. These ideas help constructivists to discover a noncausal explanation for state relations that attends to meaning at the domestic and international levels, meaning expressed through a mutually constitutive relationship embodied in the globalized state. This meaning speaks to the common objectives (ideational factors) and costs and benefits (institutional factors) that underlie transformation. It also implies endless mutual adjustment and a fluidity of community in which identity cannot be taken for granted. In this way, transformation is seen by constructivists "as a normal feature of international politics" (Ruggie 1998, 27).

In contrast, then, to practitioners of the traditional international relations theory and to the globalization literature discussed earlier, constructivists position the state and the international system as mutually constitutive — that is, they consider the domestic and the international as part of the same field of forces rather than separate. Therefore, as a single unit of analysis, the globalized state does not (and likely cannot) contain a zero-sum relationship. Instead, it contains a mutually constitutive relationship characterized by common objectives between domestic and international spheres and by costs and benefits that make it historically and politically relevant and help account for transformation.

A Static Reading of NAFTA's Chapter 16

It is possible to read the provisions governing the temporary entry of business people in chapter 16 of NAFTA as setting up a separation between the domestic and international spheres as well as assuming a zero-sum relationship between the provisions promoting freer movement, on the one hand, and the exclusions from those provisions and the regulatory structures to which the exclusions pertain, on the other. This reading leads to a static view of the import of this chapter and provides no insight into how it might contribute to transformation in the North American context. Such a reading of chapter 16 and of related provisions of NAFTA proceeds as follows.

The preamble to NAFTA and the objectives of the Agreement, set out in chapter 1, establish the general tone and orientation for the entire Agreement. The preamble not only emphasizes that increased trade among the signatories is expected to result from the Agreement, but it also underlines, for example, that the signatories will "preserve their flexibility to safeguard the public welfare" and "protect, enhance, and enforce basic workers' rights" (North American Free Trade Agreement 1993). Two separate domestic and international spheres are thereby assumed to exist, and it is hinted that the domestic has to be protected from the international by the state, or a potential loss will be incurred. In this way, it is perceived that any contact between the two spheres will result in losses to one or the other.

The objectives of NAFTA, as outlined in article 102, focus on the international (trade) side without reference to the domestic. These objectives are purely economic in nature. NAFTA is intended to eliminate barriers to trade in goods and services, promote fair competition and increase investment opportunities. That is, it purports to create a free trade area, leaving members free to pursue their own trade policies vis-à-vis nonmembers. It does not purport to create a customs union, which would require the adoption of a common set of external commercial policies; neither does it promote an economic and social union requiring some form of harmonization of domestic policies. Consequently, there is no need here to give direct attention to domestic matters, since the international sphere is considered to be a separate entity.

Chapter 12, "Cross-Border Trade in Services," applies generally to temporary entry, while chapter 16, "Temporary Entry for Business Persons," describes the kind of temporary entry that is facilitated. Chapter 12 states clearly that "Nothing in this Chapter shall be construed to: (a) impose any obligations on a Party with respect to a national of another Party seeking access to its employment market, or employed on a permanent basis in its territory, or to confer any right on that national with respect to that access or employment" (article 1201.3a). In the context of the international trade in cross-border services promoted in this chapter, this provision ensures that the state retains full domestic policy control of the domestic employment market, presumably because the state does not want to subject this domestic policy area to the (international) agreement it has signed. The separation of domestic and international spheres is seemingly assured by this provision.

The general principles article on which chapter 16, "Temporary Entry for Business Persons," is based emphasizes the desirability of facilitating temporary entry (to increase international trade) as well as "the need to ensure border security and to protect the domestic labour force and permanent employment in their

respective territories" (article 1601). Again, two separate spheres are implied, and there is a sense that without appropriate attention, domestic policy issues relating to border security and labour market development might be affected by the Agreement in unwanted ways. Consequently, the chapter makes reference to temporary entry being granted only to those "qualified under applicable measures relating to public health and safety and national security" (article 1603.1); being refused when it could adversely affect the settlement of a labour dispute (article 1603.2); not imposing "any obligation on a Party regarding its immigration measures" (article 1607); being unavailable to a business person "seeking to enter the local labour market" (annex 1603.1c); and being granted only to those who comply "with existing immigration measures applicable to temporary entry" (annex 1603.3). Furthermore, visas may be imposed on temporary entrants as required (annex 1603.4). The separation of the domestic and the international, and the protection of the former from the latter to stave off the losses inherent in the perceived zero-sum linkage, are thus made clear.

Similar themes are evident in the categorization of persons eligible for temporary entry under NAFTA and in the eligibility conditions and entry restrictions to which they are subject. The four temporary entrant categories are discussed below:

Business Visitors: According to section A of annex 1603 of NAFTA, the business visitors category is for those seeking short-term entry to undertake any of these seven business activities: research and design; growth, manufacture and production; marketing; sales; distribution; after-sales service; and general service (including that provided by tourism personnel and translators). The general qualifying criteria for entry are that the applicant holds citizenship in a NAFTA country (this also applies to the categories that follow); that the applicant enters for business purposes only; that the applicant's scope of business activity is international; that the applicant does not enter the local labour market; that the applicant's primary source of remuneration is outside the country to which temporary entry is sought; and that the applicant's principal place of business and the predominant place where profits are accrued is outside the country to which temporary entry is being sought. In addition, the applicant must meet existing immigration requirements for temporary entry (for example, related to health, public safety or security; annex 1603, s. A.1-2]); this general condition also applies to the categories that follow.

Generally, each NAFTA member is committed to granting temporary entry to applicants in this category without requiring an employment authorization, prior petitions or labour market tests, and without imposing numerical restrictions. However (as with the categories that follow), visas may be imposed (annex 1603, s. A.3-5), reflecting the state's desire to preserve its border-policing function to override, whenever necessary, the temporary provisions.

Traders and Investors: In section B of annex 1603, traders are defined as business persons who are engaged in conducting significant trade in goods and services between their country of citizenship and the country to which they seek entry. Investors are defined as business persons who establish, develop, administer or provide key technical services for the operation of an investment to which their enterprise has committed substantial capital. In both categories, the capacity of the business person must be supervisory or executive or involve essential skills.

The general qualifying criteria for a trader are that the enterprise is based in a NAFTA member country and that the trader is an executive, supervisor or someone with essential skills. An investor must have citizenship in a NAFTA member country and be an executive or a supervisor or possess essential skills; the enterprise must be real and operational and based in a NAFTA member country; and a substantial financial investment must have been made. NAFTA member states have agreed not to impose labour market tests or numerical restrictions on traders and investors.

Intracompany Transferees: Under NAFTA, temporary entry is also granted to "a business person employed by an enterprise who seeks to render services to that enterprise or a subsidiary or affiliate thereof, in a capacity that is managerial, executive or involves specialized knowledge" (annex 1603, s. C.1). The general qualifying criteria for this category include proof that employment is of an executive or managerial nature or requires specialized knowledge.

NAFTA member states have agreed not to impose labour market tests or numerical restrictions on intracompany transferees.

Professionals: Professionals are defined as business persons "seeking to engage in a business activity at a professional level in a profession set out in Appendix 1603.D.1" (NAFTA 1993, annex 1603, s. D.1). All of the 63 categories set out in that appendix require at least a baccalaureate degree. To gain temporary entry, professionals do not have to undergo prior approval procedures, petitions or labour certification tests. At the border, however, proof of citizenship must be presented, prearranged employment documents (such as a contract or letter of offer) must be shown and the intention not to reside indefinitely in the country must be demonstrated.

Although NAFTA generally prohibits numerical restrictions, it allows them to be imposed in this category "if the Parties concerned have not agreed otherwise prior to the date of entry into force of this Agreement for those Parties" (NAFTA 1993, annex 1603, s. D.4). In appendix 1603, section D.4, the United States imposed a numerical quota of 5,500 upon Mexican professionals entering the country. It was removed in 2004, 10 years after NAFTA entered into force. This quota did not pertain to the renewal of a period of temporary entry, or to

the entry of an entrant's spouse or children, or to any other domestic legislation or numerical quotas regarding professionals (appendix 1603, s. D.4.2a, b). The description of the professionals category also makes reference to the fact that temporary entry may be granted "to a business person who practices in a profession where accreditation, licensing, and certification requirements are mutually recognized by the Parties" (annex 1603, s. D.5c).

All four categories contain provisions geared toward facilitating international trade (such as removing employment authorizations and labour certification tests), but they also ensure that domestic immigration and labour market objectives are not compromised (by, for example, requiring compliance with existing immigration measures applicable to temporary entry, and requiring proof of temporary stay and no intent to enter the domestic labour force on a permanent basis). In this way, the domestic and international spheres are kept separate within the Agreement. The overriding ability of states to impose visas in all categories acts as a safeguard in the event that this separation is not adequately maintained and the facilitating of business visitors compromises regulatory objectives. A similar reading can be given to the numerical quota limit imposed by the US on Mexican professionals. Both the visas and the quotas point to a zero-sum view of the relationship between international trade and domestic regulation, which is anticipated in the Agreement for temporary entry should the domestic and international spheres come into contact.

This reading of NAFTA's provisions for temporary entry leaves us with a static, nontransformative understanding of what constitutes temporary entry among the signatories to the Agreement. It tells us nothing about the meaning or dynamism of temporary entry other than that it is a useful vehicle for furthering material interests within a cooperative interstate arrangement. To gain a more dynamic and transformative perspective, we require a different approach, which involves, as outlined earlier, "constructing meaning" around the provisions. To this I now turn.

A Constructivist Reading of NAFTA's Temporary Entry Provisions

One methodological approach to constructivism is to "identify, inventory, and specify the consequences of innovative micro-practices in international relations today" (Ruggie 1998, 9). Doing so helps to create a meaningful explanation of events, also known as a narrative, which is set within a lived context of multi-

plicity and change. Using this approach to explore labour mobility within the context of NAFTA, a narrative will be developed giving attention to the negotiating history that resulted in provisions for temporary entry; the terms on which each signatory implements temporary entry; the domestic regulatory environment in which provisions for temporary entry are set; and the ways in which "unbundled territoriality" serves as a transformational driver. As this narrative will show, NAFTA's chapter 16 provisions represent a place where a globalized state embodies a mutually constitutive relationship between the common objectives of the domestic and international spheres, and where it faces a set of costs and benefits leading to transformation. Broad policy recommendations will then be set within this narrative.

The History of the Canada-US FTA Negotiations

NAFTA's provisions for temporary entry are based largely on the Canada-US Free Trade Agreement's provisions for temporary entry.[3] The Free Trade Agreement (FTA) between Canada and the United States came into effect in 1989. The factors that led to its negotiation have been discussed in detail elsewhere.[4] Briefly, rising protectionism in the United States coupled with a bogged-down multilateral trade negotiation in Geneva in the mid-1980s prompted Canada, in 1985, to consider a bilateral agreement with the United States in order to achieve secure access to the American market. The United States administration, concerned about a protectionist Congress and foot-dragging in Geneva, hoped that a tough-minded trade bargain with Canada would mollify Congress and create renewed support for the Uruguay Round (multilateral trade negotiations begun in Uruguay in 1986 and concluded in Geneva in late 1993 (Hart, Dymond, and Robertson 1994, 243). For these reasons, Canada and the United States agreed to undertake bilateral free trade negotiations. These negotiations began in 1986 and were concluded in October 1987.

The US's interest in including services and investment chapters in an FTA was always greater than its interest in including a chapter on temporary entry for business persons. The US did not want to create a demonstration effect for the services-negotiating context in Geneva regarding temporary entry, and the US Immigration and Naturalization Services (INS) and the Department of Labor (DOL) were reluctant to negotiate such a sensitive issue. First, the DOL was concerned that provisions for temporary entry would inhibit its ability to protect the American labour market, particularly in times of economic downturn. Also, it was not obvious to either the DOL or the INS, given the complexity of the American visa system for nonimmi-

grant categories, how such an issue would be negotiated or which immigration laws would have to be changed to accommodate negotiated provisions.[5]

However, strong lobbying by the American business services sector helped to make the case that increased investment and service exports by American business needed to be accompanied by some provisions for the temporary entry of business persons.[6] Given that this would likely involve coverage for only highly skilled workers, the INS and the DOL were reassured that the US labour market would not be compromised by cheaper low-skilled labour from Canada. In any case, this potential Canadian threat was never viewed with alarm or considered as serious as policing issues at the US-Mexico border.

From a Canadian negotiating perspective, it seemed obvious from the beginning of the negotiation that the movement of service suppliers was necessary to accompany services exports and investment.[7] Representatives of the banking sector, through Canadian Sectoral Advisory Groups on International Trade, highlighted the importance of being able to enter the United States easily to conduct business. The Canadians were also particularly interested in provisions for after-sales services, since many of the goods they sold in the American market required, as part of the sale, follow-up service support by specialized personnel. Canadian after-sales service providers had always experienced difficulty entering the American market, and they hoped that this problem would be addressed in the trade agreement.[8]

Further into the negotiations, Canada proposed temporary entry for professionals who sought work in either the American or the Canadian labour markets. It is not exactly clear why this proposal was made and why the US eventually agreed to accept it. Certainly, there had always been complaints that it was difficult for Canadians (indeed for any applicants) to cope with the complex American temporary entry system, and there was intense competition for available visas, which were meted out globally on a quota basis. Canadian negotiators likely saw this as a chance to get a jump on the international competition for temporary entry into the American labour market. In any case, Canadians were far more likely to use this provision to enter the American market, where there were more opportunities for highly skilled professionals. It is conceivable that the Americans wanted to codify an illegal practice that had existed for some time — highly skilled Canadians would lie to border officials about the purpose of their visits in order to gain temporary entry into the US labour market and better position themselves to acquire employer-sponsored green cards.

From the Canadian perspective, the motivation for proposing temporary entry for professionals to work and be paid in the host market was less clear. Presumably, Canada did not want to lose its professionals permanently to the US. It is probable that negotiators were aware that Canadian professionals had long

sought entry into the American labour market and Canada was one of the US's largest sources of temporary professional labour. Canadian professionals were, however, among the least likely entrants to seek permanent residency status (Kramer 1997, 15, 20, 42). Instead, they were likely to return to Canada within five years of leaving.[9] It is conceivable that Canadian negotiators wanted to enhance this reality. It is also conceivable that they wanted to create some leverage for the investment concessions they were being asked to make. In other words, by being aggressive on temporary entry for Canadian professional workers, they hoped to create some negotiating room with regard to American negotiating demands on investment.

In any case, the Canadian negotiators knew that Canada's *Immigration Act* provided for the entry of visitors into Canada for the purpose of fostering trade and commerce. This made it unlikely that any provisions negotiated in the FTA would require legislative changes in Canada. Furthermore, since Canadian negotiators and Canadian regulators concerned with immigration and labour market development policy did not anticipate a huge northward migration of highly skilled American workers, they felt that it made sense to push the United States for provisions on temporary entry. Although the Americans were not especially enthusiastic about provisions for temporary entry, in the end they accepted their inclusion in the FTA.

The history of the FTA temporary entry negotiation begins to reveal a globalized state characterized by a mutually constitutive relationship between the domestic and international spheres. This relationship has produced a common objective for the negotiating parties (increased trade and investment, leading to wealth and the "good life"), and it has revealed costs (potential displacement of domestic workers and increased challenges in the areas of domestic security and border policing) and benefits (technology transfer, increased border efficiency and better tracking of entrants). As this common objective is identified and acted upon and the cost-and-benefit trade-offs are addressed, we will see that transformation is realized in the form of increased North American labour market integration for certain categories of entrants.

The History of the NAFTA Negotiations

Negotiations for NAFTA began in 1991 and were completed in 1992. The impetus for such a negotiation initially came from Mexico's debt-induced economic collapse and the significant economic reforms Presidents de la Madrid and Salinas of Mexico had begun in the 1980s (Prestowitz et al. 1991). In 1990

President Salinas surprised the United States by proposing the negotiation of a comprehensive bilateral free trade agreement between the two countries.

United States Trade Representative Carla Hills was at first reluctant to consider it, because most of the resources of her office were tied up in the Uruguay Round negotiations. However, appeals from the Salinas administration to President Bush and Secretary of State Baker prompted the Bush administration to respond favourably (Mayer 1998, 39-43). However, it was only after a hard-fought battle with Congress to win fast-track negotiating authority (during which time the Bush administration agreed to include some consideration for labour and environmental concerns) that the US actually took a seat at the negotiating table.

Canada was initially uninterested in negotiating a regional agreement since it had no clear economic interest in establishing free trade with Mexico. Furthermore, Prime Minister Mulroney perceived such a negotiation as politically risky, given the national debate that had raged over the FTA. However, not wanting to be positioned as just another bilateral trade partner of the US within the Western Hemisphere, Canada opted to join the negotiations (Wonnacott 1990).

Although the negotiations purportedly proceeded from a clean slate, it was assumed that the FTA provisions would have a significant impact on what was negotiated in the context of NAFTA (Schott and Hufbauer 1992, 63). For temporary entry, the demonstration effect of the FTA coupled with Canada's insistence that nothing in the FTA's chapter 15, "Temporary Entry for Business Persons," be rolled back (at least with regard to the US treatment of Canada) seemed to guarantee that some provisions for temporary entry would make it into NAFTA. However, this was not initially the viewpoint of the US administration, given the intense political sensitivities the US faced with regard to its porous southern border. It also reflected the reality that although the countries participating in the negotiation had agreed to conduct a trilateral negotiation, some issues might not be fully trilateralized. Temporary entry was one of these issues.

Mexico's position on negotiating temporary entry was at first ambivalent. There were some within the Mexican bureaucracy, supported by certain non-governmental organizations, who believed that these negotiations would provide an excellent opportunity to resolve some of the long-standing labour migration issues that existed between the US and Mexico.[10] However, this viewpoint was soon overcome by a narrower trade liberalization perspective, which prioritized goods, services and investment on the negotiating agenda and relegated labour mobility to the category of minor trade-negotiating issue. Mexican negotiators feared that any prominence given to migration issues would endanger the achievement of a free trade agreement with the United States or perhaps

force Mexico to police its own northern border to prevent illegal emigration. Also, Mexico did not want to draw attention to the fact that trade liberalization with the United States would likely exacerbate the displacement of Mexican peasant farmers and create more incentives for illegal migration to the US, at least in the short term. Furthermore, the strategy of exporting its unemployment problem to the US netted Mexico significant remittance dollars, which, in turn, it used to prop up its debt-ridden economy.[11] Therefore, during the negotiations Mexico did not press migration issues, including temporary entry for business persons. This virtually guaranteed that it would accept different treatment for temporary entry than that which had been achieved between Canada and the US with the FTA.

Nevertheless, the eventual application of NAFTA chapter 16, "Temporary Entry for Business Persons," to all parties to the Agreement demonstrated the emergence of a globalized state embodying a mutually constitutive relationship between the domestic and international spheres. The common objective and the costs and benefits were similar to those of the FTA, though the costs had a heightened level of intensity on the US-Mexico side. We will now see that a transformation occurred that resulted in a significant intertwining of domestic regulatory and international trade policy concerns, with regard to both detailed implementation of the provisions by which temporary entrants are admitted and the ways in which the immigrant, labour market development and professional accreditation regulations relate to NAFTA chapter 16.

Implementation by the Signatories

In addition to the general qualifying criteria for each category of temporary entrant described above, each member country implements the Agreement's temporary entry provisions somewhat differently in light of its own existing immigration measures. This makes the provisions a referent for domestically administered measures (and particular concerns), and vice versa. A description of this implementation by the three signatories follows.

Business Visitors: American and Mexican business visitors entering Canada must meet the general qualifying criteria by presenting, at the port of entry, proof of citizenship and a letter outlining the purpose of the business trip. This letter must indicate that the business activity is international in scope and that there will be no attempt to enter the Canadian labour market. This can be done by showing that the primary source of remuneration, the principal place of business

and the accrual of profits are all outside Canada. If entry for after-sales service is being sought, copies of the original sale, warranty or service agreement and any extension must be presented. The applicant must also present proof of any specialized knowledge essential to the seller's contractual obligation (Canada 1995, 9-10). A visitor record may be issued at the border to facilitate frequent re-entries or to serve as documentation for stays of more than two days.

Canadian and American business visitors entering Mexico must complete an FMN form at the port of entry. This form asks for information on the type of activity and the principal Mexican enterprise or Mexican individual with which or with whom it will be carried out. The FMN form is valid for 30 days, but it can be extended for an additional 30 days. The applicant must return it to Mexican immigration officials when leaving the country.

Canadians entering the United States must satisfy the general qualifying criteria at the port of entry. Applicants can facilitate their frequent cross-border movements over a six-month period by asking that an I-94 document be inserted in their passports. Entry is allowed for up to six months, with possible extensions in increments of up to six months.

Mexican business visitors entering the United States must produce a border-crossing card.[12] The application for this card is made at an American embassy or consulate in Mexico. The United States is able to impose the requirement for a border-crossing card because of an exception it was able to negotiate with Mexico regarding paragraphs 4 and 5 of annex 1603, which prohibits prior approval procedures and petitions (appendix 1603, D.4, 3). With this exception, the US is able to impose a more onerous border-policing function on Mexico, and this hinders business visitors from attaining temporary entry. Due to this, more emphasis is given to meeting certain US domestic regulatory objectives where Mexican entrants are concerned.

Traders and Investors: Existing immigration requirements for temporary entry differ between NAFTA members. Mexican and American traders and investors entering Canada must meet the general qualifying criteria outlined earlier, and upon entering the country they may use the employment authorization to obtain a social insurance number (Canada 1995, 7), and the benefits (access to certain services) and obligations (for example, paying taxes) that come with the use of such a number.

Canadian and American traders and investors entering Mexico must meet the general qualifying criteria and possess a completed FM3 employment authorization form. This authorization can be issued to applicants either before they enter Mexico or within 30 days of their entry. It is valid for one year, and it can be renewed for an additional four years before a new FM3 must be obtained.

Canadian and Mexican traders and investors entering the United States

must complete and have approved an application for entry as a trader or investor, available at a US embassy or consulate. Upon approval of the application, an employment authorization document (E-1 for traders; E-2 for investors) is issued and inserted into the applicant's passport.[13] When entering the US, the trader/investor should obtain a social security number. There is no specified length of time a trader/investor may remain in the US. This is the only category in which Canadians and Mexicans seeking to enter the American market are subject to identical entry requirements. Notably, however, NAFTA indicates that a visa may be required prior to entry (annex 1603, s. B.3). Interestingly, this qualifier was not included in the FTA, and it reflects the reassertion of border-policing functions in a context where significant border tensions related to migration exist between two NAFTA members — namely, the US and Mexico.

Intracompany Transferees: In the case of Mexican and American intracompany transferees entering Canada, a letter from the American or Mexican employer must be presented. The letter must describe the job to be performed in Canada, confirm employment of one year out of the past three with the current employer and indicate the duration of the assignment. An application for an employment authorization may be completed and approved at a Canadian consulate or embassy before the applicant departs for Canada. Application may also be made directly at the port of entry. Employment authorizations are initially issued for up to one year, and extensions may be granted in increments of up to two years. The total period of stay for executives and managers must not exceed seven years; for those employed in a specialized knowledge capacity, the limit is five years. Upon arriving in Canada, intracompany transferees can obtain a social insurance number (Canada 1995, 5).

In the case of American and Canadian intracompany transferees entering Mexico, an FM3 employment authorization form must be issued either before one enters Mexico or up to 30 days afterwards. The employment authorization is valid for one year, and it can be renewed for an additional four years before another FM3 must be obtained.

In the case of Canadian intracompany transferees entering the US, the US employer must submit a petition to the INS for an employment authorization. The intracompany transferee must show the petition at the port of entry, at which time an employment authorization (L-1) will be issued.[14] Upon arriving in the US, the intracompany transferee can use this employment authorization to obtain a social security number.

In addition, Canadian small-business owners who are considering expanding into the US (and not simply entering to seek self-employment) may apply to enter as intracompany transferees at any consulate, embassy or port of entry. A

detailed business plan must be provided explaining how the expansion will result in direct local employment. An extension of up to seven years may be granted if the applicant can prove that the objectives of the business plan are being met (Canada 1995, 5).

Mexican intracompany transferees entering the US must meet the general qualifying criteria, and the US employer must submit a petition to the INS for an employment authorization. These intracompany transferees must have their petitions approved before arriving at the border, and they must also apply for, and be granted, admission to the US prior to arriving at the port of entry. Mexicans, unlike Canadians, are kept away from the port of entry until all of their documents are in order. This is another example of an American border-policing function that serves to inhibit temporary entry for Mexicans but helps the US control its border relations with its neighbour. Upon arriving at the port of entry with the appropriate documents, the Mexican intracompany transferee will be issued an employment authorization (L-1). This authorization can be used to obtain an American social security number. As it does for those in the trader/investor category, NAFTA indicates that for applicants in the intracompany transferee category, a visa may be required prior to entry (annex 1603, s. C.3). This qualifier was not included in the FTA.

Professionals: Mexican and American professionals entering Canada must apply for an employment authorization at any Canadian embassy, consulate or port of entry. Professionals must have prearranged employment and present a letter from the employer attesting to the fact that the employment is in an occupation listed in annex 1603 D.1 of the Agreement. They must meet the minimum educational requirements and be qualified to work in the profession. There is no limit on the amount of time professionals are permitted to remain in Canada. Upon entry into Canada, applicants in this category may use the employment authorization to obtain a social insurance number (Canada 1995, 4).

Canadian and American professionals entering Mexico must obtain an FM3 employment authorization either before entering Mexico or within 30 days of entry. Professionals must also acquire professional identity cards before commencing practice. The employment authorization is valid for one year, and it may be renewed up to four times before a new one is needed.

Canadian professionals entering the United States must meet the general qualifying criteria at the port of entry. Labour market tests, prior appraisal or petitions are not required. At the port of entry, an employment authorization (TN) will be issued, which can be used to obtain a social security number. There is no limit on the duration of the employment authorization for this category.[15] These provisions are identical to the ones negotiated in the FTA.

A Mexican professional wishing to enter the United States must file a non-

immigrant worker petition at a US embassy or consulate. Once this petition is approved, the DOL performs a labour market test to establish whether the employer in question will displace an American worker or adversely affect US wages by employing this Mexican professional.[16] (For the first 10 years of the Agreement, entry was limited to 5,500 applicants — the numerical quota outlined in appendix 1603 D.4). This provision applies only to Mexicans, and it reflects the United States' attempt to better regulate its border relations with Mexico where labour mobility is concerned. When all conditions are met, a certification is issued. Professionals may then proceed to an American port of entry to obtain a TN employment authorization, which can be used to obtain a social security number. There is no limit on the amount of time a Mexican professional with a TN employment authorization is permitted to remain in the country.

In all three countries, professionals can arrange to provide services through an employer-employee relationship with the host enterprise, a signed contract between the professional and the host enterprise, and a signed contract between the professional's home employer and the host enterprise. Self-employed professionals may gain temporary entry under this category only to conduct training activities, such as seminars. They may not enter under this category to establish a professional practice solely for the purpose of self-employment. As do applicants in the previous two categories, applicants in this category may require a visa prior to entry (annex 1603, s. D.3). This qualifier was also not included in the FTA.

This discussion of the domestic implementation procedures illustrates how the domestic regulations and temporary entry provisions are linked to create a mutually constitutive relationship that reflects a globalized state. Here, the common objective of the two domains is to create a system that simultaneously increases trade and maintains (economic) security. Certain costs attend the implementation of this objective: political concerns leading to differential treatment of Mexicans entering the US; increased strain on distributional programs such as social security; and even some confusion about who is captured by chapter 16. On the benefits side, there are such things as increased mobility and therefore increased trade and investment, the potential for greater border efficiency, and more access to services related to social insurance and social security, such as student loans or banking. The transformation resulting from this implementation has also led to a more widespread awareness among North Americans of labour market integration in terms of employment and market opportunities, as well as in terms of increased competition for employment opportunities (for some categories of workers), attendant technology transfer and trading opportunities (see Papademetriou 2003 for an overview of increased movement of temporary entrants under, NAFTA).

Furthermore, this discussion demonstrates how regulatory concerns arise from the temporary entry provisions while the objectives of those provisions are being implemented. In this way, the domestic implementation procedures and the temporary entry provisions are mutually constitutive.

The Domestic Regulatory Environment

The domestic implementation procedures for the four NAFTA temporary entry categories hint at the complexity and depth of the domestic policy environment in which the temporary entry provisions of chapter 16 are set. These procedures create a link between the provisions and the domestic regulatory environment in three areas: immigration, labour market development and professional accreditation.

Where NAFTA's chapter 16 provisions and the domestic implementation procedures address citizenship requirements and immigration measures related to national security, public health, public safety and nonpermanent entry, they suggest the complex domestic regulatory framework for immigration on which the chapter ultimately rests. From an immigration perspective, the temporary movement of people across borders to provide services produces various security-related problems, putting increased pressure on immigration officials. First, they must regulate entry in order to identify criminals, monitor health and safety issues and prevent fraud. Second, they must prevent foreigners from working in certain sectors deemed security-related. Third, they must enforce exit after the service is supplied for the agreed-upon amount of time. Otherwise, regulation of permanent entry becomes a problem.

NAFTA's provisions and domestic implementation procedures that address protection of the domestic labour force — the waiving of labour certification tests, the provisions to ensure nonentry into the local labour market, the limits on length of stay in the host market, the minimum qualifications, the preemployment criteria, the quotas, the access to social insurance/security numbers, the denial of entry to persons who might adversely affect a labour dispute — all demonstrate the complexity of regulating the domestic labour market. From a domestic labour market perspective, temporary entry is analyzed in terms of the impact it could have on that market and on wider social distribution issues.

In sectors characterized by seasonal labour, high unemployment, low skills and/or unstable union membership, such as the construction industry, labour mobility is perceived as a sensitive economic and political issue with the potential to depress wages and undermine labour market development. In higher skill sectors, such as computer services, foreign labour may be perceived as filling gaps

and/or hindering training opportunities and therefore labour market development in the host economy. In sectors attracting both high- and low-skilled service suppliers, the myriad relationships service suppliers have with their service or work must be tracked, because, especially in domestic environments that lack comprehensive social benefits, the nature of these relationships will affect benefits and therefore social planning and redistribution efforts. Access to social insurance/security programs, where they exist, reflects the connection of labour market policy to other domestic regulatory areas such as taxation, unemployment insurance, old-age insurance, health insurance and union membership. The provisions in NAFTA that speak to professional accreditation are contained in chapters 12 and 16. These provisions provide a glimpse into a policy field focused on mutual recognition of licensing and qualification requirements administered at the subnational level. Chapter 16 of NAFTA provides for a grant of temporary entry for professionals who practise in a profession, listed in the agreement, "where accreditation, licensing, and certification requirements are mutually recognized by those Parties" (annex 1603, s. D, 5c). The process of achieving recognition agreements is addressed in chapter 12, annex 1210.5, but only in terms of encouraging their negotiation in certain fields, including foreign legal consulting, engineering and architecture.

The weakness of this provision is that mutual recognition agreements are negotiated by certain signatory states (Canada and the US), not among signatory states or even their subnational governments, but among professional associations. Such negotiations are tied only by reference to NAFTA, and this reference does not seem to have contributed significantly to their success. Negotiations for foreign legal consultants have gone nowhere; only agreements among Canada, Mexico and Texas have been successfully concluded for engineers, and the mutual recognition agreement (MRA) for architects between Canada and the US (referred to in annex 1404 of the FTA) concluded after the FTA was signed has not been extended to Mexico. Under NAFTA, Mexico must be given the opportunity to demonstrate that its standards and criteria for the licensing of architects are comparable to those of the Canada-US MRA (article 1210.2a-b). So far, American concerns about Mexican qualification and licensing procedures have inhibited the conclusion of an agreement.

NAFTA contains another procedure for ensuring that licensing and certification requirements for professionals do not constitute unnecessary barriers to trade. It merely directs members to "endeavour" to ensure that any such requirements are based on objective and transparent criteria, are not more burdensome than necessary to ensure the quality of a service and do not constitute a disguised restriction on the cross-border provision of a service (article 1210.1a-c). This procedure is weak because it does not involve member negotiation.

As outlined in annex 1210.5 (3a-h), the standards and criteria recommended for development of MRAs are with regard to education, examinations, experience, conduct and ethics, professional development and recertification, scope of practice, local knowledge, and consumer protection. This provision reveals the domestic issues with which professionals concern themselves. Professional associations exist for the following interrelated purposes: to protect consumers, to maintain standards and to control who practises in the profession. Often, the associations themselves are regulated by governments to protect citizens from the abuse of monopoly power.

Professional associations view entry by foreign suppliers with some concern, since their presence makes maintaining standards more difficult. Furthermore, foreign service suppliers represent a form of competition within the profession both in terms of numbers and in terms of any additional skills they may bring. The concern over numbers depends particularly on labour market tightness. The concern over additional skills may be debated positively (foreigners bring new knowledge to the profession) or negatively (such knowledge may threaten the coherence of the profession).

As the preceding discussion demonstrates, the temporary entry provisions rest directly on wide-ranging domestic regulatory environments involving immigration, labour market development and professional accreditation. The links that arise between the temporary entry provisions and the domestic regulatory environment point to a mutually constitutive relationship that reflects the globalized state. In terms of the domestic regulatory environment, the common objectives of this relationship are to create a regulatory structure that simultaneously increases trade and investment and maintains domestic regulatory security. The creation of this structure within the globalized state produces costs (the threat of intake, including more diversity, labour displacement, lower professional standards and protectionism) and benefits (increased diversity and additional skills). The transformation that results from these costs and benefits is a dynamic tension reflecting the globalized state's struggle with the concept of diversity (regarding, for example, class issues and accreditation standards) as well as the traditional concept of territoriality (for example, who can enter and who cannot).

Unbundled Territoriality

The provisions for temporary entry are directly linked to an immigration policy environment that relies, conceptually speaking, on defining and justifying the conditions of membership within the modern territory — that is, “who may

become citizens and who must remain strangers" (Trebilcock and Howse 1995, 367).[17] A variety of rights and responsibilities flow from this membership. These provisions are also linked to territorially specific labour market policies that speak to distributional issues and the corresponding legitimacy they help to confer on domestic state action. They are linked as well to territorially specific professional accreditation policies that speak to domestic consumer protection and traditional protectionism.

The links established between these temporary entry provisions and domestic regulatory environments serve to "unbundle" traditional notions of modern territoriality so that other ways of thinking about territory and the rights attached to it become apparent (Ruggie 1998, 190). For example, if a citizen of a signatory state meets the requirements for entry, a right to enter and provide the service in the host market is conferred, even though that person is not a citizen of the host market (NAFTA 1993, article 1606). Similarly, the provisions that prevent the use of employment authorizations, confer social insurance access on temporary entrants and encourage mutual recognition agreements provide new ways to think about how states deal with those aspects of their collective existence that are not reducible to territorial space (Ruggie 1998, 190). It is important to note that while this unbundling of territoriality is transformative in nature, it is not unidirectional, and it does not necessarily displace more traditional notions of territoriality. For example, visas may still be imposed on temporary entrants, and immigration officials still have to be convinced that such entrants are not trying to enter the labour market on a permanent basis.

The unbundling of territoriality also operates with regard to the trade principles on which chapter 16 rests. These principles are laid out in chapter 12, "Cross-Border Trade in Services," and they include national treatment and local presence (articles 1202, 1205). National treatment requires signatories to accord to each other's service suppliers the same treatment that they accord, in like circumstances, to their own domestic suppliers. The local presence principle states that signatories may not require another signatory to establish an office or a residence in the host territory in order to provide a cross-border service. In terms of temporary entry, these principles set up an opening, from the trade perspective, to reconceive or unbundle territoriality to accommodate trade objectives. From a traditional territorial perspective, it is perfectly normal to treat noncitizens differently. However, such differential treatment can hamper the cross-border supply of services between signatories. The national treatment principle solves that problem by limiting the extent to which traditional territoriality dictates treatment. The local presence requirement similarly reconceives traditional territoriality by allowing service provision by nonresidents and without a commercial presence. Both

residency and presence are concepts that underpin traditional territoriality. Without them, an unbundled concept of territory emerges.

Further evidence of the unbundling of territoriality is apparent in the terminological instability surrounding the temporary entry provisions in NAFTA. On the one hand, temporary entry is afforded to various kinds of "business persons," such as "business visitors," "traders and investors," "intracompany transferees" and "professionals." These categories seem to connote high skill levels and wages as well as professional affiliations. In the provisions themselves, temporary entrants are positioned as economic agents who presumably engage in business activities to fulfill common NAFTA objectives, such as facilitation of the cross-border movement of goods and services and an increase in investment opportunities. These provisions create an interface with but do not in any way embed temporary entrants within a domestic social framework. Indeed, "temporary entry" is defined in chapter 16 as "entry into the territory of a Party by a business person of another Party without the intent to establish permanent residence" (article 1608). Any rights deriving from permanent entry, such as social rights, are limited by the exclusion of "permanent residence" from the definition. Furthermore, the provisions clearly indicate that no temporary entrant seeking to enter the local labour market shall be admitted, which seems to imply that temporary entrants are not "labourers" (with all the class connotations of that term).

On the other hand, the domestic implementation procedures applied to temporary entrants do seem to take steps toward positioning temporary entrants within the domestic social framework. For example, a trader/investor, intracompany transferee or professional can obtain a social insurance number and be accorded the rights and responsibilities that go with it. However, such positioning is selective, given the narrowness of the entrant categories. Both the right of entry and the social rights available to temporary entrants are, therefore, selectively conferred so that states can make the provisions work within their domestic regulatory environments. Through this unbundling of territoriality, the outlines of a North American labour market are drawn, albeit for the benefit of some citizens and not others.

This selectivity or exclusivity speaks to the dynamic tension inherent in the globalized state's cost/benefit struggle to address diversity and territoriality via the mutually constitutive relationship between temporary entry provisions and domestic regulatory policy. This dynamic tension is transformative in nature because it increases cross-border trade and investment, labour market integration and domestic regulatory exposure to realities that exist beyond the border.

Concluding Remarks

In this paper, I have attempted to demonstrate that a conceptual policy framework based on the separation of domestic and international spheres leads to a zero-sum way of thinking about the relationship between trade and domestic regulation. In the policy context of NAFTA temporary entry, this means that we are left with a very static, nontransformative understanding of the provisions themselves, as well as a very limited understanding of how trade and domestic regulatory policies operate and interact within a trade agreement to produce a transformation in the globalized state.

In searching for a new analytical framework to address these limitations, it is useful to apply a constructivist approach to an examination of temporary entry in the context of NAFTA. Such an approach allows us to view the domestic and international spheres within the same field of forces, thereby creating the conceptual space for the globalized state. It has been noted that this field produces a mutually constitutive relationship containing common objectives and costs and benefits that lead to transformation. In the case of temporary entry, common objectives and costs and benefits have been discussed in this paper with regard to the negotiating history of the FTA and NAFTA, signatory implementation and the domestic regulatory environment (including immigration, labour market development and professional accreditation policies). From here, transformation has been identified in the creation of formal temporary entry provisions, labour market integration, diversity and territoriality.

The importance of the mutually constitutive relationship between trade and domestic regulatory policy for temporary entry emerges when we consider the policy implications that flow from it. The following discussion briefly identifies those policy implications in the context of NAFTA and in the wider context of Canada-US border management.

Trade policy must find ways to consider domestic regulatory policy (that is, immigration, labour market development and professional accreditation) in formulating and implementing trade agreements, and domestic regulatory policy must incorporate trade policy into its framework. In this way, objectives common to both can be pursued.

An interesting example of this approach to policy can be seen in the NAFTA Temporary Entry Working Group (TEWG). The TEWG, established in accordance with NAFTA's article 1605 exists to implement and administer chapter 16, develop measures to further facilitate temporary entry, consider waiving labour certification tests for spouses of temporary entrants, and propose modifications to chapter 16. The TEWG is co-chaired by immigration officials from each NAFTA

member country and comprises immigration, labour and trade officials. It has been moderately successful in dealing with a variety of issues, including: reaching agreement on adding plant pathologists to the list of professionals; clarifying the terms "scientific technicians" and "scientific technologists"; reaching agreement on how to interpret the prohibition on self-employment in the receiving country; clarifying who may enter to perform after-sales service; clarifying interpretations concerning professionals who are nationals of NAFTA members but represent non-NAFTA firms; and clarifying issues concerning employee mobility and entry and accreditation requirements. Decisions made by the TEWG are forwarded to border officials for implementation. The work of the TEWG is an excellent example of trade and regulatory officials thinking and acting in accord with each other's policy terms in order to adequately implement chapter 16 on an ongoing basis.

When working with the reality of a mutually constitutive relationship between trade and domestic regulatory policy, we must account for costs and benefits.

The cost of increasing trade and investment through temporary entry provisions is that countries become more dependent on an open and efficient border as a prosperity driver. This means that when security concerns escalate and the border becomes less open, the negative impact is significant. The benefits of an open border are increased trade and investment leading to increased prosperity. The challenge, from a policy perspective, is to maximize the benefits and minimize the costs. The general success of NAFTA chapter 16 rests on its ability to facilitate temporary entry while ensuring that domestic regulatory objectives concerning immigration, labour market development and professional accreditation are realized. In the broader context of Canada-US border management, various efforts have been made in the last seven years to ensure that economic security (delivered via trade agreements) is not undermined by national security objectives.[18] The 1995 Canada-US Accord on Our Shared Border and the 1997 Border Vision worked to create a border that was flexible enough to accommodate economic interests and protect the health and safety of citizens. Initiatives included the Canadian CANPASS Highway and the US PortPASS dedicated commuter lanes for low-risk frequent commuters who are citizens or permanent residents. There are now CANPASS and INSPASS programs at airports for pre-approved low-risk frequent travellers. In the wake of 9/11, the Canada-US Smart Border Declaration was issued. In addition to the American preoccupation with security issues, the declaration also emphasized the importance of keeping the Canada-US border open to legitimate trade. To this end, it suggested the development of such things as common biometric identifiers in documentation — for example, permanent resident cards and NEXUS documents (which give pre-screened, low-risk individuals access to a simplified entry process) — and the initiation of joint reviews of respective visa waiver lists. All of these ini-

tiatives have focused on ensuring that the benefits of trade-related temporary entry are not undermined by the implementation of tighter security measures.

When formulating trade and domestic regulatory policy, it is necessary to consider policy options that unbundle traditional notions of territoriality and lead to transformation.

Certain examples of unbundled territoriality were discussed earlier in relation to NAFTA's chapter 16 (enforceable right of entry; prevention of employment authorizations; selective access to social insurance; encouragement of MRAs; application of national treatment and local presence; terminological instability). Unbundled territoriality also emerges in the broader context of Canada-US border management policy. In the cooperative programs established to better manage that shared border (mentioned earlier), significant attempts are being made to harmonize border management policy. The NEXUS program, for example, is working toward common eligibility requirements, a common sanctions regime, joint enrolment processes, and one application and instruction sheet. Moreover, the customs and immigration agencies of Canada and the US are working in the same border office to improve the coordination and efficiency of their policy delivery. In effect, the long-term objectives of these programs are to harmonize Canada-US inspection processes and expedite clearance of pre-approved, low-risk travellers (including NAFTA's chapter 16 entrants) and tourists while maintaining security and border integrity. These examples point to an unbundled territoriality in which a state no longer finds it efficient or effective to go it alone when implementing its domestic regulatory objectives and ensuring its economic security. Here, the transformation reflects a globalized state in which domestic and international issues are played out in the same field of forces through a mutually constitutive relationship.

These policy implications for considering temporary entry exist only in relation to the meaningful explanation of events or narrative that has been constructed in this paper as a way of understanding what temporary entry in NAFTA means to signatory states and their relations with one another. A constructivist approach to the development of this narrative is crucial for gaining access to a richer, more dynamic understanding of the temporary entry provisions and their policy relevance. It is also crucial for ensuring that there is no backsliding into a zero-sum, static approach to defining the relationship between trade and domestic regulatory policy where temporary entry is concerned. More fundamentally, this approach opens up a new way of thinking about the basis on which temporary entry speaks to an ever-changing North American reality and, by extension, about the basis on which a North American community might be imagined.

Notes

1 The notion of “dynamic density” was first developed by the French sociologist Emile Durkheim (1895, 115).

2 Waltz's model of structure is criticized for its inability to account for the transformation that occurred in the shift from the medieval to the modern period. Waltz ignores the fact that “sovereignty” as it is conceived in the modern period (unified rule and territorial exclusiveness) did not exist during the medieval period. Since the notion of sovereignty as he conceived it is crucial to his theory, this weakens the reproducibility of his model, which he claims holds over all periods (Ruggie 1998, 137).

3 Since NAFTA's provisions are very similar (though not identical) to the FTA's, a detailed examination of them will proceed in the NAFTA context. Where the FTA provisions differ significantly from the NAFTA provisions, it will be indicated.

4 For further information on the FTA, see Richard and Dearden (1988); Hart, Dymond, and Robertson (1994).

5 The nonimmigrant categories, including temporary workers, are codified in the *US Immigration and Nationality Act*, 8 USC 1101(a)(15)(B) (1994).

6 This pressure helped to ensure that “immigration” was at least included on the American negotiating agenda right from the beginning of the negotiations (Murphy 1986, 87).

7 The fact that the Canadian negotiator for services and temporary entry was the same person seemed to indicate that Canada viewed these issues as complementary. The Americans, however, had a different negotiator for each, perhaps reflecting a more traditional view of the separateness of trade and temporary entry. The United States Trade Representative (USTR) was the lead on negotiations for services, while the DOL was the lead on negotiations for temporary entry. The same pattern prevailed during the NAFTA negotiations.

8 Although the FTA included provisions for after-sales service, these were not well implemented on the ground. Implementation issues concerning after-sales service were more successfully dealt with under NAFTA.

9 There is, however, some debate within Canada over the issue of whether a permanent brain drain to the United States from Canada is actually occurring. This debate is muddied by the fact that it is very difficult to determine when temporary entrants become permanent. For more on this debate, see DeVoretz (1998); Finnie et al. (2001).

10 William Orme appears to be the only commentator to suggest that President Salinas himself initially wanted the negotiations to deal with long-standing migration irritants, perhaps as part of whatever approach would be taken for labour and environmental issues. However, Mexico backed off in the face of strong US opposition (1996, 316).

11 By 2003, remittances by Mexican workers abroad had reached US$13.4 billion, nearly seven times the 1991 figure and accounting for 7 percent of all of Mexico's foreign currency earnings. International Monetary Fund (1998, table B-19), and Banco de México (2004).

12 US immigration rules requiring a border-crossing card are codified in the US Code of Federal Regulations (CFR): 8 CFR 214.2(b) (4).

13 Codified in 8 CFR 212.1 (1) (1995).

14 Codified in 8 CFR 214 (1), (17).

15 Codified in 8 CFR 214.6(e) (2-3)(f-h).

16 Codified in 8 CFR 214.6(d) (1), (2).

17 “Modern territoriality” is understood to mean the consolidation of public and private spheres of life under one rule and the monopolization of the legitimate use of force within a given territory that can be projected externally (Ruggie 1998, 180).

18 A fuller description of the programs described here can be found on the Citizenship and Immigration Canada Web site: http://www.cic.gc.ca

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