

the art of the state
Volume II no.6

FTA at 15,
NAFTA at 10

A Canadian Perspective
on North American
Integration

Thomas J. Courchene

Giving Direct
Effect to NAFTA

Analysis of Issues

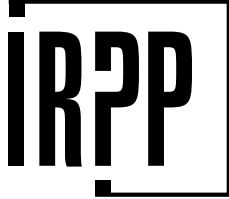
Armand de Mestral and Jan Winter

Where's the Beef?

Law, Institutions and
the Canada-US Border

Robert Wolfe





*Institute for
Research on
Public Policy*

*Institut de
recherche
en politiques
publiques*



FOUNDED IN 1972, THE INSTITUTE FOR RESEARCH ON Public Policy is an independent, national, non-profit organization.

IRPP seeks to improve public policy in Canada by generating research, providing insight and sparking debate that will contribute to the public policy decision-making process and strengthen the quality of the public policy decisions made by Canadian governments, citizens, institutions and organizations.

IRPP's independence is assured by an endowment fund established in the early 1970s.

The Canadian Institute for Research on Regional Development, located on the campus of the Université de Moncton, was established in 1983. It is an independent, nonprofit organization governed by a board of directors. Through its research, publication and conferences programs, it seeks to encourage continuing research into questions relating to regional development.

The institute views the study of regional development from a broad perspective and encourages a multidisciplinary approach including economics, economic geography, political science, public policy and sociology.

The institute's goals are twofold:

1. To act as a catalyst in promoting informed public debate on regional development issues.
2. To make available to all interested parties objective information and data pertaining to the study of regional development.

Scholars with an interest in undertaking research on regional development issues are invited to contact the institute. Our Web site is: www.umoncton.ca/icrdr

FONDÉ EN 1972, L'INSTITUT DE RECHERCHE EN POLITIQUES publiques (IRPP) est un organisme canadien, indépendant et sans but lucratif.

L'IRPP cherche à améliorer les politiques publiques canadiennes en encourageant la recherche, en mettant de l'avant de nouvelles perspectives et en suscitant des débats qui contribueront au processus décisionnel en matière de politiques publiques et qui rehausseront la qualité des décisions que prennent les gouvernements, les citoyens, les institutions et les organismes canadiens.

L'indépendance de l'IRPP est assurée par un fonds de dotation établi au début des années 1970.

L'Institut canadien de recherche sur le développement régional a été créé en 1983 et est établi sur le campus de l'Université de Moncton. Organisme indépendant et sans but lucratif, il est régi par un conseil d'administration. Son mandat est de promouvoir la recherche sur les questions relatives au développement régional dans le cadre notamment de programmes de recherche, de publication et de conférences.

L'Institut envisage l'étude du développement régional dans une perspective très large et souhaite favoriser une approche pluridisciplinaire, incluant l'économie, la géographie économique, la science politique, les politiques publiques et la sociologie.

Les objectifs de l'Institut sont les suivants :

1. susciter un débat public éclairé sur le développement régional;
2. rendre accessibles des informations et des données objectives à ce sujet.

Tout spécialiste intéressé à entreprendre des recherches sur les questions de développement régional est invité à communiquer avec l'Institut. Son site Internet est à l'adresse suivante : www.umoncton.ca/icrdr



*Institute for
Research on
Public Policy*

*Institut de
recherche
en politiques
publiques*



The Art of the State II
Thinking North
America

Thomas J. Courchene,

Donald J. Savoie and

Daniel Schwanen, editors

Copyright ©
The Institute for Research on Public Policy (IRPP) 2004
All rights reserved

Printed in Canada
Dépôt légal 2004

National Library of Canada
Bibliothèque nationale du Québec

CANADIAN CATALOGUING IN PUBLICATION DATA

Thinking North America / editors, Thomas J.
Courchene, Donald J. Savoie and Daniel Schwanen.

(Art of the state; v. 2)
To be complete in 8 folios.
Proceedings of a conference held Oct. 17-18, 2003,
Montebello, Quebec. Contents: Folio 2. A new accommoda-
tion with the United States: the trade and economic
dimension / Michael Hart — folio 3. The role of subnational
governments in North American integration / Earl H. Fry
— folio 4. Deeper, broader: a roadmap for a treaty of North
America / Daniel Schwanen — folio 5. Thinking North
American environmental management / Scott Vaughan —
folio 6. FTA at 15, NAFTA at 10: a Canadian perspective on
North American integration / Thomas J. Courchene. Giving
direct effect to NAFTA: analysis of issues / Armand de
Mestral and Jan Winter. Where's the beef? Law, institutions
and the Canada-US border / Robert Wolfe.
ISBN 0-88645-212-0 (set of 8 folios)

1. North America—Congresses. 2. Free trade—North
America—Congresses. 3. North America—Economic
integration—Congresses. 4. Subnational governments—
North America—Congresses. I. Courchene, Thomas J.,
1940- II. Savoie, Donald J., 1947- III. Schwanen,
Daniel, 1959- IV. Institute for Research on Public Policy
V. Series: Art of the state (Montreal, Quebec); v. 2.

E38.T44 2004 970 C2004-901775-6

PROJECT DIRECTORS
Thomas J. Courchene
Donald J. Savoie
Daniel Schwanen

COPY EDITORS
Marilyn Banting
Timothy Niedermann

PROOFREADING
Francesca Worrall

COVER AND INTERIOR DESIGN
Schumacher Design

COVER ILLUSTRATION
Normand Cousineau

INTERIOR PRODUCTION
Chantal Létourneau

PUBLISHED BY
The Institute for Research on Public Policy (IRPP)
l'Institut de recherche en politiques publiques
1470 Peel Street, Suite 200
Montreal, Quebec H3A 1T1
Tel: 514-985-2461
Fax: 514-985-2559
E-mail: irpp@irpp.org
www.irpp.org

To cite a paper in this document:

Armand de Mestral and Jan Winter. 2004. "Giving Direct Effect to NAFTA: Analysis of Issues." In no. 6 of *Thinking North America*, edited by Thomas J. Courchene, Donald Savoie, and Daniel Schwanen. The Art of the State, vol. 2. Montreal: Institute for Research on Public Policy.

1**Foreword****3****Thomas J. Courchene***FTA at 15, NAFTA at 10:**A Canadian Perspective on
North American Integration***35****Armand de Mestral and****Jan Winter***Giving Direct Effect to NAFTA:**Analysis of Issues***69****Robert Wolfe***Where's the Beef? Law**Institutions and the Canada-US
Border*

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

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

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

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

Hugh Segal
Montreal, March 15, 2004

FTA at 15, NAFTA at
10: A Canadian
Perspective on North
American Integration

1. Introduction

NAFTA AND ITS CANADA-US PRECURSOR, THE FTA, HAVE BEEN ASTOUNDINGLY successful trade-wise. In the 1993–2000 period alone, Canada-US trade has doubled, while Mexico-US and Mexico-Canada trade have both tripled (Hufbauer & Vega-Canavas, 2003, Table 1). More impressive still, over the full free-trade period (1989-2001) Canada's exports to the US doubled as a percent of GDP, from 18.6% in 1989 to 37.6% in 2002 (Table 1). Indeed, the very success of the FTA and NAFTA has led to a concern on the part of many Canadians that the trading relationship with the Americans needs institutional deepening: "We have reached a level of integration closer to that of a customs union or a common market, but without the institutions and rules to make sure that we are getting the full benefits of this level of bilateral integration" (Hart, 2001, p. 2).

Then came 9/11, and the possibility that failure on the part of Canada to successfully engage the Americans in their pursuit of "homeland security" might lead to a dramatic "thickening" of the border and perhaps even to an unwinding of the existing degree of Canada-US integration and trade. There can be little doubt that for NAFTA to move forward, it will have to take account of this new reality. As Richard Haass (2002), Director of the Policy Planning Staff at the Department of State, has noted: "In the twenty-first century, the principal aim of American foreign policy is to integrate other countries and organizations into arrangements that will sustain a world consistent with US interests and values, and thereby promote peace, prosperity, and justice as widely as possible." These developments have provided Canada with "an extraordinary window of opportunity to pursue common security and economic concerns within the framework of

a well-crafted initiative focused on the need to address border security” (Hart & Dymond, 2001, p. 3).

In recognition of NAFTA’s 10th anniversary and the FTAs 15th,¹ my remarks will cast both a retrospective and a prospective eye on the evolution of economic integration in North America, but from a Canadian perspective. Section 2 reviews selected indicators of Canada’s performance under FTA/NAFTA, while Section 3 focuses on the FTA and NAFTA as the catalysts, if not the drivers, of the dramatic expansion in trade and the associated transformation of the Canadian economy from its historical east-west trading axis to a north-south trading axis. Attention centers on the evolution of Canadian provinces/regions into what might be termed “North American economic region states,” i.e. sub-national jurisdictions whose focus under NAFTA is increasingly to privilege themselves and their citizens in North American economic space. Section 4 then addresses the set of issues related to broadening and deepening NAFTA, beginning with the factors motivating reform, and what a NAFTA reform “wish-list” might look like from a Canadian perspective. This is followed by a focus on strategic bargains — linking Canada’s interests in economic security and the American interest in homeland security — as a vehicle for broadening and deepening NAFTA. The section ends with proposals espousing a pluralist and bottom-up approach to the evolution of North American integration. In the conclusion, I offer some conjectures on the likely nature and scope of NAFTA at 20.

2 . C a n a d a u n d e r F T A / N A F T A : S o m e R e l e v a n t F a c t s

IN ORDER TO MORE FULLY APPRECIATE THE IMPACTS THE FTA AND NAFTA HAVE HAD on Canada’s political economy, this section provides an economic and statistical “report card” on selected indicators of Canada’s performance (relative to the US) since the advent of the FTA in 1989. As the first row of Table 1 indicates, Canada’s exports of goods and services in 1989 represented 25% of GDP. By 2001, this percentage had soared to 43%, with the already-very-high US share of Canadian exports rising from 73 to 87%. Expressed as a percent of GDP, Canada’s exports to the US doubled over 1989-2001 from 18.6 to 37.6%. This heightened

north-south integration stands in stark relief to the pattern of east-west or inter-provincial exports. From columns 4 and 8 of the Canada row of Table 1, inter-provincial exports have fallen from 22.5% of GDP in 1989 to 19.7% in 2001, which leaves interprovincial exports running at only half of the 37.6% of Canada's exports destined for the US.

It is appropriate to note that inflows of foreign goods and services into Canada as a percent of GDP increased from 25.8 to 38.1%. The US share of these imports rose only slightly — from 68.3% in 1989 to 71.0% in 2001. Hence, Canada is running a significant merchandise surplus with the United States. Just how significant is evident from Fig. 1. Canada's current account balance with the US soared from a deficit of 1% of GDP in 1989 to a surplus of over 6% in 2000 and 2001. In dollar terms, this totaled C\$67 billion in 2001, with the goods surplus of C\$95 billion partially offset by deficits in other components of the current account (Canada, 2002, Table 2B). While factors such as tariff reductions under FTA/NAFTA, within-firm cross-border rationalization of production along product mandate lines in key sectors like autos, the advent of cross-border just-in-time supplier-manufacturer/assembly relationships (again in autos), as well as the shift in Canada toward an export mentality have all contributed to the dramatic surge in exports as recorded in Table 1, a further major reason was the significant depreciation of the Canadian dollar (relative to the US dollar) from 1991 onward. This downward trend is also charted in Fig. 1, where the exchange rate is defined as US cents per Canadian dollar, corrected for relative consumer prices and expressed as an index equaling 100 for 1990. By 2001, the real value of the Canadian dollar had fallen to 70% of its 1990 value.

Fig. 2 presents a longer-term overview of the behavior of the Canada-US nominal exchange rate (expressed as the number of US cents for one Canadian dollar). From a premium (i.e. above \$1.00 US) in the mid-1970s, the Canadian dollar fell sharply to the low 70 US cent range in the mid-1980s, then rebounded to the 89-cent level in 1991, depreciated sharply during Canada's early 1990s recession, fell further to roughly 68 cents in the aftermath of the Asian currency crisis, and then tumbled further still to the low 60-cent range at the turn of the century. At the time of writing, the Canadian dollar has rebounded considerably to trade in the 68-cent range.

The Bank of Canada's principal rationale for the falling dollar is that it is tracking (and "buffering") the fall in world real commodity prices. Fig. 2 charts the behavior of

| 1989: Exports as % of GDP | | | | | |
|---------------------------|-----------------|------------------------|--------------------------|-----------------|--|
| | International | | | Interprovincial | |
| | % of GDP (1) | US share of (1) (2) | US as of % of GDP (3) | (4) | |
| Canada | 25.4 | 73.2 | 18.6 | 22.5 | |
| NFLD | 31.0 | 68.4 | 21.2 | 11.9 | |
| PEI | 14.7 | 60.2 | 8.8 | 30.6 | |
| NS | 15.8 | 66.0 | 10.4 | 21.0 | |
| NB | 26.2 | 66.5 | 17.4 | 30.0 | |
| QC | 21.2 | 75.7 | 16.0 | 22.9 | |
| ON | 28.6 | 85.9 | 24.6 | 22.6 | |
| MB | 18.5 | 62.6 | 11.6 | 28.0 | |
| SK | 22.7 | 45.0 | 10.2 | 25.6 | |
| AB | 24.5 | 75.7 | 18.5 | 28.5 | |
| BC | 28.7 | 83.4 | 12.5 | 13.5 | |

Source: Canada Department of Foreign Affairs and International Trade (2002), Tables 1A and 9E.

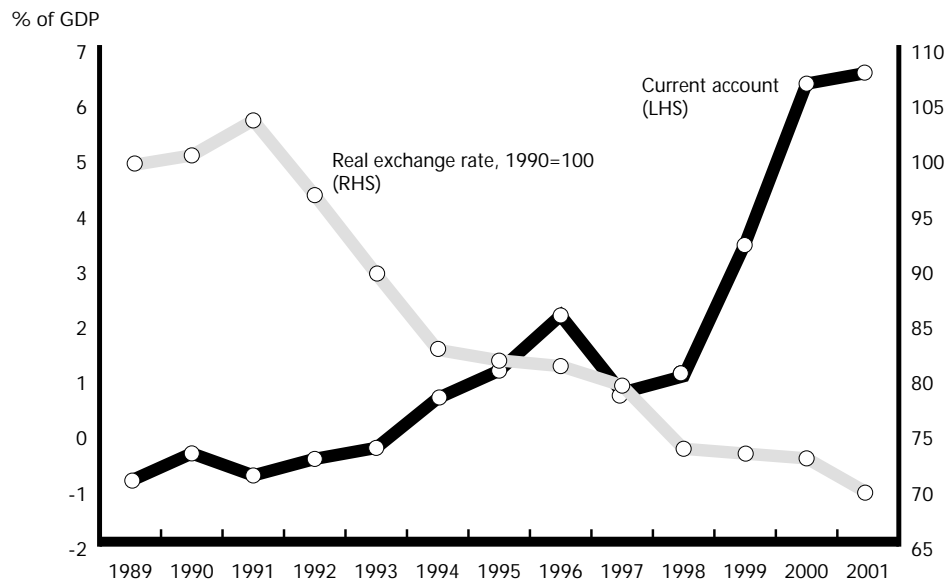
Notes: NFLD, Newfoundland; PEI, Prince Edward Island; NS, Nova Scotia; NB, New Brunswick; Que., Quebec; Ont., Ontario; Man., Manitoba; Sask., Saskatchewan; Alta., Alberta; BC, British Columbia. Provincial exports relate to provincial GDP.

International and
Interprovincial Trade,
1989 and 2001

2001: Exports as % of GDP

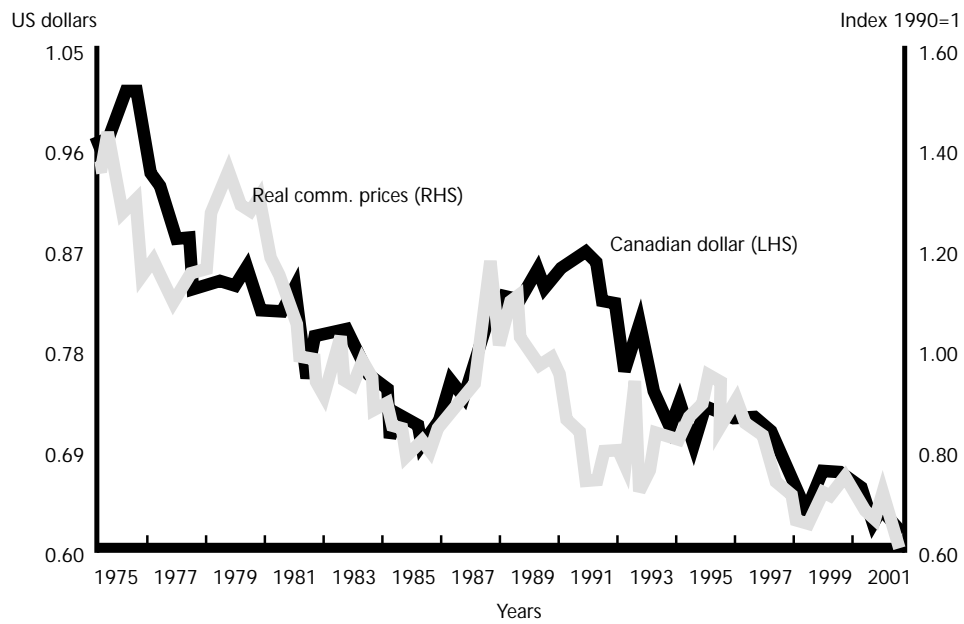
| | International | | | Interprovincial |
|--|-----------------|------------------------|--------------------------|-----------------|
| | % of GDP (5) | US share of (5) (6) | US as of % of GDP (7) | (8) |
| | 43.1 | 87.3 | 37.6 | 19.7 |
| | 37.1 | 65.6 | 24.3 | 20.3 |
| | 31.8 | 89.9 | 28.5 | 27.7 |
| | 29.0 | 82.7 | 23.7 | 21.1 |
| | 45.7 | 89.1 | 42.3 | 31.2 |
| | 39.6 | 84.8 | 33.6 | 19.4 |
| | 51.5 | 93.3 | 48.0 | 18.7 |
| | 30.7 | 80.0 | 24.6 | 29.7 |
| | 44.2 | 59.0 | 26.1 | 25.4 |
| | 41.3 | 88.8 | 36.7 | 22.1 |
| | 31.3 | 70.9 | 22.2 | 14.1 |

Canada's Real Exchange Rate vis-à-vis US Dollar and Current Account Balance with the US, 1989-2001



Source: Canada, 2002, Fig. 12.

Canadian Dollar and Real Commodity Prices



Source: Bank of Canada, Statistics Canada.

these relative commodity prices, defined as the price of (non-energy) commodities relative to the price of manufactured goods, converted to an index with 1990 equal to unity. The only major post-FTA deviation of the pattern of exchange rates tracking commodity prices occurs during 1988-1991, when the Bank of Canada sharply hiked interest rates (and triggered currency appreciation) as part of the transition mechanism toward its price-stability goal (enunciated in 1988).

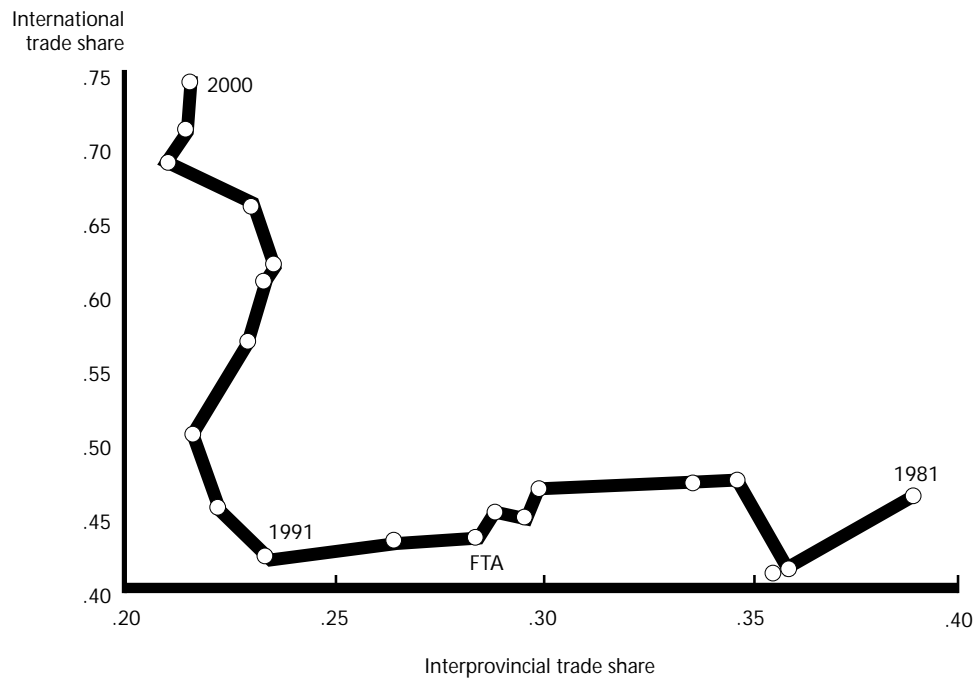
3 . F T A / N A F T A a n d t h e T r a n s f o r m a t i o n o f C a n a d i a n E c o n o m i c S p a c e

AS ALREADY NOTED, THE FTA AND NAFTA HAVE TRANSFORMED CANADIAN GEO-economic space from the traditional east-west trading axis to a north-south trading axis. Understanding the full ramifications of this reconfigured trade requires resort to the provincial data in the body of Table 1. In 2001, 9 of the 10 provinces exported more to the US than they did to their sister provinces (compare columns 7 and 8). The sole outlier here is Manitoba, even though its US export share more than doubled over this period — from 11.6% of GDP in 1989 to 24.6% in 2001 (rows 3 and 7). In sharp contrast, only 2 of the 10 provinces (Newfoundland and Ontario) had US exports in excess of interprovincial exports in 1989 (compare rows 3 and 4).

The shift of trade is evident in Fig. 3, adopted from Coulombe (2002), where the trade share is defined as $(X+M)/GDP$ for both interprovincial and international trade.² What this “L-curve” reveals is that Canada’s international trade share remained roughly constant from 1981 to 1991, whereas interprovincial trade fell from nearly 40% to just under 25% over this same period. From 1991 onward, the opposite occurred — the interprovincial trade share remained roughly constant, while the international share ballooned from about 42 to 75% of GDP. Note that the inflection point corresponds with the sharp depreciation of the Canadian dollar around 1991 (see Figs. 1 and 2).

The province of Ontario, with over one-third of Canada’s population and two-fifths of its GDP, merits highlight. Fig. 4 charts Ontario’s interprovincial exports, its US exports and its total international exports over the 1989-2001

The Canadian
International and
Interprovincial
Trade Shares



Source: Coulombe 2002.

Note: The trade share is defined as the sum of imports and exports as a percent of GDP. Years increase monotonically along the line segment 1981-2000.

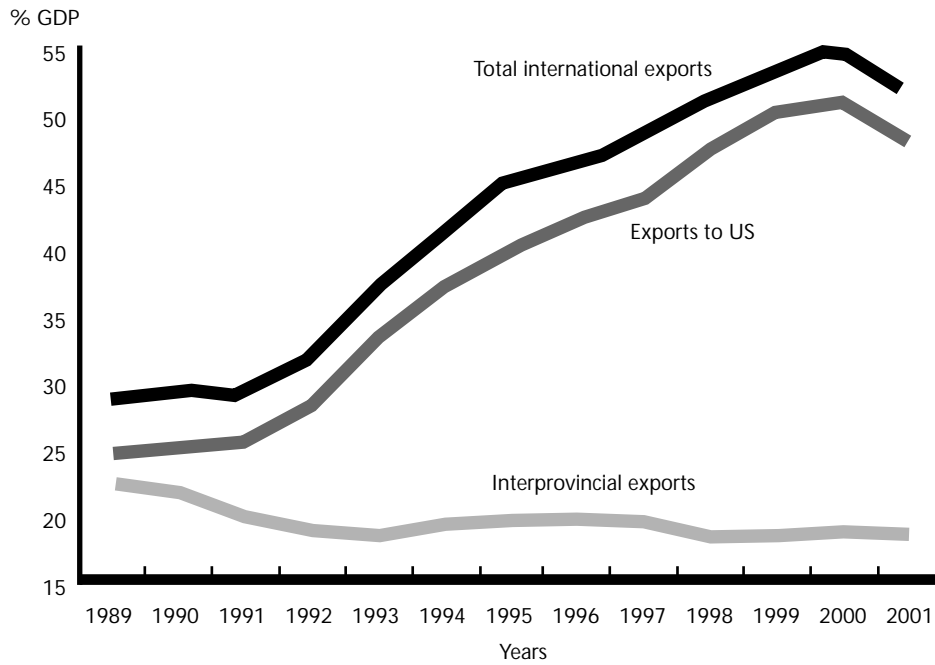
period. Prior to the FTA (i.e. in the early 1980s), Ontario's total international exports, let alone its exports to the US, were running below its interprovincial exports. As Fig. 4 reveals, by the time the FTA was signed, Ontario's exports to the US had surpassed exports to its sister provinces — roughly 25% versus 23%. By 2001, Ontario's interprovincial exports had fallen nearly 4 percentage points from 1989, whereas exports to the US had soared to nearly 50% of provincial GDP (18.7% versus 48.0% from rows 7 and 8 in Table 1). This reality suggests that Ontario's economic future now lies in NAFTA economic space and that Ontario, long the economic heartland of Canada, is becoming what Telmer and I (1998) labeled a North American economic region state, or more simply a North American region state.³

However, in order to merit fully the economic-region-state label, Ontario must be more than highly trade-linked with the US: it must also utilize its policy levers to privilege Ontario and Ontarians in North American economic space. Phrased differently, it must embrace a sub-national/international orientation, which in turn means that it must legislate to create attractive locational externalities. And Ontario certainly has done this, initially with its 1995 *Common Sense Revolution* in pursuit of fiscal integrity and tax cuts and, later, with its institutional/municipal revolution which reformed virtually every facet of the Ontario public sector in quest of operational efficiency (Courchene & Telmer, 1998, chapters 8-10). By way of an obvious example, the tax rates that concern Ontario are those in Michigan, Ohio, New York, etc., rather than those in Newfoundland or British Columbia. Accordingly, when Ontario recently cut its corporate income tax rates in half, the Ontario Finance Minister noted: "When our tax cut is fully in place, the [combined] Ontario and federal corporate income tax will be more than 10 percentage points lower than the average of that of the US Great Lakes states, our biggest competitors for businesses and jobs" (Eves, 2000, p. 26).

3.1. Canada as a Series of North-South Economies

While Ontario may be leading the way in pursuing a north-south economic future, other provinces/regions are not far behind. British Columbia is closely tied economically with Washington, Oregon and parts of California. Energy-rich Alberta's policies keep a close eye on those of the Texas Gulf. The breadbaskets of Saskatchewan and Manitoba compete with the grain states south of the border. Quebec, an industrial province like Ontario, also vies for markets

Ontario's
Interprovincial and
International Exports



Source: Canada (2002), Table 9E and F.

along the New York-Chicago corridor. And the four Atlantic provinces, which still maintain an Atlantic Rim interest, are progressively turning their attention to Boston, and New England generally. This means that one of the world's most decentralized federations is becoming not only more decentralized, but more policy-asymmetric. Canada is thus progressively less and less a single national economy and more and more a series of regional cross-border economies.

While the Canadian domestic or east-west economy is still more integrated than the cross-border regional economies, it is nonetheless the case that, in terms of gross flows and dynamism, NAFTA economic space is where Canada's economic future will unfold. The Canadian response to this new economic climate has been to preserve and promote selected socio-economic and political achievements of the former east-west paradigm, on the one hand, and to combine them with creative measures and instrumentalities designed to capitalize on the opportunities arising from NAFTA, on the other. For example, the governments of Canada and the provinces embarked on a series of agreements designed to secure the east-west or internal economic and social unions — the 1995 *Agreement on Internal Trade* for goods and services; the 1999 *Social Union Framework Agreement* for securing the internal social union; and the mutual recognition proposals/commitments designed to ensure that training, licenses, credentials and certification are portable across the Canadian provinces.

3.2. Mexico and North-South Integration

The foregoing considerations are also relevant to Mexico. Indeed, Mexico's northern tier of states (the maquiladora states as well as the more fully integrated border pairings such as Nuevo Leon and Texas) would surely qualify as North American economic region states. Not surprisingly, these NAFTA-integrating northern states want much more in the way of fiscal autonomy, in terms both of taxation and expenditure powers, in order to enhance their opportunities and competitive position in NAFTA economic space. Some of these states are already highly dollarized and are developing governmental capacity and expertise to take on more policy responsibilities. In contrast, many of the southern states have much weaker tax bases and administrative capacities, and would prefer to continue to rely on cash transfers from the center rather than opt for greater tax

autonomy. This NAFTA-triggered challenge to the operations of Mexican federalism is every bit as daunting as is the corresponding centrifugal challenge to Canadian federalism.⁴

3.3. US and NAFTA

Although the trade impacts of NAFTA for the US are identical in absolute value, they are *relatively* much less important to the US economy than they are to Mexico and Canada. Nonetheless, and perhaps surprisingly, the FTA and NAFTA are gradually reworking US economic geography in very significant ways. For example, as Sands (2002) and Haynal (2002) note, Canada is now the number one export market for 38 US states. At least six of the remaining states have Mexico as their top trading partner, and roughly a score of states have Mexico as number two. US exports to Canada account for 22.4% of overall US exports, which is above the 21.8% destined for the European Union. In tandem with Mexico's 13.9% share of the US export market, NAFTA now accounts for over a third of US exports, and it is not difficult to foresee a day when this percentage will approach 50%, in part because Mexico will likely replace Canada as the largest export market for the US.

This completes the brief NAFTA retrospective as it relates to the implications for North American integration. Arguably, and drawing from Blank (1992), in the pre-FTA era for Canada and the pre-NAFTA era for Mexico, trade flows were running behind the existing degree of infrastructure and economic integration. The FTA and NAFTA addressed this by decreasing tariffs, by enhancing access, by broadening free trade to include services, and the like. One result was the mushrooming of trade. Another was the further transformation of North American infrastructure (rail, roads, gas, electricity, pipelines, airline routes, telecommunications, standards and regulations) from three national systems into a single continental system (Blank, 2002, p. 2). In tandem, these two factors have created an environment where both trade flows and the underlying cross-border infrastructure and economic integration are, as noted, proceeding at levels more appropriate to a customs union or a common market than a free trade agreement. As a consequence, and in spite of the daunting challenges alluded to above, pressures are mounting in Canada to take steps to shrink this growing gap between the extent of cross-border integration, on the one hand, and the rules and institutions needed to govern it, on the other (Hart, 2001, p. 2).

4 . B r o a d e n i n g a n d D e e p e n i n g N A F T A

4.1. Motivating Reform

NAFTA IS A REMARKABLE MILESTONE IN THE ANNALS OF INTERNATIONAL TRADE AND economic integration. For the first time ever a comprehensive free trade agreement brought together both developed and developing countries. Moreover, it not only broadened the scope of traditional free trade agreements by embracing services, foreign investment and property rights, but as well it recognized the importance of workers' and environmental rights and issues (although it settled for having countries enforce their existing laws in these two areas rather than advancing some common principles and enforceable practices). Since it envisages no political evolution, the operative principle is "national treatment," which is sovereignty-preserving, if not sovereignty-enhancing, in contrast to the EU drive toward harmonization and a single market via hundreds of directives adjudicated via administrative law.⁵ And, of course, NAFTA has been spectacularly successful in enhancing North American trade and integration.

While these are indeed signal achievements, there is nonetheless a groundswell of interest among governments, think tanks and the academy in all three countries directed toward rethinking and reworking aspects of NAFTA. At the most general level, potential reforms tend to focus on one or all of broadening, deepening and updating NAFTA. *Broadening* is straightforward — extending NAFTA to new areas (e.g. trucking) or to potentially new members (e.g. the FTAA membership). *Deepening* is much more complex since it could imply (a) institutional deepening such as converting the free trade agreement into a customs union (CU) or a common market (CM); (b) integrating the US and Mexican states and the Canadian provinces more fully and more formally into NAFTA; and (c) embedding internal governance structures into NAFTA so that it has the ability to adjust from within to new challenges. *Updating* NAFTA involves, among other things, addressing what Hart & Dymond (2001) refer to in the Canada-US trade context as "the tyranny of small differences." In their words:

The response of the two economies to the challenges posed by freer bilateral trade and investment has been both remarkable and positive. Nevertheless, the results have created new bilateral tensions, challenges, and opportunities. The growing web of economic linkages joining the two countries, the result of the

cumulative impact of billions of discrete daily decisions by consumers and producers alike, point to the need for policy responses on both sides of the border that will have an important bearing on the quality and pace of further integration. Deepening interaction is exposing policies and practices that stand in the way of more beneficial trade and investment. Cumbersome rules of origin, discriminatory government procurement restrictions, complex antidumping procedures, intrusive countervailing duty investigations, burdensome regulatory requirements, vexatious security considerations, onerous immigration procedures, and other restrictive measures remain in place, discouraging rational investment decisions and deterring wealth-creating trade flows. The key to resolving many of these issues can be found in better ways and means to manage the border. (Hart & Dymond, 2001, p. 3, emphasis added)

4.2. A Canadian “Wish List”

Table 2, reproduced from Hart and Dymond (2001), presents what could pass for a rather comprehensive “wish list” in terms of broadening (nos. 4, 5, 7, and 8), deepening (nos. 2, 3, 5, 6, 7, 8, and 9), and updating (nos. 1, 3, and 4) NAFTA.

By way of elaboration, some of the items in Table 2 (e.g. no. 2 relating to rules of origin) could be addressed by moving toward a CU, since a common external tariff would obviate the need for complex rules of origin.⁶ Intriguingly, however, many of the items in the table would require a degree of institutional or policy deepening that is typically associated more with a CM than with a CU — for example, nos. 8 and 9. Overall, however, the provisions in Table 2 would fall way short of an EU-type single market, since principles such as national treatment and mutual recognition (evident in nos. 3 and 4 but implicit throughout the table) would be operative, thus preventing the degree of harmonization and uniformity found in the EU. The larger point here is that none of the NAFTA signatories would embrace the EU model either in its elimination of the border for non-trade purposes or in its implications for national sovereignty.

Trade in services is another problem area. With trade in services expected to increase substantially, and with employee mobility an essential part of services trade, failure to expand the Trade-NAFTA Visas (T-N Visas) beyond professional workers will surely tempt Canadian-based firms to relocate in the US. More generally, the “thicker” the border, the greater is the incentive to locate state-side for those firms intent on serving the North American market.

Overall and apart from removing the economic border, what Canadians want from any reworking of NAFTA is first, to level the playing field for Canadian-based firms and second, to permit further policy coordination in

An Agenda for Opening the Canada-US Border Further

1. For customs and border administration, more progress needs to be made on various initiatives to facilitate, streamline, and even eliminate the need for routine customs clearance of both people and goods
2. For tariffs and related programs, such as rules of origin, industry on both sides of the border would benefit from the reduction and harmonization of MFN tariff levels, obviating the need for many of these programs
3. For product and process standards and regulations, much more progress can be made in developing either common standards or greater acceptance of equivalence, mutual recognition, common testing protocols, and similar provisions
4. For services, there is room to move beyond commitments on market access to greater reliance on common standards and mutual recognition; sectoral discussions related to financial, transportation, telecommunications, and professional services would also provide further scope for reducing discrimination and enhancing trade and investment opportunities, and increasing healthy competition on a brader basis
5. For government procurement, the rules could advance from the limited entities method pursued in the GATT/WTO Procurement Agreement and expanded in the CUFTA/NAFTA to a full national-treatment approach, mandating that governments throughout the region purchase goods and services for their own use on a non-discriminatory, fully competitive basis, at least insofar as North American Suppliers are concerned
6. For trade remedies — antidumping and countervailing duties — the rules should evolve beyond WTO-like procedural safeguards to common rules about competition and subsidies, reducing the scope for anti-competitive harassment and procedures
7. For competition policy, more effort could be devoted to setting out common goals and providing a basis for cooperative enforcement procedures
8. For investment, provisions should move further down to the track of enforcement by the domestic courts of jointly agreed rules of behaviour, and
9. Institutionally, the two governments may need to move beyond the ad hoc inter-governmental arrangements of the CUFTA and NAFTA toward more permanent supranational institutions.

Source: Hart and Dymond (2001, pp. 10-11).

sensitive areas only to the extent that Canada maintains appropriate policy flexibility. Among other things, the former requires that the national treatment provision of the FTA and NAFTA be interpreted very expansively. For example, Canada-based firms operating in the US should be accorded privileges and responsibilities identical to those of US firms. With respect to policy coordination, Canadians will accept that there need to be minimum standards in various areas (e.g. labor market, environment) as well as some agreed-upon principles relating, for example, to competition policy and regulation generally. After setting these minimum standards and principles and non-discrimination provisions, however, NAFTA should allow the signatories to implement these standards and principles in *equivalent* rather than *uniform* ways.

4.3. An Analytic Detour: Deepening NAFTA and Rational Choice

That NAFTA lacks institutional infrastructure or institutional depth is fully recognized. Pastor (2001, pp. 73-74) for example, reflects as follows:

The signatories of NAFTA deliberately wanted to avoid establishing any bureaucratic or supranational institutions. The core of the agreement was therefore self-executing or designed to be implemented by *each* government. Still, the dispute-settlement mechanism obviously needed some structure. The modus operandi was to create a "NAFTA Free Trade Commission," which was a "virtual" structure; that is, it was simply a phrase to describe periodic meetings among the trade ministers of the three countries, "with no permanent location or staff."

Hence the preponderance of numbers in Table 2 that relate to deepening NAFTA. But why was NAFTA so institutionally shallow in the first place?

Toward this end, Belanger (2002, p. 4) notes that international agreements/treaties such as NAFTA have to strike a balance between comprehensiveness and internal precision, on the one hand, and delegation and internal governance structures, on the other, or, more simply, between completeness and self-governance. NAFTA fares incredibly well on the completeness dimension:

NAFTA is among the most highly detailed international trade agreements ever negotiated between governments. It comprises twenty-two chapters setting forth specific obligations on trade in goods, services, financial services, investment, intellectual property rights, technical barriers to trade, sanitary and phytosanitary measures, safeguards measures, and dispute settlement. It incorporates a panoply of annexes that elaborate the extent (and limits) or obligations by reference, among other things, to the internal legislation of its parties. NAFTA is broader in

scope of coverage ... than the WTO agreement, and it is comparable in the level of detail to the WTO agreement. NAFTA was drafted at a level of detail substantially higher than the EC treaty ... (Abbott, 2000, p. 542)

Bélanger goes on to note that with this high degree of completeness one might have expected NAFTA to also have a correspondingly well-developed process of institutionalized delegation or internal governance, e.g. a permanent court on trade and investment. But this is precisely what NAFTA does not have. Rather, as noted above, it has institutionally shallow dispute-resolution mechanisms that have neither the power of a tribunal nor the ability to internally update NAFTA to accommodate new challenges. This is in sharp contrast to the EU, which has a “relatively imprecise charter coupled with a high degree of delegation that may promulgate secondary legislation with more precise content” (Abbott, 2000, p. 521). Thus, the European Court of Justice, for example, can trump national courts.

Given the long-standing US concern about yielding sovereignty to international bodies, and the overwhelming power imbalance between the US and Canada (and Mexico), it should come as no surprise that the FTA/NAFTA has effectively no ability to adapt and adjust from within:

Powerful states are most concerned with delegation, the major source of unanticipated sovereignty costs. As a result, forms of legalization that involve limited delegation ... provide the crucial basis for cooperation between the weak and the strong. Lower levels of delegation prevent unexpected intrusions into the sovereign preserves of powerful countries while allowing them significant influence over decision making. (Abbott & Snidal, 2000, p. 449)

In his overall assessment of the interaction between the structure of NAFTA and rational choice theory, Belanger (2002) suggests that powerful states like the US will not only prefer agreements that favor completeness relative to meaningful delegation and especially to discretionary internal governance structures, but they will go further and will favor completeness as an *alternative* to internal governance.⁷ While both Canada and the US have benefited initially from the specificity and amplitude of NAFTA, over the longer term the US, because of its sheer size and power, can bear more easily than can Canada the costs/frustrations of the progressively increasing trade problems and irritants which arise in part because NAFTA itself cannot resolve them.

The important message here is that NAFTA is institutionally shallow by design, not by happenstance. The obvious corollary is that proposals for deepening

NAFTA are not likely to be successful unless US self-interest changes significantly. Enter 9/11 and homeland security.

4.4. Strategic Bargains: Linking Trade and Security

The American reality is characterized by a new single-mindedness — “homeland security” will henceforth be uppermost, and if the movement of persons, vehicles, and goods across the border compromises US security, then the border arrangements will be altered in ways that will serve to guarantee homeland security. While Canadians also remain vitally concerned on the security front, 9/11 brought home the dual reality of just how economically dependent Canada is on the seamless border with the US and just how vulnerable Canada is when the border becomes dysfunctional. Border security measures after September 11 triggered shutdowns for the just-in-time automobile manufacturers that cost them up to US\$ 25,000 per minute (Hart & Dymond, 2001, p. 7). Clearly a border subject to unpredictable slowdowns and closures will wreak havoc with much of Canada’s manufacturing and export sector. Existing Canadian firms in the just-in-time manufacturing mode will consider relocating to the US and incoming North American foreign direct investment will discount Canadian locations.

Small wonder, then, that there has been a groundswell of interest and activity in Canada directed toward rethinking NAFTA in the larger context of an overall security perimeter encompassing homeland security as well as economic security. What is emerging are proposals for a “grand bargain” (Gotlieb, 2003) or a “Big Idea” (Dobson, 2002) that link common security and economic concerns. If there is a consensus among those Canadians desirous of broadening and deepening NAFTA, it is to see 9/11 as creating a window of opportunity for pursuing common security and economic interests. As the CCCE (Canadian Council of Chief Executives) notes, “The events of September 11 provided a powerful catalyst ... Homeland security and economic security quickly became cross-border rallying cries” (d’Aquino, 2003, p. 1). The two principles that underpin this new strategy are that North American economic integration is *irreversible* and that North American economic and physical security is *indivisible*.

Beyond the security-trade linkage, there are at least two other common features of these strategic proposals. The first is that they tend to be *bilateral*, or Canada-US proposals. As a signatory of NAFTA, Canada has a moral commitment, as well as a material interest, to advance common tripartite goals in North

America. Yet, in the post 9/11 environment, the Canada-US relationship is characterized by a set of opportunities, challenges and priorities that are quite distinct from those that characterize the Mexico-US relationship. The further reality is that despite President Vicente Fox's earlier proposals for deepening NAFTA, Mexico appears recently to have dedicated itself to a series of important domestic reforms as prelude to any further negotiations related to deepening NAFTA (Ramirez De la O, 2002). Lest one view this Canada-US bilateral option as abandoning the tripartite character of NAFTA, it is instructive to recall that it was the bilateral (Canada-US) FTA that prepared the way for trilateral NAFTA. Indeed, Sands (2002a) suggests that the so-called "variable geometry" of European integration may well be appropriate as an approach to deepening NAFTA. And by way of underscoring this point, Sands notes that North American integration is already proceeding on a de facto "two-speed" basis, inasmuch as Canada and the US have already substantially deepened their security/border relationships.⁸

The second common feature is that, as is the case of the FTA, it is up to Canada to take the initiative in generating proposals linking economic and security issues. Moreover, since past experience shows how difficult it is for Canada to engage US officials on an issue-by-issue basis, any Canadian initiative must be sufficiently bold, broad and creative to capture the imagination of leading US political figures (Hart & Dymond, 2001, p. 18). Dobson (2002) argues along similar lines: "Close observers of the US political system argue that Canada can achieve nothing of significance by pursuing deeper integration in a piecemeal manner." Rather, "only a Big Idea will succeed, one that addresses US objectives while creating new economic opportunities for Canada" (Dobson, 2002, p. 1).

One such Big Idea is a customs union, another is a common market. Still another is Dobson's proposal of a pragmatic strategic bargain (Dobson, 2002, p. 1):

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

The CCCE position paper "Security and Prosperity: The Dynamics of a New Canada-US Partnership in North America" (d'Aquino, 2003) embeds Dobson's energy security proposal within a broader "North American resource security

pact,” encompassing oil, gas, electricity, coal, uranium, metals, forest products and agriculture. What the CCCE hopes to accomplish is to trade off resource security for resolution of long-standing issues and irritants relating to pricing, subsidies and regulatory practices in selected resource products (e.g. lumber).

Not surprisingly perhaps, a focus on re-inventing the border also looms large in these position papers. For example, the CCCE proposals include shifting key aspects of security enforcement away from the internal border to the North American perimeter and then streamlining the internal border by (a) creating shared identity documents for frequent border users, (b) moving commercial clearing away from the border, and (c) sharing border infrastructure and policing. The proposal also includes the creation of a Canada-US Joint Commission on border management, replicating the highly successful International Joint Commission, the oldest Canada-US intergovernmental organization, established in 1912 (under the Boundary Water Treaty of 1901) to deal with the development and conservation of water resources along the international boundary.

It is instructive to note that this security-economic linkage is finding voice elsewhere in NAFTA. In “Whither NAFTA: A Common Frontier,” Hufbauer and Vega-Canavas (2003) advance the concept of a “common frontier” with a three-pronged agenda focusing on border management, defense alliances and immigration. They envisage benefits in energy cooperation (including pipeline construction), services trade (finance, transportation, tourism, broadcasting, entertainment, health, education), agriculture, and a common external tariff. Indeed, they go further than most Canadian proposals by contemplating some version of North American monetary cooperation which, in the shorter term, could be advanced by non-voting Mexican and Canadian central bank representatives on the Federal Reserve Board.

Not surprisingly, the strategic-bargain approach to reforming NAFTA also has its detractors, even among those who are in favor of deepening North American integration. One alternative proposal (Golden, 2003), probably best described as “aggressive incrementalism,” would eschew any overarching homeland-security/economic-security deal or bargain in favor of engaging the Americans in a pragmatic manner across a variety of areas, such as those outlined in Table 2 above. A more challenging alternative (Wolfe, 2003) insists that meaningful deepening of North American integration requires much more than reworking NAFTA. What NAFTA needs are healthy doses of decentralization, pluralism and subsidiarity.

4.5. Pluralism, Subsidiarity, Mutual Recognition and NAFTA

Wolfe (2003) takes a dim view of any grand or strategic bargain since the result will, he suggests, lead to Washington-based institutions designed, in all likelihood, in line with Washington's policy priorities. Hence, "if we don't want to see the Americans in Washington, we have to talk to them everywhere" (ibid). To Wolfe that is precisely what North American integration is all about. In 2002, there were nearly 300 treaties, agreements and understandings in force between Canada and the US. This is but the tip of the iceberg of the thousands of arrangements — some formal and some informal, some written and some tacit or in the form of conventions, some public and some private — that effectively serve as a living and growing "constitution" of North America.

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

While NAFTA is undoubtedly the single most important framework for North American integration, the pluralistic nature of the players and the linkages is such that not all of the negotiation efforts should focus on the Ottawa-Washington axis. Rather, Wolfe (2003) calls for "Swiss-knife diplomacy," modeled after Gotlieb's (1991, pp. 117-118) "multiplicity-of-instruments" doctrine, i.e. "encouraging Canadian officials, legislators, politicians, businessmen, lobbyists, and others from all levels of government to be active in a kaleidoscopic effort to defend Canadian interests in the United States" (Wolfe, 2003). Beyond this, Wolfe argues that the multilateralism of the WTO may be a more promising venue to engage the United States in trade disputes than the (highly-power-imbalanced) trilateralism of NAFTA.

Blank (2002), in his "Building the North American Community: Next Steps," approaches deepening North American integration from a somewhat similar perspective. Noting that there is at present no sense of a North American interest, almost no university institutes dedicated to North America, nor any foundation devoted to North American research, Blank wrestles with how to build a North American "community."

Responding to Pastor's (2001) suggestion that a reformed NAFTA should create a North American Commission (modeled on the EU counterpart), whose mandate would be to develop a top-down plan for North American development, Blank notes (2002, p. 7):

Is this the right step at this time? I think not — at least for now — for several reasons. The first is that it is unlikely that Ottawa, Mexico City or Washington would be willing to take this step. Second is that, if the national governments were prepared to take steps to create a North American Commission, its composition would surely be severely politicized ... Finally, ... the institutions of North America should not be the creation solely of the three national governments. Their legitimacy must rest on wider and deeper foundations. ... [They] must represent the reality and complexity of North America — a mosaic of regions.

Like Wolfe, Blank adopts a pluralist view of North American integration by focusing on the myriad of associations/agreements and players/agents. However, he places more emphasis on deepening NAFTA politically (or, perhaps, federally) by proposing to bring in Mexican, US and Canadian state and province legislators and governments more fully and more formally into the institutions of North America. Indeed, in recognition of the fact that the three NAFTA partners are all federations, Blank proposes that mutual recognition and subsidiarity be the appropriate operational instruments since they both serve as counterbalances toward excessive centralization:

Europeans found that efforts to harmonize regulations at the EU level were inefficient, expensive and exhausting. The innovation was for each government to recognize regulations that had been put in place by the other governments, i.e. mutual recognition. In fact, our federal systems operate this way. We don't need separate licenses for each state we drive in. My New York State license is recognized not only by other US states, but in Canada and Mexico as well. The second policy is "subsidiarity," by which the Europeans mean that decisions should be taken as close as possible to the level of citizens. The aim is to build in from the beginning what the Europeans' learned along the way — that a critical function of the North American community should be to protect and invigorate local and regional identities. (Blank, 2002, pp. 11-12)

My assessment of these "bottom-up" approaches is that Wolfe wants to *democratize North American integration* by relegating NAFTA to the role of one (albeit still the most important) of many frameworks/agreements for conducting relationships on this continent. Blank, on the other hand, wants to *democratize NAFTA*, by arguing that with roughly 100 national and subnational governments (abstracting from the municipalities) in Canada, Mexico and the US, NAFTA should have purchase on more than just three of these. Implicit in both approaches, however, is that some of the trade disputes that currently defy resolution, because they get caught up in the

high politics of the Ottawa-Washington-Mexico City power corridor might, in a more pluralistic, decentralized and subsidiarity-driven framework, be more likely to be defused in an out-of-the-limelight manner by the relevant cross-border interests.

4.6. Recapitulation

This completes the brief *tour d'horizon* of alternative blueprints for broadening and deepening NAFTA. The analysis attempted to be indicative rather than exhaustive in terms of the range of proposals and no attempt was made to canvass the views of free-trade opponents. Moreover, these are not mutually exclusive blueprints — adherents of grand or strategic bargains would have no problem at all with bringing sub-national governments more formally under the NAFTA umbrella, and for his part Blank is on record as being in favor of a permanent court on trade and investment. Finally, the emphasis was on airing differing perspectives with respect to reforming NAFTA, without any concerted effort either to assess the merits of particular perspectives or to reconcile them with others. I now turn to a comparative perspective and assessment in the concluding section, by speculating on what NAFTA at 20 might look like.

5 . C o n c l u s i o n

NAFTA AND THE FTA HAVE BEEN ASTOUNDINGLY SUCCESSFUL IN GENERATING TRADE and integration among Canada, Mexico and the US. In the wake of this integration, several challenges have emerged. One is that in the process of reaping these benefits, Canada has undergone a dramatic transformation of its geo-economic space, so much so that for some policy purposes Canada is best viewed as a series of north-south cross-border economies rather than as a single east-west economy. Given that similar trading areas exist along the US-Mexico border, there are now important regional dimensions that have a stake in the future evolution of NAFTA.

A second challenge is that the transformation of the underlying economic infrastructure from three national systems toward one continental system is, if anything, accelerating as the process transcends physical infrastructure (transportation, energy grids, telecommunication systems, etc.) and involves not only electronic infrastructure but increasingly the range of areas coming under the umbrella of what Friedman (1999, p. 20) calls “software” (the regulatory system, competition policy, accounting and legal practices, commercial policy, and the like). This is part

and parcel of the claim that North American trade and integration are running well ahead of the institutional capacity to efficiently accommodate these flows.

The third challenge is to reconcile international integration with preservation of national policy flexibility. This transcends NAFTA, as Ostry (1997, pp. 10-11) notes:

The “shallow integration” of GATT, which centred mainly on the removal of [border] barriers, implied a preservation of national diversity ... But the [WTO] agenda of deeper integration is ... more intrusive and erosive of national sovereignty as it involves an intrinsic pressure for harmonization of diverse systems.

Most, if not all, of the above reform proposals wrestle in one way or another with this sovereignty dimension, as reflected in the emphasis on national treatment, mutual recognition, and equivalencies as avenues for reconciling different national policy preferences.

A final challenge or opportunity is the new issue of US homeland security as a domestic/foreign policy priority and the degree to which it might influence the evolution of NAFTA.

With these challenges as backdrop, the remainder of the conclusion draws inferences relating to how NAFTA might look a decade from now. Since this will be an issue-oriented rather than a detail-oriented exercise, let me make a blanket assertion to the effect that most, if not all, of the items in the Table 2 “wish list” will either be part of NAFTA at 20 or substantively addressed in alternative ways.

5.1. NAFTA at 20

The underlying force driving the shape of NAFTA at 20 is the force that led to the FTA and NAFTA in the first place — the relentless continentalization of diverse aspects of North American infrastructure. The emerging standards underpinning structural integration, especially in the software areas, tend to be set by international technical committees, international regulatory agencies, trade associations, international businesses, and institutions such as the World Bank, IMF, UN, etc., rather than by individual governments. This move in the direction of generally acceptable standards/principles will serve to level the playing field and facilitate both the broadening and deepening of trade and economic integration. In selected areas, NAFTA at 10 can accommodate this broadening of trade. In important new areas, however, NAFTA will need to be updated in terms of both substance and process to reap the benefits from on-going continental integration.

Deepening NAFTA is at the same time more complex and more difficult. Developing common standards may lead to deepening, but not necessarily always

under the NAFTA umbrella. The CCCE recommendation (d'Aquino, 2003, p. 8) that the principle of "tested once" with respect to standards, inspection, and certification procedures could be implemented either as a stand-alone agreement or within a renewed NAFTA, is an example.

Among the forces serving to deepen North American integration by NAFTA's 20th anniversary will be the drive to strengthen economic integration within each of the three federations. Canada has begun the process of removing internal barriers. As Mexico's development proceeds, a free and well-functioning domestic market becomes ever more important. In the US, completing its internal economic union has never been a national priority, and in any event may not have been possible politically. However, the US will be under increased economic pressure to perfect its internal market. Whether this comes about via the harmonization of state regulations, or the adoption of the equivalent of national treatment at the state level, or by the acceptance of the principle of mutual recognition, the stage will then be set for a simultaneous broadening and deepening of NAFTA. States and provinces are already committed to full-blown internal economic integration in key NAFTA problem areas such as trucking regulation and sub-national government procurement. Hence, it will become much easier for US states to extend any reciprocity treatment to Canadian provinces since they would be extending it to their sister states. In a sense this is an extension of the principle of national treatment to the sub-national government level.

Sub-national governments will likely become the new motors for energizing NAFTA reform. Already, the governments of Ontario and Michigan are discussing cross-border trade and how to better manage the Ontario-Michigan border. Similar initiatives are in progress elsewhere along the US-Canadian and US-Mexican borders. Since the needs and interests of Michigan and Ontario are likely to differ from those of BC and Washington or those of Texas and Nuevo Leon, it may be desirable for NAFTA to allow for sub-national/regional "understandings" that would enhance cross-border trade and access for these clusters (subject, presumably, to some overarching principles). From the US standpoint, it will not go unnoticed that many of the Canada-based firms likely to gain from such measures are in fact US-owned and that there is enormous potential for US export growth as Mexico reaps the benefits from North American integration.

The very definition of policy sovereignty or autonomy is changing rapidly in the information era. Global forces are progressively impinging on the ability of nation-states to control key aspects of policy, even within their own borders. One can view this

as the development of a “global policy commons.” Castells (1998) applies this “global commons” analytical framework to the evolution of the EU when he observes that European integration has succeeded in part because the European Union does not supplant existing nation-states. On the contrary, it enhances their survival in spite of the forfeiture of some sovereignty by ensuring their greater say in region and world affairs in the age of globalization. Phrased differently, “nationalism, not federalism, is the concomitant development of European integration” (ibid, p. 327). Admittedly, what applies to multi-polar Europe may not carry over to US-dominated North America. Nonetheless, proposals for deepening that are unacceptable today may be welcome a decade from now, in the same way that Canadians are probably ready to embrace a CU today, even though this was deemed unacceptable during NAFTA negotiations.

In terms of strategic or grand bargains, it is certain that Canada and the US will undertake further initiatives relating to homeland-security/economic-security. As former Canadian Prime Minister Mulroney (2002, p. 5) noted, “our internal borders will only be smart if our external perimeter is secure.” The more interesting question is whether homeland security can be exchanged for a deepening of NAFTA. If something like the CCCE proposal for a resource pact were included, there would be enough on the table to enable Canadians to achieve some of their objectives.

However, deepening in the sense of Gotlieb (2003) conception of NAFTA as a “community of laws” is a more difficult goal, since it is not evident that the US would relinquish anti-dumping and trade-remedy laws in favor of coordinated competition policy and anti-trust law. Better, perhaps, to apply the rule of law initially to a less high-profile area, where success is more likely and then count on extending this to other areas as Americans become more comfortable with a rules/law-based regime and as the sense of a North American community gains momentum.

Two further policy issues could have important implications for NAFTA at 20. One is Canada’s flexible exchange rate regime. Courchene and Harris (1999, 2000) argue that the Canada-US exchange rate has been too volatile, given Canada’s degree of integration with the US. They argue that a fixed-exchange-rate regime is preferable and that the optimal fixed rate is North American Monetary Union (NAMU) anchored around the US dollar and modeled along euro and European Central Bank lines. Pastor (2001) is clearly in favor of NAMU, Hufbauer and Vega-Canavas (2003) appear to be supportive, and Dobson (2002) accepts it as a possibility. In the interval between winning the election and ascending to the Presidency, Vicente Fox was

a staunch advocate for deepening NAFTA, including the introduction of a common currency. Even though NAMU could play an important role in deepening North American integration, it appears that it remains an idea whose time is not quite nigh.

Canada's exchange rate regime affects the country's relations with the US in yet another way. Commenting on the dramatic depreciation of the Canadian dollar in the early 1990s (see Fig. 1 and Fig. 2), Pastor (2001, p. 110) is candid:

A significant element of the timber problem — and, for that matter, many other trade problems — is due to foreign exchange rates. As long as the Canadian dollar sells for about two-thirds (65 cents) of the US dollar, Canadian exports will remain cheap, and a surge is likely to have dangerous effects, evoking threats of countervailing duties or antidumping from the United States. If the currencies were in better alignment, protectionist measures would diminish.

It is one thing to ignore this issue, as all Canadian proposals do. It is quite another for Canadians to ask for conversion of countervail and antidumping procedures to rules-based adjudication, without recognizing that the Americans will insist on ensuring that Canada does not use exchange-rate depreciation to undercut any such agreement. This is just one area where Canada can influence the degree to which NAFTA may be deepened.

The second policy issue impinging on NAFTA at 20 is the proposed Free Trade Area of the Americas (FTAA), which would embrace 34 countries, 800 million people and an annual GDP of US\$ 12.5 trillion. The FTAA and NAFTA could well get caught up in the "European dilemma" — deepening NAFTA may preclude meaningful broadening to encompass the remaining countries of the FTAA, and broadening may inhibit deepening. None of the Canadian proposals highlighted above devotes any attention to the FTAA.

It is clear that the underlying infrastructure of North America will continue to evolve along continental lines, deepening interdependence and creating common interests and goals among North Americans. NAFTA will continue to be a key vehicle on this journey.

It is a pleasure to acknowledge valuable discussions with, among others, Dan Ciuriak, John Curtis, David Elder, George von Furstenberg, Michael Hart, George Haynal, John Noble, Donald Savoie, Larry Schembri, Hugh Segal, Daniel Schwanen, Robert Wolfe and Robert Young. Special thanks go to Sven Arndt for his insightful comments on both substance and structure.

Notes

- This paper was presented as the Presidential Address to the North American Economics and Finance Association Meetings in Washington, DC, January 2003. Reprinted from the *North American Journal of Economics and Finance* 14 (2003): 263-85, with permission from Elsevier. This paper served as a backgrounder for the "Art of the State" conference around the theme "Thinking North America: Prospect and Pathways" held in October 2003 in Montebello.
- 1 NAFTA was signed by Prime Minister Mulroney, President George H. Bush and President Carlos Salinas de Gortari in 1992. It was ratified in 1993 and it took effect on January 1, 1994. The FTA was signed in 1988 and took effect on January 1, 1989.
 - 2 The dots represent successive years beginning with 1981. For example, the FTA is located at the 1989 dot. The data in Fig. 3 relate to trade in goods. Services trade has a different pattern, although the aggregate results (for goods and services) also generate an L curve. See Coulombe (2002). Finally, the ratio of exports to GDP can exceed 100%, since exports are valued in terms of the full cost of the product, independent of the value-added in Canada, whereas GDP measures value-added.
 - 3 In *From Heartland to North American Region State ...* (1998) we defined region-state in terms of three characteristics: it must be a political sub-region, i.e. a province or a state; it must have an economic hinterland/trading area that is cross-border; it must use its legislative powers to advance its economic fortunes in this cross-border economic space.
 - 4 One potentially promising approach to accommodating these diverging state preferences arising from North American integration would be to decentralize taxation and expenditure responsibilities, but then to embed this tax decentralization within a Canadian-style equalization program so that benefits of economic progress, wherever they arise, are equitably shared across all states and citizens. See Courchene, Diaz-Cayeros, and Webb (2002) for elaboration.
 - 5 National treatment means that an American firm can do in Canada exactly what a Canadian firm can do. In contrast, and in the limit, the EU single-market principle (sometimes referred to as home-country rule) implies that a German firm can do in France exactly what the German firm can do in Germany. Apart from exemptions relating to health and safety, the application of home country rules drives the EU toward uniform regulations.
 - 6 It is not evident that NAFTA members would be willing to embrace a formal CU since, among other things, this would require altering bilateral free-trade agreements with third nations.
 - 7 It is admittedly the case that Canada also feared that deepening NAFTA along selected lines could lead to Washington-based institutions modeled along US policy lines (Wolfe, 2003). However, in important areas like dispute resolution, approaches to countervail, subsidy codes and the like, Canada would have preferred institutionalized governance structures embedded within NAFTA.
 - 8 From Sands (2002, p. 2): "The action plan set out in the 30-point Smart Border Declaration signed by both countries in December 2001 is mostly complete, with officials in the two countries now sharing an unprecedented amount of information (including intelligence on potential immigrants and refugees) in real time. Under the Container Security Initiative, US and Canadian inspectors have formed joint teams in the ports of Halifax, Montreal, Vancouver, Seattle, and New York to ensure that shipping containers do not conceal weapons of mass destruction. The FBI and RCMP (Royal Canadian Mounted Police) cooperate in joint investigations, including counterterrorism and old-fash-

ioned criminal cases. Interoperability with the US military is the declared goal of Canada's military planners, and Canada is seeking to develop a close relationship with the new US Northern Command, including NORAD (North American Air and Aerospace Defense Command), which first integrated Canadian and US air defenses in the 1950s."

References

- Abbott, F.M. (2000). NAFTA and the legalization of world politics: A case study. *International Organization* 54 3 pp. 519-547.
- Abbott, K.W., and D. Snidal (2000). Hard law and soft law in international government. *International Organization* 54 3, pp. 421-456.
- Bélanger, L. (2002). Vers une communauté nord-américaine? Asymétrie et institutions communes au sein de l'ALENA. Paper presented at the conference *Intégration dans les Amériques: Dix ans d'ALENA*, Paris 3-Sorbonne, Paris, June 13-14.
- Blank, S. (2002). *Building the North American community: Next steps*. Mimeo. Business School, Pace University, New York City.
- _____. (1992). *The United States and Canada: The emerging architecture of North America*. A submission to the Carnegie Endowment for International Peace, National Commission on America and the New World (April 10). New York: Americas Society.
- Canada (2002). *Trade update 2002: Third annual report on Canada's state of trade*. Department of Foreign Affairs and International Trade: Minister of Public Works and Government Services Canada.
- Castells, M. (1998). *The end of millennium*. Oxford: Blackwell.
- Coulombe, S. (2002). *Border effects and North American integration: Where are we up to?* Paper presented at the Industry Canada and Human Resources Development Canada Conference, Social and Labour Aspects of North American Linkages, Montreal, November 20-22. Ottawa: Industry Canada.
- Courchene, T. J., A. Diaz-Cayeros, and S. Webb (2002). *Mexican fiscal federalism: Current practice and potential scenarios for political and fiscal decentralization*. Mimeo. School of Policy Studies, Queen's University, Kingston, Ontario.
- Courchene, T. J., and R. G. Harris (1999). *From fixing to monetary union: Options for North American currency integration*. Commentary 127. Toronto: C.D. Howe Institute.
- Courchene, T.J., and R.G. Harris (2000). A North American monetary union: Analytical principles and operational guidelines. *North American Journal of Economics and Finance* 2, p. B-18.
- Courchene, T. J., and C. R. Telmer (1998). *From heartland to North American region state: The social, fiscal and federal evolution of Ontario*. Toronto: Centre for Public Management, Rotman School of Business, University of Toronto.
- d'Aquino, T. (2003). *Security and prosperity: The dynamics of a new Canada-United States partnership in North America*. Presentation to the Annual General Meeting of the Canadian Council of Chief Executives, Toronto, January 14. Available at CCCE website.
- Dobson, W. (2002). *Shaping the future of the North American economic space: A framework for action*. Commentary No. 162. Toronto: C.D. Howe Institute.
- Eves, E., Ontario Minister of Finance. (2000). *The 2000 Ontario budget: Balanced budgets — bright futures*. Budget speech. Queen's Park, Toronto: Queen's Printer for Ontario.
- Friedman, T. (1999). *The Lexus and the olive tree: Understanding globalization*. New York: Faviar, Strauss and Giroux.
- Golden, A. (2003). Building a new partnership. *The Globe and Mail* (March 5), A15.
- Gotlieb, A. (2003). A grand bargain with the US. *The Globe and Mail* (March 5), A14.
- _____. (1991). *I'll be with you in a minute, Mr. Ambassador: The education of a Canadian diplomat in Washington*, Toronto: University of Toronto Press.
- Haass, R. (2002). <http://www.state.gov/s/p/rem/9632pf.htm>

- Hart, M. (2001). *What prospects does the Bush administration hold for Canadian trade interests?* Address to the certified general accountants of Canada (February 14). Available at <http://www.carleton.ca/ctpl.michael1.htm>
- Hart, M., and W. Dymond (2001). *Common borders, shared destinies: Canada, and the United States and deepening integration*. Centre for Trade Policy and Law. Ottawa: Norman Patterson School of International Affairs at Carleton University.
- Haynal, G. (2002). Interdependence, globalization and North American borders. *Policy Options/Options politiques*, 23(5), 20-28. Montreal: Institute for Research on Public Policy.
- Hufbauer, G. C., and G. Vega-Cánovas (2003). Whither NAFTA: A common frontier. In P. Andreas and T. Biersteker (Eds.), *The rebordering of North America: Integration and exclusion in a new security context*. New York: Routledge.
- Mulroney, Prime Minister B. (2002). NAFTA: Past present and future. Keynote address to the *NAFTA at 10: Progress, Potential, Precedents*. Conference at the Woodrow Wilson International Center, Washington, DC, December 9-10.
- Ostry, S. (1997). Globalization and the nation state. In T. J. Courchene (Ed.), *The nation state in a global/information era*. Queen's University, The John Deutsch Institute for the Study of Economic Policy.
- Pastor, R. A. (2001). *Toward a North American community: Lessons from the old world for the new*. Washington, DC: Institute for International Economics.
- Ramirez De la O, R. (2002). *Mexico: NAFTA and the prospects for North American integration*. The Border Papers. Commentary 172. Toronto: C.D. Howe Institute.
- Sands, C. (2002). Integration: Process, condition, or doctrine. *North American Integration Monitor*, 1(1). Washington, DC: Center for Strategic and International Studies.
- _____. (2002a). North America at two speeds. *North American Integration Monitor*, 1(2). Washington, DC: Center for Strategic and International Studies.
- Wolfe, R. (2003). "See you in Washington?: A Pluralist Perspective on North American Integration." *IRPP Choices* 9, no. 4. Montreal: Institute for Research on Public Policy.

Giving Direct
Effect to NAFTA:
Analysis of Issues

I n t r o d u c t i o n

A NUMBER OF AUTHORS AND COMMENTATORS HAVE EVOKED THE IDEA OF A “TREATY of North America.” The impetus for such an idea seems to rest on a number of concerns. Key among them is the need to better manage North American economic and social integration, especially amid the sharply heightened security concerns present since September 11, 2001 (9/11). There is a perception in some quarters that the current “light” formal institutional structure under the North American Free Trade Agreement (NAFTA) may not be up to the task of addressing these issues. It is striking, for instance, that measures to deal with security concerns after 9/11 have largely been negotiated and adopted outside of the NAFTA context. The contrast is often made with Europe, where integration has been proceeding apace within the context of the European Community (EC)¹ in a host of areas ranging from the strictly economic to monetary matters, social and cultural issues and even measures dealing with refugees, immigration and border controls. Can we really envisage a North America where free movement of products and people, mutual recognition of standards, a Schengen-like structure ensuring proper control at the perimeter and perhaps even cross-border “structural” fiscal transfers will work to the benefit of citizens from all three NAFTA countries? And is NAFTA itself the proper vehicle for addressing these matters, or has it, as some have stated, reached the limits of its usefulness?

NAFTA has been an undoubted success, but its limits are becoming more and more apparent as the years pass. The very form of a free trade agreement implies that scant institutional means are created for maintaining the momentum of economic integration; furtherance of the goals of the agreement remains

dependent on the political will of the governments that are party to it. Since governments are notoriously focused on the short term, they in fact seldom have the incentive to maintain the long-term commitment needed to make the constant necessary adjustments to the agreement to respond to ever-changing economic, social and political conditions. In the case of NAFTA, much has been done to facilitate the free movement of goods, services and capital but very little has been done to facilitate the free movement of people. This has fuelled the public perception of free trade as creating fundamental social inequity and has bolstered fears of the effects of globalization and more open markets. Thus clearly the legal structures created by the three governments under NAFTA have proven to be insufficient to create a genuine North American economic space.

What can be done to take NAFTA further down the road toward genuine economic integration among the United States, Canada and Mexico? A variety of economic models can be proposed or developed, but the issue is essentially one of policy and will be determined above all by political considerations. Foremost of these considerations is the degree of openness in each country toward supranational rules and institutions. For a variety of reasons it does not appear that policy makers or the general public in any of the three countries would be open to solutions of a supranational character based on the EC model, so the normal institutions of a successful customs union do not seem likely to be available as options.

It is for this reason that this paper makes a somewhat unorthodox proposal: to give “direct effect” to selected provisions of NAFTA. To better further the aims of economic integration, citizens should be able to claim rights under NAFTA directly, and courts should be empowered to enforce these rights. This proposal builds on NAFTA’s existing format and adds no new supranational structures. It is hoped that this proposal will increase popular support for NAFTA by ensuring that citizens have a stake in its enforcement. As such this is intended to constitute a pragmatic approach to further the goal of enhancing economic integration among the NAFTA countries, eliminating borders and creating a genuine consciousness of a North American economic space.

This paper is laid out in several parts. The first section provides the background and commentary on the need to reevaluate the NAFTA agreement, summarizing the range of past proposals for its improvement. After a brief presentation on the concept of direct effect, the rest of the paper discusses in detail some of the issues raised by it, including discussions on treaty law in

general and treaty implementation in the three NAFTA countries, finishing with a discussion of the nature and logic of direct effect as applied to NAFTA.²

The Range of Recent Proposals

THERE IS A GROWING CONSENSUS AMONG SCHOLARS AND OTHERS THAT SOMETHING should be done to improve NAFTA. The president of Mexico has proposed a customs union before the Parliament of Canada. Many commentators and institutions in Canada, but also in Mexico and even in the United States, are of the view that NAFTA, as it exists, is no longer responding to the reality of the North American economic environment. It is felt that the degree of economic integration actually reached (especially by Canada and the United States) is not matched by the rules and institutions of NAFTA. This is particularly true of the institutions, which are manifestly inadequate. But the same can be said of some of the rules: there are too many exceptions and anomalies resulting from negotiating constraints that may have existed 10 years ago but are now forgotten. The greatest defect is that the NAFTA text does not contain the means of its own development: a “widening” or “deepening” of NAFTA can only be accomplished by ad hoc decisions of the three governments, all of whom are notoriously caught up by the exigencies of the moment, which seldom include NAFTA. A striking example of this fact is the reaction to the border crisis after 9/11, where negotiation and initiation of enhanced national security measures, which have a substantial direct impact on cross-border trade and on NAFTA, was accomplished almost entirely outside the NAFTA framework.

Proposals for exactly how to modify the agreement are numerous and varied. The summary below does not cover all the proposals made, nor does space allow us to do justice to their sophistication and complexity.

Wendy Dobson has advocated a “big-idea” approach to reinvigorate the North American economic environment. She believes that Canada should “initiate a joint strategy for achieving a common goal of North American physical and economic security” (Dobson 2002a, 1). This strategy should include links to four key elements: security, defence, natural resources and economic efficiency (Dobson 2002b). She has suggested that there are three big ideas that could be

pursued: a customs union, a common market or a strategic bargain. A strategic bargain is a pragmatic approach to deepening the North American relationship, not through harmonization and common institutions, but through mutual recognition and a satisfactory division of functions among governments. Further, she has proposed that a strategic approach to physical and economic security should focus on the Canada-US relationship instead of involving Mexico. According to Dobson, a renewed relationship incorporating some of the features of a customs union or common market would be beneficial to Canada, and, in order to interest the United States in these features, Canada should be willing to cooperate on American security interests. The benefits of a customs union or a common market should also be pursued without the accompanying harmonization, which would undermine Canadian political sovereignty. In Dobson's view, Canada needs to formulate a strategic objective and propose large initiatives in order to best ensure that its goals are addressed and to facilitate the trade-offs and linkages that will remove remaining bilateral economic barriers.

Thomas Courchene has considered the impact of the 9/11 attacks on the Canada-US trade relationship, highlighting the impact that the American homeland security measures could have, and have had, on the maintenance of an open border. Courchene argues that North American economic integration is irreversible and that economic and physical security are inextricably linked. Like Dobson, Courchene also suggests that Canada should initiate a proposal for reinvigorating NAFTA, and that this would best be pursued on a bilateral basis. He suggests that "the operating principles underlying NAFTA deepening should be national treatment, mutual recognition, or policy equivalency, rather than policy or institutional uniformity" (Courchene 2003, 41). While he has been a long-standing advocate of a monetary union, he lends his support to Dobson's "big-idea" approach, suggesting that a strategic bargain can be forged that will allow trade-offs among defence, borders, immigration and energy access in order to broaden and deepen the Canada-US trade relationship.

Michael Hart and William Dymond focus on the importance of the border to Canada-US relations. Also recognizing the unique negotiating environment that has arisen post-9/11, Dymond and Hart advocate a bilateral Canadian initiative to tackle common security and economic concerns. They argue that there are important economic and security reasons for the border to be kept open to trade, investment and tourism and that the two countries should pursue a bold and

coordinated approach to maintaining its smooth operation (Dymond and Hart 2003). Suggesting that current cross-border arrangements are inadequate to manage the issues that need to be addressed, they suggest that the two governments pursue a comprehensive agreement that will progress along three tracks: (1) strengthen “institutional and other linkages that will facilitate full cooperation in addressing terrorist and other threats to the security and well-being of their citizens”; (2) “build upon such programs as CANPASS and INSPASS to create a much more open and less bureaucratic border”; and (3) “examine the contours of a new agreement, enshrined in a NAFTA-plus accord, implementing rules, procedures, and institutions consonant with the reality of ever-deepening, mutually beneficial cross-border integration.” The objective of these efforts should be “to create a North America that is more open, more secure and more prosperous” (Dymond and Hart 2003, 3).

In a paper setting out a plan for a new long-term arrangement between Canada and the United States, Michael Hart proposes a “new deep-integration agreement” by which the Canadian and American governments can better manage their common economic space (2004, 2). He focuses on a wide range of issues raised by increased economic integration such as the elimination of complex border controls, security, immigration, the regulation of consumer safety and the treatment of third-country goods. He makes a strong case for increased cooperation between the two governments through recourse to flexible institutions to maintain dynamic and competitive markets, including cooperative bilateral institutions.

Danielle Goldfarb sets out a proposal for a Canada-US customs union, offering suggestions as to how it might be structured at several different levels of integration (2003). In a careful comparison of tariff structures, she suggests that, with a few notable exceptions, the establishment of a single tariff would bring Canadian rates down. She also argues that one of the principal advantages of a harmonized tariff would be the elimination of the perverse effects of NAFTA rules of origin. In her view the most complex issues are posed by the need to reconcile the effects of the many preferential arrangements made by the three parties to NAFTA. She is largely silent on the need to provide more effective institutions or the World Trade Organization (WTO) law difficulties posed by her sectoral proposals.

Robert Wolfe, in contrast, proposes a plurilateral alternative to the big-idea visions of deepening integration (2003). Wolfe recognizes the arguments made in favour of integration, and does not counsel inaction, but does suggest that the various

big idea proposals for integration are radical and may be moving too fast. The current system, according to Wolfe, is sustained by innumerable plurilateral links that operate effectively across all levels of society, without the need for centralized integration. Small institutional settings can be used to encourage problem-solving, instead of pushing for big, systemwide integration that will be constrained by the political realities in both Canada and the United States. Thus, Wolfe argues that the current system is not in need of fixing and that problems arising between Canada and the United States can be resolved by placing greater reliance on the individual links that already exist to facilitate the relationship between the two countries.

Gary Clyde Hufbauer and Gustavo Vega-Cánovas have issued a call for integration beyond the current NAFTA trade and investment liberalization, outlining a proposal that they have termed an action for a “Common Frontier” (2003). Their agenda is divided into three key areas: border management, defence alliance and immigration. In each area the authors advocate a detailed revitalization and integration of common issues. In border management they suggest preborder inspection programs to facilitate cross-border traffic. Under defence they advocate the creation of a new defence alliance that would promote intelligence-sharing, electronic surveillance, the creation of a NAFTA arrest warrant and an integrated coast guard. Their immigration proposals include a two-tiered NAFTA/non-NAFTA approach, with advanced screening of security threats and a smoother system of facilitation for NAFTA business travel, cross-border retirement and Mexican migration. Writing from the American perspective, Hufbauer and Vega-Cánovas suggest that such an initiative would best be proposed by a joint effort between Mexico and Canada.

Thomas d’Aquino, writing from the perspective of Canadian business leaders, argues that North American economic and physical security are indivisible (2003). D’Aquino writes in support of a proposal by the Canadian Council of Chief Executives to create a North American security and prosperity Initiative (NAPSI). The NAPSI has five key elements: first, a reinvention of borders to create a continental zone of cooperation instead of a continued focus on the border alone; second, a maximization of economic efficiencies through a reduction of redundant regulations and harmonized standards (this would also include addressing the use of trade remedies, “regulatory restrictions on access and ownership in major industries, and impediments to the mobility of skilled labour”); third, ensuring resource security through the removal of threats of trade

disputes; fourth, creation of a North American defence alliance, which would include increased Canadian participation in security; and finally, the development of institutions that can take the Canada-US relationship further than its current institutions are capable of sustaining (D'Aquino 2003, 4).

Stephen Blank, writing from the American perspective, suggests steps that can be taken to build a North American Economic Community (2002). Blank believes that there are limits to "bottom-up integration" and that efforts need to be made to foster a sense of a "North American community." This can be accomplished through the development of a vision that includes an understanding of common interests and a common identity. He also calls for a common voice through a North American commission that would represent the diversity of North American regions and would include representatives from key organizations across the continent. Finally, he calls for the strengthening of current institutions and the creation of new ones to deepen continental ties guided by the principles of "mutual recognition" and "subsidiarity" (Blank 2002).

To conclude, a considerable amount of current commentary on the state of North American economic integration seems to agree that there is a need for some sort of action to deepen NAFTA. While the majority of concerned opinions are voiced in Canada, similar concerns have been expressed in the United States and Mexico. There is little agreement, however, on precisely what form additional institutions or rules should take. Few, if any, of the proposals present a concrete map for how to proceed along a path to increased integration. While NAFTA is agreed to be inadequate to manage the current state of economic, social and security relations among the three countries, there is still a need for a proposal that lays out the specific steps to be taken to remedy this situation.

T h e P r o p o s a l : G i v i n g D i r e c t E f f e c t t o N A F T A

AS A CONTRIBUTION TO THIS DEBATE, THIS PAPER PROPOSES THAT MANY OF THE PROVISIONS OF NAFTA BE GIVEN "direct effect," that is, that the citizens of the three signatory countries be given private rights of action under NAFTA to enforce those provisions.

The concept of direct effect is most clearly developed in European Community law. Similar but different concepts are the “self-executing treaty” — used in the US and suggesting a treaty whose provisions are designed to be applied by domestic courts, and “direct application” — suggesting the complete assimilation of a treaty to domestic statutory law. In some cases, courts or governments have confused (or fused) these latter two concepts, judging a treaty to be directly applicable or self-executing partly by whether a private party may invoke it. We believe that it is analytically preferable, in order to avoid confusion and potential error, to separate these concepts, particularly since the policies that relate to each one differ considerably. For example, direct application may primarily be a question of intent of one or more of the treaty parties, while self-execution may depend on the precision of the language of the treaty itself: definitions of categories of persons (e.g., citizen, adult male), or concepts of justiciability or political question (Jackson 1992, 317-18). Direct application implies that the international instrument applies both between citizens and governments and between individual citizens; while direct effect refers essentially to legal relations between citizens and governments. Direct effect, as proposed here, is a “vertical” direct effect limited to relations between governments and the governed. It is not proposed to give “horizontal” direct effect to NAFTA so as to have it govern interpersonal or intercorporate relations.

Currently, NAFTA applies only to the three states as governments and not directly to their citizens. If this proposal were implemented, NAFTA would cease — particularly in Canada and the United States — to be purely an intergovernmental agreement and would become a document having direct, rather than indirect, relevance to the lives, business decisions and legal relations of private citizens and companies doing cross-border business vis-à-vis their governments. This Rubicon has long been crossed in economic terms in the sense that the Canadian economy is more integrated into that of the United States than any two EC countries are with each other. But in legal terms NAFTA, unlike the EC, remains a commitment among the three states that is wholly managed by the three signatory governments.

The granting of direct effect to specific provisions of NAFTA would empower citizens to rely upon these provisions as rules of domestic law before the courts in situations where they consider that their government has failed to properly respect the agreement. No longer would citizens have to wait until

intergovernmental negotiation had resolved an issue, since they would be able to go to court to enforce the agreement against the will of their governments or in the face of what they consider to be an administrative decision taken in violation of commitments made under NAFTA. This proposal is a radical step, in that it would deprive the three signatory governments of “ownership” of the agreement. On the other hand, it is cautious in that it implies no other substantive change in NAFTA and does not require the adoption of supranational rules or institutions. This proposal uses the courts and expands their authority on the assumption that they constitute the only North American governmental institutions whose powers can be expanded without encountering serious political objections.

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

A few examples can be given of the potential impact of direct effect. If the rule of NAFTA chapter 3 of no new tariffs were to be directly effective, any border measure, tax or internal charge that resembled a tariff would be subject to challenge. If the rule banning quotas were to be directly effective, any law or administrative decision that operated as an absolute ban on the entry of goods into the domestic market could be challenged. This would involve judges in the sometimes difficult process of characterizing measures as trade related or aimed at other different social or environmental policies not restricted by NAFTA. This process can be controversial, but judges in Europe do it every day of the week without serious challenge to their integrity or to the legitimacy of the process. It is probable that, with a few exceptions, many of

the cases that have gone to arbitration panels under the chapter 18 of the Canada-US Free Trade Agreement or NAFTA chapter 20 could have been pursued by private parties directly affected by the governmental measures at issue. Similarly, where governments might be reluctant to proceed with international panel proceedings under chapter 20, private parties would be empowered to seek their own remedies before the courts.

In the long run, the means chosen to facilitate further integration of the North American economies must be capable of evolution. In particular, they must be able to respond to the challenges of common security concerns and perimeter issues, the mutual recognition of measures for a host of regulatory issues such as consumer safety, environmental protection and the growing need for NAFTA parties to project coherent policies on immigration and security. To some, the proposal to give direct effect may appear to be little more than legalism; it is only a partial (even a second-best) solution, and in all probability more extensive measures will ultimately be necessary. However, it would be unwise to underestimate the dynamic nature of the concept of direct effect.

In the European Community, the concept of direct effect has been the bedrock of legal integration. The original Treaty of Rome required the "direct application" of Community regulations: law-making instruments equivalent to domestic statutes. But it was the European Court of Justice (ECJ) in 1963 that declared that treaty provisions requiring clear positive or negative results must also be given direct effect. According to the ECJ, such provisions as the absolute ban on the establishment of measures equivalent to a quota could be invoked by any citizen against the EC or his or her own government in legal proceedings before domestic courts or before the ECJ. The concept of direct effect, coupled with the twin concept of supremacy of Community law, came to have power equivalent to that of a constitutional provision in a federal system.

Over the years, direct effect has been used by the ECJ to strengthen the power of Community law in many respects and to empower Community citizens to play an important part of the process of building and enforcing the Community legal order. Thus, directives, which in principle are only binding upon states as to their effect and are not to be invoked in the same way as regulations, have been declared by the court to be susceptible to direct effect and may be invoked before the courts by citizens when the period for their implementation has passed. The

ECJ has, in a number of other ways, strengthened the capacity of citizens to challenge legislative and administrative actions of the EC and member states acting pursuant to Community law, by invoking the concept of direct effect. The ECJ has even declared that where the EC or member states cause financial losses to citizens by serious breaches of Community law, they may render themselves liable to actions in damages to repair the loss.³

As a final comment, it should be mentioned that, although the expression “direct effect” seems to be well known by American scholars when referring to EU or international economic law (see Hinton 1999; Miller 1999; Esposito 1998; Brand 1996-97; van Gerven 1993), it might be misleading for American lawyers familiar only with American law, as it might be taken to refer to the criteria needed to determine whether the consequences of commercial activities of a foreign state outside the United States allow American courts to have jurisdiction under the *Foreign State Immunities Act* (see Murphy 2003; Frostestad 2000; Bensen 1999; Gohlke 1995; Card 1990).

I s s u e s R a i s e d b y T h i s P r o p o s a l

Treaty Law Issues

NAFTA IS A TREATY, A DOCUMENT BINDING UPON THE STATES THAT AGREE TO BE bound and governed by its rules under public international law. The treaty is a generic concept coming under a wide variety of names and made in a variety of forms. The different forms of treaty texts may have different significance in domestic law, but in international law the binding effect upon a state is the same whatever the designation.

Brownlie quotes a provisional draft of the International Law Commission defining a “treaty” as

any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, modus vivendi or any other appellation), concluded between two or more States or other subjects of international law and governed by international law. (Brownlie 1998, 608-09)

Article 2 (1)(a) of the Vienna Convention on the Law of Treaties states that

“Treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. (United Nations 1969)

In principle, a treaty binds only the governments that have committed themselves to it. Whether and how a treaty makes law for individuals is a matter of domestic constitutional law, and two theories — “monism” and “dualism” — dominate the analysis of the question. Each is at a different end of the spectrum, but in practice most countries employ a mix of the two positions:

The monist state treats international agreements which it has ratified as automatically incorporated upon adoption directly into the domestic legal order; indeed, there is deemed to be only one body of law, conjoining international and domestic law, with international law higher in the hierarchy...

The dualist state views international law and domestic law as occupying two separate, parallel legal orders. International obligations assumed by a dualist state are only enforceable against it through the international dispute resolution mechanism, if any, incorporated into the international treaty itself, or through diplomatic means. The treaty norm will only be applicable within the ratifying country’s domestic legal order if the country engages in an “act of transformation,” such as enactment of a domestic law or regulation incorporating the ratified international norm. On this view, the treaty itself is never directly applicable to domestic law; rather, the domestic statute or regulation adopted to effectuate the treaty is the only operative provision under domestic law. (Weiss 1998, 201-02)

As a treaty, NAFTA is binding upon the three signatory states: The United States, Canada and Mexico. It is translated into their respective domestic laws by various forms of legislative and regulatory action as well as by administrative decision-making. This process is governed by the applicable constitutional principles, which differ somewhat in each of the three states. One must start, however, from the presumption that NAFTA creates duties and rights for the three governments but not for their citizens and corporations.

Canada is unquestionably a dualist state. The Constitution of the United States admits a greater degree of congruence between domestic and international law, but the legislative practice of the United States respecting trade agreements is largely dualist as well. The Constitution of Mexico, on the other hand, is grounded on monist principles, but in practice, legislative intervention to enforce a treaty such as NAFTA is expected and indeed required. This being the case,

even in Mexico one cannot expect that all the provisions of a treaty will become law automatically and thus be directly enforceable in normal circumstances before a court of law by persons and corporations.

Treaty Implementation in the Three Countries

United States and treaty implementation

The US employs several different processes for treaty implementation:

The United States essentially has three different procedures, and the process for selecting one for a given instance remains largely discretionary and undefined. The three procedures are those for: (1) sole executive agreements — which only require the approval of the executive branch; (2) “treaties” — which require approval by two-thirds of the Senate; and (3) congressional-executive agreements — which are approved by simple majorities of both houses of Congress. (Yoo 2003, 482)

Article II (2) of the US Constitution provides that the president “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.” Treaty-making is therefore a mandate of the executive branch. The Senate’s role is primarily one of post-negotiation consent.

It is the President who decides whether to negotiate, chooses and instructs the negotiators, decides whether to sign an agreement, seeks the consent of the Senate, and ratifies a treaty. If the Senate does choose to consent, it may condition its consent with reservations, understandings, and/or declarations. (Yoo 2003, 480)

For this reason, recourse to the article II (2) procedure is fraught with peril and is very seldom attempted in the area of trade. An additional reason to avoid the formal treaty process for trade agreements is the constitutional authority of Congress over trade matters. Consequently, for the conclusion of trade agreements, the US administration has long preferred the simplified “fast-track” procedure, which relies upon prior legislative negotiating authority from Congress and a single majority vote in the House of Representatives and in the Senate to approve the agreement and any necessary implementing legislation and regulations.

Congressional-executive agreements can thus be used as a source of treaty-making power. A simple majority in both houses of Congress is needed to approve

the agreement instead of a two-thirds majority in the Senate. Congressional-executive agreements are not referred to in the Constitution, and their legitimacy as a substitute for treaties has been questioned. Nevertheless, this form of treaty-making has been used to negotiate a host of international trade agreements, including NAFTA. This mechanism is not always available, however: authority to negotiate trade agreements and to seek their approval was denied President Clinton throughout his second term but was later granted to President Bush.

The third form of treaty-making, the executive agreement, is used in circumstances where the president enjoys full prior authority to make the agreement, either by virtue of inherent executive authority or prior legislative authority. Under the 1972 *Case-Zablocki Act*, Congress requires the submission of all executive agreements to Congress within a certain number of months for consideration and examination (United States 1972).

Article VI of the Constitution states:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding.

Therefore, treaties ratified by receiving the advice and consent of the Senate produce legal effects and prevail over domestic law. They are subordinate, however, to the Constitution and to subsequent federal legislation that may override them.

The closest analogue to direct effect in US law is the concept of the self-executing treaty. No mention is made in the text of the Constitution itself, but the Supreme Court adopted the concept early on in *Foster v. Neilson*, and it is now very much part of constitutional doctrine.⁴ Following the *Restatement (Third) of the Foreign Relations Law of the United States*, a treaty is “non-self-executing” if it “manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation”; “if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation”; or “if implementing legislation is constitutionally required” (*Restatement [Third] 1987*, section 111[4]).

“Self-executing treaties, once ratified, become fully effective as domestic law. Non-self-executing treaties, by contrast, require implementing legislation.

And in the latter case, it is the legislation and not the treaty which has the effect of domestic law” (Seminar Proceedings 1998, 231). “A treaty is self-executing when the court can and must use it as a rule of decision” (232). The question naturally arises as to when a treaty is self-executing and when is not. An executive-branch statement to that effect will normally be included with such treaties when submitted to Congress, and this is usually determinative. The general assumption is that treaties are not self-executing (233). The American legal doctrine of self-executing treaties is thus very much reminiscent of the EC doctrine of direct effect (see Sloss 1999, 2002; Brand 1996-97; Vazquez 1995; Paust 1988).

The US Constitution would seem to be drafted upon monist principles, but even with respect to treaties approved by the Senate, which are capable of producing legal effects in the domestic legal order, it is common for implementing legislation to be adopted in order to give full effect to the treaty. This is all the more true with respect to treaties made under the congressional executive agreement fast-track procedure, which requires extensive legislative intervention to give effect to the agreement in domestic law. The normal practice is for the agreement to be submitted to both houses of Congress together with implementing legislation and the regulations required to give them full effect. Congress is thus made aware of the full package of measures that the executive branch is proposing. This total package can then be passed by a single majority vote. Thus, with respect to treaties made by the Senate procedure, the United States appears to be a monist country. Nevertheless, if one considers the theory of the self-executing treaty and the practice concerning the executive and congressional executive agreement, the United States is normally put into the dualist camp.

To sum up, it must be assumed that in order for a treaty to have direct effect in the US domestic legal system it must be adopted by a two-thirds Senate vote or be a self-executing executive agreement designated as such. A trade agreement made under the fast-track procedure will not be self-executing and will not have direct effect unless very clear legislative direction to this effect is included in the implementing legislation.

NAFTA was implemented by the *North American Free Trade Implementation Act* (United States 1993) and any amendment to give it direct effect in US domestic law would have to be approved by a procedure having the same legal effect, presumably following a similar fast-track negotiation with similar implementing legislation.

Mexico and treaty
implementation

Article 133 of the Constitution of Mexico states:

This Constitution, the laws of the Congress of the Union that emanate therefrom, and all treaties that have been made and shall be in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union. The judges of each State shall conform to the said Constitution, the laws, and treaties, in spite of any contradictory provisions that may appear in the constitutions or laws of the State. (Mexico 1917)

This provision appears to place Mexico in the monist camp and would seem to make it possible for treaties to have the force of law in the domestic legal order. But despite this declaration, laws cannot be made contrary to the Constitution, therefore, as in the United States, the Constitution is supreme over any treaty. The supremacy of the Constitution is reinforced by article 15, first adopted at a time when Mexican authorities were eager to prevent the introduction of unwanted foreign compulsion into their legal system by virtue of direct application of treaty rules. Article 15 states that:

No treaty shall be authorized for the extradition of political offenders or of offenders of the common order who have been slaves in the country where the offense was committed. Nor shall any agreement or treaty be entered into which restricts or modifies the guarantees and rights which this Constitution grants to the individual and to the citizen.

Treaty law and congressionally passed law are held to be on an equal level (Seminar Proceedings 1998, 249). The effect of this is to make it possible, subject to subsequent legislative repeal, for treaties to have the force of law in the domestic legal order, but treaties and laws are subject to constitutional supremacy, enforced by the *amparo*⁵ and other legal procedures before the courts. Treaty provisions having effect in the domestic legal order and legislative provisions are seen as normally complementary rather than as in opposition.

From the procedural perspective, Mexico is a dualist country:

[F]or a treaty to be incorporated into domestic law it must go through two phases. First, the President of the Republic must sign the treaty or convention. Second, the convention must be approved by the Congress of the country. And in both cases, Articles 15 and 133 of the Constitution must be respected. These stipulate that the conventional treaty must be in accordance with the Constitution. (Seminar Proceedings 1998, 248)

Subsequent to its adoption, a treaty must be published in the official state bulletin, *Diario Oficial de la Federación*, in accordance with article 4 of the Constitution.

There is a tradition in Mexico forbidding the judicial interpretation of laws that have the effect of a change or a repeal of the law. In the case of doubt with regard to the interpretation of a particular law, the courts were compelled to present this text to the legislature so that these parties could resolve any doubts that there may be in the interpretation of said law. This precedent is now reflected in paragraph (f) of article 72 in the Mexican Constitution in which “any reform or repeal of a law or federal resolutions or decrees must be undertaken in accordance with the proceedings of the creation” (Seminar Proceedings 1998, 271-72). This principle is more a fiction than a reality, since extensive procedures are present in the Constitution guaranteeing powers of judicial review in order to ensure the integrity of the Constitution. But one effect of article 72 (f) is to preserve the integrity of treaty rules forming part of the domestic legal order:

Domestically, in accordance with Mexico’s Treaty Act, international instruments are divided into two legal categories: (a) Treaties, and (b) Inter-institutional agreements. In essence, a “Treaty” is an agreement governed by international law, regardless of its name, whereby Mexico, as a national State, assumes an obligation. It must be approved by the Congress and be in accordance with its Political Constitution (Article 2(1)). An “Inter-institutional agreement” is an agreement governed by international law, in writing, entered into between an entity of Mexico’s public administration, at the federal, state, or municipal level, and one or more foreign governmental entities or international organizations, regardless of its name, and whether it derives from a valid treaty or not (article 2[2]). (Vargas 1998, 23-24)

NAFTA was adopted as a treaty duly approved by the president and Congress. It is therefore susceptible to legal effect in the Mexican legal system and, contrary to the situation in the United States and Canada, can be directly invoked before the courts in Mexico. Thus, in a situation where action in violation of the approved treaty text is proposed by a government official, such action can be challenged by way of the *amparo* procedure by an individual having a clear interest in ensuring respect for the treaty. NAFTA is, however, supplemented by legislation designed to give certain provisions greater legal effect, and, should the Mexican parliament adopt a law in conflict with NAFTA, this conflict cannot be challenged by a private citizen.

Canada and treaty
implementation

Of the three NAFTA parties, Canada has the most strictly dualist system. Treaties can bind Canada under international law as a state, but cannot create legal effects in the domestic legal order without implementing legislation. For this reason there is no concept of self-executing treaties in Canada.

The federal government is responsible for treaty-making; this includes the process of negotiation and the formal step of declaring that Canada as a state assumes the obligations of the treaty. This power is derived from Crown prerogative and is largely uncodified and is not set out in legislation. The prerogative power is exercised by the governor general upon the advice of federal ministers. There is no requirement under the constitution of Canada of formal involvement by Parliament in the treaty-making process, whether it be the authorization to negotiate, the negotiation or the approval stages. Treaty-making is viewed as essentially an executive act. There is only a need to involve Canada's legislative bodies if a treaty requires changes in domestic law (Seminar Proceedings 1998, 260). Where legislation is required to implement the treaty, the applicable principle was stated by the Privy Council opinion in *Attorney General of Canada v. Attorney General of Ontario* (Labour Conventions),⁶ "with respect to the implementation of treaties through legislation, and only through legislation, the normal division of powers in the Canadian Constitution applies" (Seminar Proceedings 1998, 264).

The result of this principle is that, absent implementing legislation, a treaty is inapplicable to domestic law in Canada (Hogg 1997, 11.4). Treaties do not prevail over domestic law in Canada. The normal Canadian practice is for implementing legislation to be drafted, at the federal or provincial levels as appropriate, prior to ratification of the treaty. Once this is ready, the federal government files the instrument of ratification or exchanges letters indicating that Canada is bound. On occasion, legislation will append the treaty text and incorporate its provisions as law by reference to specific provisions. In more limited circumstances, a federal-state clause is included in the treaty in order to allow the federal government to enter into treaty obligations in areas that are within provincial jurisdiction and to accept such obligations only in respect of those provinces that have been notified by the federal government to its treaty partners. This was done with respect to the two NAFTA side agreements on environmental and labour standards but not with respect to NAFTA itself, which was implemented by the *North American Free Trade Agreement*

Implementation Act, which puts the commitments of NAFTA into the form of a federal law. The result of this form of enactment is that NAFTA cannot be invoked before the courts either in litigation against the Government of Canada or in litigation between private parties.

T h e C o n c e p t o f D i r e c t E f f e c t

Direct Effect and Its Place in International Law

THE LEGAL CONCEPT OF “DIRECT EFFECT” HAS EXISTED IN GENERAL INTERNATIONAL law for some time, if not always under that explicit wording. A similar concept was recognized by the Permanent Court of International Justice in 1928 in the *Jurisdiction of the Courts of Danzig* case (Dupuy 2002, 398, 432). In this case, the Permanent Court found that it was possible for a treaty to be directly applicable in national law and to create rights for private persons, directly enforceable before national courts, depending on the intention of the contracting parties and of the wording of the provisions of the treaty:

Does the [treaty], as it stands, form part of the series of provisions governing legal relationship between the Polish Railways Administration and the Danzig officials who have passed into its service (contract of service)? The answer to this question depends upon the intention of the contracting Parties. It may be readily admitted that, according to a well-established principle of international law, the [treaty], being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating rights and obligations and enforceable by the national courts...

The wording and general tenor of the [treaty] show that its provisions are directly applicable as between the officials and the Administration. (Permanent Court of International Justice 1928, 17-18)

The result of this case is that public international law creates the potential for direct effect where the parties to a treaty explicitly so desire. Incorporation of the treaty in domestic law is the precondition for direct effect. The treaty, created within the international legal order, becomes part of the national legal order of a contracting party, and one duly incorporated may be interpreted by the national courts of that state, not as an external source of positive law, but as an internal one.

Direct Effect under European Community Law

The criteria for direct effect of EC treaties were elaborated by the ECJ, starting with the landmark *Van Gend en Loos* case (ECJ 1963). The classical meaning of the concept of direct effect as developed by the ECJ is usually expressed as the capacity of a provision of EC law to confer rights on individuals that they may invoke before a national court either against another private individual or against a member state. In *Van Gend en Loos*, the ECJ indicated that direct effect attaches to a Community provision, even if individuals relying on it are not expressly designated as the beneficiaries of such a provision, if the provision in question imposes on the member state an obligation that is sufficiently clear and unconditional, without there being any qualifications to implementation that would necessitate further legislative activity. So rights are created for the benefit of individuals not only when explicitly granted but also as a corollary of obligations, whether negative or positive, imposed in a clearly defined way on others, in particular the EC member states.

For obvious reasons, it seems difficult to confer direct effect on a treaty obligation if that obligation is qualified by a reservation or a condition. In such a case, it is impossible to argue that the provision satisfies the double requirement that it should be clear and unconditional. Therefore, if a treaty prescribes legislative intervention in order to flesh out an imprecisely worded obligation or if it subjects a rule (e.g., an obligation to grant national treatment to workers from other member states) to limitations (justified, for example, on grounds of public health, public security, etc.), direct effect is generally considered to be ruled out. However, the ECJ has held that, even in situations where the *Van Gend en Loos* criteria of unconditionality and absence of reservations are not fully met, a Community treaty provision may be found to be directly effective and therefore justiciable.⁷ This could occur in cases, for instance, where the member states do not enjoy significant discretion in applying or implementing a provision. In principle, a certain measure of discretion precludes direct effect, but if, by its nature, the treaty obligation is very clear and specific and leaves the member states practically no latitude of judgment in executing it, the court is prepared to dispense with the “positive” measures of implementation that the member states ought to have taken. This means that in certain circumstances private individuals can ask the national courts to enforce a treaty provision over the domestic law that ought to have been repealed or adjusted in order to achieve a legal situation envisaged by the treaty

provision. These issues assume special importance in cases where the member states are committed to adopting domestic implementation legislation before the expiry of a certain deadline. If they miss the deadline, the obligation is presumed to have become unconditional as far as the time constraint is concerned, and judges may substitute the treaty rule for domestic legislation in relations between the member state and private individuals, provided always that the rule relied on before the courts is sufficiently clear to allow judicial application.

Direct access to the ECJ for private parties alleging a violation of the Treaty Establishing the European Community (EC Treaty) by the EC is also envisaged in specific circumstances, set out in articles 230 to 233. Access to the ECJ for a private party alleging violation of the EC treaty by an EC organ also exists through the indirect preliminary ruling procedure arising out of private litigation in a domestic court under article 234. National courts have jurisdiction to hear private complaints regarding violation of the EC Treaty by a measure of a member state. The choice of which national court is to have jurisdiction over EC law was left to the national law of each member state. The procedural law to be followed by the national courts was also left to the national law of each member state.

In sum, within the framework of the European Community, direct effect has become an essential instrument for ensuring private enforcement of EC treaties. Whenever a treaty provision imposes positive or negative obligations on the member states, such obligations may be invoked by private individuals who have a legal interest in seeking the enforcement of the obligations in the national courts. Reservations and conditions attached to such treaty provisions will preclude direct effect if the consequence of such reservations or conditions is to make legislative implementation of the treaty provision necessary. In such cases, application of the treaty rule by a judge constitutes an improper encroachment on the prerogatives of the other branches of government.

Debate in EU law as to direct
effect of the GATT/WTO
agreements

There has been considerable debate in EU law as to whether the provisions of the General Agreement on Tariffs and Trade (GATT) and, subsequently, the WTO agreements, should be given direct effect. But despite considerable pressure from litigants in the EU, the ECJ has consistently been reluctant to give direct

effect to the GATT. Most observers believe that the reluctance of the ECJ is based on judicial policy — rather than on any absolute impediment in principle — and on the fact that the GATT and WTO are multilateral agreements that must apply to the different circumstances of over 140 countries. The fact that the GATT obligations are subject to safeguard measures, a possible waiver, a procedure of amendment, as well as the grandfathering of existing legislation (under the GATT but no longer under the WTO) also seems to have been important in those decisions (Carreau, Thiébaud, and Juillard 2003). Perhaps of central importance is the issue of nonreciprocity; that is, that a decision of the court holding that the GATT had direct effect would tie the hands of the European Commission in the face of other jurisdictions that are not so restricted.

Arguably, the reasons leading the ECJ to refuse to grant direct effect to the GATT and the WTO agreements as a matter of general principle are not as strong in the NAFTA context, where the three parties are bound by a much more specific set of obligations, which are designed to foster a much closer degree of economic integration than is possible under the WTO. Furthermore, it is possible to meet potential objections by singling out the specific NAFTA provisions that are to receive direct effect and excluding those provisions of a more hortatory or discretionary character. By giving direct effect to a limited number of specifically enumerated provisions in NAFTA, rather than to the whole treaty, it should be easier to predict the consequences and thereby exercise control over the process.

Implementing Direct Effect: The UK Model

The European Communities Act 1972 of the United Kingdom is drafted in the following manner:

Section 2. General implementation of treaties.

(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the treaties, and all such remedies and procedures from time to time provided for by or under the treaties, as in accordance with the treaties are without further enactment to be given legal effect or used in the United Kingdom and shall be recognized and available in law, and be enforced, allowed and followed accordingly; and the expression “enforceable Community right” and similar expressions shall be read as referring to one to which this subsection applies.

(4) ...any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section. (United Kingdom 1972, ch. 68)

As Lenaerts and Van Nuffel explain:

In the United Kingdom, Community law obtains its legal force from an act of Parliament. This is because British Law adheres to the principle of parliamentary sovereignty, which is tantamount to saying that the legislature is subject to no limitation, apart from its inability to restrict its own sovereignty. Consequently, the legal force of primary and secondary Community law is based upon Section 2(1) of the *European Communities Act 1972*. As far as the relationship with domestic law is concerned, although Section 2(4) does not recognize the primacy of Community law as such, it does provide that any enactment passed or to be passed shall be construed and have effect subject to the “foregoing provisions” of that section, which include Section 2(1), the effect of which is to incorporate the whole of community law into the law of the United Kingdom. (Lenaerts and Van Nuffel 1999, 522)

It should be noted that the UK approach is further strengthened by the fact that section 3(1) of the *European Communities Act 1972* requires that any question as to the “effect” of EC law in UK law be determined according to the rules of EC law. (Since there would be no general NAFTA court to make decisions comparable to the ECJ on such matters, the protocol amending NAFTA should contain explicit instructions as to which provisions of NAFTA should have direct effect. These provisions would have priority over other provisions of law by virtue of an explicit notwithstanding clause.)

In the UK model, primacy of EC law is achieved and reconciled with parliamentary supremacy through a provision for primacy in the incorporating legislation. Thus, the American and Canadian implementing/incorporation legislation could provide for primacy of that act over future acts of Parliament or Congress, though nothing would prevent the legislature from erasing this primacy explicitly in a subsequent act (without prejudice to potential questions of international responsibility of the state). This would not be as constraining as if a NAFTA signatory's constitution were to provide for primacy of international law, but it seems to be a workable solution in light of the UK example.

The question of primacy of international law could prove to be a stumbling block regarding the direct effect of NAFTA, since in the United States a self-executing treaty has the rank of a federal statute.⁸ A similar result is to be found in Canada, where a treaty incorporated into domestic law by legislation necessarily has the rank of that piece of legislation in domestic law.

Implementing Direct
Effect into NAFTA

General Considerations

DIRECT EFFECT WOULD MEAN THAT A PROVISION OF NAFTA COULD BE INVOKED BY a private party before the national court of a NAFTA party, after having been incorporated into domestic law according to the constitutional law of that NAFTA party. But the introduction of the concept of direct effect would be without difficulties, either of a political or legal nature, and J.H. Jackson's analysis is very helpful in this regard. Under Jackson's conception: "direct application of a treaty generally seems to mean that courts in the system (as well as other government bodies) will look to the treaty language itself as a source of law, analogously to the way they look at constitutions, statutes or certain other instruments of domestic law" (1992, 321).

Jackson lists reasons for and against the direct applicability of treaties (322-27). His analysis focuses on the general proposition of direct applicability, but it is relevant to the NAFTA context. Jackson's arguments in favour of the acceptance of direct effect are as follows: (1) it will enhance the effectiveness of international law and treaty implementation; (2) it better assures the other parties that all parties will carry out their obligations under the treaty; and (3) it better assures the rights of individuals in the legal system when a treaty contains norms designed to apply to those individuals.

Arguments that he gives against are: (1) international law is a separate system, so direct applicability reduces sovereignty; (2) international treaties have little democratic participation, and as such the process of legislative implementation is an important democratic check; (3) the process of implementation allows legislatures to adjust the wording of treaties to correspond with local norms; (4) if the treaty is ambiguous, the process of implementation can be used as clarification for the domestic courts; (5) legislatures may have political reasons to oppose direct applicability; (6) national officials may fear that direct application will result in court determinations that their government is acting in violation of the treaty; and (7) it may allow for the argument that the international interpretation of the treaty is binding domestically.

Jackson's arguments against granting direct effect relate to treaties in general, and they reflect widely held views. But there is nevertheless good reason to

conclude that these objections should not apply in the context of NAFTA. First, it is legally possible to give direct effect to a treaty in principle and in practice. Second, monist legal systems often go far in granting direct effect to treaties as a matter of course. Arguably, in appropriate circumstances, such as those governed by international economic law where the objective is to secure closer economic integration, direct effect is the right approach. In the context of NAFTA, the treaty provisions are susceptible to direct effect, the economies of the three signatory countries are more closely associated than the economies of most EU members, and there is a strong desire to sustain and secure the benefits of even closer economic integration. Thus, many of Jackson's objections fall away. Consequently, it will depend entirely upon the will of the NAFTA parties and their citizens as to whether direct effect can be a solution to the problems that they wish to solve: if granting direct effect results in closer economic integration, and if that integration is desired by the governments and people of the three countries, there is no reason in principle why direct effect should not be adopted.

The Legal Framework for Direct Effect of NAFTA

In Canada, the implementing legislation declares that no cause of action is created by the fact of legislative approval of NAFTA⁹ (*North American Free Trade Agreement Implementation Act 1993*), and, for greater certainty, the act subjects any such action to the prior consent of the attorney general of Canada. As matters now stand, there is strong case law denying that NAFTA was incorporated into Canadian domestic law. Despite a number of attempts by litigants, Canadian courts have consistently denied direct effect.¹⁰ The rule emerging from these cases is that the mere approval of a treaty by legislation would not be sufficient to incorporate it into Canadian law: a clear and unambiguous intention to that effect would be needed in the legislation.¹¹ Moreover, in *Pfizer Inc. v. Canada*, the Canadian federal court was of the opinion that Parliament by itself would be incapable of incorporating the WTO agreements into Canadian domestic law, as the action of the provincial legislatures would also be needed.¹² This reasoning would probably also apply to incorporation of NAFTA into federal and provincial domestic law.

How should the Canadian government proceed to give direct effect to NAFTA? First, assuming that NAFTA need not be amended, its incorporation into the domestic law of the parties would have to be done in accordance with their respective constitutions. In Canada, this needs to be done by an act of Parliament

and possibly also by the provincial legislatures. Second, once the incorporation of NAFTA into domestic law is secured, it would be necessary to amend the implementing legislation, in order to remove the barriers to private actions on the basis of NAFTA to the extent desired by the parties; that is, specifying, for instance, which chapters of NAFTA are open to private complaints before national courts against a measure of that party. Then, it would be left to national courts to decide which NAFTA provisions incorporated have direct effect (or are self-executing).

In the United States, if a treaty is found to be self-executing, it would be automatically incorporated into domestic law. US constitutional law also allows for partial incorporation of a treaty, where some provisions are self-executing and others aren't. The fact that the US legislature found it necessary in the NAFTA implementing legislation to include a clause preventing direct effect and private actions before US courts indicates that NAFTA would likely be self-executing. And while the issue of whether a treaty is self-executing is "a question distinct from whether the treaty creates private rights or remedies" (Restatement [Third] 1987, section 111, 47), under US law "[a] private person having rights against the United States under an international agreement may assert those rights in courts in the United States of appropriate jurisdiction either by way of claim or defense" (section 907). It is therefore logical to assume that, in the US, legislation need only be adopted by Congress to give direct effect to NAFTA. This could be done by a special act or pursuant to existing trade agreements legislation.

In Mexico, Parliament would have to legislate to give direct effect to NAFTA pursuant to the adoption of a protocol amending NAFTA in order to ensure that it prevail over subsequent domestic legislation.

Implications of articles 2020 and 2021

A potential concern arises out of article 2021 of NAFTA, which requires the parties to NAFTA to block any legal action taken in their national courts against any other party (i.e., government) for violation of NAFTA. However, there seems to be no legal obstacle in the text of NAFTA that would prevent a NAFTA signatory from authorizing legal actions alleging violations of NAFTA to be taken against *itself* before its own national courts. Hence, the essence of direct effect seems not to be prohibited by NAFTA, and this article of the treaty would probably not have to be amended in order to grant direct effect to some of its provisions.

Support for this interpretation can be found elsewhere in NAFTA and in the implementing legislation of the United States. First, article 2020 sketches out a mechanism for the referral of questions of interpretation or application of NAFTA, raised before a national judicial or administrative court, to the party to which it belongs, soliciting its views on the matter. This mechanism is remotely reminiscent of preliminary rulings before the European Court of Justice, which have proven to be a fundamental element of the operation of the doctrine of direct effect in the EC. (One may wonder why article 2020, which seems to imply some measure of potential direct effect, was included in NAFTA: to date it has not been invoked.) Second, the current US implementing legislation for NAFTA explicitly bars both direct effect and private remedies before US courts for violation of NAFTA.¹³ One may wonder what would have been the situation absent this clause: could the US courts have found NAFTA provisions self-executing and thus capable of invalidating incompatible US measures? It seems possible.

Procedural Law Framework for Direct Effect of NAFTA

Regarding the procedural law to be used for adjudication of private causes of action under NAFTA, it seems appropriate initially to defer to the respective national law of NAFTA parties. If it became evident that doing so resulted in discrepancies in enforcement from country to country, diplomatic resolution could be attempted under chapter 20 for clarification of procedures and, potentially, for amendments to individual national procedural law.

The key questions to be looked at are which national court in each country would have jurisdiction over private complaints of NAFTA violations and what procedural law would have to be followed. In Canada, ordinary jurisdiction belongs to the superior courts of each province under section 96 of the *Constitution Act 1867*. The Federal Court of Canada was added to this basic scheme, with concurring or exclusive jurisdiction depending on the matter before the court. The Federal Court of Canada has, for instance, exclusive judicial-review jurisdiction over federal administrative tribunals; this jurisdiction is exercised by the Federal Court of Appeal regarding decisions of the Canadian International Trade Tribunal (CITT).¹⁴

If NAFTA provisions were to be incorporated into Canadian law, the federal court could have exclusive jurisdiction over federal administrative measures, but not over those of the provinces. The jurisdiction of the federal court over

federal legislation would depend on the terms of the statute itself, but provincial legislative measures would fall exclusively within the provincial superior court's jurisdiction. That being the case, it seems that, initially, it would be federal measures that would most likely be the target of direct-effect suits under NAFTA, although this could be done either before the provincial superior courts or the federal court, depending on whether it is an administrative or legislative measure. The issue of litigating provincial measures could be dealt with at a later stage, although at least initially, the federal court would perhaps be a better choice of forum due to the expertise it has developed with its judicial review jurisdiction over the CITT, as well as the desirability of unity in interpretation and the complexity of the cases for certain provincial courts.

In the United States, the federal courts would seem to constitute the appropriate forum for all direct-effect claims arising out of NAFTA.

If NAFTA were to be directly effective in Mexico, the competent tribunal would be the Fiscal and Administrative Justice Court (*Tribunal Federal de Justicia Fiscal y Administrativa*).¹⁵ According to article 11 of the *Organic Law of the Fiscal and Administrative Justice Court*, this tribunal has jurisdiction to resolve any decision by the Mexican authorities that imposes a tax. Paragraph XI of the same article states that the tribunal also has jurisdiction over the acts mentioned in article 94 of the Foreign Trade Law (*Ley de Comercio Exterior*), which is the one that directly addresses all the issues of customs duties, safeguards, countervailing duties and other issues covered by NAFTA.

Result of conflict between a
directly effective provision of
NAFTA and a domestic law or
administrative decision

Applying the EC law analogy would suggest that if a domestic court found a violation of NAFTA to have occurred, the measure at issue could then be declared invalid or simply withdrawn. But, given that NAFTA does not enjoy a status comparable to the supremacy of EC law, the result will in fact depend on procedures contained in the agreement amending NAFTA for the purpose of enabling direct effect and any subsequent legislative enactments. It will therefore be necessary to specify in such an amendment how measures can be challenged, before what courts actions may be brought, and the effect of a finding of conflict

between NAFTA and domestic law. The parties will have to agree which treaty provisions to give direct effect to; they will have to specify what courts will have jurisdiction to hear such complaints; and they will have to determine what types of relief may be granted by the courts. Given the traditions of parliamentary supremacy in Canada and the concept of the self-executing treaty in the United States, the UK model (discussed below) requiring treaties to prevail over other legislation (both existing and future) would appear to be appropriate approach to follow. As in the EC, the courts of each state would then act according to their own rules of procedure.

Impact of subsequent legislation

A central question requiring a clear answer is that of the relationship between a directly effective NAFTA and a later law enacted by one of the parties. Would NAFTA have higher status than domestic legislation? Would a party that wanted to enact legislation that might in some way conflict with NAFTA be unable to do so without abandoning the treaty? What does this say about the democratic nature of the treaty? If part of the purpose of extending direct effect is to involve private parties, what does this say about the retroactive impact of giving NAFTA higher status, since there was little democratic participation in the drafting of the treaty in the first place? Arguably, it would mean that interest groups would be locked into the rules of NAFTA to argue their cases. There would be little scope for later legislation that interest groups might want to be implemented to reflect changes in their perception of changing social issues. This is a classic complaint of antiglobalization critics, but may be more of an issue here, for although the extension of direct effect to NAFTA may address some consumer/business-related private-party issues, it may not adequately protect the interests of other members of society. The problem here, however, likely lies not with the concept of direct effect but with potentially weak public policy exceptions clauses currently in NAFTA.

NAFTA Side Agreements

Three other agreements entered into force with NAFTA as part of a single package: the North American Agreement on Environmental Cooperation (NAAEC), the North American Agreement on Labour Cooperation (NAALC) and the Mexico-US Agreement on Border Cooperation. Adoption of the first two “side

agreements” was a condition *sine qua non* set by Congress in the US *NAFTA Implementation Act*. Both these agreements create the beginnings of a private right of complaint that can be exercised variously by private persons, environmental NGO and labour unions. The complaints trigger an investigation by the Secretariat of the Commission on Environmental Cooperation, in the case of the NAAEC, and a hearing before a national department of labour, in the case of the NAALC. This is an interesting precedent.

A l t e r n a t i v e M o d e l s

I N THE INTRODUCTION TO THIS PAPER WE INDICATED THAT THE PROPOSAL HERE IS PARTIAL and essentially temporary. In the long run, granting direct effect to NAFTA will not be sufficient to meet the needs of the movement toward ever greater North American economic integration. The experience of the most successful regional integration agreement, the European Community, proves that integration is not a static phenomenon, but one that progresses and evolves. The European Community has moved from a customs union to a single market to an economic union and recently to a monetary union, and it soon may progress further toward greater political union. NAFTA needs the legal and institutional basis to develop. It does not have this at the present time. Rightly or wrongly, the authors of this paper and many other commentators in Canada assume that deeper integration by way of a move toward a fully fledged customs union buttressed by the necessary institutions is not currently politically possible. But this does not mean that it is not desirable or necessary in the longer term.

Short of a customs union, one model of regional integration that merits consideration is the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA). The ANZCERTA was first concluded in 1983 and is the foundation of the ever-closer economic relations between Australia and New Zealand. Under this agreement, economic integration is being achieved without recourse to the legal technique of direct effect, but rather through a series of protocols of acceleration, parallel agreements and understandings between the two governments. There is no international dispute-settlement mechanism; rather, article 22 provides for consultations between the two countries in disputes concerning the agreement. In many ways, the ANZCERTA can be considered the world's most comprehensive, effective and multilaterally compatible free trade agreement.

It is worth mentioning that such a protocol of acceleration eliminated recourse to antidumping laws between the two countries as of July 1, 1990. Parallel agreements, understandings and arrangements were also concluded to establish the freedom of movement of persons between the two countries, as well as greater harmonization of their business laws. The Australian federated entities are also signatories of some of these documents, on an equal footing with the Australian federal government and the New Zealand government.

The ANZCERTA model of acceleration of economic integration is worth considering as a potential alternative direct effect to further North American economic integration. The inclusion of policies such as freedom of movement for persons would add a new dimension currently lacking in NAFTA. Equally important could be the formal implication of federated entities in the process of economic integration between the three countries.

C o n c l u s i o n s

GRANTING DIRECT EFFECT TO CERTAIN KEY PROVISIONS OF NAFTA SHOULD NOT BE seen as an end in itself but rather part of a broader framework of measures designed to strengthen and sustain the degree of economic integration that exists among Canada, the United States and Mexico. On the assumption that this integration is irreversible and that it has already reached a stage where it requires further support than that provided by the existing NAFTA text, direct effect can serve to reinforce the economic integration that exists. Direct effect has the great advantage of enlisting private citizens in the process of strengthening economic integration. Ideally, of course, the creation of new institutions of a supranational character would be the best way to sustain future increased economic integration, especially given the degree of economic integration that already exists, but, as in other areas of economics, it is often better to take the second-best solution than to take none at all.

Notes

- 1 For simplicity's sake, the authors use the term European Community or EC as a catch-all phrase to indicate with the European political and economic integration begun with the Treaty of Rome up through the current European Union (EU).
- 2 An appendix, which includes the text of a protocol to the NAFTA and a more lengthy detailed analysis, can be consulted on the IRPP Web site, at irpp.org/books/archive/demestral_appendix.pdf
- 3 Cases C-6/90 and C-9/90, *Francovich and Bonifaci v. Italy*, [1991] E.C.R. I-5357.
- 4 *Foster v. Neilson*, 27 U.S. 253 (1829).
- 5 The principal remedy under the Constitution for citizens to assert constitutional rights.
- 6 *Attorney General of Canada v. Attorney General of Ontario (Labour Conventions)* A.C. 326 (1937).
- 7 Case 43/75, *Defrenne II*, [1976] E.C.R. 455.
- 8 See *Head Money Cases*, 112 U.S. 580 (1884); see also *Whitney v. Robertson*, 124 U.S. 190 (1888).
- 9 *North American Free Trade Agreement Implementation Act*, 1993 S.C., c.44, art. 6 (Can.).
- 10 See, for instance, *Industries Hillenbrand Canada Ltée v. Québec (Bureau de normalisation)* (15 August 2002), Montréal 500-05-071484-024, (C.S.), para. 191; see also *Pfizer Inc. v. Canada*, [1999] 4 F.C. 441, para. 45, confirmed by the Federal Court of Appeal (14 October 1999) A-469-99; see also *UL Canada Inc. v. Québec (P.G.)*, [1999] R.J.Q. 1720; see also *Les Entreprises de rebuts Sanipan v. Procureur général du Québec*, [1995] R.J.Q. 821 (C.S.).
- 11 That this is possible is shown by the decision of the High Court of Australia *Project Blue Sky v. Australian Broadcasting Authority*, [1998] H.C.A. 28; 153 *Australian Law Review* 490; 194 *Commonwealth Law Review* 355, where the ANZCERTA agreement between Australia and New Zealand was successfully used to challenge a regulatory decision.
- 12 *Pfizer Inc. v. Canada*, para. 45.
- 13 See 19 U.S.C.S. ch. 19, s. 3312 for implementing NAFTA legislation.
- 14 *Federal Court Act*, R.S.C. ss. 18, 28(1)e 1970 (Can.).

- 15 This court was previously called Federal Fiscal Tribunal (*Tribunal Fiscal de la Federación*), but had a name change in 2001.

References

- Bensen, M. 1999. "The All New (International) 'People's Court': The Future of the Direct Effect Clause After *Voest-Alpine Trading USA Corp. v. Bank of China*." *Minneapolis Law Review* 4:997.
- Blank, S. 2002. "Building a North American Community: Next Steps." *Looking Ahead* 8, no. 1.
- Brand, R.A. 1996-97. "Direct Effect of International Economic Law in the United States and the European Union." *Northwestern Journal of International Law and Business* 17, no. 2/3:556-608.
- Brownlie, I. 1998. *Principles of Public International Law*. Oxford: Clarendon Press.
- Card, H.A. 1990. "Interpreting the Direct Effects Clause of the FSIA's Commercial Activity Exception." *Fordham Law Review* 59, no. 1:91-111.
- Carreau, D., F. Thiébaud, and P. Juillard. 2003. *Droit international économique*. 5th ed. Paris: Librairie générale de droit et de jurisprudence.
- Courchene, T. J. 2003. "FTA at 15, NAFTA at 10: A Canadian Perspective on North American Integration." Presidential Address to the North American Economics and Finance Association. *North American Journal of Economics and Finance* 14:263-85.
- D'Aquino, T. 2003. "Security and Prosperity: The Dynamics of a New Canada-United States Partnership in North America." Paper presented to the annual general meeting of the Canadian Council of Chief Executives, January, Toronto.
- Dobson, W. 2002a. "Shaping the Future of the North American Economic Space: A Framework for Action." *C.D. Howe Institute Commentary* 162. Toronto: C.D. Howe Institute.
- _____. 2002b. "North American Integration in an Integrating World." Paper presented at the Asia-Pacific Summit, 13 November.
- Dupuy, P.-M. 2002. *Droit international public*, 6th ed. Paris: Dalloz.

- Dymond, W., and M. Hart. 2003. "Canada and the Global Challenge: Finding a Place to Stand." *C.D. Howe Institute Commentary* 180. Toronto: C.D. Howe Institute.
- Esposito, C.D. 1998. "The Role of the European Court of Justice in the Direct Applicability and Direct Effect of WTO Law, with a Dantesque Metaphor." *Berkeley Journal of International Law* 16, no. 1:138-52.
- European Court of Justice (ECJ). 1963. *Van Gend en Loos v. Nederlandse Administratie der Belastingen*. Case no. 26/62. *European Court Review* 1.
- Frostestad, H.L. 2000. "Voest-Alpine Trading v. Bank of China: Can a Uniform Interpretation of a 'Direct Effect' be Attained under the Foreign Sovereign Immunities Act (FISA) of 1976?" *Valparaiso University Law Review* 34, no. 3:515-53.
- Gohlke, D.E. 1995. "Clearing the Air or Muddying the Waters? Defining 'A Direct Effect in the United States' Under the Foreign Sovereign Immunities Act after *Republic of Argentina v. Weltove*." *Houston Journal of International Law* 18:261-98.
- Goldfarb, D. 2003. "The Road to a Canada-U.S. Customs Union: Step-by-Step or in a Single Bound?" *C.D. Howe Institute Commentary* 184. Toronto: C.D. Howe Institute.
- Hart, M. 2004. "A New Accommodation with the United States: The Trade and Economic Dimension." No. 2 of *Thinking North America*, edited by Thomas J. Courchene, Donald J. Savoie, and Daniel Schwanen. *The Art of the State*, vol. 2. Montreal: Institute for Research on Public Policy.
- Hinton, E.F. 1999. "Strengthening the Effectiveness of Community Law: Direct Effect, Article 5 EC, and the European Court of Justice." *New York University Journal of International Law & Politics* 31, no. 2/3:307-48.
- Hogg, P.W. 1997. *Constitutional Law of Canada*. 4th ed. Toronto: Carswell.
- Hufbauer, G.C., and G. Vega-Cánovas. 2003. "Whither NAFTA: A Common Frontier." In *The Rebordering of North America: Integration and Exclusion in a New Security Context*, edited by P. Andreas and T.J. Biersteker. New York: Routledge.
- Jackson, J.H. 1992. "Status of Treaties in Domestic Legal Systems: A Policy Analysis." *The American Journal of International Law* 86:310-40.
- Lenaerts, K., and P. Van Nuffel. 1999. *Constitutional Law of the European Union*. London: Sweet & Maxwell.
- Mexico. 1917. *Constitution of Mexico*. In *Constitución Política de los Estados Unidos Mexicanos*, Trigésima Quinta Edición, 1967, Editorial Porrúa, S.A. México, D.F. Accessed May 4, 2004. www.ilstu.edu/class/hist263/docs/1917const.html
- Miller, M. 1999. "The TRIPs Agreement and Direct Effect in European Community Law: You Can Look... but Can You Touch?" *Notre Dame Law Review* 74:597.
- Murphy, S.D. 2003. "Contemporary Practice of the United States Relating to International Law: Interpretation of 'Direct Effect' Under FISA Commercial-Activity Exception." *American Journal of International Law* 97, no. 1:179-208.
- Paust, J.J. 1988. "Self-Executing Treaties." *American Journal of International Law* 82:760-83.
- Permanent Court of International Justice. 1928. Advisory opinion no. 15. *Jurisdiction of the Courts of Danzig*. P.C.I.J. (ser. B) no. 15, at 15-21.
- Restatement (Third) of the Foreign Relations Law of the United States. 1987.
- Seminar Proceedings. 1998. "Proceedings of the Seminar: United States Department of Labor National Administrative Office Seminar on International Treaties and Constitutional Systems of the United States, Mexico and Canada." *The Maryland Journal of International Law and Trade* 22, no. 2:221-77.
- Sloss, D. 1999. "The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties." *Yale Journal of International Law* 24, no. 1: 129-221.
- _____. 2002. "Non-Self-Executing Treaties: Exposing a Constitutional Fallacy." *U.C. Davis Law Review* 36, no. 1:1-84.
- United Kingdom. 1972. *European Communities Act 1972* (U.K.), 1972, c. 68.
- United Nations. 1969. Vienna Convention on the Law of Treaties. *Treaty Series* 1155: 331.
- United States. 1972. *Case-Zablocki Act*. 1 U.S.C. s.112b (2000).

- _____. 1993. *North American Free Trade Implementation Act*. 19 U.S.C. ss. 3351–3357 (2000).
- Van Gerven, W. 1993. "The Genesis of EEA Law and the Principles of Primacy and Direct Effect." *Fordham International Law Journal* 16:955.
- Vargas, J. 1998. *Mexican Law: A Treatise for Legal Practitioners and International Investors*. St. Paul, MN: West Group.
- Vazquez, C.M. 1995. "The Four Doctrines of Self-Executing Treaties." *American Journal of International Law* 89:695-723.
- Weiss, M.S. 1998. "Proceedings of the Seminar on International Treaties and Constitutional Systems of the United States, Mexico and Canada: Laboring in the Shadow of Regional Integration." *The Maryland Journal of International Law and Trade* 22, no. 2:185-219.
- Wolfe, R. 2003. "See You in Washington? A Pluralist Perspective on North American Institutions." *IRPP Choices* 9, no. 4.
- Yoo, J. 2003. "Participation in the Making of Legislative Treaties: The United States and Other Federal Systems." *Columbia Journal of Transnational Law* 41, no. 2:455-88.
- Selected Bibliography**
- Arnall, A.M., A.A. Dashwood, M.G. Ross, and D.A. Wyatt. 2000. *Wyatt and Dashwood's European Union Law*. London: Sweet and Maxwell.
- Bermann, G.A. 1998. "Constitutional Implications of U.S. Participation in Regional Integration." *American Journal of Comparative Law* 463, no. 46.
- Bermann, G.A., R. J. Goebel, W.J. Davey, and E.M. Fox. 1993. *Cases and Materials on European Community Law*. St. Paul, MN: West Publishing Co.
- Cicero, J. 1997. "International Law in Mexican Courts." *Vanderbilt Journal of Transnational Law* 1035, no. 30.
- Craig, P., and G. de Búrca. 2003. *EU Law: Text, Cases, and Materials*. Oxford: Oxford University Press.
- Gal-Or, N. 1998. "Private Party Direct Access: A Comparison of the NAFTA and EU Disciplines." *Boston College International and Comparative Law Review* 1, no. 21.
- Hart, M., and W. Dymond. 2001. *Common Borders, Shared Destinies: Canada, the United States and Deepening Integration*. Ottawa: Centre for Trade Policy and Law.
- Klabbers, J. 1996. *The Concept of Treaty in International Law*. The Hague: Kluwer Law International.
- Kindred, H.M., K. Mickelson, T.L. McDorman, R. Provost, A.L.C. de Mestral, L.C. Reif, and S.A. Williams. 2000. *International Law Chiefly as Interpreted and Applied in Canada*. Toronto: Emond Montgomery Publications Limited.
- Lasok, K.P.E. 2001. *Laws and Institutions of the European Union*. London: Butterworths.
- Mexico. 1992. *Ley sobre la Celebración de Tratados*. D.O. of January 2.
- Omalu, M.K. 1999. *NAFTA and the Energy Charter Treaty: Compliance with Implementation and Effectiveness of International Investment Agreements*. The Hague: Kluwer Law International.
- Pastor, R.A. 2001. *Toward A North American Community: Lessons from the Old World for the New*. Washington, DC: Institute for International Economics.
- Strom, T.H., and P. Finkle. 1993. "Treaty Implementation: The Canadian Game Needs Australian Rules." *Ottawa Law Review* 39, no. 25.
- Van Hogendorp, G.K. 2002. *Direct Effect: Rethinking a Classic of EC Legal Doctrine*, edited by J.M. Prinszen and A. Schrauwen. Vol. 3 of *The Hogendorp Papers*. Centre for European Constitutional Studies, University of Amsterdam. Groningen: Europa Law Publishing.

Where's the Beef?
Law, Institutions and
the Canada-US Border

THE BORDER WITH THE UNITED STATES REMAINS ONE OF THE DEFINING CHARACTERISTICS of Canadian life. Its importance comes precisely because it is defended and not the reverse as the cliché would have it. In the post-September 11, 2001 (9/11) era, the border has assumed heightened importance, confirmed when Paul Martin took office as prime minister in December 2003 and created a new Border Services Agency. American efforts to strengthen their security challenge Canada's ability to sustain the most fundamental attribute of modern sovereignty, the right to decide who is in or out. American security worries also threaten to bifurcate what some Canadians want to see as a common North American economic space, disrupting the flow of commercial transactions.

Elites confidently expected the new prime minister to deliver on his promise to fix Canada-US relations, supposedly undermined by diverging responses to the War on Terror. Improving the tone of relations among politicians along with efforts to ensure that Americans far from Washington understand what is at stake in their relations with Canadians are hardly controversial. But many of the proposals to fix relations are designed, implicitly or explicitly, to make the border disappear, at least as an economic barrier.

This paper is a critique of the view of law and institutions manifested in these proposals. I start from the assumption that Canadians neither want nor are able to send representatives to Washington; Parliament and Congress will therefore retain their respective responsibilities, which means that a defended border with the US will remain a reality of Canadian life.

While I do not think that getting rid of the border is likely, ensuring that it remains open is as vital now as it was more than a century ago. In the last four decades

of the nineteenth century, emigration of native-born Canadians was enormous, arguably because the labour of a rapidly expanding Canadian population was shut out of the larger American market by the maintenance of high tariffs, first imposed to fund the Civil War. People who could not trade moved to the United States to find the opportunities that the Canadian economy could not provide (McInnis 2003).

Canadian elites are always aware that labour and capital might leave if the returns available in Canada diverge too sharply from those available in the US. It is ironic, therefore, that the attempt to maintain a viable Canadian polity capable of sustaining a strong Canadian state may often require North American trade liberalization; the paradox of the modern era of behind-the-border trade policy is that such liberalization may undermine the state, leading some nationalists to oppose the liberalization on which Canada's future depends.

What can we do to keep the border open? Can we use the law, or a treaty, to improve the governance of our shared continent? The question has three dimensions. The first is vital but also routine — can Canadian producers have assured and unfettered access to the US market sufficient to maintain the standard of living to which Canadians aspire? Would we need some new arrangements going beyond the North American Free Trade Agreement (NAFTA) to maintain such access given the changing nature of trade policy? The second dimension is how we manage occasional crises in our relations, such as the “mad cow” affair, which arose in 2003, and the third is whether our institutions can cope with the effect on the border of catastrophes such as another 9/11.

I am the outlier in debates on North American governance, notably in this series. Others argue that Canada needs to create strong institutions to manage our shared North American economic space. Such institutions will have to have a treaty base, Canada will have to take the initiative, and getting American attention will require a commitment to comprehensive negotiations. I disagree with these ideas both as empirical propositions about North American reality and as implicit theoretical claims about ideal Canadian futures. In the first section of this paper, I recall my argument about pluralism in North American institutions as a benchmark for discussing the other ideas (Wolfe 2003). In the second and third sections I comment explicitly on certain aspects of papers by de Mestral and Winter and by Hart (both published in 2004 as part of this *Art of the State* volume) as a means of contrasting my ideas to the perspective I wish to challenge. In the fourth section I discuss the way Canada managed the devastating effect on

the beef industry when one cow with BSE (bovine spongiform encephalopathy) was discovered in Alberta in May 2003. I use the example of this crisis to ask: “Where’s the beef?” in other proposals, and to try to respond to those who would ask the same question of me.

S e e Y o u i n W a s h i n g t o n ?

CANADA AND THE UNITED STATES HAVE BEEN DRAFTING TREATIES AND CREATING ORGANIZATIONS to manage the complexities of our relations since the eighteenth century, but prominent academics, business leaders and former ambassadors are worried about the apparent weaknesses of North American institutions. The grand schemes designed to address these worries are usually based on a claim that Canada can get inside the American “perimeter” only by concentrating all aspects of our relations in one centralist framework. Allan Gotlieb, one of the prominent exponents of such ideas, thinks a “community of law” establishing a common set of binding rules favouring the movement of people, services and goods within a joint Canada-US space does not require joint political institutions (Gotlieb 2003, 29-30). I disagree. Such a centralized community of law must have a constitutive basis in shared institutions if it is to be legitimate. If such institutions could be created, they would be located in Washington.

For Canadians who derive satisfaction from having a different kind of polity, and for those who think that our institutions reflect distinct Canadian values, this weakening of Canadian institutions might be perceived as a loss. It might be an easy loss to bear if the institutions we have for managing our relations with the US were failing us, but those institutions actually work rather well.

It is misleading to dream of an overarching constitution in which the relations of Canadians and Americans can be subsumed in a strong state-to-state framework with a single set of coherent policy tools. Instead of the concrete metaphor of an overarching bridge, or one comprehensive treaty, the pluralist metaphor of the legal framework is a *kaleidoscope*, with its constantly shifting shapes and colours, just like our many shared institutions (Macdonald 2003). The kaleidoscopic North American constitution has been evolving since the Jay Treaty of 1794. The NAFTA texts work well, but they do not work alone in guiding the interactions of millions of traders. Hundreds of treaties, arrangements and

joint organizations govern aspects of the Canada-US relationship. Canadians meet with their American counterparts in academic societies and professional associations. Many provinces are members of US state associations. Thousands of firms have integrated operations across borders, and myriad standard-setting bodies affect industrial and commercial practices.

This representation of Canada-US relations based on theories of legal pluralism (Wolfe, forthcoming) has closer affinities to transnational models of international relations than to transgovernmental network models (Slaughter 2004), and is based on a realistic assessment of the US political system. The US is not a centralized entity acting as a single unit. It may be the world's hegemon, but its decentralized structure allows many points of access for interest groups — domestic and foreign. This openness makes Canadians crazy when small, concentrated interests can derail a treaty or block settlement of the perennial softwood lumber dispute, but this openness is also an advantage. As two American scholars observe: “In a large and pluralistic polity, such as the United States, it is relatively easy for foreign actors to represent their interests in forms that more resemble domestic politics than traditional diplomacy” (Deudney and Ikenberry 1999, 110).

In single-point diplomacy, state-to-state relations are the responsibility of ambassadors and foreign ministers, but power is everywhere in the United States, not just in the White House or on Capitol Hill. I claim that no central institution can be created to manipulate such diffuse power on Canada's behalf. Canadians do not vote in US elections, and nothing we can say in the domestic political arena will make much difference. And our difficulties with the US Congress cannot be solved by creating more legal texts, let alone by trying to codify the North American “constitution” that we already have. Other countries can and do play this game, but proximity and similarity give Canadians enormous advantages. We are still a subordinate power, however, with no systemic leverage on the hegemon.

In contrast to the image of a single document signed by our two leaders solving all policy problems, imagine a *Swiss Army knife*: not a single tool nor even the same tool for every person, but a collection of tools infinitely adaptable to the purposes of millions of users (Macdonald 2002). In Swiss-knife diplomacy, Canada-US relations are everyone's responsibility, not just the prime minister's, and everyone creates their own knife, their own set of tools. Such a metaphor is appropriate in this era of what Salamon calls third-party governance, when the state accomplishes its purposes as often, or more often, through efforts to

“negotiate and persuade” rather than “command and control” (Salamon 2002). Managing Canada-US relations requires the continuous engagement of Canadian officials, legislators, politicians, businessmen, lobbyists and others from all levels of Canadian life (Heynen and Higginbotham 2004). Critics in the business community have misunderstood this observation, thinking it means accepting the status quo, or dealing with irritants exclusively on a case-by-case basis, but I advocate no such lassitude with respect to Canada’s most important foreign relationship. Rather, I argue that an activist approach to North American security and prosperity can be managed within existing institutions, institutions that are constantly being reshaped by the daily interaction of millions of North Americans.

Kaleidoscopes and Swiss knives are cute, but where’s the beef? Too much of the beef, of course, was in Alberta on the hoof in 2003 and 2004, and not on American tables. I propose to ask, therefore, whether my approach or some of the more aggressive alternatives are more helpful in explaining what happened when one “mad cow” was found in Alberta, and in proposing what we should do next to keep the American border open. Given that many proposals hinge on better legal mechanisms or new institutions, the answer will be informed by discussion of the detail of the de Mestral and Winter (2004) and Hart (2004) proposals published in this series.

S H O U L D N A F T A B E G I V E N D I R E C T E F F E C T ?

ARMAND DE MESTRAL AND JAN A. WINTER PROPOSE TO GIVE DIRECT EFFECT TO NAFTA, meaning that a provision of NAFTA could be invoked by a private party before the national court of a NAFTA signatory (2004). They admit that this is a somewhat unorthodox proposal to expand the role of the courts in enforcing NAFTA, but they make it on the assumption that the courts enjoy a high degree of popular trust. They do not say why NAFTA needs more enforcement, nor what problem this proposal would solve. They do say that it would further the goal of enhancing economic integration of the NAFTA parties, eliminating borders and creating a genuine consciousness of a North American economic space.

They do not say who might share that goal, though they think that consumers and citizens have a great stake in the success of this enterprise. For a variety of reasons, this message has not been well received in North America in recent

years, they say, and significant sectors of the public maintain a skeptical attitude concerning the benefits of NAFTA. But, they think, popular support will increase if citizens are able to claim rights against governments and against other citizens. They then argue that the granting of direct effect to many provisions of NAFTA would empower citizens to rely upon these provisions as rules of domestic law before the courts in situations where they consider that their government has failed to properly respect the agreement. No longer would citizens have to wait until intergovernmental negotiation has resolved an issue, since they would be able to go to court to enforce the agreement against the will of their government or in the face of what they consider to be an administrative decision taken in violation of commitments made under NAFTA.

I do not have the technical expertise to comment on de Mestral and Winter's detailed legal analysis of how direct effect works in general, or how it might work in the three countries, nor have I read the treaty as carefully as they have to assess its provisions in light of their criteria. Instead I want to describe three worries I have about seeing the law in these terms. I will root my worries in a hypothetical example.

De Mestral and Winter propose to give direct effect to paragraphs 1 to 6 of article 712 of NAFTA, the basic rights and obligations of the parties to take sanitary and phytosanitary (SPS) measures. The text is reproduced in the appendix to this paper (see page 60). The language is similar to that of the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures, which itself was intended as a way to translate the general exemptions from the normal disciplines on trade restrictions of article XX of the General Agreement on Tariffs and Trade (GATT) into the language of food safety. Trade agreements are drafted to govern the mutual obligations of states. In this case, the rules are meant to provide guidelines for determining whether an SPS measure in one state that seems to discriminate against another state has been taken for an important policy purpose, or whether the real objective served by a measure is protectionist — a measure can be deemed appropriate if it is based on scientific principles and the results of a risk analysis.

How would direct effect change the application of this provision of NAFTA? Let us assume that the Canadian Food Inspection Agency (CFIA) uses a precautionary approach in risk analysis, as required by federal policy (Canada 2003a; 2003c). Would there be a right of appeal to a Canadian court because pre-

caution is not mentioned in NAFTA section 712 (3)? If the CFIA conducts a contentious risk analysis, should a Canadian court be asked to adjudicate the resulting claims under normal Canadian administrative law principles or under NAFTA, section 712 (3)?

The first worry is whether the problem we face in North America is best solved in court. Should a complex food safety issue be resolved in court rather than by negotiation? Pluralists are dubious about adjudication as an instrument for economic management and for governmental participation in the allocation of economic resources (Fuller 1969, 169). They see adjudication as an “inappropriate way to debate and decide important issues of public policy,” because “the logic of litigation is circumstantial, not systemic: wrongs are ascertained, remedies are awarded and rights are declared on the basis of the particular facts and arguments presented on the record, not with a view to comprehensively assessing and reconciling conflicting social needs, institutional possibilities, financial implications and competing public policies” (Arthurs 1999, 55-56).

Komesar shows that courts have high thresholds for bringing issues before them; their independence and small numbers limit the range of issues that they can or will hear; and their formality raises the costs of participation, especially information costs (1994). Accordingly, the nature of the stakes affects what sorts of issues are likely to be adjudicated, and why. Most public-goods issues, for example, are excluded from litigation because the highly dispersed interests associated with public goods reduce the profitability of litigation. In contrast, when the stakes are high and concentrated, as with many private goods, participants can often resolve the problem in the market. Courts can only resolve matters that are brought to them, and what is brought to the courts (such as the Canada-US softwood lumber battle) will often be skewed to losses by concentrated minorities (American loggers) not diffuse majority gains (American home buyers). Moreover, courts can only decide matters based on the arguments presented to them, which places inordinate weight on questions of standing, and on what “facts” can be introduced. In this case, the “citizens” who would benefit from direct effect are more likely to be large firms and industry associations, rather than individuals or diffuse interests disaffected by the constraints trade agreements place on policy choice.

A second worry is about whether it is wise to ask domestic courts to interpret trade concepts like most favoured nation (MFN) to interpret the international balance of scientific controversies, or to interpret a text that was drafted keeping in

mind the mutual obligations of states rather than the rights of individuals. Governments are even reluctant to allow international trade panels to adjudicate SPS matters; despite thousands of SPS problems between the parties, there have been no formal NAFTA SPS disputes. After an early surge, the WTO dispute settlement system has not been heavily used for SPS matters either. It takes years to get a decision, and by the time a decision is rendered (e.g., Canada's complaint about Australia's rules on salmon) the commercial interests of producers have moved on; or, as in the case of beef hormones, the parties to the dispute keep waiting for one side (the European Union) to implement the decision, while the Appellate Body report generates enormous debate among legal scholars about what it means, if anything.¹ Much more use is made at the WTO of the procedure for members to raise "specific trade concerns" with each other under the provisions of article 12.2 of the SPS Agreement, which provides for informal ad hoc consultations (WTO Committee on Sanitary and Phytosanitary Measures 2003b; see also Wolfe, forthcoming).

The third worry suggested by this example is that direct effect would amount to constitutional entrenchment of NAFTA as a device for holding the state accountable. This top-down approach is typical of an era when lawyers look first, not last, to the Charter of Rights and Freedoms for judicial review of administrative action. Administrative action is essential in the modern welfare state. Administrative agencies provide some public services directly and they contract with nonstate entities to provide others. They ensure food is safe, develop workplace standards, monitor air quality, and so on. Administrative agencies are pervasive in every citizen's life, yet they are neither elected legislative bodies, nor an elected executive, nor a court. Legislation cannot possibly foresee all matters requiring decisions, and courts cannot possibly make all administrative decisions, yet democracies require administrative agencies to be accountable. In its concern for the relation between law and democracy, and citizens and the executive, administrative law goes to the heart of constitutional concerns about the rule of law and human agency. As its influence on domestic administrative law grows, NAFTA has already begun to take on characteristics that some scholars associate with constitutions. For good or ill it is an apparent constraint on domestic discretion, but are these constitutional effects an obstacle to or essential for democracy?

The question is more typically asked of the WTO than of NAFTA. The most explicit statement of the view of WTO as an international court

constraining domestic administrative discretion comes from Ernst-Ulrich Petersmann, who thinks that the WTO as rule of law is essential to protecting the rights of citizens against their own governments (1998b). For Petersmann, international economic law is citizen-oriented: "It is not the nation state and its national economy, but their global integration and deregulation for the benefit of individual producers, traders and consumers that are the objectives of modern international economic law" (1998a, 179).² One Canadian scholar goes further, arguing that "international trade law is concerned with removing the impediments that sovereignty places in the way of trading across borders" (McRae 1997, 123). This approach shifts the focus of negotiations and interpretation away from the mutual obligations of the governments toward vindicating absolute principles of economic justice.

Civil society organizations understand this rhetoric. They think that the WTO has autonomous legislative and judicial power capable of coercing its members in the service of property, not people. They see the WTO in the same way as the "international economic law" approach, but where that approach values this type of "constitution," civil society organizations have been critical of trade agreements as an "external constitution" because they are said to codify the "neoliberal" attack on the welfare state by creating limits on political discretion. Scholars also observe that international trade agreements (along with associated commercial practices, standards and other treaties) can have constitutional effects on governance arrangements within countries, although unlike the nominal constitution, these agreements lack democratic legitimacy — indeed NAFTA and the WTO can be seen as a "supraconstitution," meaning an order that controls government action even though it is not part of the national constitutional order (Arthurs 1999, 32; Gill 2002; Clarkson 2002, chap. 4).

Proponents of the international economic law approach might welcome this constitutionalization of NAFTA, but it is hard to see how giving NAFTA direct effect could be achieved without some sort of constitutional amending process, and hard to see how doing so would diminish criticism by those citizens who are already worried about the constitutional effects of trade agreements (see Wolfe, in progress).

If giving NAFTA direct effect is not the best way to improve the management of a common economic space, would a new comprehensive agreement help?

Do We Need a New
Comprehensive
Agreement?

MICHAEL HART'S PAPER IS BASED ON A WEALTH OF INFORMATION ON THE EXTENT OF Canada's economic relations with the US (2004). He shows where we have benefited from integration, and suggests areas where more could be done: border administration, regulatory differences, trade remedy and institutional capacity. I want to address two issues: first, the claim that this agenda must be pursued in a comprehensive bilateral arrangement, because I worry that the rewards would not be worth the costs of a comprehensive deal; and second, the centralist institutional proposals.

Let me begin by stressing that I am not arguing for the status quo. Every opportunity to pursue "smart regulation" initiatives is worth pursuing, as are enhancements to the Smart Border Action Plan. A commendable example is the effort underway to improve so-called "bio-security," while allowing fast transit for food, animals and plants by handling inspection and certification away from the physical border. I am not convinced, however, that these unceasing efforts to manage North American space require a new comprehensive agreement.

Hart, in common with most proponents of "deeper integration," does not provide quantitative estimates of how much the current framework costs, or how much Canadians could gain if a comprehensive agreement were successfully implemented. Perhaps we can draw some inferences from an Organisation for Economic Co-operation and Development (OECD) study of member country markets that finds scope for further reducing policy barriers to integration, defined as increases in trade and investment. Many people would argue that continuing inflows of investment are vital if Canada is to maintain a high level of employment in dynamic industries.

Leaving aside whether US policy impedes investment in Canada, perhaps because of market access restrictions, let us ask what the OECD says about Canadian policy. The answers are striking. If we reduced our restrictions on inward investment to the level of the least restrictive OECD country, the UK, inward investment might increase by 70 percent (2003, figure 24). Easing our product market regulations to the level of the least restrictive country would boost investment by 25 percent (2003, figure 25). It seems we do have much to gain from regulatory

change, but if Canadians want that increased investment, we could probably have it by changing our own policies, whether or not the US Congress goes along. Why then do we need a comprehensive deal with the US?

Negotiating the original Free Trade Agreement (FTA) and then NAFTA was a conscious industrial policy decision: the intent was to use an international agreement to force the pace of restructuring of the Canadian economy and of Canadian regulation. Could we use a new comprehensive deal more effectively than unilateral policy change if we wanted to lower our barriers to investment? I am dubious about both the desirability and practicality of such a proposal. I suspect that John Helliwell is right when he argues that the *marginal costs* of forcing the pace on more integration with the US, given how much has already taken place, would be much higher than the *marginal benefits* in improved well-being for Canadians (2002).³

If we still want to use international pressure, we might see greater marginal benefits from adapting ourselves to the other markets. If the most rapid growth in the world economy will come from Brazil, India and China, Canada should be trying to win new markets there, not trying to squeeze the last drop of access to the US market at the expense of complicated regulatory change. But if further integration with the US is wanted, the real question is, could we bring enough to the table to get American attention to Canada, as opposed to what might be on offer for them in transatlantic negotiations with the EU, or trans-Pacific negotiations with Japan and China? Indeed, given the intense American interest in transatlantic negotiations, notably on regulatory barriers, and the lack of evident interest in a separate comprehensive deal with Canada, the strategic question is whether we seek a seat at the EU-US table, or encourage both sides of the Atlantic to negotiate energetically in the WTO.

Realism is needed when we talk about Canada and the US as if they were comparable entities, given the huge disparities in the size of the two economies. Hart rightly argues that asymmetry in economic interests at the macro level is not in itself a reason to think that the US is not interested in new arrangements. The analytical question is under what circumstances would Americans be interested? What does the US not now get from Canada in some domain, or a number of domains, that it wants? We may be their largest trade partner, but they have many other trade partners, and many sectors of their economy where trade is not hugely important. We have a big share of their imports in wood and wood products, which

gets us attention we may not want. We are big in energy, especially oil and gas, and in transportation. Obviously anything to do with the border is big for them, including security and the environment. Where else are relations with Canada a big enough part of the American puzzle to get their complete attention? Where are the areas where an agency on one side of the border cannot do its job without talking to its counterparts on the other? And where are current arrangements inadequate?

Regional deals work best with issues that have few world externalities, which explains why when Canada placed all market access issues on the NAFTA table, we created a package big enough to get the attention of Congress. But the issues now being talked about are ones where the world externalities are bigger than the Canada-specific dimensions, which would be true of most behind-the-border issues. These issues have an inherently MFN character: once the legal framework is changed, it is changed for everyone. For things that affect imports as a whole, Canada represents less than 20 percent of US trade. For things that affect the structure of the economy as a whole, trade with Canada represents only 2 percent of US gross domestic product (GDP). It is for this reason that we will only make progress on negotiating new understandings about subsidies, dumping and other “unfair” practices multilaterally in the WTO.

I do not mean that bilateral efforts would impede multilateral efforts; I mean that bilateral negotiations on trade remedy are unlikely to be fruitful, even if one agrees that current US policy makes no sense either for the world or for an immensely integrated North American market. This is an issue that affects all US trading partners. If the Americans are prepared to change at all, I do not think they will change for just one. We should not imagine that we could negotiate as equals to create a legal regime that would trump the ability of Congress to act on its perceptions of American self-interest. Congress is especially unlikely to give Canadians an equal voice for setting policy for trade and investment with third parties.

My most important complaint about the Hart paper is his advocacy of a centralized institutional framework. Hart writes that managing deepening integration and an increasingly complex relationship requires that the two governments assess the capacity of current institutional and procedural frameworks to iron out differences, reduce conflict and provide a more flexible basis for adapting to changing circumstances (2004). Despite his assessment of the enormous network of treaties, agreements and other arrangements that we have developed on an organic basis, he seems to think that what we now need is a top-down

formal treaty aimed at requiring officials to do what they have been doing for decades. He never says why we have suddenly reached the point where decades of experience with a bottom-up process of institution-building has been proved insufficient. He tends to assume that the alternative to his proposal is the status quo, which would leave current rules hostage to changing circumstances. Yet he knows that the rules are changing all the time anyway, in part through the complex networks he describes, and in part because of NAFTA.⁴

We can see the centralist logic of Hart's approach in the domain of food safety. He observes that CFIA and Health Canada work closely with the US Department of Agriculture (USDA) Food Safety and Inspection Service and with USDA's Animal and Plant Health Inspection Service (APHIS) along with other agencies on the basis of hundreds of agreed protocols and understandings. (He could have added the Food and Drug Administration, the Environmental Protection Agency and the Department of Homeland Security to the list of American partners.) Hart thinks, however, that this extensive network lacks the status of domestic law or international treaties, and any problems need to be resolved at the level of the minister and secretary of agriculture. He suggests that "enshrining current levels of cooperation into a bilateral treaty and assigning supervisory responsibility for the continued adaptation of its implementation to a new, bilateral institution would greatly enhance both consumer and producer confidence in the two governments' commitment to governing what is, *de facto*, an integrated market" (2004). When bureaucrats cannot get along, I suspect that citizens are relieved to see ministers involved. More importantly, I think that it is misleading to say that the extensive web of North American relations "lacks the status of domestic law or international treaties." These arrangements are legal in their effects whether or not they are codified.⁵ The centralist approach assumes that the US Congress is responsive to coercive trade treaties, but of the four WTO cases that the US has lost where implementation required a change in legislation (as opposed to a change in regulation), Congress had failed to act in each one (WTO 2003) until legislative changes were finally agreed upon in the spring of 2004 on the case involving tax treatment for foreign sales companies (WTO 2004). That case is especially salient because of EU threats of massive retaliation if the US failed to change its law.

In another example of why no one should place much confidence in the ability of a mere treaty to trump powerful lobbies, Canada's trade minister complained in a July 2004 letter to the commerce secretary that the US response to a

softwood lumber ruling undermined respect for NAFTA dispute settlement because while the administration intended to implement a ruling, it planned to do so only on a prospective basis, contrary to their own NAFTA legislation (Peterson 2004). The Americans seem not to have responded. All Canadians share the minister's frustration, especially in the case of softwood lumber, yet it shows the difficulty of thinking that any legal approach will exempt foreigners from US politics.

In sum, I have found little to recommend either giving NAFTA direct effect, or negotiating a new comprehensive deal with the US. I do not see how either would substantially improve the routine management of Canada-US relations. I now want to test these contrasting propositions against a crisis. NAFTA has erased the border between the Canadian and US markets for beef, creating a trade worth \$3.7 billion per year (Poulin and Boame 2003). Yet the *regulatory border* has not been erased. How do centralist and pluralist models fare in this case?

T h e M a d - C o w C r i s i s

ON MAY 20, 2003, CANADA ANNOUNCED THAT A COW SLAUGHTERED IN ALBERTA in January 2003 had suffered from bovine spongiform encephalopathy (BSE), the so-called "mad-cow" disease. Every Canadian producer's worst nightmare then unfolded, as all of Canada's export markets for beef closed their borders immediately. The consequences were devastating to the beef industry, and significant for the economy as a whole. In 2002, Canada exported over \$4 billion of beef, 90 percent of it to the US. After the ban, when Canada's exports plunged, US exports filled the gap in Canada's traditional markets in Mexico, Japan and South Korea (Poulin and Boame 2003; on the effects of the crisis on the Canadian beef industry, see Canada 2004). The beef industry won considerable public sympathy for its demands that the government do something to get the border opened quickly. The crisis began to affect American producers after BSE was found in a cow in Washington State in December 2003, but that compounded Canada's problem when authorities determined that that cow had been born in Alberta. Some proponents of closer ties to the US, or at least of enhanced regulatory cooperation, argue that the mad-cow crisis illustrates the costs of having separate Canadian and American systems (Haynal 2004). I draw a different

conclusion from the crisis. In this section I describe the rules that shaped the policy response to this crisis on both sides of the border.

BSE first emerged in cattle in the United Kingdom in 1986. Control measures were gradually introduced as scientists began to understand the disease. The intensity of these efforts increased after 1996, when a number of cases of variant Creutzfeldt Jacob Disease (vCJD) were discovered, suggesting that BSE was a zoonotic disease — one that could be transmitted to humans (WHO 2002). When the one Alberta case was found, the public and Canada's trading partners were informed immediately, both directly, in the case of the US and other major partners, and through the World Organization for Animal Health (known as the OIE, for Office International des Epizooties) as the international rules require.⁶ A scientific investigation began immediately in order to determine whether it was an isolated case, and whether the source of infection could be traced. Representatives of US authorities and an international team of experts were invited to monitor the investigation. Both sides were worried about the health of consumers, and the health of animals, as well as open trade. It was not a classic trade dispute, however, despite losses to Canadian producers, because nobody wanted to compromise on the integrity of the strong system already in place (Kellar and Lees 2003).

When the Canadian authorities concluded on June 27, 2003, that the scientific phase could be considered over, the American and international experts agreed. Canada could have confidence that the single case identified had not passed the disease on to other cattle or to humans.⁷ The international experts recommended some changes in Canadian policy and practice. The minister promised action, though many of the complex changes would require coordination with the provinces, the industry and with the United States, given the integrated North American beef industry. The first set of new regulations was in place by the end of July and on August 8, 2003, the US agriculture secretary announced that the border would reopen to imports of boneless beef from animals under 30 months of age on the basis of an import permit system. Restoring Canadian access to the US market for live animals was not possible, however, under current US rules. (Current OIE rules do not help in the absence of a clear basis for reopening a market if BSE is once discovered, as discussed below.) On November 4, 2003, USDA issued a proposed rule to amend its BSE regulations in a way that would place Canada on a list of countries considered to be a minimal risk for BSE, thus making Canada eligible to export certain live animals again. In

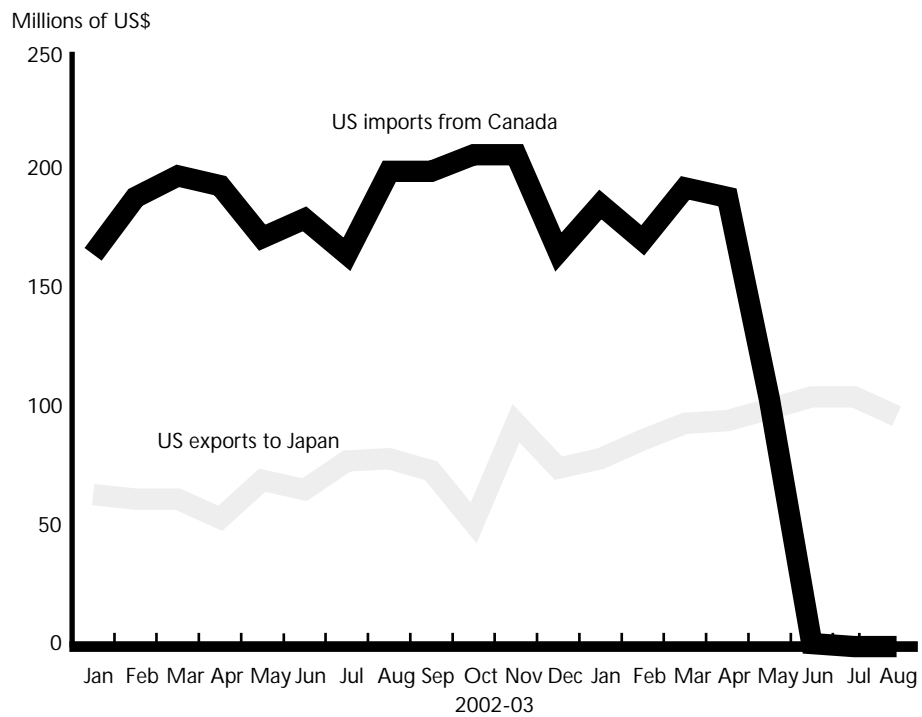
the draft regulation, regions where BSE had been found would be considered a minimal-risk region if specified preventive measures have been in place for an appropriate period of time (USDA 2003, 62387).

The BSE crisis had an immediate and devastating effect on Canadian exports to the US, as figure 1 shows. Solving the problem would have been more straightforward had it only involved the US, but it did not. Japan was also involved because, as figure 1 also shows, American exports to Japan are significant. Given the integrated nature of the North American market (Young and Marsh 1998), it is not easy to say whether processed beef exported from the US began as a live animal or even a processed product imported from Canada. Dealing with Japan is complicated by that country's difficulties with BSE after a case was discovered there in 2001. Officials subsequently claimed that the system was fixed, and then another case was discovered. The most recent case was discovered in October 2003. Ministers have resigned over the issue; officials are spooked by the possibility of another case; and the public is mistrustful.

On May 20, 2003, Japan, like many countries, immediately closed its border to Canadian beef. The Americans naturally hesitated to reopen their border to Canada, even after there was no scientific reason not to, because they did not want to risk their access to the Japanese market. Japanese officials understand how integrated the two markets are, and therefore decided that they would only accept American beef if it could be certified as not being of Canadian origin. The US has a system, a rather porous one, for allowing meat-packing plants to certify compliance with the Buy America provisions of school lunch programs. As part of opening the border to processed meat from Canada, on August 8, 2003, the USDA also extended this system to exports by creating the Beef Export Verification Program, which allows producers to certify that their meat comes from a US slaughterhouse and that American beef has been kept segregated from foreign beef. The Japanese authorities were satisfied with this sleight of hand ("US Adopts Beef Labeling System" 2003). But when the case was discovered in Washington State, they closed their border to US beef as well.

The discovery of the case in Washington caused the USDA to republish the proposed rule on imports of live animals with an extended comment period, and as of June 2004 the department was still reviewing all the comments received, many of them from interests not keen on reopening the border. While waiting for the regulatory process to conclude, in early April 2004 the department decided

US Beef Imports from
Canada and Exports
to Japan, 2002-03



Source: Prepared by Brad Adams-Barrie using data from USDA Foreign Agricultural Service and Statistics Canada. It aggregates HS codes 0201 — Meat, Bovine Fresh or Chilled, 0202 — Meat, Bovine Frozen, and 0102 — Live Bovine Animals.

to expand the list of acceptable processed products, perhaps in response to representations from Prime Minister Martin at his first meeting with President Bush in January 2004. In response to this slight change, the Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (R-CALF US) filed suit against the USDA in US District Court for the District of Montana. On April 26, 2004, a friendly judge issued a temporary restraining order that prohibits the department from issuing import permits for products other than those included as part of the August 2003 list of low-risk Canadian products.

The prime minister raised the issue again when he visited the White House at the end of April. Canadian officials are convinced that these bilateral representations have imparted a sense of urgency to the US regulatory process, with many more staff assigned to the file than might normally be expected. But the administration was rattled by the Montana injunction, and it will now be scrupulous in ensuring that all the regulatory steps are undertaken correctly. Only when that domestic process is complete will the border open again to live cattle.

It is not surprising that the injunction was filed by cattle producers, not the meat packers. The closed border eliminated the supply of Canadian cattle for processing, which raised prices for producers while hurting the packers, but those cattle might never come back if Canadian processing capacity increases. After the case was discovered in Washington, however, the USDA immediately announced emergency regulations to restore confidence in the safety of US beef. On April 7, 2004, the USDA's Food Safety and Inspection Service (FSIS) released its preliminary regulatory impact analysis (PRIA) of those new regulations, showing that the cost to producers and processors could be as high as \$150 million a year. At the same time as this report, and the R-CALF injunction, seven senators wrote to the secretary of agriculture urging that the proposed rule be withdrawn, ostensibly because the rules would endanger the health and safety of American cattle and consumers, but really because of a concern that regulatory differences might imply a cost advantage for Canadian producers, and perhaps a concern that Canadian access might increase problems in export markets. The Canadian embassy pointed out in letters to each senator that Canadian practices, if anything, were ahead of those in the US, and that given the intense integration of the market, the countries should have the same risk status.

The situation was also complicated by international rules. Animal health measures may result in trade restrictions, but governments accept that these

restrictions may be necessary and appropriate in emergency situations to ensure food safety and animal health protection (Marabelli, Ferri and Bellini 1999). The OIE guidelines on what should be done if a case of BSE is discovered are contained in chapter 2.3.13 of the *International Animal Health Code*. The considerable trade implications of these rules are the subject of discussion in the WTO (WTO. Committee on Sanitary and Phytosanitary Measures 2001). The issue exploded in the trading system not when BSE was discovered in cows in 1986, but as it became clear in 1996 that it could be transmitted to humans, making it an issue of human as well as animal health. In 1997, Canada, among other countries, tightened its regulations governing beef imports.

Since 1997, as the trade consequences of tighter beef regulations have been felt, BSE has been raised more than two dozen times in the SPS committee under the “specific trade concerns” procedure discussed above. Many of the complaints came from exporting countries where BSE was a low or minimal risk, countries that thought some aspect of the import regime of another country was too restrictive, or not based on a risk analysis (WTO. Committee on Sanitary and Phytosanitary Measures 2003b). Most of the BSE complaints raised in the SPS committee were resolved through discussion; indeed, what we really see in the committee notes is evidence of extensive discussions among officials about appropriate regulatory practice.

The concerns raised are not always about huge amounts of trade. In one case, Canada and the EU complained in March 1999 that India had no scientific basis, according to OIE guidelines, for banning imports of bovine semen from Canada, but India proved very slow to change the rules. The EU, US, Canada and Argentina, in particular, find themselves on both sides of BSE concerns raised in the committee. For example, Canada complained many times, prior to May 2003, that other countries were not treating it as BSE-free. On the other hand, Canada was asked to justify the stringency of its import rules. Only one of the BSE complaints raised in the committee has gone on to become a formal WTO dispute, but there is no evidence (as of May 2004) that this particular matter was actually pursued either in the committee or in the dispute settlement system. Another complaint was raised in the dispute settlement system without being raised in the committee; it too is still “pending consultations.”

Again and again, the central question in the BSE cases is whether the measure is supported by a risk analysis. Sound analysis matters because the whole process from calf to table must be controlled, given that no means exists to test for BSE in a

live animal, or in processed products (the only test is microscopic analysis of brain tissue). Science can explain the links where the disease can be transmitted, but a risk analysis is needed to understand where such transmission may be possible in a given set of circumstances. That risk analysis can then form the basis for a risk-management plan, since the OIE guidelines must be adapted to each country's circumstances. Risk-management plans typically affect not just the traditional beef trade, but all the products whose contents might contain infected beef products, like cosmetics.

Canada's restrictive rules go beyond the requirements of the OIE, as is permitted under the WTO if the higher standard is based on a risk assessment, and if a country treats other countries as it treats itself (the national treatment principle). Canada considers a country to be free of BSE if a number of conditions are met, notably that it have no reported cases of BSE for the previous seven years and a sophisticated regulatory and monitoring system in place (Canada 2001). Canada considers Argentina, Australia, Brazil (with conditions), Chile, New Zealand, the United States and Uruguay as being BSE-free. No European country is yet on the list (the EU had 1,318 new cases in 2003 alone). At the moment, Canadian rules would not allow imports from Canada, because Canada does not meet the strict test of being BSE-free, despite the conclusion of the scientific investigation that the one case discovered is considered to be an isolated one, and with new regulations in place to protect both animal and human health.

Officials continue reviewing the regulatory implications of the mad-cow crisis. Some changes were introduced in 2004 to ensure that Canadian and American rules keep pace, but more new rules might be needed in Canada as a result of weaknesses revealed by the scientific investigation — changes may yet be coming on the level of surveillance in slaughterhouses (if not all the way to the Japanese demand to test every cow), and on traceability of animals. When Canada again has a stable regulatory system, officials must review the import rules to ensure that we are treating others as we treat ourselves. Sweden, for example, probably now has a claim to be allowed to export to Canada. Canada has to be careful, however, not to set the regulatory bar so high that we would have to close the border to imports from the US, especially if we imposed a feed standard they could not meet, which might be the case with the tough new rules on animal feed proposed in July 2004.

The immediate issue on exports of live cattle is how to classify Canada. Is Canada a country of "minimal risk" of BSE, or a country of moderate risk? Both the diseased cow found in Washington State in December 2003 and the cow found

earlier in Alberta were born before Canada implemented its ban on ruminant feeding in 1997. The scientific consensus is that Canada is certainly of minimal risk, and indeed of equal risk, to the US itself. That is, the OIE requires a risk analysis; and no risk analysis would classify Canada as of more than minimal risk.

Canada was the first major exporter to be targeted by the OIE rules on BSE. The case revealed that the world cannot distinguish between one case in Canada and 180,000 in the UK. In response to a request from Canada, the US and Mexico, the OIE asked an international expert group to review the most recent scientific knowledge in order to consider whether the current OIE international standards on BSE are in need of revision. In its subsequent statement, the OIE noted that "In order to protect public and animal health the present Code recommends different risk mitigating measures, with increasing levels of severity as they move from categories of countries of lower to higher levels of BSE risk." Some countries fail to comply with these guidelines, the statement went on, while others impose embargoes with no risk analysis, a situation that "penalizes countries with good and transparent BSE surveillance, declaring cases while perfectly controlling the disease." The expert group concluded that the scientific basis of the standards remains valid, but modifications might be possible to the way countries are categorized as being free or provisionally free of BSE (OIE 2003).

As a result of the expert group's recommendations, when the OIE International Committee met in May 2004, it adopted several amendments to the BSE chapter of the *Terrestrial Animal Health Code*, the standards that guide member countries' responses to the disease. The committee accepted changes to the chapter proposed by Canada and several other countries that encourage trade responses based on the safety of commodities rather than a country's BSE status. The committee also discussed possible future simplifications to the categorization system used to establish BSE status.

Earlier, the OIE had also expressed its worries to the WTO Committee on Sanitary and Phytosanitary Measures, observing that some member countries are applying trade bans when an exporting country reports the presence of a significant disease, without having conducted a risk analysis, yet the OIE rarely recommends a ban on animals or specific animal products coming from an infected country. These unnecessary trade bans may result in a reluctance to report future cases and an increased likelihood of disease spread internationally (WTO Committee on Sanitary and Phytosanitary Measures 2003a, paras 23-28).⁸ The

OIE guidelines clearly allow discrimination between countries based on the degree of disease prevalence, so discrimination is not *prima facie* wrong in WTO terms, but the usual problem arises of distinguishing between protectionism and a health necessity. In its statement to the WTO, the OIE implied that if Canada brought a formal dispute, countries would have trouble showing that their restrictions were based on either a risk analysis or an international standard. But Canada did not bring a case. The problem was discussed intensively between scientists, officials and politicians, in bilateral meetings (and on the phone) and at OIE and SPS meetings, but nobody has suggested launching a formal dispute under WTO or NAFTA. International agreements have certainly structured the responses of all concerned — actors have been ruled by law — but nobody seems to think that adjudication would be appropriate.

What do we learn from the mad-cow crisis about using the law or institutions to manage bilateral crises in North America's integrated market? What we now know is that the one cow found in Canada with BSE could have been born in the US, although it was not, and could have been fattened on US feed. The decision to close the border on May 20, 2003, therefore, was based on the fiction of a difference between Canadian and US beef that could be maintained by segregating the two markets. There is no difference, though. There is not even all that much difference between the regulations. The regulatory border quickly became a real border because the authorities in Canada are responsible to Parliament, those in the US to Congress. No treaty can force the regulators to abrogate that responsibility for human and animal health.

Canada got the border open again, for processed products, because of the close networks among officials, but those networks are predicated on common objectives. No third party could have moved this process more quickly. No third party could be better placed than American officials for assessing whether Canadian progress in understanding the source of the outbreak and in improving our procedures was sufficient to allow the American authorities to discharge their responsibilities under US law. No outside institution could have decided if authorities on both sides were safeguarding the integrity of the food safety system. Not even a joint institution would help in trying to understand whether the two countries were acting in good faith to solve a difficult problem, or whether they were being protectionist.

At some point US officials recognized that there was no scientific reason for keeping the border closed to live animals, but closed it remained, because of

Japan. Could a challenge have been mounted by Canadians in a US domestic court if the SPS provisions of NAFTA had been given direct effect? Would such action have been seen as legitimate by American citizens? Perhaps, but such a court case would be hugely expensive, so only large processors and industry associations could have brought the case. The process would be slow, and the outcome, whenever it finally arrived, might simply confirm that the US authorities had correctly implemented NAFTA.⁹

We have a complete triangle. The Americans had to solve the Japanese situation before they could open the border to Canada. Canada's efforts to open the Japanese and American markets depend on multilateral action. Bilateral rules are helpful, but we still need international rules, not least because Canada's relations with the US are usually only a portion of that country's relations with foreign countries. And we must never forget that for Americans, Canada remains a foreign country — a letter from seven senators and a Montana injunction will always carry great weight.

C o n c l u s i o n

KEEPING THE LONG, BUT DEFENDED, BORDER WITH THE UNITED STATES OPEN IS among the most vital of Canadian interests, but we Canadians cannot reduce our vulnerability by trying to make the border go away. Our relations are governed by law, but it is the law that first arises in the interactions of millions of North Americans. Improving on this legal framework is hard. The US may take close to 80 percent of our exports of goods and services, but we are both enmeshed in many legal regimes beyond NAFTA. The market is integrated, but a sharp regulatory line runs through it, based on the differing responsibilities to citizens of Parliament and Congress.

The big ideas have a top-down approach, the belief that the prime minister and his officials can solve problems if they bundle everything into a centralized framework. But when we look at Canada-US relations from the bottom up, we realize that cooperation is intense in most regulatory domains, but unproblematic, and far from the direct control of the president and the prime minister. Most issues are managed on a department-to-department basis, and government officials are probably only brought in when citizens cannot solve the problem themselves. Our kaleidoscopic North American constitution does not need an amendment. It retains the

vitality to adapt to changing needs. And it allows all of us to deploy the flexible set of policy tools we need as circumstances require — Swiss-knife diplomacy, I call it. To be clear, I am not saying that we need *no* new institutions. I am saying that we need no new *centralized* institutions. We do need to create and to reinvent the sorts of institutions that help us manage North American relations.

It is appropriate to respond to my argument by asking how I would propose to deal with the concrete problems Canadians face in dealing with the US. How does this mode of analysis suggest we solve new problems? If there were another 9/11, where would we be? The quick response would be, right where we were the last time. For example, Canadian officials, using formal and informal links, worked quickly and effectively with their American counterparts to ensure the safety and security of both countries' civil aviation systems. They shut down North American airspace and ensured that aircraft landed as quickly as possible. No treaty was needed because Canadians and Americans relied on a host of understandings of varying degrees of flexibility to deal with the implications of a novel situation.

This pattern is repeated every day as officials respond to routine frictions and new crises (Heynen and Higginbotham 2004). These ongoing interactions certainly leave written deposits: as officials gain experience in dealing with a category of problem, indeed when they find themselves categorizing a set of interactions as a single problem, they frequently wish to codify their shared understandings in an exchange of letters, or memoranda of understanding, even formal agreements. But this constantly growing written record is not in itself the shared understanding, nor does it need embodiment in a formal overarching treaty to be effective.

My focus is on economic relationships, but my conclusion would not change if I added security relationships. American concern about homeland security stands on its own. We cannot expect to be paid for security cooperation with market access, and no common institutions will trump this absolute security concern. The challenge is how we can work issue by issue to make all our shared border security institutions effective. This effort has been underway since the morning of 9/11. New bodies may be needed, or not; the US will calm down at some point. The current muscular type of diplomacy will not last, nor will the politics of fear endure forever. Our obligation to cooperate in the defence of North America, and to work with our closest ally to build a more peaceful world, does not depend on our economic interests. If close collaboration on security generates goodwill that spills over to other domains, so much the better, but

security cooperation stands on its own as a Canadian interest. And economic cooperation stands on its own as an American interest; White House irritation with the Chrétien government's statements about Iraq had little discernible impact on other domains.

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

APPENDIX
North American Free
Trade Agreement

Article 712: Basic Rights and Obligations

Right to Take Sanitary and
Phytosanitary Measures

1. Each Party may, in accordance with this Section, adopt, maintain or apply any sanitary or phytosanitary measure necessary for the protection of human, animal or plant life or health in its territory, including a measure more stringent than an international standard, guideline or recommendation.

Right to Establish Level of
Protection

2. Notwithstanding any other provision of this Section, each Party may, in protecting human, animal or plant life or health, establish its appropriate levels of protection in accordance with Article 715 [Risk Assessment and Appropriate Level of Protection].

Scientific Principles

3. Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains or applies is:
 - (a) based on scientific principles, taking into account relevant factors including, where appropriate, different geographic conditions;
 - (b) not maintained where there is no longer a scientific basis for it; and
 - (c) based on a risk assessment, as appropriate to the circumstances.

Non-Discriminatory Treatment

4. Each Party shall ensure that a sanitary or phytosanitary measure that it adopts, maintains or applies does not arbitrarily or unjustifiably discriminate between its goods and like goods of another Party, or between goods of another Party and like goods of any other country, where identical or similar conditions prevail.

Unnecessary Obstacles

5. Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains or applies is applied only to the extent necessary to achieve its appropriate level of protection, taking into account technical and economic feasibility.

Disguised Restrictions

6. No Party may adopt, maintain or apply any sanitary or phytosanitary measure with a view to, or with the effect of, creating a disguised restriction on trade between the Parties.

Notes

- 1 Some scholars conclude, for example, that the Appellate Body decisions often do not present an unambiguous articulation of the central governing principles of the SPS agreement (Trebilcock and Soloway 2002).
- 2 On the contrast with traditional public international law, see Kennedy (1999, 38).
- 3 To take one alternative means of reducing the impact of the border, three bridges in Ontario that matter a great deal to the auto industry account for over half of Canada's trade (Canada 2003b, figure 2.6.3). If a just-in-time auto industry finds that its trucks are waiting too long at the border, we have many ways to improve matters for them, including inspecting and sealing shipments at the factory gate, which would speed passage across the bridges, although infrastructure improvements may be more important than anything else. That said, sharing regulatory and scientific expertise can help both countries, depending on the sector, and all it takes is goodwill, not treaties (Griller 2004).
- 4 When it met in Montreal on October 7, 2003, the NAFTA Free Trade Commission started work on harmonizing MFN tariffs and reducing the burden of the Rules of Origin. The partners have also created a new steel committee and commissioned a study on reducing border transaction costs. Clearly much is possible within the institutional framework that now exists (NAFTA 2003).
- 5 The full argument from legal theory on which this statement rests is developed in Wolfe (forthcoming).
- 6 For a chronology of events, see the cumulative daily updates on the CFIA Web site at www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/situationone.shtml. I understand more about this case after confidential interviews with Canadian officials, who are not responsible for my mistakes.
- 7 What is less appreciated is that while the case is isolated, it may not be unique: Canada may have a small number of additional cases.

- 8 This principle of transparency and open reporting is an essential foundation for all global disease control. The 2003 SARS crisis also shows the importance of countries not being punished for providing information.
- 9 An empirical test of one aspect of this proposition arose shortly after the final draft of this paper was completed. On August 12, 2004, a small group of very large Canadian producers (with over 100,000 head of cattle among them) filed a claim against the US government under chapter 11 of NAFTA, which allows investors to claim that they have been harmed by a government action contrary to the treaty. The Alberta farmers claim that they are unfairly hurt by the arbitrary closing of the border to live cattle. They ask for monetary relief of C\$95,000,000, on the basis that US authorities are in breach of NAFTA, but they do not ask for what a tribunal cannot give — an immediate change in US regulation, which is the only policy outcome that would benefit Canada as a whole, rather than the private interests of a small group of large producers. (A copy of the claim, written by lawyers Michael Woods and Todd Weiler, is available from *Inside U.S. Trade* [see www.insidetrade.com/secure/pdf6/wto2004_5069.pef])

References

- Arthurs, H.W. 1999. "Constitutionalizing Neo-Conservatism and Regional Economic Integration: Tina X 2." In *Room to Manoeuvre? Globalization and Policy Convergence*, edited by T.J. Courchene. Montreal and Kingston: School of Policy Studies, Queen's University, and McGill-Queen's University Press.
- Canada. 2001. "Canadian Bovine Spongiform Encephalopathy (BSE) Import Policies." Working paper no. AHPD/DSAE-IE-2001-17-4. Accessed October 12, 2003. www.inspection.gc.ca/english/anima/heasan/policy/ie-2001-17-4e.shtml.
- _____. 2003a. "Framework for the Application of Precaution in Science-Based

- Decision Making About Risk." Ottawa: Privy Council Office. Accessed October 15, 2003. www.pco-bcp.gc.ca/default.asp?Language=E&Page=publications&Suc=precaution&Doc=precaution_e.htm.
- _____. 2003b. "NAFTA @ 10: A Preliminary Report." Ottawa: Department of Foreign Affairs and International Trade.
- _____. 2003c. "Risk Analysis Framework to Address Animal Health, Plant Health and Food Safety Risks within the Canadian Food Inspection Agency." Ottawa: Canadian Food Inspection Agency. Accessed October 15, 2003. www.inspection.gc.ca/english/reg/precaut/precaute.shtml.
- _____. 2004. Senate Standing Committee on Agriculture and Forestry. "The BSE Crisis: Lessons for the Future." Interim report. Ottawa: Government of Canada.
- Clarkson, S. 2002. *Uncle Sam and Us: Globalization, Neoconservatism and the Canadian State*. Toronto: University of Toronto Press.
- de Mestral, A., and J. Winter. 2004. "Giving Direct Effect to NAFTA: Analysis of Issues." No. 6 of *Thinking North America*, edited by Thomas J. Courchene, Donald J. Savoie, and Daniel Schwanen. *The Art of the State*, vol. 2. Montreal: Institute for Research on Public Policy.
- Deudney, D., and G.J. Ikenberry. 1999. "Realism, Structural Liberalism, and the Western Order." In *Unipolar Politics: Realism and State Strategies after the Cold War*, edited by E.B. Kapstein and M. Mastanduno. New York: Columbia University Press.
- Fuller, L.L. 1969. *The Morality of Law*. Rev. ed. New Haven and London: Yale University Press.
- Gill, S. 2002. "Constitutionalizing Inequality and the Clash of Globalizations." *International Studies Review* 4, no. 2:47-65.
- Gotlieb, A. 2003. "A North American Community of Law." *Ideas that Matter* 2, no. 4:25-30.
- Griller, D. 2004. "Can Regulatory Collaboration Improve Safety in Health Care?" *Horizons* 7, no. 1:17-22.
- Hart, M. 2004. "A New Accommodation with the United States: The Trade and Economic Dimension." No. 2 of *Thinking North America*, edited by Thomas J. Courchene, Donald J. Savoie, and Daniel Schwanen. *The Art of the State*, vol. 2. Montreal: Institute for Research on Public Policy.
- Haynal, G. 2004. "The Next Plateau in North America: What's the Big Idea?" *Policy Options* 25, no. 6:35-39. Montreal: IRPP.
- Helliwell, J.F. 2002. *Globalization and Well-Being*. Vancouver: UBC Press.
- Heynen, J., and J. Higginbotham. 2004. *Advancing Canadian Interests in the United States: A Practical Guide for Canadian Public Officials*. Ottawa: Canada School for Public Service.
- Kellar, J.A., and V.W. Lees. 2003. "Risk Management of the Transmissible Spongiform Encephalopathies in North America." *Revue Scientifique et Technique de L'Office International des Epizooties* 22, no. 1:201-25.
- Kennedy, D. 1999. "The Disciplines of International Law and Policy." *Leiden Journal of International Law* 12, no. 1:9-133.
- Komesar, N.K. 1994. *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*. Chicago: University of Chicago Press.
- Macdonald, R.A. 2002. "The Swiss Army Knife of Governance." Paper presented at the "Instrument of Choice in Global Democracies" conference, Faculty of Law, McGill University, Montreal, September 26-28.
- _____. 2003. "Kaleidoscopic Federalism." Paper presented at the International Colloquium on Federalism, McGill University, November 8-10.
- Marabelli, R., G. Ferri, and S. Bellini. 1999. "Management of Animal Health Emergencies: General Principles and Legal and International Obligations." *Revue Scientifique et Technique de L'Office International des Epizooties* 18, no. 1:21-29.
- McInnis, M. 2003. "The Anglo-Canadian Hemorrhage: The Great Emigration from Canada, 1861-1901." Working paper, Department of Economics, Queen's University.
- McRae, D.M. 1997. "The Contribution of International Trade Law to the Development of International Law." In *Recueil Des Cours: Collected Courses of the Hague Academy of International Law 1996*, Tome 260. The Hague: Martinus Nijhoff Publishers.

- North American Free Trade Association (NAFTA). 2003. "Celebrating NAFTA at Ten." Free Trade Commission joint statement, October 7. Accessed October 9, 2003. www.dfait-maeci.gc.ca/trade/nafta_alena/statement_en.asp.
- Office International des Epizooties (OIE). 2003. "OIE Addressed Demands on Clarification of BSE Standards." Press release, October 3. Accessed October 11, 2003. www.oie.int/eng/press/en_last.htm.
- Organisation for Economic Co-operation and Development (OECD). 2003. "Policies and International Integration: Influences on Trade and Foreign Direct Investment." Working paper no. ECO/WKP(2003)13, OECD, Paris.
- Petersmann, E.U. 1998a. "From the Hobbesian International Law of Coexistence to Modern Integration Law: The WTO Dispute Settlement System." *Journal of International Economic Law* 1, no. 2:175-98.
- _____. 1998b. "How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System." *Journal of International Economic Law* 1, no. 1:25-48.
- Peterson, J.S. 2004. Personal letter to US Secretary of Commerce Donald L. Evans, July 2.
- Poulin, D., and A.K. Boame. 2003. "Mad Cow Disease and Beef Trade." Analytical paper, Statistics Canada, Ottawa.
- Salamon, L.M., ed. 2002. *The Tools of Government: A Guide to the New Governance*. Oxford: Oxford University Press.
- Slaughter, A.M. 2004. *A New World Order*. Princeton, NJ: Princeton University Press.
- Trebilcock, M.J., and J.A. Soloway. 2002. "International Trade Policy and Domestic Food Safety Regulation: The Case for Substantial Deference by the WTO Dispute Settlement Body under the SPS Agreement." In *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec*, edited by D.L.M. Kennedy and J.D. Southwick. Minneapolis, MN: University of Minnesota Press.
- United States Department of Agriculture (USDA). Animal and Plant Health Inspection Service. 2003. "9 CFR Parts 93, 94, and 95 Bovine Spongiform Encephalopathy: Minimal Risk Regions and Importation of Commodities." *Federal Register* 68, no. 213:62386-405.
- "US Adopts Beef Labeling System to Address Japan's Mad Cow Fears." 2003. *Inside U.S. Trade*, August 15.
- Wolfe, R. 2003. "See You in Washington? A Pluralist Perspective on North American Institutions," *IRPP Choices* 9, no. 4.
- Wolfe, Robert. Forthcoming. "See You in Geneva? Pluralism and Centralism in Legal Representations of the Trading System." *European Journal of International Relations*.
- _____. In progress. "Is the WTO Constitutional? Legalization, Administrative Law, and Agency in the Trading System." In *The Legalization of International Relations*, edited by C. Brüttsch and D. Lehmkuhl.
- World Health Organization (WHO). 2002. *Understanding the BSE Threat*. Geneva: WHO. Accessed November 3, 2004. www.who.int/csr/resources/publications/bse/en/BSEthreat.pdf.
- World Trade Organization (WTO). 2003. *Update of WTO Dispute Settlement Cases*. Paper no. WT/DS/OV/17. Geneva: WTO.
- _____. 2004. *Tax Treatment for Foreign Sales Corporations*. Paper no. WT/DS/108. Geneva: WTO.
- World Trade Organization (WTO). Committee on Sanitary and Phytosanitary Measures. 2001. "International Standard on Bovine Spongiform Encephalopathy (BSE) — Submission by the Office International Des Epizooties (OIE)." Paper no. G/SPS/GEN/230. Geneva: WTO.
- _____. 2003a. "Implementing the Standards of the OEI: Communication from the OIE." Paper no. G/SPS/GEN/437. Geneva: WTO.
- _____. 2003b. "Specific Trade Concerns." Paper no. G/SPS/GEN/204/Rev3. Geneva: WTO.
- Young, L.M., and J. Marsh. 1998. "Integration and Interdependence in the US and Canadian Live Cattle and Beef Sectors." *American Review of Canadian Studies* 28, no. 3:335-54.

Summary

The economic integration of North America promised by NAFTA has resulted in profound changes in economic relations among Mexico, the United States and Canada, although it has met neither the optimistic expectations of its promoters nor the pessimistic anticipations of its detractors. Ten years after its signing, NAFTA remains a work in progress. These three papers look at NAFTA, where it has been, where it is now, and where it might be headed.

In "FTA at 15, NAFTA at 10," Thomas Courchene, professor of economic and financial policy at the Queen's University School of Policy Studies and IRPP senior scholar, begins his analysis by demonstrating that Canada's trading activity in the future will continue to be dominated by the NAFTA countries. NAFTA's shallow institutional structure, however, has increasingly shown itself to be incapable of accommodating the rapidly evolving issues within what is currently the world's largest bilateral trading relationship. Courchene sets out alternative approaches to broadening and deepening NAFTA — combining economic security and homeland security in strategic bargains for reworking NAFTA, democratizing North American integration along the pluralist lines articulated by Robert Wolfe, and democratizing NAFTA itself by bringing the nearly 100 Canadian, Mexican and American subnational governments more fully into the operations of NAFTA. The paper concludes by forecasting what NAFTA might look like at 20, arguing that evolving views on the very definition of policy sovereignty and autonomy will influence its shape.

Armand de Mestral, professor at the Faculty of Law and the Institute of Comparative Law at McGill University, and Jan Winter, professor of European Union law at the Free University at Amsterdam, examine an area of EU law that might be instructive for NAFTA. EU law has relied heavily on the concept of "direct effect," whereby a clear positive or negative treaty obligation can be invoked by individual citizens or companies against member states before domestic courts, rather than being restricted to purely intergovernmental dispute-settlement processes. A bedrock of legal integration in Europe, direct effect has allowed private parties to play an important role in the development of EU law. The authors go on to examine what NAFTA would look like if its major provisions were given direct effect, laying out part of the relevant legal framework within which direct effect could be applied in the NAFTA countries. The article also discusses whether direct effect should be given to all of NAFTA or only to certain provisions of it. The authors conclude that giving direct effect to NAFTA could be of considerable benefit to trade within NAFTA and could be accomplished without additional levels of bureaucracy.

In "Where's the Beef?," Robert Wolfe, associate professor at the Queen's University School of Policy Studies, shows us what the Canada-US border looks like under NAFTA. He points out that the border with the US is so important, the familiar cliché notwithstanding, because it *is* defended. Given the differing responsibilities of the US Congress and the Canadian Parliament to their citizens, it is likely that the border will remain an issue in Canada-US relations for the foreseeable future. Nevertheless, it is also apparent that keeping the border as open as possible is essential for both countries. Wolfe argues for a pluralistic as opposed to centralist approach to the creation and management of North American institutions, using the full range of tools already available — what he calls "Swiss army knife" diplomacy. He questions whether the courts are indeed the best vehicle for resolving trade disputes, and finds the prospect of a centralized framework under a new comprehensive regional trade agreement too bureaucratic. He supports these conclusions with an analysis of the responses of governments to the crisis caused by the 2003 discovery of a cow in Alberta with bovine spongiform encephalopathy ("mad cow" disease), arguing that neither the "direct effect" proposal by de Mestral and Winter in this volume nor the comprehensive agreement with the United States advocated by Hart in this series and by many others would have changed its outcome. The article concludes that both bilateral and international rules are necessary for the effective resolution of border and trade issues and that the best way to deal with future issues is to avoid a top-down approach and to "create and reinvent" the necessary institutions to manage North American integration.

Earl H. Fry
Michael Hart
Peter Leslie
John McDougall
Sylvia Ostry
Maryse Robert
Jeffrey Schott
Daniel Schwanen
Denis Stairs
Debra Steger
Isabel Studer
Scott Vaughan
Jennifer Welsh
Jaime Zabudovsky



Edited by
Thomas J. Courchene
Donald J. Savole
Daniel Schwanen

