THE NAFTA'S INSTITUTIONS AND DISPUTE RESOLUTION MECHANISMS: A CASE FOR PUBLIC PARTICIPATION

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ABSTRACT

The objective of this thesis is to determine whether those who negotiated the NAFTA created institutions and dispute resolution mechanisms capable of allowing the NAFTA to achieve its policy goals. Accordingly, this thesis first examines the intellectual and historical roots of free trade in North America in an effort to determine what the goals of policymakers were when they negotiated the NAFTA. The thesis then analyzes the institutional and dispute resolution provisions of the NAFTA through a set of criteria to assess whether these provisions are capable of furthering those goals. This analysis leads the author to conclude that the Parties have created a system incompatible with the freemarket goals of the free trade policy. The present regime virtually shuts private parties out of the decision-making process leaving both the creation of rules and the protection of their integrity within the hands of the governments of the three Parties. Without effective avenues for participation, the market will not respond in the manner necessary to allow North Americans to reap the benefits predicted by the theory of comparative advantage. The thesis therefore makes a series of proposals aimed at increasing the access of private parties to the NAFTA's institutions and dispute resolution mechanisms. The goal of such recommendations is to create a legal order capable of enabling the NAFTA to deliver the economic advantages policymakers promised to North Americans when they initiated free trade negotiations.

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CHAPTER I. INTRODUCTION

Negotiations for a free trade agreement between Canada, Mexico and the United States (the "Parties") formally commenced on February 5, 1991 when Canada announced that it would join the free trade talks between Mexico and the United States which had been underway since the summer of 1990.[1] This announcement was followed by 19 months of intense negotiations which culminated in the signing of the North American Free Trade Agreement ("NAFTA") on December 17, 1992 by the heads of government of each Party.[2] The signing of the NAFTA commenced a year long debate in each of the three Parties over whether the agreement signed by the three heads of government should be implemented by the appropriate legislative bodies. This sometimes divisive debate ended only after the most recalcitrant of these bodies, the United States Congress voted in favour of ratification of the NAFTA on November 20, 1993.[3] Accordingly the NAFTA entered into force, as scheduled, on January 1, 1994.

The NAFTA establishes the largest free trade area in the world. It covers an area comprising 8.2 million square miles, 354 million people and economies worth a combined total of $7 trillion.[4]

The NAFTA is divided into eight parts. Part One sets out the objectives of the Parties

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[1]Canada, NAFTA-What's it All About (Ottawa: Ministry of External Affairs and International Trade, 1993) at 10.

[2]Canada, The North American Free Trade Agreement (Ottawa: Minister of Supply and Services, 1993). The NAFTA was signed by Canadian Prime Minister Brian Mulroney, Mexican President Carlos Salinas de Gortari, and American President George Bush.

[3]Helen Dewar, "NAFTA Wins Final Congressional Test" The [Washington] Post (21 November 1993) A1.

[4]Nicholas Kublicki, "The Greening of Free Trade: NAFTA, Mexican Environmental Law, and Debt Exchanges for Mexican Environmental Infrastructure Development" (1994) 19 Columbia Journal of Environmental Law 59 at 60.

in entering into the NAFTA. Part Two establishes rules governing trade in goods between the Parties. Part Three preserves the right of each Party to establish its own health, safety, and environmental standards, but places a series of restrictions on that right where such standards prohibit the importation of a good or service from another Party. Part Four establishes a series of rules by which the governments of the Parties will conduct themselves when contracting for goods or services with the private sector. Part Five sets out rules governing cross-border investment and trade in services. Part Six creates a regime aimed at the protection of intellectual property rights within the free trade area. Part Seven creates new institutional arrangements and dispute resolution mechanisms aimed at maintaining, managing and enhancing the future relationships among the Parties. Part Eight, entitled simply, "Other Provisions" contains a series of miscellaneous provisions governing such varied areas as taxation, national security, accession of other parties and withdrawal.

This paper will concern itself primarily with Part Seven, entitled, "Administrative and Institutional Provisions." This Part establishes the institutions which the Parties have created to implement the terms of the NAFTA. It also details the procedures that the Parties have agreed to use to resolve most disputes that may arise from the NAFTA's terms. These procedures will be called dispute resolution mechanisms (DRMs) throughout this paper. The Parties have further created a limited number of special DRMs to resolve disputes that may arise in specified areas. This paper will therefore go outside Part Seven to examine those provisions of the NAFTA that set out specialized DRMs.

Institutional arrangements and DRMs have been chosen as the subject matter of this paper, because more than the technical rules of trade contained in the NAFTA, it will ultimately be the extent to which these procedures are considered effective that will decide the importance of the NAFTA in the North American economy. Without procedures that facilitate effective

implementation and interpretation of the technical rules, those rules will become meaningless and the legitimacy of the entire agreement will be undermined. At a recent discussion on DRMs in international trade law, Professor Smit of Columbia University, Faculty of Law appropriately summed up the crucial role that DRMs play when he said:[5]

> Well if the discussion this morning has proved anything, it has proved what I always tell my students: that the Bible says in the beginning was the word, but that is not true. In the beginning there was procedure. Procedure, settlement of disputes is the crux of getting effective mechanisms working.

DRMs are not unique to the NAFTA. Most international agreements that contemplate ongoing relationships between the parties include some type of DRM. Both of the other major trade agreements to which Canada is a party, the General Agreement on Tariffs and Trade (GATT) and the Canada - United Stated Free Trade Agreement (FTA) either contain or have developed extensive DRMs. In fact, the DRMs contained in the NAFTA could be seen as direct descendants of those used under both GATT and the FTA regimes. Accordingly, NAFTA scholarship, which will no doubt grow now that the agreement has entered into force, cannot be viewed separately from the scholarship written on other international trade agreements. Rather, it must join and hopefully complement the expanding body of scholarship in the area of international trade law.

Within that body of scholarship, DRMs, in particular, have attracted a considerable degree of interest. Several approaches have been taken to the topic. The most commonly employed analytical framework in discussions of DRMs is the dichotomy between "legalism" and "pragmatism". Legalism refers to a rule-oriented system developed within a formal adjudicatory process with a strict enforcement mechanism. Pragmatism refers to a system

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[5] _____ "Transcript of Discussion Following Presentation by Kenneth W. Abbott" [1992] Columbia Business Law Review 151 at 164.

designed to encourage negotiations, where measures are taken by consensus of the parties and where enforcement mechanisms emphasize voluntary compliance rather than coercion.[6] Several authors have recently taken this approach to their analysis of DRMs in international trade agreements. Some of the better examples of this approach include Huntington[7] Rosa[8], Whitney and Smith[9], and Mora[10].

Professor Kenneth W. Abbott, in a recent article, has recast this traditional analysis as a "private interests" vs. "public interests" dichotomy.[11] In Professor Abbott's analysis, "private interests" refers to a system that is designed to resolve disputes between parties on a case by case basis within some form of adjudication. "Public interests" refers to a system that is not as interested in the resolution of individual disputes as it is in the promotion of a cohesive trading organization (ie GATT). Cohesion is encouraged through mechanisms that facilitate negotiations in which the views of all parties can be taken into account. In this approach "public" refers to the organization as a whole as opposed to the interests of particular members.

A third approach taken to the analysis of DRMs is the approach taken by such writers

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[6]David S. Huntington, "Settling Disputes under the North American Free Trade Agreement" (1993) 34 Harvard International Law Journal 407 at 408.

[7]Ibid.

[8]Andrew K. Rosa, "Old Wine, New Skins: NAFTA and the Evolution of International Trade Dispute Resolution" (1993) 15 Michigan Journal of International Law 255.

[9]Marilyn Whitney and James F. Smith "The Dispute Settlement Mechanism of the NAFTA and Agriculture" (1992) 68 North Dakota Law Review 567.

[10]Miquel Montana i Mora "A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes" (1993) 31 Columbia Journal of Transnational Law 103.

[11]Kenneth W. Abbott "The Uruguay Round and Dispute Resolution Building: A Private Interests System of Justice" [1992] Columbia Business Law Review 111.

as Lowenfeld[12], Battram[13], and Horlick and DeBusk[14]. This approach may be called an efficiency analysis. These writers have framed their analysis of DRMs in terms of such questions as the following: Have deadlines been met? Has the system been cost effective? Have panelists been impartial? Have decisions been of high quality? These writers are interested in determining whether the systems created are an effective, efficient means of resolving disputes.

A fourth approach to the topic is that employed by Michael W. Dunleavy in a recent article that appears in the University of Toronto Faculty of Law Review.[15] Dunleavy examines DRMs by examining the extent to which they impede upon national sovereignty. National sovereignty is referred to as the ability of a state to act independently. Dunleavy struggles with the question of to what degree can states expect to act independently in the modern world and what role DRMs might play in either curbing or enhancing the independence of states. Dunleavy is especially interested in the impact of a global environmental crisis on national sovereignty.

A fifth framework brought to this topic is influenced by the environmental movement.

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[12]Andreas F. Lowenfeld, "The Free Trade Agreement Meets its First Challenge: Dispute Settlement and the Pork Case" (1992) 37 McGill Law Journal 597; see also Lowenfeld, "Binational Dispute Settlement under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal" (1991) 24 New York University Journal of International Law and Politics 269.

[13]Shelley P. Battram "Expected Provisions of the North American Free Trade Agreement" (1992) 7 Florida Journal of International Law 47.

[14]Gary N. Horlick and F. Amanda DeBusk, "Dispute Resolution under NAFTA: Building on the U.S.-Canada FTA, GATT and ICSID" (1993) 10 Journal of International Arbitration 51; see also, Horlick and DeBusk, "Dispute Resolution Panels of the U.S.-Canada Free Trade Agreement: The First Two and One-Half Years" (1992) 37 McGill Law Journal 574.

[15]Michael W. Dunleavy,"The Limits of Free Trade: Sovereignty, Environmental Protection and NAFTA" (1993) 51 University of Toronto Faculty of Law Review 204.

Examples of works employing this framework are those completed by Ludwiszewski[16] and Vasquez.[17] The central concern of this approach is the degree to which the NAFTA's institutional arrangements and DRMs will facilitate environmental protection in North America. Writers examining the NAFTA from this viewpoint are interested in questions such as the following: To what extent can environmental regulations in North America be harmonized? Can environmental standards be effectively enforced? What avenues are available for public participation in the process? What use will be made of scientific evidence in the decision making process? Where do burdens of proof lie?

A sixth approach used to analyse the DRMs contained in the NAFTA is a comparative approach. Writers employing this analytical framework compare the NAFTA provisions to similar provisions in other international trade agreements. The provisions of the GATT and the FTA are the ones most commonly used in these comparative analyses as the NAFTA provisions are derived mainly from those two agreements. Examples of authors who have employed this framework are Moyer,[18] Fitch[19], and Bialos and Siegel[20]. These writers use the experience with provisions of other agreements to predict how the provisions of the NAFTA may or may

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[16]Raymond B. Ludwiszewski, "Green Language in NAFTA: Reconciling Free Trade and Environmental Protection" (1993) 27 International Lawyer 691.

[17]Xavier Carlos Vasquez, "The North American Free Trade Agreement and Environmental Racism" (1993) 34 Harvard International Law Journal 357.

[18]Homer E. Moyer Jr., "Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort" (1993) 27 International Lawyer 707.

[19]Susan D. Fitch, "Dispute Settlement under the NAFTA: Will the Political, Cultural, and Legal Differences between the United States and Mexico Inhibit the Establishment of Fair Dispute Settlement Procedures" (1991) 22 California Western International Law Journal 353.

[20]Jeffrey P. Bialos and Deborah E. Siegel, "Dispute Resolution under the NAFTA: The Newer and Improved Model" (1993) 27 International Lawyer 603.

not work. The comparative approach can be a very effective tool for detecting the intention of the NAFTA negotiators. By showing how provisions have evolved from agreement to agreement, these writers can surmise the reasoning behind each provision.

A seventh analytical framework brought to this topic may be referred to as a dichotomy between a people-centered legal system and a state-centered legal system. In traditional international legal discourse this is often considered in terms of the dichotomy between subjects and objects. Traditionally, states have been the actors at international law, negotiating agreements and putting matters on the international agenda. Citizens have been merely objects of international law. They may be affected by international arrangements but they have little impact upon the decision making process. In a people-centered legal system, however, citizens or citizen groups have a role to play in the international arena. Writers such as Grossman and Bradlow[21] and Bronkers[22] have attempted to frame the debate over DRMs in terms of the extent to which citizens should or can be considered subjects of international law. A key consideration of these writers is the access of individuals to international institutions, and in particular to DRMs.

An eighth approach to this topic was employed by O. Thomas Johnson Jr.[23] in an article that appeared in the SMU Law Review. Johnson views the DRMs contained in the NAFTA from the standpoint of traditional alternative dispute resolution (ADR) mechanisms. The author

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[21]Claudio Grossman and Daniel D. Bradlow, "Are We Being Propelled Towards A People-Cantered Transnational Legal Order" (1994) 9 The American University of International Law and Policy 1.

[22]Marco Bronkers, "Non-Judicial and Judicial Remedies in International Trade Disputes: Same Reflections at the Close of the Uruguay Round" (1990) 24 Journal of World Trade 121.

[23]O. Thomas Johnson Jr., "Alternative Dispute Resolution in the International Context: The North American Free Trade Agreement" (1993) 46 SMU Law Review 2175.

discusses the differences between the basic ADR mechanisms, mediation, non-binding arbitration and binding arbitration. He then compares these traditional ADR mechanisms with the DRMs found in the NAFTA.

While each of the eight frameworks outlined above has been presented as separate analytical devises, there is a considerable degree of overlap among them. For example, Huntington's article is organized mainly in terms of the dichotomy between legalism and pragmatism. Still, his analysis draws considerable comparisons between DRMs contained in the NAFTA and those created under the FTA. Similarly, Ludwiszewski's article, written from the viewpoint of an environmentalist raises many questions asked by those authors concerned with the dichotomy between people centered legal systems and state centered legal systems. This should not be surprising. These authors have written in the same field on the same topic. They therefore have relied on similar resources for their research. They each have used these resources in the formulation of their analyses. It is only natural, therefore, that each of these analyses shows the influence of the many common resources that each of these scholars has shared. In this sense, each of these writers can be seen as parts of the same community of scholars, each contributing to the body of knowledge in the area of international trade law.

This paper will also show the influence of the many common resources used by those writing the in the international trade law community. It will therefore, at times, employ the dichotomy between legalism and pragmatism. At other times a comparative analysis will be used. At still other times it will examine the impact of the DRMs contained in the NAFTA on the sovereignty of the three Parties. However the overriding framework of analysis throughout this paper will be that provided by the scholarship that has come to be known as the New Public Law ("NPL").

NPL is a field of legal scholarship that has emerged in reaction to the rise in importance

of the executive and legislative branches of government. These institutions have now replaced the judiciary, to which traditional legal scholarship has addressed itself, as the central law making institutions in our society. NPL recognizes this shift in the role of lawmakers by attempting to analyse and influence the driving force behind the law created by these institutions, policy.[24]

Policymakers in our society are usually government ministers. Government ministers are the people responsible for setting policy goals. The Bureaucracy is responsible for implementing these goals. NPL scholars must therefore frame their arguments in a manner which speaks to Government ministers and their bureaucracies.

Government ministers are necessarily motivated by the need for re-election. They are unlikely to be motivated to do anything that will not in some way enhance their chances for re-election especially if that which they are asked to do is controversial. The NPL scholar must therefore identify a problem, which if not resolved may hinder the Government's chances of reelection. Accordingly, the first stage of NPL scholarship is problem identification. Once a problem has been identified, the scholar must then make recommendations that the Government can follow to solve the problem. Professor Rubin captured the essence of NPL scholarship when he wrote:[25]

> The changes that have occurred in our social conception of law over the course of the past century are of a different order. They have changed the meaning of law in its entirety because they have created a new group of legal decisionmakers. These decisionmakers, primarily legislators and administrators, are now the principal law creating officials in our society, and thus the most appropriate audience for legal scholars. To the extent that legal scholars fail to structure their works as recommendations to these decisionmakers, they will restrict the

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[24]Edwin L. Rubin, "The Concept of Law and the New Public Law and the New Public Law Scholarship" (1991) Michigan Law Review 792.

[25]Ibid. at 797.

significance of their endeavours.

To structure their works for decisionmakers, NPL scholars must address the concerns of decisionmakers. Unlike judges, who decide law on a case by case basis, policymakers must view issues through the widest lens possible. They must be able to discern the values of society and attempt to transform those widely held values into policy. Accordingly NPL scholars must attempt to examine societal values and structure their recommendations in a way that will reflect those values.[26] If NPL scholars ignore the values reflected in both existing policy and in the recommendations following their analysis they will greatly impede the utility of their works.

This paper will follow the structure of NPL scholarships as outlined above. It will first identify a problem which exists under the NAFTA's current institutional framework. This problem will be identified through an examination of the values held by the societies of the three Parties that caused each Party to negotiate a free trade arrangement in North America. It will then prescribe a series of recommendations aimed at correcting the problems identified. Finally, it will make a series of arguments aimed at convincing policymakers, traditionally a conservative lot, that the recommendations prescribed are in step with both traditional institutional arrangements in North America and current world trends.

The conceptual framework of this paper is as follows: The theory that supports the concept of free trade between nations is, at heart, a free market theory. The concept of free trade has been advocated by every free market theorist from Adam Smith to Milton Friedman. In order for nations to receive the benefits predicted by free trade, nations must create rules and institutions that will enhance the values of a free market society, namely limited governments,

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[26]R.A. Heinman et al. eds. The World of the Policy Analyst (Chatam, New Jersey: Chatam, 1990) at 37.

freedom of choice for individuals, and protection of individuals from coercion, either from other individuals in society or from government.

In the early 1980s each of the three Parties suffered through periods of declining productivity and stagnant economic growth. The solutions embraced by each Party were based on free trade market ideals. Thus, the governments of each Party enacted such policies as deregulation, privatization, and tight fiscal management. The negotiation of free trade was a natural extension of these free market policies. Free markets required the freedom to sell goods to the largest possible markets and to purchase goods at the lowest possible prices. Moreover, as it was recognized by each government that free trade theory was dependent on free market policies, free trade agreements were seen as a means of institutionalizing the free market policies that they had implemented. For example, the Conservative Government of Brian Mulroney viewed the FTA as a means of ensuring that no future government could enact policies such as the National Energy Program (NEP) which the Liberal Government had implemented in the early 1980s.[27]

So free trade theory is intertwined with free market theory. The policy of free trade in North America was embraced by each of the three Parties both because it was a natural extension of their free trade market policies and because it would further entrench those policies in their economies. Free markets require free trade. Free trade requires free markets.

However, an examination of the institutional arrangements and DRMs contained in the NAFTA reveals that the Parties have created institutions that inhibit free markets rather than facilitate them. The institutions that have been created under the NAFTA demand a larger role for government in the North American economy. They are incapable of producing enforceable,

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[27]Edelgard Mahant, Free Trade in American-Canadian Relations (Malabar, Florida: Kriger, 1993) at 50.

predictable rules to govern trade. They are nontransparent. They deny individuals, both legal and personal, rights of access. This incongruence between the ideological basis of free trade theory and the NAFTA that was actually negotiated, dooms the policy of free trade in North America. Institutions incompatible with free markets will inevitably be incapable of delivering the benefits promised by the theory of free trade.

Therein lies the problems for which this paper urges action. The NAFTA was negotiated and eventually billed as a vehicle for attaining sustained economic growth. For example, on July 15, 1992, American president George Bush said:[28]

> By building together the largest free trading region in the world, Mexico, the United States, and Canada are working to ensure that the future will bring increased prosperity, trade and new jobs for the citizens of each of our countries.

Yet the NAFTA in its current form is incapable of producing sustained economic growth because it inhibits the key ingredient for such growth, freedom of the marketplace. Unless changes are made to the institutions created by the NAFTA, the NAFTA may actually mark a step backwards for the North American economy that is increasingly looking inwards as a result of the NAFTA having been negotiated and now implemented. This paper will therefore present a series of recommendations designed to address some of the concerns that the Parties had when they negotiated the NAFTA, such as issues of national sovereignty, yet at the same time create the conditions necessary for prosperity based upon free trade to be realized in North America.

NPL scholarship, because of its audience and scope, is wide enough to allow various methodologies to be employed.[29] NPL scholarship is written for policymakers. Policymakers

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[28]Office of the U.S. Trade Representative, The North American Free Trade Agreement: Overview (Washington, D.C. : U.S. Trade Representative, 1992) at 4.

[29]Supra, at note 24 at 820.

set policy for all segments of society. Therefore, policymakers must take a wide view of problems. Economic, political, legal, and sociological factors must all be considered. Accordingly, this paper will follow several methodologies throughout with particular emphasis on the legal and political implications of the DRMs contained in the NAFTA.

This paper will be divided into five parts. Part One will examine the political economy of free trade theory. It will explain the theoretical basis for free trade. It will then describe how the application of this theory has affected world trade in the Twentieth Century. The NAFTA cannot be viewed in isolation from the world trading system. Therefore some understanding of how the NAFTA fits into the development of this system will be required for understanding the later analysis. Finally, Part One will explore the relationship between free trade theory and the theory of free markets, Eighteenth Century Liberalism.

Part Two of this paper will examine the histories of each Party that caused them to converge in the 1990s to form the world's largest trading bloc. Throughout this examination emphasis will be placed on how serious recessions caused each Party to embrace more market orientated principles and how the implementation of these principles into policy led each Party to seek free trade.

Part Three will introduce the specific institutions and DRMs created by the NAFTA. It will then assess each of these DRMs in terms of a criteria established to determine the degree to which they facilitate or hinder the flow of benefits promised by free trade theory. As the key institutions and DRMs of the NAFTA are based upon the FTA, this assessment of the NAFTA, will include an analysis of the FTA experience. The FTA experience provided valuable insights into what can be expected under the NAFTA. This examination of the FTA experience will include a traditional analysis of the case law that has developed under the FTA's DRMs. Finally, the NAFTA provisions will be analysed using the NAFTA's biggest rival, the European

Community (the "EC") for comparative purposes. The institutions and the DRMs of the EC will be introduced and then assessed in terms of the same criteria used to assess the NAFTA provisions. The results of the EC assessment will then be compared to the results of the NAFTA assessment. The purpose of this comparative analysis is to highlight both the positives and the flaws of two completely different approaches to trading relationships. This analysis will be used in the formulation of recommendations.

Part Four will outline a series of recommendations regarding the institutional provisions and the DRMs of the NAFTA. The purpose of these recommendations is to create a system which will facilitate rather than hinder the activity of free markets and therefore allow North Americans to reap the benefits expected under free trade theory.

Part Five will consist of various arguments in favour of the recommendations set out in Part Four. These arguments are designed to alleviate potential concerns which policymakers might have in adopting the recommendations set out in this paper. This Part is designed to show that the approach taken to DRMs in the NAFTA actually bucks against current world trends. Some of those trends are within the control of policymakers such as the strengthening of the DRMs in both the Treaty on European Union[30] and the final agreement emanating from the Uruguay Round of the GATT.[31] Other factors, however, are outside the power of policymakers. Such factors include rapid improvements in technological capabilities, the growing Environmental crisis, and the power vacuums left by the end of the Cold War. Finally, implications of both the trends listed above and the recommendations put forth in this paper on

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[30]The Treaty on European Union, signed at Maastricht on February 7, 1992, entered into force on November 1, 1993.

[31]See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, signed December 17, 1993.

the concept of national sovereignty are discussed.

This paper concludes that because the governments of each Party were primarily concerned with the protection of national sovereignty they created weak, closed, and convoluted systems incapable of delivering the benefits of free trade to their citizens. They appear to have lost sight of the fact that free trade is a free market theory embraced at a time in history when each Party was in the midst of strengthening their committments to free market principles in an attempt to cope with a dramatic restructuring of the global economy. In doing so, the three governments have ignored the fact that factors beyond their control are rapidly changing the traditional concept of sovereignty. Such factors are pushing legal theory away from state centred theories of sovereignty toward people centred theories. Therefore both because it is inevitable and because it is necessary economically, the NAFTA must become a people centered arrangement. Systems must be created that allow public participation, the creation of enforceable rules that can be interpreted with predictability, and private rights of access to DRMs.

PART ONE: THE THEORETICAL ROOTS OF FREE TRADE

CHAPTER II. FREE TRADE - THE THEORY AND THE PRACTICE

The noted economist, Paul Samuelson wrote:[32]

> There is essentially one argument for free trade or freer trade, but it is an exceedingly powerful one, namely: Free trade promotes a mutually profitable division of labour, greatly enhances the potential real national product of all nations, and makes possible higher standards of living all over the globe.

This statement summarizes the predicted benefits under the theory of free trade. This chapter will explain how the theory can make such predictions. It will then examine how the application of this theory has affected world trade in the Twentieth Century.

1. The Development of the Free Trade Theory

A. The Theory of Absolute Advantage

Early trade theorists developed a theory of trade known as the mercantilist theory.[33] Under the mercantilist theory of trade the goal of a nation was to amass national power through the accumulation of gold or money. This goal could be accomplished by exporting goods to foreign nations while importing as little as possible. Gold or money would then come into the country when a foreign nation paid for the exported goods. Importing little from other countries ensured that such gold would not leave the country, thus, allowing money to be accumulated. The accumulation of money was the end goal of production under the mercantilist theory. However, the British economist, Adam Smith exposed a fatal flaw in the mercantilist theory. Smith noted that the mere accumulation of money in the country did not in and of itself

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[32]Paul Samuelson, Economics 11th ed. (New York: McGraw Hill, 1980) at 651.

[33]John H. Jackson, The World Trading System, (Cambridge, Massachusetts: The MIT Press, 1991) at 10.

ensure better standards of living for the citizens of the country, nor did it necessarily enable the country to accumulate more instruments of power such as guns or warships. Moreover Smith noted, that the accumulation of money could cause inflation, and thus undermine the country's economic position.[34]

Accordingly, Smith developed an alternate trade theory. In his landmark work, An Inquiry into the Nature and Causes of the Wealth of the Nations[35] Smith theorized that it would be an inefficient use of both time and resources for individuals to attempt to produce all the food, clothing, shelter, etc. required throughout a lifetime. For that reason, Smith surmized, that individuals attempt to specialize in the production of one product or type of product. For example the farmer specializes in growing wheat. The baker specializes in baking bread. The carpenter specializes in building houses. According to Smith, specialization leads to efficiency. Efficiency allows individuals to trade for those goods that they do not produce themselves. So the farmers will trade wheat for bread baked by the baker. The baker will trade loaves of bread for the house built by the carpenter. Smith believed that specialization can lead to maximum efficiency in society because each individual can produce more by specializing in the production of a good than they could if they produced everything needed for daily living. Society is therefore better off when individuals specialize in producing certain products and trading for those products in which they do not specialize. This theory has became known as the theory of absolute advantage. The theory of absolute advantage predicts that the baker will trade wheat with the farmer because the farmer has an absolute advantage over the baker in the area of wheat

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[34]Ibid. at 11.

[35]Adam Smith, An Inquiry into the Nature and Causes of the Wealth of the Nations (Whitefairs, U.K.: T. Davison, 1822).

production.[36]

Smith applied the theory of absolute advantage to trade between nations. Just as the theory could predict what would be traded between individuals the theory could also predict what would be traded between nations. Smith wrote, "What is prudence in the conduct of every private family, can scarce be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry...".[37]

Smith believed that each nation is endowed with certain non transferable assets such as natural resources, space, climate, etc. These non transferable assets provide each nation with absolute advantages over other nations in the production of certain products. Smith theorized that each nation would produce those products in which they hold an absolute advantage and trade for the rest. For example due to Canada's vast supply of natural resources, Canada holds an absolute advantage over Brazil in the production of oil and natural gas. However, due to Brazil's climate, Brazil holds an absolute advantage over Canada in the production of coffee. The theory of absolute advantage predicts that Canada will trade oil and natural gas with Brazil for coffee. Both countries are in a better position because of this trade because without such an exchange Canada would have no coffee and Brazil would have no natural gas or oil.

B. The Theory of Comparative Advantage

In 1817, another British economist, David Ricardo, took the theory of absolute advantage

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[36]Jeffery S. Thomas, Subsidies and Countervailing Duties in the Canada-United States Free Trade Agreement (LLM Thesis, University of Toronto, 1990) at 6.

[37]Peter Kenen, The International Economy (Englewood Cliffs, New Jersey: Prentice Hall, 1985) at 7.

a step further. Ricardo observed that even where a nation holds an absolute advantage over another nation in the production of all goods it may still be able to trade to the mutual advantage of both nations. This is because each nation will be better off if it specializes only in those goods in which it holds the greatest advantage relative to other nations and trades for the rest. This is known as the theory of comparative advantage. The theory of comparative advantage has served as the intellectual basis for free trade between nations throughout this century.[38] It has provided the stimulus necessary for the formation of GATT, the European Community, the FTA, and the NAFTA.

Ricardo developed the theory of comparative advantage using a simple model of two countries, Britain and Portugal, trading two products, wine and cloth. The only factor of production used in the model was labour.

Assume that in Britain it takes five hours of labour to produce a yard of cloth and ten hours to produce a gallon of wine. Assume further that in Portugal it takes ten hours to produce a yard of cloth and six hours to produce a gallon of wine. Without trade, and if consumers in both countries want both wine and cloth, each country must spread its production capacity between the two products and produce a combination of both wine and cloth. For example in ninety hours of labour available Britain could produce ten yards of cloth and four gallons of wine. Portugal could produce ten gallons of wine and three yards of cloth. Therefore, under this model the two countries could produce a total of thirteen yards of cloth and fourteen gallons of wine.

If, however, Smith's theory of absolute advantage is applied, Britain would produce eighteen yards of cloth and zero gallons of wine since Britain holds an absolute advantage over

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[38]Supra, note 33 at 11.

Portugal in the production of cloth. Portugal would produce fifteen gallons of wine and zero yards of cloth since Portugal holds an absolute advantage over Britain in the production of wine. Under this model, therefore, the two countries can produce a total of eighteen yards of cloth and fifteen gallons of wine, more than the amount that could be produced if there were no trade between the two countries.

However, now assume that Portugal does not hold an absolute advantage over Britain in the production of either wine or cloth. Assume that in Britain it still takes five hours of labour to produce one yard of cloth and ten hours of labour to produce one gallon of wine. Further, assume that in Portugal it takes ten hours to produce one yard of cloth and ten hours to produce one gallon of wine. Without trade and assuming that the production capacity of each country is split between the two products, some combination of the two products could be produced in each country for every ninety hours of labour available. Assume for example, that in Britain the combination is ten yards of cloth and four gallons of wine. Assume further that in Portugal the combination is five yards of cloth and four gallons of wine. Under this situation the two countries could produce a total of fifteen yards of cloth and eight gallons of wine.

But if Britain were to put its production capacity completely into cloth in which it holds the greatest advantage relative to Portugal it could produce a total of eighteen yards of cloth. This would create a market for wine in Britain. Portugal therefore could put its entire production capacity into wine, allowing it to produce a total of nine gallons of wine. Therefore even if Portugal does not hold an absolute advantage over Britain in the production of either wine or cloth it is still to the advantage of both countries to trade, as more wine and cloth could be produced than if there were no trade at all.[39]

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[39]Ibid. at 11-12.

If this model is then applied to the world, trading between nations will allow the greatest production from the resources of the world and therefore the most efficient use of such resources. This allows Samuelson to predict the benefits from free trade outlined at the beginning of this chapter.

C. The Theory of Factor Endowment

The theory of comparative advantage has been revised by many economists in an attempt to make the model more realistic. Perhaps the most famous example of these revisions is the factor endowment theory created by Heckscher and Ohlin. This theory takes into account that there is more than one factor of production. It is based on the idea that all nations have similar technological capacity but differ in their endowment of factors of production such as land, climate, natural resources and capital. Nations gain comparative advantages over other nations in those industries that make use of the factors with which they are endowed. They then import those goods in which they have a comparative factor disadvantage.[40] For example nations with abundant land, such as Canada, will export goods dependant upon land such as wheat and beef. Nations with abundant capital, such as Japan will export capital intensive goods such as automobiles.

Despite the revisions of Heckscher and Ohlin, the central thesis of Ricardo's theory remains the same. Nations will export those goods in which they hold a comparative advantage and import those goods in which they hold a comparative disadvantage and the welfare of the world will be better off as a result of such trade. To date the majority of economists agree that

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[40]Michael E. Porter, The Competitive Advantage of Nations (New York: The Free Press, 1990) at 11.

this general thesis is yet to be successfully challenged.[41] Accordingly it has been this central thesis that has provided the driving force in the formation of the current regime of world trade.

2. Free Trade Theory in Practice

This section had two purposes. First, it will provide the reader with an overview of the system that has been created to put the theory of comparative advantage into practice. Secondly, it will assist the reader in placing the NAFTA in context. The NAFTA cannot be viewed in isolation. Without an appreciation of the context in which the NAFTA arises an understanding of the NAFTA and its implications is impossible. This section provides only an outline of the current world system of trade. Many points in this section will be expanded upon in later chapters.

A. The Roots of the Modern System of World Trade

The roots of the modern system of world trade lie in the lessons learned from the period between 1920 and 1939. Until the beginning of World War I, trade between nations was conducted informally. One of the few multilateral treaties in effect before World War I was a treaty signed in 1890 "Concerning the Creation of an International Union for the Publication of Customs and Tariffs."[42] International meetings to address problems of customs cooperation were held pursuant to this treaty in 1900, 1908, and 1913.[43] The prevailing attitude towards trade was driven by the theory of comparative advantage and could best be described as laissez

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[41]A.V. Deardorff, "General Validity of the Law of Comparative Advantage" (1980) 88 Journal of Political Economy 941.

[42]Supra, note 33 at 30.

[43]Ibid. at 31.

faire. Governments generally did not interfere with the workings of the market. The largest restrictions on world trade were those imposed by production and transportation capabilities.

However, these foundations of economic liberalism were shaken in the aftermath of World War I. As Clair Wilcox, a prominent figure in the creation of the current system of world trade noted:[44]

> The economy of Europe was disorganized, production facilities were destroyed; channels of trade were broken; heavy debts were incurred. Nationalism and protectionism were stimulated by the revision of boundaries and the creation of new states. Economic and political uncertainty weakened devotion to the principles that were once unquestioned. Governments assumed increasing responsibility for the direction of economic life....
>
> The foundation of economic liberalism, badly shaken by the First World War were all but demolished by the Great Depression. The gold standard disappeared; currencies were thrown into chaos; exchanges were subject to national controls. There was a sharp contraction in the volume of the world's trade. The attention of governments turned inwards. [E]ach for himself and the devil takes the hindmost became the general rule.

With the economic system of the world in this chaotic state, the United States struck a fatal blow to free trade by passing the Hawley-Smoot tariff in 1930. This tariff raised duties on imported goods to their highest levels in American history. Over the next two years tariffs were raised in Canada, Cuba, France, Mexico, Italy, Spain, Australia, New Zealand, and the United Kingdom. This began a vicious series of trade battles in which all forms of restrictive trade practices were enlisted: quotas were imposed, exports were subsidized, currencies were depreciated, and tariffs were raised.[45]

During World War II the idea grew among many Allied countries that such policies prolonged the effects of the Great Depression that in turn contributed to the causes of that War.

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[44]Clair Wilcox as quoted by Robert E. Hudec, The GATT Legal System and World Trade Diplomacy 2nd ed. (Salem, New Hampshire: Butterworth, 1990) at 6.

[45]Ibid.

The American Under Secretary of State, Sumner Wells in a 1941 speech entitled "Post War Commercial Policy" stated:[46]

> Nations have more often than not undertaken economic discriminations and raised up trade barriers with complete disregard for the damaging effects on the trade and livelihood of other peoples, and ironically enough, with similar disregard for the harmful effects upon their own export trade...
>
> The resultant misery, bewilderment, and resentment together with equally pernicious contributing causes, paved the way for the rise of those very dictatorships which have plunged almost the entire world into war.

In an attempt to ensure the establishment of institutions which would prevent the nations of the world from repeating such mistakes, ministers of finance from the various Allied countries met at Bretton Woods New Hampshire in 1944. This conference was devoted mainly to monetary and banking issues. It established the charters for both the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (the World Bank). Moreover, and most importantly, for our purposes, the ministries recognized the need for a comparable institution to regulate trade in the post war world.[47]

On the strength of this recommendation by the ministers of finance from the then leading industrial powers of the world, diplomats met at Geneva Switzerland in 1947. The Geneva meeting was divided into three parts. The first part was devoted to the preparation of a charter for a multilateral trade institution to be called the International Trade Organization (ITO). The second part was concerned with the negotiation of an agreement to reciprocally reduce tariffs. The third part was devoted to the drafting of "general clauses" relating to tariff obligations. The

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[46]Sumner Welles as quoted by John H. Jackson, World Trade and the Law of GATT (Charlottesville, Virginia: The Michie Company, 1969) at 38.

[47]United Nations Monetary and Financial Conference (Bretton Woods, New Hampshire, July 1-22, 1944), Proceedings and Documents 941.

second and third parts constitute the GATT.[48]

B. The GATT

The GATT was not intended to be an organization. It was merely to be a multilateral treaty designed to operate under the ITO when the ITO came into being. It contained a series of tariff reduction schedules complemented by a series of general clauses. The general clauses were taken from the draft charter of the ITO and contained only those articles that would normally be found in commercial treaties.[49] It was intended that when the ITO charter came into effect parallel GATT clauses would be revised to bring them into conformity with provisions of the ITO charter.[50] The GATT was signed on October 30, 1947 and entered into force on January 1, 1948.

On November 21, 1947, the "United Nations Conference on Trade and Employment" convened in Havana, Cuba. The conference, which lasted until March, 1948 completed work on the ITO Charter. However, the ITO did not come into force. The 1948 American election saw the election of a Republican-dominated Congress. The Republicans were generally opposed to the idea of international organizations. Accordingly, the Congress failed to approve the agreement reached at Havana. Without the participation of the then preeminent economic power, the rest of the world allowed the ITO to die.

Since the ITO did not come into being the agreement that did exist, the GATT, became the governing forum, through which the modern system of world trade has developed. There

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[48]Supra, note 33 at 33.

[49]Supra, note 44 at 44.

[50]Supra, note 33 at 33.

are two central obligations imposed upon GATT members under the agreement. The first is tariff concessions found in Article II. Under Article II the contracting parties have agreed to limit the tariffs they will impose upon goods from other GATT contracting parties. Most observers of the GATT agree that these obligations have been successful under the GATT. Through a series of negotiated tariff reductions the general average tariffs on industrial goods have dropped significantly to 4.7 percent or less.[51] Because tariff levels are so low, tariffs are no longer considered significant barriers to world trade. Accordingly, attention has now turned to the reduction of non tariff barriers such as quotas, antidumping duties (ADs) and countervailing duties (CVDs).

The second central obligation under the GATT is the principle of non-discrimination. This principle is enshrined in two GATT articles. The first article, Article I, obliges each contracting party to grant any other contracting party most favoured nation (MFN) treatment.[52] For example, if Canada grants a low tariff to Argentina on imports from Argentina, Canada is obligated under the GATT to grant the same low tariff to the other contracting parties. Each contracting party must be given the best treatment Canada affords to any other party.

The second article in which the principle of non-discrimination is enshrined is Article III. Article III obliges each contracting party to provide national treatment to the imported goods of the other contracting parties. Once an imported good has come over the border and cleared customs, it must be provided the same treatment that domestically produced goods are afforded.[53] For example if a good is shipped from Japan to Canada, Canada may subject that

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[51]Ibid. at 40.

[52]Ibid. at 133.

[53]Ibid. at 189.

good to its usual border procedures. Canada may then impose the usual tariff it would impose on like goods from Japan. However, once that good has cleared customs and border procedures it cannot be subjected to any further taxation or other impediments to sale that are not also imposed upon similar goods made in Canada. Moreover, Canada cannot provide domestically produced goods with benefits designed to enhance their saleability without also providing the same benefits to the goods from Japan. For example Canada cannot provide loan concessions to buyers of domestically produced goods unless it also provides such concessions to buyers of the Japanese goods.

Tariff concessions and the principle of non-discrimination, both of which were included in the GATT by the original negotiators, continue to be the central obligations of the contracting party under the GATT. However, as the GATT was never intended to be the governing instrument of world trade, many of the rules and procedures by which world trade is currently conducted have evolved over time. The major vehicle through which this evolution has occurred is a series of trade negotiation rounds. A trade negotiation round is a set of negotiations involving each of the contracting parties. There have been eight rounds completed as of 1993 including the original negotiations in 1947. The first five of these rounds were devoted almost exclusively to the reduction of tariffs, although during the "review session" of 1954-55 protocols were drafted regarding non-tariff measures and institutional procedures. The sixth round, named the "Kennedy Round" took place between 1962 and 1967 and was devoted to non-tariff measures. Unfortunately, the results of the Kennedy Round were limited and required that the contracting parties come together again for the Tokyo Round that lasted from 1973 to 1979. The Tokyo Round saw substantial success on the issue of non-tariff barriers. Nine Agreements and four Understandings were reached, covering such topics as technical barriers to trade,

government procurement, subsidies and dumping.[54]

The legal status of these agreements is unclear. The nine agreements are drafted as stand alone treaties and obligate only those nations that sign and ratify them. The four understandings express goals or general obligations, or describe procedures that had evolved through practice and accordingly were already followed.[55]

The eighth GATT Round, known as the "Uruguay Round" commenced in 1986 and was completed on December 17, 1993. The Uruguay Round may be the most substantively important of the rounds completed to date. Extensive agreements were reached on several contentious issues, including agricultural subsidies, dispute resolution, technical barriers to trade, and countervailing duties. As will be discussed in subsequent chapters despite the progress made at the Uruguay Round, the goal of free trade among nations remains unrealized. This most recent GATT arrangement does not eliminate the ability of nations to engage in restrictive trade practices.

C. Regional Trade Agreements

In addition to the GATT, the current system of world trade includes several regional trading agreements. Such regional trade agreements are sanctioned under the terms of the GATT itself. Article XXIV, paragraphs 4 through 10, create an exception to the MFN principle discussed above. Article XXIV, paragraph 4, reads as follows:

> The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or a free trade area should be to facilitate

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[54]Ibid. at 55.

[55]Ibid. at 55-56.

> trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

It is generally considered that Paragraph 4 expresses the general acceptability of regional trade agreements as long as they comply with the specific criteria set out in paragraphs 5 through 10.[56] The purpose of this exception to the MFN principle is two-fold. First it recognizes the historical precedent of special regimes of trade between nations within a close proximity to each other. Secondly, it reflects the promise of the theory of comparative advantage, namely, that total world welfare can be increased by lowering restrictions on trade among countries.[57] As free trade regimes appeared to be elusive at the world level, the negotiators of GATT recognized that nations with similar histories, cultures, and geographies may have greater success at creating unrestricted trading arrangements than GATT. The creators of GATT, thus included Article XXIV as a means of allowing nations to attain the benefits of free trade even if world wide free trade remained elusive.

The exception created by Article XXIV has been used to allow the formation of several regional trading blocs. Among the most prominent examples of these blocs are the European Economic Community, Canada and the United States under the FTA, and Australia and New Zealand under the Australia-New Zealand Close Economic Relations Trade Agreement. It is also this exception that has allowed the creation of a trading bloc between Canada, Mexico and the United States under the NAFTA.

Thus, the modern system of world trade is characterized by a world organization centered upon the principle of non-discrimination. This organization continues to be involved in a

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[56]Supra, note 46 at 600.

[57]Supra, note 33 at 141.

process of evolution that was first embarked upon in 1947. Its greatest success to date has been the virtual elimination of tariffs on secondary goods. While recent progress has been made in the area of non tariff barriers, the organization has been, as yet, unable to secure world wide free trade. As free trade is often more attainable among nations of similar history and geography than among nations with highly diverse interests, the creators of the GATT, being committed to the theory of comparative advantage, included an exception to the principle of non-discrimination. This exception has allowed the emergence of many regional trading blocs.

The NAFTA became a part of this system when it entered into force on January 1, 1994. The above outline of this system will serve as an important foundation for the analysis of the NAFTA that will follow in subsequent chapters.

CHAPTER III. THE POLITICAL ECONOMY OF FREE TRADE THEORY

The theory of comparative advantage, described in Chapter II was not developed in isolation. It therefore cannot be viewed in isolation. It was developed as part of an intellectual movement that began in 1776 when Adam Smith published An Inquiry into the Nature and Causes of the Wealth of the Nations and blossomed into maturity in the Nineteenth Century with the writings of James Mill, Thomas Malthus, David Ricardo, and John Stuart Mill.[58] This movement has been known under a variety of names over the years. For the purposes of this paper it will be called classical liberalism. The purpose of this chapter is to explain the intellectual underpinnings of classical liberalism in an attempt to demonstrate the immutable bond between this movement and the theory of comparative advantage.

Classical liberalism is an intellectual movement that developed in an attempt to explain the economic system that had evolved in such countries as the United Kingdom, France, and the United States by 1776. What set it apart from prior movements, and perhaps later ones as well, was the great breadth of its grasp.[59] At heart, it concentrated upon economics but it recognized that economics is only one part of a system in which no part is independent. Economics is interdependent with all social sciences, notably sociology, psychology, government and law. Each of these fields impacts significantly upon the others. Because the movement of classical liberalism recognized this it was able to develop a theory for how each of these fields should fit together.

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[58]Stephen C. Neff, Friends but No Allies-Economic Liberalism and the Law of Nations (New York: Columbia University Press, 1990) at 40.

[59]D.D. Raphael, "Introduction" in Adam Smith's The Wealth of the Nations (New York: Alfred A. Knopf, 1991) at ix.

Like any intellectual movement classical liberalism developed through evolution. Adam Smith developed the foundations of the movement, however those foundations were built upon by later generations, often through critical analysis. Although the movement evolved over a period of eighty years through writers who often disagreed with one another, one of the most striking features of this movement is the coherence of its central beliefs. Perhaps this central coherence can be explained by the fact the writers who developed this movement were part of the same community. They all lived in the same country, the United Kingdom. They each studied the other's works. They were friends. However, they did not allow their friendship to cloud their judgements. They never stopped questioning. They never stopped analysing critically. This may explain the intellectual rigour of the movement. The workings of such autonomy within a single intellectual community is aptly demonstrated in the following passage from the autobiography of John Stuart Mill in which he described the role his father, James Mill, played in his education:[60]

> It was in 1819 that he took me through a complete course of political economy. His loved and intimate friend, Ricardo had shortly before published the book which formed so great an epoch in political economy; a book which would never have been published or written, but for the entreaty and strong encouragement of my father...No didactic treaty embodying its doctrines, in a manner fit for learners, had yet appeared. My father, therefore, commenced instructing me in the science by a sort of lectures, which he delivered to me in our walks. He expounded each day a portion of the subject, and I gave him next day a written account of it, which he made me rewrite over and over again until it was clear, precise and tolerably complete. In this manner I went through the whole extent of the science; and the written outline of it which resulted from my daily compte rendu served him afterwards as notes from which to write his Elements of Political Economy. After, this I read Ricardo, giving an account detailing of what I read, and discussing... the collateral points which offered themselves in our progress.
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> On Money, as the most intricate part of the subject, he made me read in the same manner Ricardo's admirable pamphlets, written during... the Bullion controversy;

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[60]John Stuart Mill, Autobiography (New York: Houghton Mifflin, 1969) at 18.

> to these succeeded Adam Smith; and ... it was one of my father's main objects to make me apply to Smith's more superficial view of political economy the superior lights of Ricardo, and detect what was fallacious in Smith's argument, or erroneous in any of his conclusions. Such a mode of instruction was excellently calculated to form a thinker but it required to be worked by a thinker, as close and vigorous as my father ...

It is the sense of community, among the classical liberals as demonstrated by this passage that gave the movement its internal cohesion. Therefore despite the individual contributions made to the movement by each of the writers of the period the movement remained true to a set of core beliefs.

Central to the classical liberal movement was the division of labour theory developed by Adam Smith. Smith explained this theory by citing the example of a pin factory. He noted that if one person was entirely responsible for producing a pin, it would take over one day's work to produce one pin. Yet in a factory comprised of ten people, each specializing in one step necessary in the production of a pin, nearly fifty thousand pins could be produced in one day.[61] As explained in Chapter II, Smith applied this theory to society at large to predict that specialization creates efficiency that leads to trade which allows for a much wealthier society than one in which each person attempts to produce everything required for daily living.

According to the classical liberals the central figure in this more efficient, wealthier society is the individual. The individual will specialize in that activity which through natural strengths, hard work, or a combination of the two, will yield the greatest advantage. Specialization will lead to an efficient use of resources and greater production will benefit society. Accordingly, the pursuit of self interest will lead to general benefits for all of society. There is therefore no need for central direction of an economy because society is best served

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[61]Supra, note 59 at 5.

when individuals independently pursue their greatest advantage which is a natural instinct. Smith referred to this phenomena as the 'invisible hand'.

It was shown in Chapter II how the 'invisible hand' theory was applied by Smith, and later Ricardo to trade between nations. Each nation, these writers predicted, would produce only those goods, which either because of natural endowments or native ingenuity, or a combination of the two, would yield them the greatest advantage. Production of only those goods which would yield the greatest advantage would lead to efficiency. Efficiency would allow trade between nations. World welfare would be greater than if each nation attempted to produce everything required for the needs of its citizens. Ricardo described the workings of the invisible hand at the international level in the following way:[62]

> Under a system of perfectly free commerce, each country naturally devotes its capital and labour to such employments as are most beneficial to each. The pursuit of individual advantage is admirably connected with the universal good of the whole. By stimulating industry, by rewarding ingenuity, and by using most efficaciously the peculiar powers bestowed by nature, it distributes labour most effectively and most economically: while, by increasing the general mass of productions, it diffuses general benefit, and binds together by one common tie of interest and intercourse, the universal society of nations throughout the civilized world. It is this principle that determines that wine shall be made in France and Portugal, that corn will be grown in America and Poland, and that hardware and other goods shall be manufactured in England.

According to the classical liberals, the key to the invisible hand working is non-interference by government in the economy. Individuals must be left free to choose which activities they will pursue. Individuals, afterall, are best suited to assess their own strengths and therefore decide how best to pursue their own advantage. John Stuart Mill observed that "as a general rule the business of life is better performed when those who have an immediate interest

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[62]David Ricardo, On the Principles of Political Economy and Taxation 3rd ed. (London: John Murray, 1821) at 134.

in it are left to take their own course."[63] Accordingly, the welfare of society is dependent upon individuals being free to decide their own interests without the interference of public officials.

To the classical liberals, the doctrine of non-interference remained as true in the international economy as it did in the domestic economy. If nations naturally produce those goods for which they hold an advantage relative to other nations and trade for those products in which they have a relative disadvantage thus increasing world welfare, then any interference by government in the process through protectionist measures reduces world welfare. John Stuart Mill wrote:[64]

> ... importation of foreign commodities in the common course of traffic never takes place except when it is economically speaking, a natural good, by causing the same amount of commodities to be obtained at a smaller cost of labour and capital to the country. To prohibit, therefore, this importation or impose duties which prevent it, is to render the labour and capital of the country less efficient in production than would otherwise be.

A modern example of how government interference might reduce overall efficiency in classical theory might be provided by the form of intervention known as a subsidy. Subsidies were not common in the Nineteenth Century but today they represent one of the most recurrent forms of government intervention in the economy.

In its broadest sense a subsidy is "any non-market benefit bestowed by a government upon a given line of production." [65] By granting a benefit that would not naturally occur a government may be distorting that which would naturally occur, thus rendering an inefficient use of resources. If, for example, a Canadian manufacturer can produce a baseball bat at a cost

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[63]John Stuart Mill, Principles of Political Economy (New York: Augustus M. Kelley, 1969) at 952.

[64]Ibid. at 917.

[65]J.J. Barcelo, "Subsidies and Countervailing Duties: Analysis and Proposals" (1977) 9 Law and Policy in International Policy 779 at 835.

of $40.00,it ordinarily would not be able to compete with the American manufacture that can produce the same bat at a cost of $30.00. Normal market forces should drive the Canadian manufacturer out of business. Under the theory of comparative advantage, the resources which were expended in the production of the Canadian bat, labour, material, capital, etc. would be diverted to a line of production in which Canada has a comparative advantage over other countries. Efficiency will therefore be maximized.

However, if the Canadian Government provided the Canadian manufacturer with a $100,000.00 grant which allows it to sell bats for $30.00, the Canadian manufacturer might be able to compete. But efficiency will not be maximized because Canadian resources will continue to be expended in a line of production that is relatively inefficient. Moreover, the American manufacturer which can produce the bat most efficiently will suffer because it will be unable to sell the number of bats that it should under normal market conditions. Therefore American resources will not be used as efficiently as they should be. Thus by providing the subsidy, the Canadian government is not only distorting production within Canada, it is distorting the flow of world trade and under the theory of comparative advantage reducing overall world welfare.[66]

Concerns over interference with the workings of the invisible hand caused classical liberals to consider the proper role of government in society. To the classical liberal the role of government should be confined as much as possible. The purpose of such confinement is to allow the individual the maximum amount of liberty in the pursuit of individual advantage. The general rule, therefore, is non-intervention.

The classical liberals, however, recognized a variety of exceptions to this general rule. Generally, speaking, intervention is justified for activities that could not be performed by

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[66]Supra, note 36 at Chapter 1, pg. 15.

individuals either because they could only be carried out collectively or because while they were important, they were not motivated by self interest. Some examples of exceptions recognized by classical liberals include: education of the masses, construction of public works, law enforcement, maintenance of a justice system, regulation of charities, and the protection of those unable to look after their own interests such as the insane or children.

These examples of recognized exceptions are not as important as the motivation for such recognition. The general goal of classical liberalism was the betterment of society as determined by greater productivity and efficiency. Classical liberals believed that the path to such a goal could best be paved by the efforts of individuals. However, where it was demonstrated that the betterment of society could not be accomplished through the efforts of individuals, classical liberals believed that government could play a role. However, in performing that role it was crucial that the government refrain from any activity that might suppress individual effort and, in fact, do everything possible to encourage it. As John Stuart Mill wrote:[67]

> A good government will give all its aid in such a shape as to encourage and nurture any rudiments it may find of a spirit of individual exertion. It will be assiduous in removing obstacles and discouragements to voluntary enterprise, and in giving whatever facilities and whatever direction and guidance may be necessary: its pecuniary means will be applied, when practicable, in aid of private efforts rather than in suppression of them, and it will call into play its machinery of rewards and hours to elicit such efforts. Government aid, when given merely in default of private enterprise, should be so given as to be as far as possible a course of education for the people in the art of accomplishing great objects by individual energy and voluntary cooperation.

Governments, therefore, in the classical liberal tradition, should play a limited role in both society and the economy. Classical liberals mistrusted governments. They feared that big government would impede individual choice and suppress individual effort, both of which were key ingredients in the creation of an efficient, wealthy society. Governments therefore should

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[67]Supra, note 63 at 978.

not interfere with the workings of the invisible hand. To the classical liberal this meant that governments should remain small, keep taxes low, refrain from involving themselves in activities best performed by individuals. It should confine itself only to those activities which individuals cannot perform themselves. Where governments do act they should be careful to encourage individual action and refrain from doing anything that might discourage it.

The classical liberals certainly did not agree on every point. The movement was often advanced through critical analysis of past theories. This is shown by the development of the theory of comparative advantage. But they did comprise a close knit community. As members of that community, the classical liberals developed theories that stemmed from the core set of beliefs outlined above.

These core beliefs provided the classical theories with cohesion. This is important because none of the classical liberal theories were developed in isolation from the classical liberal movement. Therefore, they cannot be viewed in isolation from that movement. The theory of comparative advantage predicts increased world welfare when each nation produces those goods in which it holds a comparative advantage and trades for those goods in which it has a comparative disadvantage. However, this theory will only work if the governments of the world refrain form protectionist activities.

If, for example, Canada holds a comparative advantage over Mexico in the production of wheat and a comparative disadvantage over Mexico in the production of corn, the theory of comparative advantage predicts that Canada will trade wheat for corn with Mexico and both nations will be better off because of such trade. But if Mexico imposes a tariff on Canadian wheat to satisfy Mexican wheat farmers, Canada will be unable to sell as much wheat in Mexico. Mexico would have taken away Canada's comparative advantage in wheat. If Canada cannot sell its wheat to Mexico there is little benefit to Canadian society in buying Mexican

corn. The Canadian government is better off to support Canadian corn growers through tariffs on Mexican corn or through subsidization. If the Government did not support Canadian corn growers and they went bankrupt under pressure from cheap Mexican corn, they could not begin growing wheat, because Canada would already have a surplus of wheat due to the Mexican tariff. Under the theory of comparative advantage if both societies grow both wheat and corn, both societies would be worse off than if they had traded wheat for corn.

So from a Canadian viewpoint it is best if the Mexican Government remains non-interventionist and does not place a tariff on Canadian wheat. But from a Mexican viewpoint, the Mexican Government can only remain non-interventionist if it can be ensured that if the Mexican wheat industry collapses under pressure from Canadian wheat, Mexican wheat farmers will find work in other areas such as in the corn industry. The Mexicans may hold a comparative advantage over Canada in the production of corn but there will only be a need for more corn growers in Mexico if Mexico can sell its corn in foreign markets. Such sales will only take place if foreign governments, such as Canada remain non-interventionist.

Free trade therefore is dependent upon other governments adhering to principles of classical liberalism. They must remain non-interventionist. They must allow the invisible hand to develop efficient producers within their societies. The development of efficient producers is dependent upon free trade as efficient producers require markets in which to sell their goods.

It is no accident that free trade theory was developed as part of the classical liberal movement. It was a natural outgrowth of classical liberal principles. Adherence to those principles leads to free trade. Free trade requires adherence to those principles. The principles of free trade theory are therefore interdependent with the other principles developed during the classical liberal movement.

PART TWO: THE HISTORICAL ROOTS OF THE NAFTA

INTRODUCTION

An examination of free trade theory suggests a link between that theory and the principles which emerged from the classical liberal movement. Part Two of this paper will examine whether this link can be seen in the historical causes of the NAFTA. This will be done by considering the circumstances which led Canada, Mexico, and the United States to enter into the NAFTA.

In the early 1980s each of these countries experienced their worst economic downturns since the Great Depression.[68] The response of each country to these downturns set each country upon the road that would eventually lead to the NAFTA. Accordingly, particular attention will be paid to the political and economic effects of these downturns. As it was Mexico that initiated the NAFTA, Part Two will commence with an examination of the events that brought Mexico to the NAFTA negotiating table.[69]

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[68]_____, "Mexico-U.S.-Canada Relations in the New World Order" (1992) 12 Chicano-Latino Law Review 108 at 109.

[69]Ronald J. Wonnacott, The Economics of Overlapping Free Trade Areas and the Mexican Challenge (Toronto: C.D. Howe Institute, 1991) at 1.

CHAPTER IV. MEXICO'S ROAD TO THE NAFTA

An understanding of Mexico's road to the NAFTA requires some knowledge of Mexico's past. Until 1810, Mexico, then known as New Spain, was a Spanish colony. Mexico's years as a colony were marked by Spanish dominance of the economy and exploitation of the Mexican workforce and natural resources. After achieving independence from Spain in 1810, Mexico suffered through a period of acute political and economic instability. In the first fifty years following independence, Mexico had over forty different presidents.[70]

This period of political instability finally ended when Porfirio Diaz became president in 1876. Diaz remained president until 1911. Diaz pursued an open door policy towards foreigners. This policy was successful in stimulating economic growth but in the process Mexico lost control of its economy. Foreigners acquired thirty-two million hectares of land under the Diaz regime. The Government lost control over the most important sectors of the economy including oil, railroads, and electricity. By 1900, 76 percent of the main industrial enterprises in Mexico were owned or controlled by foreign investors.[71] The result of this foreign domination throughout much of Mexico's early history was a deep-seated mistrust of foreign investment which prevailed in Mexico until recently.[72]

In 1911, under the strain of a huge gap in living standards between most Mexicans and a few wealthy families and foreigners, the discontent of the peasant population exploded into civil war. The revolutionaries were successful and on February 5, 1917 the Mexican

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[70]Juan Francisco Torres Landa R, "The Changing Times: Foreign Investment in Mexico" (1991) 23 New York University Journal of Politics 801 at 802.

[71]Ibid. at 807.

[72]Nora Lustig, Mexico: The Remaking of an Economy (Washington, D.C.: The Brookings Institute, 1992) at 126.

Constitution was signed. The Constitution reflects many of the concerns which gave rise to the Revolution including a hostile attitude towards foreign investment.[73]

The Constitution restricted foreign investment from areas considered "basic to Mexico's national interest."[74] Article 27 granted Mexico original title to all property and natural resources, thereby giving the government the powers of expropriation.

This article was used in 1938 to expropriate all oil concessions in the country which had been predominantly held by American companies. The success of this expropriation was extremely popular among Mexicans and inspired a sense of pride or "revolutionary nationalism."[75] It also resulted in a drop in the amount of foreign capital brought into the country, from approximately $1.7 billion in 1926 to about $449 million in 1940.[76]

Inspired by this new sense of nationalism, Mexico adopted the economic theories of the Argentine economist of Raul Piebisch shortly after World War II. These theories were based upon the idea of import substitution which in turn was based on the idea that manufactured goods had a higher value than raw materials. Unless imported goods could be replaced by domestically produced goods, it was feared that Mexico would permanently be cast in the role of a producer of natural resources and never a manufacturer of secondary goods. To substitute domestically produced goods for imported goods, support and protection had to be given to infant industries to allow these domestic industries to maintain domestic prices above world

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[73]Supra, note 70 at 808.

[74]Ibid.

[75]Jorge Camil, "Mexico in Contemplation of NAFTA: Is the Government Abdicating the Rectoria del Estado" (1993) 15 Loyola of Los Angeles 761.

[76]Supra, note 70 at 812.

level.[77]

The adoption of the import substitution theory caused Mexico to implement a series of highly protectionist policies. The foundations of these policies were high tariff walls and import licences. Import licences were required if designated goods were to be brought into the country. By the 1970's 70% of all imports to Mexico were subject to import licensing requirements.[78] The decision of whether or not such licenses should be granted was completely within the discretion of public officials.

A further result of the import substitution policy was an increase in the number of state owned enterprises. As private funds for investment were scarce government became increasingly involved in the economy, especially in areas that required huge capital investment such as public utilities and heavy industry.[79] By 1982, 1,155 government owned enterprises existed in Mexico.[80]

Additionally, governments began to subsidize Mexican industries heavily. Such subsidies were meant to develop Mexican industry but more often than not led to inefficiency. A further form of support was government regulation that required that finished products sold in Mexico include a minimum content of Mexican parts.[81]

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[77]Lee Axelrad, "NAFTA in the Context of Mexican Economic Liberalization" (1993) 11 International Tax and Business Lawyer 201 at 204.

[78]Supra, note 72 at 16.

[79]Werner Baer and Melissa Birch, "Privatization and the Changing Role of the State in Latin America" (1992) 25 New York University Journal of International Law and Politics 1 at 8.

[80]Sidney Weintraub, Transforming the Mexican Economy: The Salinas Sexenio (Washington, D.C.: The National Planning Association, 1990) at 6.

[81]Supra, note 70 at 814.

The initial results of the import substitution policy were very positive. From the 1940s to the 1970s Mexico averaged an annual economic rate of growth of about 6% per year, allowing this period of Mexico history to be labelled the " Mexican Miracle."[82]

However, the oil shocks of the 1970s began to dim the glow of the Mexican Miracle. The increase in oil prices necessitated that the Government choose between slowing economic growth and increased government debt to fuel further economic expansion.[83] The Government chose increased public sector involvement in the economy. As a result the deficit ballooned from 2.5 percent of GDP in 1970 to 10 percent in 1975. This resulted in an increase in the annual rate of inflation from 3.4 percent in 1969 to 17.0 percent in 1975. Worried investors removed their capital from the country in 1976 and for the first time in twenty years the Government was forced to allow the Mexican currency, the peso, to float on the open market. This led to a 49 percent drop in the value of the peso.[84]

This economic crisis was shortlived, however, as in 1978 large petroleum discoveries were found in the provinces of Tabasco and Chiapas, and in the Gulf of Mexico. The reserves in these discoveries were estimated to equal 200 billion barrels. If such reserves were proven Mexico's reserves would almost equal the total reserves of the entire Persian Gulf.[85] While these discoveries staved off a looming crisis, it also increased Mexican expectations about the future. To meet such expectations, and convinced that oil prices would remain high, the government of President Portillo continued to incur huge deficits. By 1981, the deficit totalled

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[82]Ibid.

[83]Supra, note 79 at 10.

[84]Supra, note 72 at 19.

[85]Supra, note 77 at 206.

14.1 percent of GDP.[86]

Unfortunately, partly as a result of the production by the state owned oil company which had increased production to meet Mexico's growing fiscal responsibilities, world oil prices began to decline sharply. That decline did not bottom out until the price of oil had fallen by 60 percent.[87] At this point, the Mexican position began to unravel.

Worried about the huge debt, which then totalled $86 billion,[88] investors began pulling their money out of Mexico at a dramatic rate. The Government was no longer able to maintain the value of the peso and by March 1982 the value had fallen from 26.35 pesos to the American dollar to 45.46 pesos to the American dollar.[89] This brought unprecedented inflation, unemployment and a drastic drop in real wages. By August 1982 the peso had dropped further to 100 pesos to the American dollar. In response, Mexico nationalized fifty-nine private banks. This left investor confidence "annihilated" resulting in greater capital flight.[90]

In the midst of this crisis in 1982, Miguel de la Madrid, was elected to the presidency of Mexico. He initiated a series of free market reforms designed to lift Mexico from the economic quagmire in which it found itself.

Mexico's most immediate problem was its international debt on which Mexico had defaulted in August, 1992.[91] de la Madrid's first move therefore was to reach an agreement

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[86]Supra, note 72 at 23.

[87]Eva Thurlow, "Mexico and North American Integration" (1993) 9 International Insights 15 at 17.

[88]Supra, note 77 at 207.

[89]Supra, note 72 at 24.

[90]Supra, note 77 at 209.

[91]Ibid.

with the International Monetary Fund which allowed Mexico to reschedule its debt. Under this agreement Mexico was able to cut its annual deficit in half by 1984.[92]

de la Madrid then introduced the National Development Plan. The centerpiece of this plan was dramatic privatization of government owned industries and deregulation of the economy.[93] Under these initiatives nearly 800 government owned enterprises were sold to the private sector between 1982 and 1989.[94] In 1983, de la Madrid reprivatized the banks which the government had nationalized a year earlier. In 1982 public sector expenditures, including debt serving totalled 27 percent of the Mexican GDP. By 1988 this figure had dropped to 18% of GDP[95], giving further evidence of the government's retreat from the economy.

As public funds were pulled out of the economy, the need for private investment grew. For the first time since the Revolution of 1911, Mexico actively attempted to attract foreign investment. The government created the Foreign Investment Commission that eased regulations governing foreign investment in Mexico. These measures had the desired effect as by 1989, the amount of accumulated foreign direct investment had risen to $26.6 billion US as compared to $ 6.8 billion US in 1979.[96]

By 1986, the government felt confident enough in the results of its free market reforms to institute a series of programs designed to expose Mexican enterprise to global competition. In 1986 Mexico became a member of the GATT. Following this accession, Mexico's import

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[92]Supra, note 80 at 16.

[93]Supra, note 70 at 822.

[94]Supra, note 80 at 6.

[95]Ibid. at 7.

[96]Supra, note 72 at 124.

licensing requirements were reduced. By 1990 the percentage of domestic production protected by import licensing dropped to 19 percent from a high of 92.2 percent in 1985.[97] In 1985 Mexico signed The Understanding on Subsidies and Countervailing Duties with the United States. Under this agreement, Mexico agreed to eliminate export subsidies.

On December 1, 1988 Carlos Salinas de Gortari was inaugurated as President of Mexico. He had previously served in the cabinet of President de la Madrid. He had campaigned promising to further entrench the free market reforms begun by de la Madrid. In a 1989 advertisement in the American press, Salinas listed his priorities in the following order: first, to maintain the fight against inflation; secondly, to encourage entrepreneurial investment; thirdly, to continue privatization and deregulation; and fourthly, to proceed with the opening of the economy.[98]

The actions of the Salinas government appear to have matched these priorities. In 1991 the government owned Fertilizantes Mexicanas, which held a monopoly in the production of fertilizer, was privatized. The government had also implemented deregulation of the telecommunications, petrochemical and transportation industries.

Later, in 1991 Salinas instituted sweeping reform of the agricultural system. Since the Revolution of 1911, Mexico's agricultural policy had centered around the ejido. Ejidos were communal farms given to peasants by the government. A peasant was given the right to farm the land but could not rent it, sell it or bequeath it. The ejido system was enshrined in Article 27 of the Constitution which gave the Mexican government the right to expropriate land and create ejidos. By 1988, 50 percent of all Mexico's arable land was controlled by the government

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[97]Ibid. at 117.

[98]Supra, note 80 at 53.

through the ejido system.[99] This contributed to the inefficient state of Mexican agriculture. In 1911, agriculture comprised only 7 percent of GDP despite the fact that it involved 23 percent of the active workforce.[100] The Salinas government reformed Article 27, reestablishing well-defined rights of private ownership which allowed ejidos to be sold or rented.

In August 1990, the Salinas government announced that it intended to seek a free trade pact with the United States. This was seen as giving a large boost to business in Mexico because it made the reversal of reforms unlikely.[101] Salinas then made the negotiation of the NAFTA the cornerstone policy of his administration. The completion of NAFTA is thought to be very important to Mexico because it is hoped that it will attract even more foreign investment to Mexico which in turn will generate employment.[102] It is also expected to open new markets for Mexican industry which has been forced to become competitive in the face of growing global competition since Mexico slowly began opening its economy in 1986. It is hoped that the NAFTA marks the fist step towards free trade throughout the Western Hemisphere.[103]

Mexico's initiation of the NAFTA can therefore be seen as part of a natural evolution which Mexico embarked upon in answer to the 1982 economic crisis. The crisis forced Mexico to initiate a series of free market reforms which included privatization, deregulation, and a program of deficit slashing. The governments' retreat from the economy required that Mexico

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[99]Ibid. at 220.

[100]George Y. Gonzalez, "An Analysis of the Legal Implications of the Intellectual Property Provisions of the North American Free Trade Agreement" (1993) 34 Harvard International Law Journal 305 at 317.

[101]Supra, note 69 at 1.

[102]Henry W. Mcgee Jr., "Mexican Perspectives on Economic, Political and Cultural Implications of Free Trade" (1993) 12 Chicano-Latino Law Review 1.

[103]Supra, note 69 at 1.

look to private investment to stimulate and sustain economic growth. With the Mexican economy in shatters, foreigners had to be looked to as a key source for much of the capital required. To attract foreign investment Mexico had to open its economy by loosening stringent controls on foreign investment and encouraging its industries to become competitive in a global economy. The NAFTA represents the cornerstone of this policy of Mexico becoming a part of the world economy.

CHAPTER V. CANADA'S ROAD TO THE NAFTA

During the federal election of 1993, the issue of the NAFTA failed to capture the imagination of Canadians. Unlike the election of 1988, the election of 1993 did not become a national referendum on the issue of free trade. The electorate was generally more interested in issues surrounding jobs, the size of the federal deficit, and national unity than in issues surrounding international trade. The NAFTA did not become a central issue during the campaign because to most people the NAFTA represented little more than the addition of Mexico to the existing free trade arrangement between Canada and the United States, an addition expected to have limited impact upon Canada.

This ambivalence most Canadians felt towards the NAFTA, stemmed from the fact that Canada joined the NAFTA mostly as a defensive procedure to ensure that the benefits it received under the FTA did not get diluted in a deal between Mexico and the United States.[104] This fear that Canada may lose the benefits of the FTA if it stayed out of an arrangement between Mexico and the United States was based on the "hub and spoke" theory, first articulated by Ronald Wonnacott in 1990.[105] According to Wonnacott, if the Americans successfully negotiated a deal with the Mexicans, it was likely that they would soon enter into similar arrangements with other countries. This would leave Canada and Mexico as the "spokes" in the North American market and the United States as the "hub." Significant investment would be diverted away from the spokes to the hub since only plants in the hub would have free access

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[104]Judith H. Bello and A.F. Holmer, "The NAFTA: Its Overarching Implications" (1993) 27 International Lawyer 589 at 591.

[105]Ronald Wonnacott, U.S. Hub and Spoke Bilateral and the Multilateral Trading System (Commentary 23)(C.D. Howe Institute, 1990).

to the entire North American market and beyond. If Canada wanted to avoid becoming merely a spoke in the North American market, and thus risk losing many of its advantages under the FTA, Wonnacott suggested that it enter the Mexican market by joining the negotiations, then commencing between Mexico and the United States.[106] Canada's road to the NAFTA, therefore is best understood as an extension of the road Canada took to the FTA.

The roots of Canada's pursuit of the FTA lie in the re-election of a Liberal government in 1980 following a brief nine month hiatus from office.[107] Following that election Prime Minister Pierre Trudeau made two appointments to his cabinet which would change the role of the government in the Canadian economy. These appointments were the appointment of Herb Gray as minister of industry, trade and commerce and the appointment of Marc Lalonde as minter of energy, mines and resources. That these appointments would have significant impact upon the role of the government in Canada was evident from the government's first speech from the throne in which it declared its commitment to greater intervention in the economy. This commitment to intervention would be fulfilled through the policies of strengthening the Foreign Investment Review Agency (FIRA) and instituting the National Energy Program (NEP).[108]

FIRA was created by the Foreign Investment Review Act (FIR Act).[109] The FIR Act was the direct result of a government report published in 1972, entitled Foreign Direct

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[106]For a critical perspective on the hub and spoke theory, see Ricardo Grinspun, "The Economics of Free Trade in Canada" in Ricardo Grinspun and Maxwell A. Cameron, eds. The Political Economy of North American Free Trade (Montreal: McGill-Queen's University Press, 1993) 105 at 115.

[107]G. Bruce Doern and Brian W. Tomlin, Faith and Fear: the Free Trade Story (Toronto: Stoddart, 1991) at 17.

[108]Stephen Clarkson, Canada and the Reagan Challenge: Crisis and Adjustment 1981-1985 (Toronto: James Lorimer, 1985) at 19-21.

[109]S.C. 1973-74, c.46, as am S.C. 1976-77, c.52, s. 128

Investment in Canada. This report was prepared by a parliamentary committee chaired by Herb Gray at a time of growing Canadian nationalism fuelled, in part, by a concern over several high profile takeovers of Canadian companies by foreign interests.

The FIR Act provided that every foreign investor, who was described as a "non eligible person" and every group containing a non eligible person must file an application with FIRA, if:

(a) such person or group proposed to acquire control of a Canadian business where the revenues of that business exceeded $3 million and the value of the assets exceeded $250,000; or
(b) such person or group proposed to establish a new business in Canada, unrelated to an existing business in Canada carried on by that person or group.

The FIR Act then provided that each application was to be reviewed or "screened" by FIRA to determine whether the proposed investment should be allowed. Such determination was to be made on the basis of whether the investment would be a "significant benefit" to Canada.[110]

Herb Gray, the new minister of industry, trade and commerce in 1980, and the principal architect of the FIR Act in 1972, committed the new Liberal government to expanding the powers of FIRA. He announced that FIRA would be strengthened by first, empowering it to review the functioning of established foreign controlled companies on the basis of export promotion and research and development; and secondly, by allowing it to publicize foreign takeover applications to enable Canadian firms to make counteroffers with the assistance of government loans.[111] The purpose of these proposed measures was to bolster the level of Canadian ownership in the economy through government regulation and assistance. As Minister

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[110]E. James Arnett, "From FIRA to Investment Canada" (1985) 24 Alberta Law Review 1 at 3.

[111]Supra, note 108 at 88.

Gray told the Association of Canadian Financial Corporations in June 1980:[112]

> The federal government is an active player in industrial development, not just a passive bystander. Our whole approach to national economic development is activist.

Minister Gray's proposals for a new activist role for government in the Canadian economy were met immediately with criticism from the international investment community. These proposals were seen as barriers to the free flow of capital in the world economy.[113]

However, the reaction to the proposals to strengthen FIRA was tame in comparison with the reaction the government's second major economic initiative, the NEP. The NEP was introduced as part of the government's budget delivered to the House of Commons by the Minister of Finance, Allan MacEachen, on October 28, 1980. The architect of the NEP was Marc Lalonde who hoped to reestablish the financial power of the federal government which had declined in the face of rising world oil prices throughout the 1970s. The declining capacity of the federal government to fund regional equity programs had been accompanied by the rising influence of the western provinces, especially Alberta, which had become wealthy from the increased oil revenues resulting from rising world oil prices.

The NEP had the following three stated objectives: energy self sufficiency for Canada, the restoration of the financial dominance of the federal government, and an increase in the level of Canadian ownership in the energy sector.[114] These objectives were to be realized through

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[112]Herb Gray as quoted at supra, note 108 at 88. The emphasis appeared in the text of the speech.

[113]Supra, note 110 at 2.

[114]The Minister of Energy Mines and Resources, Canada, "The National Energy Program, 1980" (Ottawa: Minister of Supply and Services, 1980).

the implementation of the following measures:

(a) the imposition of government controlled prices for crude oil;
(b) the imposition of government controlled prices for natural gas;
(c) the imposition of new taxes on producer revenue from both oil and natural gas
(d) a system of taxable grants, known as the Petroleum Incentive Program which was to be granted to Canadian companies to encourage the exploration for new reserves on "Canada Lands" which were basically frontier lands controlled by the federal government as opposed to conventional deposits in southern Alberta;
(e) a retroactive reservation to the federal government of a 25 percent interest in oil and gas production on the Canada Lands and a stipulation that producers on the Canada Lands be at least 50 percent Canadian-owned.[115]

The reaction to the NEP was overwhelmingly negative in both western Canada and the United States. Western Canadian business interests were opposed to what they saw as a massive federal tax grab. In 1979, the federal/provincial/industrial share of economic rents from oil and gas production had been 8.8 percent/ 50.5 percent/40.7 percent. Under the NEP this was changed to 24 percent/43 percent/33 percent.[116] Moreover, the imposition of government price controls would keep the price of oil sold in Canada at $38.00 per barrel, well below the price on the open market which was expected to hit $54.50 per barrel in 1983.[117]

American business interests shared these concerns with their Canadian counterparts. However, these concerns were exacerbated by the retroactive reservation to the federal government of a 25 percent interest in production on Canada Lands. The American government took up the cause of the American business interests. It demanded that the Canadian government compensate American oil companies for the loss of production resulting from the retroactive reservation. The Canadian government responded by offering the equivalent of 25 percent of

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[115]Leonard Waverman, "Canadian Energy Policy after 1985: Lessons from the Present" in Edward A. Carmicheal and Corina M. Herrera, eds. Canada's Energy Policy, 1985 and Beyond (Toronto: C.D. Howe Institute, 1984) 39 at 45.

[116]Supra, note 108 at 69.

[117]Supra, note 115 at 45.

the cost of exploration. Such a pittance did little to squelch the complaints by American oilmen that their interests had been "nationalized."[118]

The goal of the retroactive reservation and the accompanying regulations requiring 50 percent Canadian ownership of production on Canada Lands was to shift Canadian ownership of the oil and gas industry from 30 percent in 1980 to 50 percent by 1990, at a rate of 2 percent per year. The government was prepared to accomplish this goal by its regulatory power to discriminate in favour of firms with high Canadian ownership, including the government-owned Petro-Canada.[119] For example through the NEP, Petro-Canada's share of equity in the Hibernia Project, off the coast of Newfoundland, rose from 18.75 percent to 43.75 percent.[120]

The economic benefits from the government directed growth in the oil and gas industry were expected to have a spin-off effect on other sectors of the economy. The expected spin-offs formed the basis of the government's industrial strategy. In the 1980 speech from the throne, the government announced:[121]

> Canada's resource base will be used as the basic building block of a vigorous industrial policy. A paramount objective of my Ministers is to develop economic policies that will provide jobs, spur growth, improve regional balance and promote Canadian ownership and control of the economy.

In 1981, the government followed up on their commitment by forming the Office of Industrial and Regional Benefits within the Department of Industry, Trade and Commerce. The purpose of this new office was to distribute the benefits of the NEP to other sectors of the economy through regulations aimed at improving the access of Canadian industry to

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[118]Supra, note 108 at 72.

[119]Ibid. at 75.

[120]Ibid.

[121]Ibid. at 109.

opportunities created by the development that was to occur under the NEP.

However, the expected benefits of this industrial strategy never materialized. In 1981, world oil prices peaked and began to fall. Over the next few months world oil prices fell by 60 percent.[122] This fall in world oil prices invalidated the basic premise of the NEP which had been based on predictions of increasing world oil prices. This left the government's entire industrial policy in ruins.[123]

Instead of prosperity, Canada experienced its worst recession since the Depression of the 1930s. In 1981 the rate of inflation reached 12.5 percent. Partially in response to this high rate of inflation, the Bank of Canada raised its prime interest rate to 17 percent. Commercial interest rates rose to 22 percent, thus crippling small businesses dependent on bank loans for survival. In 1983, there were 10,913 bankruptcies in Canada, up from 5,474 in 1979. Net losses in these bankruptcies rose from $342 million in 1979 to $ 1.9 billion in 1984. For businesses that did survive, corporate profits fell by 35 percent in 1982.[124]

As profits fell, jobs disappeared. In March 1983, the official rate of unemployment peaked at 13.9 percent. Between 1982 and 1985, the number of people unemployed for more than one year rose by 91 percent. There was also a steady rise in the number of people on social assistance. By 1985, 1.9 million Canadians were dependent upon some form of social assistance.[125]

With the collapse of the economy, there was little for the government to do but to

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[122]See note 87.

[123]Supra, note 108 at 332.

[124]John W. Warlock, Free Trade and the New Right Agenda (Vancouver: New Star Books, 1988) at 48.

[125]Ibid. at 42-45.

renounce its interventionist policies and attempt to restore the faith of the market.[126] Herb Gray was replaced as Minister of Industry, Trade and Commerce by Ed Lumley, a politician with a pro-business stance. Jean Chretien replaced Marc Lalonde as the minister of energy mines and resources.

Ed Lumley immediately appointed a new FIRA commissioner and set about attempting to change the reputation of FIRA as a barrier to investment in Canada.[127] The ceiling for the faster 21 day handling of "short form" applications was raised from projects worth $2 million to projects worth $5 million. FIRA's approval rate rose form 86 percent in 1982 to 94 percent in 1983.

The government also began to retreat from the NEP. In 1982, the new Minister of Energy, Mines and Resources introduced the "NEP Update 1982."[128] Under the Update the government lowered some taxes and moved slowly towards market discipline for oil prices in Canada. By 1984 the average price of oil in Canada was 92 percent of the world level.[129]

In September 1984 the Conservatives were returned to power under the leadership of Brian Mulroney. The Conservatives entered office determined to undo the interventionist policies followed by the last Liberal government. In his first major speech after becoming Prime Minister, Mulroney addressed the Economic Club in New York. He assured his audience that his government intended to end both FIRA and the NEP. Canada, he said, "is open for business

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[126]Supra, note 108 at 332.

[127]Gorse Howarth was replaced by Robert Richardson. See supra, note 108 at 333.

[128]The Minister of Energy Mines and Resources Canada, "The National Energy Program Update, 1982" (Ottawa: Minister of Supply, 1982).

[129]Supra, note 108, at 334.

- again."[130]

The motivation for pursuing the end of FIRA and the NEP was the belief held by the government that the key to economic recovery in Canada was the creation of an open market in which firms would invest for expansion but remain efficient through discipline imposed by competition. In keeping to these beliefs, the government replaced the FIR Act with the Investment Canada Act,[131] designed to encourage foreign investment in Canada. The Investment Canada Act provides that non-Canadians need only apply for governmental approval, if they propose to acquire by direct means, control of a business valued at $5 million, or if by indirect means a business valued at $50 million. Moreover, the Investment Canada Act provides that new businesses established by non-Canadians need only be reviewed if they involve matters of cultural heritage or national identity.[132]

In March 1985, the government reached the Western Accord with the provinces in western Canada. The Accord significantly deregulated the oil and gas industry, thus dismantling the NEP. The Accord established the policy of a "market sensitive" pricing system but left implementation of the policy to further negotiations. These negotiations led to the completion of an agreement on October 31, 1985 which outlined procedures for moving from a regulated industry to a free market industry.[133]

On October 30, 1985, Pat Carney, the new Minister of Energy, Mines and Resources

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[130]Brian Mulroney, as quoted at supra, note 108 at 358.

[131]R.S.C. 1985, c. I-21.8

[132]Supra, note 110 at 3.

[133]Alistar R. Lucas and Constance D. Hunt, Oil and Gas Law in Canada (Calgary: Carswell, 1990) at 236.

tabled a document entitled "Canada's Energy Frontier: A Framework for Investment and Jobs."[134] This document announced the government's intention to introduce a new act, the Canada Petroleum Resources Act which would eliminate the retroactive reservation on Canada Lands. The new Act would also ensure that rights to resources on Canada Lands would be granted on a best bids basis, free of bureaucratic intervention and that government-owned corporations would receive no special treatment.[135] The Canada Petroleum Resources Act[136] came into effect in 1987.

In the midst of the economic recession of 1982, the Liberal government established the Royal Commission of the Economic Union and Development Prospects for Canada. The Commission, chaired by former Liberal cabinet minister, Donald Macdonald was asked to report on "the appropriate national goals and policies for economic development." The Commission delivered its report on September 5, 1985 (the "MacDonald Report").[137] The source of Canada's economic problems, according to the Commission was that Canada's manufacturing sector was no longer competitive in an increasingly competitive global economy. It produced at too high a cost for too small a market.[138] The Commission's solution to this problem was to create a free market environment in Canada which would both require and lead to a free trade

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[134]The Minister of Energy Mines and Resources Canada "Canada's Energy Frontiers: A Framework for Investment and Jobs" (Ottawa: Minister of Supply and Services, 1985).

[135]Ibid. at 50.

[136]R.S.C. 1985, c. C-8.5.

[137]Royal Commission on the Economic Union and Development Prospects for Canada, Report of the Royal Commission on the Economic Union and Development Prospects for Canada (Ottawa: Minister of Supply and Services, 1985).

[138]Supra, note 107 at 33.

agreement with Canada's largest trading partner, the United States. The Commission stated:[139]

> In the first category, Commissioners believe that in some important areas we Canadians must significantly increase our reliance on market forces. Our proposals to increase our openness to the international economy, and, specifically to enter into a free-trade arrangement with the United States reflect our general preference for market forces over state intervention as the appropriate means through which to generate incentives in the economy, from which growth will follow.

The recommendations of the Commission for free trade with the United States provided the Conservatives with the boost they needed to adopt the pursuit of an agreement with the Americans as official government policy. The government had been considering the adoption of such a policy for some time.

In its first year in office the government had initiated many reforms designed to encourage market forces. In addition to dismantling FIRA and the NEP, the government had introduced many programs to reduce government spending, privatize government-owned corporations such as Air Canada and Petro- Canada, and to deregulate industrial activity. But if market forces were going to be relied upon to pull Canada out of recession, Canadian industry required secured access to large and stable markets. Growing protectionism in the United States, Canada's largest trading partner, combined with the division of the world into several trading blocs, convinced the government that a trade agreement was necessary if Canadian industry was to be assured of continued access to a market larger than the market of 25 million which Canada could provide. History and geography made the United States the logical partner for such an arrangement. As Prime Minister, Mulroney told the House of Commons in September 1985:[140]

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[139]Supra, note 137 at Volume I pg. 66.

[140]Brian Mulroney, as quoted at supra, note 107 at 33 at 34.

> Economics, geography, common sense and the national interest dictate that we try to secure and expand our trade with our closest and largest trading partner - protectionist measures are always self-defeating. This impulse to protectionism is defensive and negative - yet entirely understandable in human terms. This is what we are up against.
>
> The answer to this problem lies in sound agreements, legally binding between trading partners, to secure and remove barriers to their mutual trade. That is our approach to world trade. And it is obvious that we must find special and direct means of securing and enhancing the annual $155 billion of two-way trade with the United States.

Additionally, the government was concerned about the level of competitiveness of Canadian industry. The government believed that Canadian industry had grown inefficient behind protectionist walls and inefficient industries would be incapable of pulling Canada out of recession in the new global economy. Free trade was viewed as a means of forcing the Canadian economy to restructure itself. Those businesses which were run inefficiently would fold under increased competition while competitive businesses would expand and produce more as access to larger markets increased. Efficient industries would provide a solid foundation on which to base the government's plan to bring prosperity to Canada through free market activities.[141]

Accordingly, when the Macdonald Report recommended free trade with the United States, the government was ready. Three weeks after the report was delivered, the government announced its intention to reach a free trade agreement with the United States. The negotiations with the Americans officially began on May 21, 1986 in Ottawa. They continued until an agreement was successfully concluded nineteen months later on December 10, 1987. That agreement, the FTA was signed by Prime Minister Mulroney and President Reagan on January 2, 1988. It entered into force on January 2, 1989.

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[141]Supra, note 107 at 33-34.

Canada therefore placed itself on the road to free trade as a result of the severe recession it suffered in the early 1980s. That recession forced the Canadian government to abandon the interventionist policies it had adopted in 1980 in favour of free market policies. These policies were further entrenched and expanded upon in the mid 1980s by a new Canadian government. The free market policies of the new government led naturally to the pursuit of a free trade agreement with the United States. If market forces were to lead the economic recovery, they required investment from the United States for expansion as well as secured access to the American market. A free trade agreement was successfully negotiated with the Americans and has been in effect since 1989. To ensure that the perceived benefits of the FTA were not diluted in a free trade agreement between Mexico and the United States, Canada joined these two countries in free trade negotiations in 1991. These negotiations resulted in the NAFTA.

CHAPTER VI. THE AMERICAN ROAD TO NAFTA

On July 15, 1979, President Carter addressed a national television audience on what he described as "a crisis of confidence." He said:[142]

> The symptoms of this crisis of the American spirit are all around us. For the first time in the history of our country the majority of our people believe that the next five years will be worse than the past five years. Two-thirds of our people do not even vote. The productivity of American workers is actually dropping and the willingness of Americans to save for the future has fallen below that of other people in the Western world.

This crisis of confidence described by President Carter stemmed from the presence of a variety of factors that indicated that the period of world economic dominance by the United States was ending. In January of 1980, the inflation rate stood at 18.2 percent. By the end of April, 1980, the prime rate of interest at most banks, hovered at 18.5 percent and some experts were predicting it would reach as high as 20 percent. The nation's two most important industries, housing and automobiles were in virtual depression. Housing starts in March were down 42 percent from a year earlier. Automobile sales were down 24 percent from the previous year. The unemployment rate in Detroit was 24 percent. The average in the rest of the country was 7 percent.[143]

The poor state of the American economy could not be blamed entirely on the policies of the Carter administration. The American economy had been on a slow decline throughout the 1970s. Total output during the 1970s increased by only two-thirds the rate recorded in the 1960s. Price levels more than doubled in the 1970s. This was four times as large an increase as occurred during the 1960s. Unemployment rates averaged 6.2 percent in the 1970s, with the

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[142]Jimmy Carter, as quoted in John F. Stacks, Watershed: The Campaign for the Presidency, 1980 (New York: Times Books, 1981) at 14.

[143]Burton I. Kaufman, The Presidency of James E. Carter Jr. (Lawrence, Kansas: University Press of Kansas, 1993) at 167-169.

figure hitting over 7 percent in the second half of the decade. In the 1960s the rate of unemployment averaged 4.18 percent.[144]

The economic policymakers since the 1960s had followed Keynesian economic principles which were premised on the assumption that business cycles could be manipulated by government activity. Under these principles during economic downturns governments were to spend money to stimulate growth and encourage employment. During upturns in the economy governments were to reduce spending to pay off the deficits incurred during recessions, and to curb inflation. Through this type of manipulation of the market, governments were supposed to be able to prevent wild fluctuation of the market.

The response of both Republicans and Democratic administrations in the 1970s to the steady decline of American economic dominance therefore was to increase government spending, mostly in the area of social programs such as unemployment benefits and Medicare. Between 1960 and 1980 federal spending rose from 18.2 percent of GNP to 23.4 percent of GNP. Total tax receipts by the federal government rose from 17.7 percent of GNP in 1960 to 20.6 percent of GNP in 1980. With productivity declining, this increase in the government's share of GNP could not keep up with the pace of government spending. Consequently, the federal deficit rose from 0.5 percent of GNP in 1960 to 2.9 percent in 1980.[145]

Despite this increase in government spending the economy remained plagued by unprecedented inflation, high unemployment and slow economic growth. This phenomenon of high inflation and high unemployment was labelled "stagflation." Traditional Keynesian

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[144]Joseph J. Williams, "Reaganomics and Economic Policy" in Dilys M. Hill, Raymond A. Moore and Phil Williams, eds. The Reagan Presidency-An Incomplete Revolution? (London: MacMillian, 1990) at 135.

[145]Ibid. at 136.

economic policies appeared incapable of dealing with stagflation. With the economy as dependent on the government as it had become, if the government attempted to curb inflation by reducing spending, unemployment increased before the rate of inflation declined. The rise in unemployment then led to public demands for increased spending.[146] This failure of Keynesian policies convinced Americans that it was time to attempt a different approach.

A different approach was offered by Ronald Reagan who was elected president in 1980. Reagan entered office with a sense of purpose not seen in most newly elected leaders. This sense of purpose stemmed from a set of deeply held beliefs which guided American policy throughout Reagan's term in office. More than any American president before or since, Reagan was an ideologue.

At the core of Reagan's beliefs was the primacy of the role of individual initiative in society. Individual initiative, Reagan believed, drives the economic engine of a nation. As Reagan said in his first inaugural address:[147]

> If we look to the answer as to why, for so many years we achieved so much and prospered as no other people on earth, it was because here in this land we unleashed the energy and individual genius of man to a greater extent than has ever been done before. Freedom and the dignity of the individual has been more available and assured here than any other place on earth.

The biggest threat to individual initiative, according to Reagan, was the growth of government. He said, "It is no coincidence that our present troubles parallel and are proportionate to the intervention and intrusion in our lives that result from unnecessary and excessive growth of government."[148] Reagan's alternative to Keynesian economic policy

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[146]Ibid.

[147]Ronald Reagan, Speaking My Mind (New York: Simon and Schuster, 1989) at 62.

[148]Ibid. at 63.

therefore was to reduce government influence in the economy. This alternative became known as "Reaganomics."

Reaganomics was influenced by the works of two economists, Arthur Laffer and Milton Friedman. Laffer theorized that there was a link between the level of taxation and individual initiative. He said that at a certain point an increase in tax rates will actually reduce the size of receipts that a government collects. This was because at a certain point taxes will be so high that they will reduce both the means and the incentive of individuals to invest in the economy. Less investment results in less income which results in less tax receipts for the government. Alternatively a reduction in the tax rate will result in an increase in government revenues. Lower taxes will allow individuals to save more which they can then invest in the economy. Greater investment will lead to greater income which will result in greater tax receipts.[149]

Friedman, the 1976 winner of the Nobel Prize in Economic Science, developed the monetarian theory. Friedman believed that the market was inherently stable. It therefore did not require the intervention and manipulation of government agencies advocated by Keynesian theory. According to Friedman it was government activism that led to inflation and eventually unemployment. Consequently Friedman suggested that the government should refrain from attempting to manipulate the markets. The role of government should be to keep the supply of money low. This, he said, would control inflation, which would allow the markets to stabilize. Stable markets would reduce unemployment.[150]

Both of these theories were reflected in the Program for Economic Recovery that Reagan presented to Congress in March 1981. The budget proposals which formed a part of this

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[149]Presidents as ideologues at 174-175.

[150]Elton Rayack, Not So Free To Choose-The Political Economy of Milton Friedman and Ronald Reagan (New York: Praeger, 1987) at 53.

Program, set the following five goals for the administration:[151]

> First we must cut the growth of Government spending. Second, we must cut tax rates so that once again work will be rewarded and saving encouraged. Third, we must carefully remove the tentacles of expensive government regulation which are strangling our economy. Fourth, while recognizing the independence of the institution, we must work with the Federal Reserve Board to develop a monetary policy that will rationally control the money supply. Fifth, we must move surely and predictably, toward a balanced budget.

The success that the Reagan administration had in meeting these goals was mixed. The complicated relationship between the president and Congress in the United States necessitated that many of these goals be watered down and some were abandoned altogether. For example, far from being reduced, the size of the federal deficit actually grew faster and larger during the Reagan administration than during any other period in American history.[152]

But there was also significant movement towards these goals. In 1981 Congress passed the Economic Recovery Tax Act of 1981. This act provided for a 23 percent across the board reduction in income tax rates.[153] Its companion legislation, the Omnibus Reconciliation Act of 1981 instituted a series of spending cuts to 250 government programs.[154] There was significant deregulation of banks, intercity buses, ocean shipping, and uses of energy.[155] The

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[151]U.S. Congress, House, Committee on the Budget, A Review of President Reagan's Budget Recommendations 1981-1985, 98th Congress, 2nd Session (Washington, D.C. Government Printing Office, 1984) at 3.

[152]Supra, note 143 at 156.

[153]Laurence J. Kollikoff, "How Tight was the Reagan Administration's First Term Fiscal Policy" in David Boaz, ed. Assessing the Reagan Years (Washington, D.C.: Cato Institute, 1988) 17 at 23.

[154]Supra, note 143 at 149.

[155]Supra, note 153 at 14.

Federal Reserve Board put tight controls on the monetary supply and inflation was eventually brought down.

Initially, these policies had a negative affect upon the economy, but as time wore on the economy began to recover. As the House Budget Committee reported in August 1984:[156]

> After declining 3 percent from the third quarter of 1981 to the third quarter of 1982, real GNP has increased 11 percent as of the second quarter of 1984. The decline was the second most severe of the postwar period... the recovery is the second fastest... Unemployment rose to a postwar record high of 10.7 percent at the end of 1982 and has now declined to 7 percent, the sharpest postwar recovery except for 1949-1951. Inflation as measured by the GNP deflator was reduced from 10.2 percent during 1980 to 3.8 percent during 1983...

The economic recovery vindicated the attempts Reagan had made to translate his ideology into policy. As a result he enjoyed a landslide victory in the 1984 presidential election. Although he had less legislative success in his second term, Reagan's ideas for less government intervention and greater reliance on market forces continued to top the American political agenda throughout the 1980s.

Reagan ideology was just as important in the area of international trade policy as it was in domestic policy. Reagan's adherence to limited government and free market principles attracted him to the idea of free trade. If the individuals that comprised the market were to be as productive as possible, they must not be restricted from trading their products by national borders.

The problem for the Reagan administration was that the vehicle for achieving free trade, the GATT, had paradoxically led to many of the most common forms of trade barriers then in use. The various rounds of GATT negotiations did achieve sharp reductions in tariff barriers, but in their place, countries had imposed a broad range of non-tariff barriers such as anti-

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[156]House Budget Committee, A Review of President Reagan's Budget Recommendations, 1981-1985 (Washington, D.C.: House Budget Committee, 1984).

dumping duties, import licensing, quotas, and countervailing duties. Efforts to extend multilateral discipline to these barriers were met with resistance by both developed and developing countries.[157]

Moreover, the GATT was slow to adjust to the realties of the international economy. International trade, especially for developed countries like the United States, no longer involved simply a trade in manufactured goods. It now also included trade in investment, services and technologies. GATT did not include rules that would protect trade in these areas. Attempts by the Americans to place these items on the agenda for a new GATT round were met with strong foreign resistance.

Such resistance exacerbated Congressional concerns about the growing United States trade deficit which peaked in 1987 at $170 billion.[158] Congressmen complained that Americans were being forced to compete on a "nonlevel playing field." While the United States had lowered barriers on many products in which it no longer held an advantage, mainly manufactured goods, other countries were refusing to lower their barriers to products in which the United States did hold an advantage, mainly high technologies.

Concern over the nonlevel playing field caused Congress to pass two acts, first, the Trade Remedies Act[159] in 1984 and secondly, the Omnibus Trade and Competitiveness Act[160] in 1988 both of which increased the government's ability to protect American industries from

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[157]Jeffrey J. Schott, Free Trade Areas and U.S. Trade Policy (Washington, D.C.: Institute for International Economics, 1989) at 4.

[158]Ibid. at 9.

[159]Public L. No. 96-39, 93 Stat. 144.

[160]Public L. No. 100-418, 102 Stat. 1102.

foreign competition.[161]

The Reagan administration responded to these developments with a two-tier approach, both of which were designed to open foreign markets to American industry. First it continued its efforts to begin a new round of multilateral GATT talks. Secondly, it began to approach its trading partners about bilateral free trade arrangements. Reagan told a business audience in 1985:[162]

> To reduce the impediments to free markets, we will accelerate our efforts towards a new GATT negotiating round with our trading partners, and we hope that the GATT members will see fit to reduce barriers for trade in agricultural products, services, technologies, investments and in mature industries. We will seek effective dispute settlement techniques in these areas. But if these negotiations are not initiated or insignificant progress is made, I am instructing our trade negotiators to explore regional or bilateral agreements with other nations.

The negotiation of trade arrangements on a bilateral or regional level served several purposes. First it provided a fall back position for the United States in the event that the GATT talks faltered. Secondly, it encouraged the other GATT countries to come to the negotiating table. Despite its difficulties, the United States was still the most important economic power in the world and its abandonment of the GATT in favour of a regional strategy would deal the GATT a fatal blow. Thirdly, provisions in regional trade agreements could serve as important building blocks for future GATT agreements.[163]

Pursuant to this policy the United States negotiated the United States - Israel Free Trade Area Agreement. This agreement came into force on September 1, 1985.

When the largest trading partner of the United States, Canada, expressed an interest in

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[161]Supra, note 157 at 9.

[162]Ronald Reagan, as quoted in supra, note 33 at 147.

[163]Supra, note 157 at 2.

negotiating a similar deal, the Reagan administration responded enthusiastically. Besides furthering its broad trade policy goals, the Reagan administration viewed the negotiations as an opportunity to impose discipline on Canada in many of its non market activities, such as subsidies.[164] Negotiations were entered and resulted in the FTA which came into effect on January 2, 1989.

In 1990, a year after the FTA came into effect, Mexico expressed an interest in negotiating a free trade agreement. By this time Reagan had been succeeded as president by his vice-president George Bush. Although not as ideological as Reagan, Bush was committed to the same trade policy goals that Reagan had initiated.

The trade talks at the Uruguay Round had bogged down and it was hardly certain that a deal could be reached. It was thought that the successful negotiation of an agreement with the Mexicans would encourage other GATT parties, especially the EC, to come to terms with the Unites States on such an agreement.

Additionally, it was hoped that a free trade agreement would stimulate market forces in Mexico and thus curb the wave of illegal immigration to the United States.[165] Consequently, the United States accepted Mexico's invitation and talks between the two countries commenced in September, 1990.

It is difficult not to view the history of the United States in the 1980s through the ideology of Ronald Reagan. His was a presidency based on ideology. He used his considerable

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[164]Lisa B. Koteen in _____, "Binational Dispute Resolution Procedures under the Canada-United States Free Trade Agreement-Experiences to Date and Portents for the Future" (1991) 24 New York University Journal of International Law and Politics 341 at 361.

[165]_____, "NAFTA: An Overview of Legal, Economic and Practical Issues" (1993) 15 Loyola of Los Angeles International and Comparative Law Journal 915 at 917.

skills as a communicator to stamp the tone of the political debate in that decade with his ideology. His policies from tax reduction to deregulation reflected his belief that America could only solve the crisis of confidence it experienced in the 1970s by reducing the role of government and by relying on individual initiative. Free trade was a natural outgrowth of these beliefs. All barriers, including restrictions imposed by other nations, had to be removed in order for the market to work efficiently. When multilateralism through the GATT proved to be an ineffective means of turning his free market beliefs into policy, Reagan embraced bilateralism. This bilateral approach has resulted in free trade agreements with Israel, Canada and most recently, Mexico.

PART THREE: ANALYSIS OF THE NAFTA'S INSTITUTIONAL PROVISIONS AND DISPUTE RESOLUTIONS MECHANISMS

CHAPTER VII. ANALYTICAL FRAMEWORK

Part Three of this paper will analyse the specific institutional provisions and DRM's contained in the NAFTA. Chapter VII will explain the framework by which this analysis will be carried out.

The stated goal of NPL scholarship is to frame recommendations for policymakers, which in our society are legislators. Legislators do not view the law as something separate from politics. As Rubin described it, "For legislators the law is an instrumentality by which they achieve their political or ideological goals."[166] The task of the NPL scholar, therefore, is to identify these political or ideological goals and then to develop a theory for translating these goals into law.[167]

The purpose of Parts One and Two of this paper, therefore, was to attempt to identify both the political and ideological goals behind free trade policy. To accomplish this purpose, both the theoretical and historical roots of the free trade policy in North America were examined. This examination revealed the following:

(a) Free trade theory was developed as part of an intellectual movement that occurred in the eighteenth and nineteenth centuries that attempted to explain the political and economic structures of a successful society.
(b) The movement developed within a relatively close community in which its members knew one another, exchanged ideas with one another and learned from one another. This sense of community within the movement allowed the development of theories, which despite the great variety of topics they covered, enjoyed a significant degree of cohesion.
(c) At the core of these theories was the belief in the invisible hand.
(d) The theory of comparative advantage both reflects and is dependent upon this belief. It

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[166]Supra, note 24 at 804.

[167]Ibid. at 815.

predicts that nations will produce those goods in which they hold a comparative advantage and trade for those goods in which they have a comparative disadvantage. This will occur in the natural order of things but only in the absence of government intervention in the form of tariffs, subsidies, quotas and other protectionist measures.

(e) Each Party to the NAFTA negotiated the NAFTA as part of a succession of policies aimed at enhancing the role of market forces within their economies.

These points suggest a link between the policy of free trade and the values of a free market economy as initially articulated by the classical liberals. The theory of free trade was founded upon free market values. Moreover, each Party adopted the policy of free trade as they moved away from interventionist policies towards more market-oriented policies. This is not mere coincidence. Free markets, to achieve maximum efficiency, require the ability to obtain products from businesses that can deliver them at the lowest cost possible, and the ability to sell products to consumers who are willing to pay a fair price for them without regard to national boundaries. Free trade, to deliver on its promise of maximizing overall world efficiency, requires that individuals, through the pursuit of individual advantage, strive to produce goods as efficiently as possible. Free markets require free trade. Free trade requires free markets.

Therefore the ideological goal of policymakers when they negotiated the NAFTA must have been the encouragement of free enterprise. An examination of both the development of free trade theory and the events which caused each Party to enter the NAFTA negotiations suggest this. The purpose of the analysis in Part Three, therefore, will be to determine how successful policymakers were in achieving this goal.

This should be an important consideration for policymakers. If they adopt a policy designed to meet certain ideological goals but then in implementing that policy enact laws that are incapable of meeting those goals, the policy they have adopted will be doomed to failure.

The institutional structure and DRMs contained in the NAFTA are designed to effectively

administer the terms of the agreement and to resolve disputes.[168] The central question of the analysis in Part Three will not be whether policymakers created procedures which are effective but whether they created procedures which are capable of achieving the ideological goals which caused them to adopt the policy of free trade.

Professor Jackson has written that any effective system in international trade law requires at least two workable procedures. He described those procedures as follows:[169]

> [first] a procedure of "norm formulation" or new rulemaking, and [secondly] a procedure for applying and implementing those rules. An implementing/applying procedure requires a "dispute settlement" mechanism as part of its rules. Somehow the existing rule must be applied to specific facts in particular cases. Inevitably, there will be disagreement about such application, that is: disagreement on the interpretation of the rule, its scope, appropriate exceptions, etc.

The analysis of the specific provisions of the NAFTA in Part Three will be organized along these lines. The provisions will be characterized as either a "norm formulation" procedure, or as an "implementing/applying" procedure. Then, depending on how the procedure is characterized, it will be examined with a view to determining whether the procedure furthers the ideological goals of the NAFTA. This examination will be carried out by assessing the NAFTA's provisions in terms of certain basic elements present in all free market legal systems.

The term "norm formulation" implies that there should be some mechanism for surveying the values of those involved in the system and then turning those values into rules by which everyone in the system will govern themselves. In a free market system, the most important players are individuals or corporations which are run by individuals. It is the initiative of the individuals in the system that will determine the success of that system. Successful market

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[168]Supra, note 2, Article 102(e).

[169]Supra, note 33 at 88.

systems, therefore, must have mechanisms that allow individuals a role in expressing their values which are then taken into account in the formulation of the rules by which that system is governed. In a nation, this mechanism is democracy. No successful market system has yet been devised in a non-democratic nation. China is currently attempting to create a market system without democracy. Only time will tell whether or not this attempt will be ultimately successful.

The NAFTA does not attempt to join the citizens of Canada, Mexico, and the United States into one nation. However, those whose initiative is relied upon to determine the success of the NAFTA must have some role to play in the norm formulation procedure. Accordingly, public participation will be the major criterion by which the norm formulation procedures will be analysed. How important is public participation in the formulation of rules? What mechanisms ensure some form of public participation? How effective are they?

The applying/implementing procedures may ultimately be more important to the success of the NAFTA than the norm formulation procedures. Individuals will not take the risks necessary to take advantage of the rules under the NAFTA unless they are assured fair and effective application and implementation of those rules.

To be assured of fair and effective application and implementation of the rules under the NAFTA, individuals must be assured of some access to DRMs. They must be assured that if a rule is applied wrongly against them or if there is a dispute over the interpretation of a rule, there is some avenue of redress. Therefore, access will be the first criterion applied to the applying /implementing procedure. Who has access to DRMs? Under what conditions? How effective are the DRMs in addressing the concerns of individuals?

The second criterion which will be applied to the applying/implementing procedures is to what degree are these procedures transparent. Transparency is a key element of the legal systems that govern most free market systems. Individuals must have access to the rules and

be able to determine how they are applied and implemented. Moreover, transparency is important for determining fairness. Individuals must have the ability to see that the rules are applied and implemented in the same manner in every case. If individuals believe that some parties receive better treatment than others, some individuals may be discouraged from taking the risks necessary to take advantage of the NAFTA's rules.

The third criterion by which the applying/implementing procedures will be assessed complements transparency. In order for efficiency to be maximized, not only must individuals have the ability to see how the rules are applied, they must also be able to predict how those rules will be applied in certain situations. Business people are prepared to take risks in the pursuit of advantage, but most are not prepared to take blind risks. When individuals are making their business plans, they must have a means of predicting with some degree of certainty, how rules will be applied to them in certain situations. If the applying/implementing procedures do not produce predictable application, business people will be unable to plan. Inability to plan will discourage their willingness to take risks. Free enterprise requires individuals to take risks. Therefore, the third criterion applied to the applying/implementing procedure will be the extent to which the procedures are capable of producing predictable applications of the rules under the NAFTA.

The final criterion that will be applied to the applying/implementing procedures is enforcement. By what mechanisms are the rules enforced? How effective are these mechanisms? If rules are not enforced, the NAFTA will come to be seen as an ineffective means of accomplishing business goals. If the NAFTA rules and procedures are viewed as being ineffective, individuals will not take those rules into account when making their business plans. It is therefore crucial to the success of the NAFTA that there be an effective means of enforcing the NAFTA rules.

An examination of both the theory of free trade and the history of the Parties in adopting the NAFTA policy suggest that the ideological/political goals of the policy was greater reliance on market forces in each of the three societies. Therefore, the purpose of the analysis which follows will be to determine the degree to which the NAFTA negotiators were successful in creating rules and procedures that will encourage market forces in North America. Each of the institutional provisions and DRMs contained in the NAFTA will be described and then analysed in terms of the criteria set out above. These criteria represent basic elements of all legal systems established by free market societies. A free market system cannot flourish without mechanisms for public participation in the formulation of norms; rights of private access to DRMs; and rules that can be consistently applied and effectively enforced.

CHAPTER VIII. CHAPTER 19

1. Introduction

The provisions contained in Chapter 19 of the NAFTA fulfil an applying/implementing function. They establish a DRM designed to settle disputes which may arise over the application of the Parties respective anti-dumping/countervailing duty (AD/CVD) laws. They have been modelled after the provisions contained in Chapter 19 of the FTA, without significant change.[170] Consequently, much of the analysis contained herein will be based on the experiences that Canada and the United States have had under Chapter 19 of the FTA.

A. AD/CVDs

An AD is designed to offset the effects of dumping. Dumping is the sale of goods to a foreign market at a price that is less than the price at which those same goods are sold in the producer's home market.[171] Dumping is considered to have harmful effects on world trade because it represents an attempt by one producer to systematically eliminate competition. By eliminating competition, the producer hopes to eventually cause higher market prices than would

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[170]Supra, note 14 at 57. There are four major differences between Chapter 19 of the NAFTA and Chapter 19 of the FTA. They are first, the NAFTA contains provisions to safeguard panel reviews (Article 1905), whereas the FTA does not; secondly, the NAFTA provides more detailed consultation procedures than does the FTA (Article 1907); thirdly, the NAFTA expressly states that a panel failing to provide the appropriate standard of review is an example of manifestly exceeding its powers, and therefore enough to evoke the Extraordinary Challenge Committee procedure (Article 1904(13)(a)(iii); and fourthly, the NAFTA does not provide for a set duration for Chapter 19, whereas the FTA does.

[171]Gilbert R. Winham and Heather A. Grant, "Antidumping and Countervailing Duties in Regional Trade Agreements: Canada-U.S. FTA, NAFTA and Beyond" (1994) 3 Minnesota Journal of Global Trade 1 at 4.

otherwise exist.[172] For a simplified example, assume that manufacturers in both Canada and the United States can both manufacture comparable bottles at a cost of $1.00 US per bottle. But assume that in Canada, there is only one bottle manufacturer and in the United States there are several. Because the Canadian manufacturer has a monopoly in Canada, assume that it can charge a price of $1.40 US per bottle. The American manufacturers, in a more competitive environment can only charge $1.20 US per bottle. If the Canadian manufacturer, who has control over the Canadian bottle market decides to break into the American market, it could sell bottles in the Unites States at its cost, $1.00 US per bottle. It would still be making a significant profit on its bottles in Canada. Because it has the ability to sell its bottles for cost in the United States, American manufacturers would be unable to compete and would be driven out business. Once the American manufacturers were out of business, the Canadian manufacturer would have control over the markets in both Canada and the United States and could charge whatever it wanted for bottles, forcing consumers to pay more than they would if there were still a competitive bottle industry in North America.

To prevent dumping, Article VI of the GATT allows nations to apply an AD against an imported good when that good is being dumped and is thereby causing or threatening to cause a "material injury to an established industry."[173] Article VI provides that the AD applied may not be greater than the difference between the price at which that good is imported and the price at which the good is sold in the ordinary course of trade in the exporting country.[174] In the

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[172]Presley L. Warner, "Canada-United States Free Trade: The Case for Replacing Antidumping with Antitrust" (1992) 23 Law and Policy in International Business 791 at 824.

[173]General Agreement on Tariffs and Trade, opened for signature October 30, 1947, 55 U.N.T.S. 187, Article VI (1).

[174]Ibid. Article VI (2).

above example, therefore, the United States could impose a duty of up to $0.40 US on each bottle imported into the United States by the Canadian manufacturer. Canadian bottles would then be sold for as much as $1.40 in the United States. American manufacturers would not have to fear being driven out of business by the Canadian manufacturer.

A CVD is designed to offset the trade distorting effects of subsidies.[175] The imposition of CVDs is allowed under Article V of the GATT where a foreign subsidy causes or threatens to cause injury to a domestic industry or the potential development of such an industry.[176]

Because GATT was as successful as it was at reducing the use of tariffs in world trade, nations began using AD and CVDs less as remedies and more as protectionist devices. In an attempt to impose some discipline on the use of AD and CVDs, trade ministers from the various members of the GATT met in Tokyo, Japan on September 14, 1973 to begin what would become known as the "Tokyo Round" of GATT Negotiations. These negotiations led to the completion of the Anti-dumping Code[177] and the Subsidies and Countervailing Duty Code,[178] which were signed in 1979. The Anti-dumping Code explicitly set out the procedures which a country must follow in conducting its dumping and injury investigations and in the applying of ADs.

The Subsidies and Countervailing Duty Code imposed strict procedural requirements on

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[175]See supra, Chapter III for an explanation of the distorting effects of subsidies.

[176]Supra, note 171 at 4.

[177]Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, entered into force January 1, 1980, reprinted in 26 GATT Basic Instruments and Selected Documents Supplement 171 (1980) ("BISD Supp.")

[178]Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, entered into force January 1, 1980, reprinted in 26 BISD Supp. 56 (1980).

countries when granting subsidies to domestic industries and when imposing CVDs on imported goods. However, the Contracting Parties were unable to reach agreement on many substantive issues surrounding subsidies.

There are two types of subsidies. "Export" subsidies are subsidies bestowed upon goods strictly for export.[179] The contracting parties agreed that CVDs could be imposed on all subsidies labelled export subsidies. Unfortunately, the Contracting Parties were unable to agree on a definition for the term "export subsidy". They did, however, agree on an illustrative list of subsidies which would qualify as export subsidies.

The second type of subsidy is called a domestic subsidy. The contracting parties agreed that domestic subsidies should not be countervailable, as domestic subsidies are subsidies which are granted to the production of a product, regardless of whether or not it is exported. They are considered to fulfil legitimate domestic purposes. For example, public education may be considered a benefit granted by governments that lower the costs of businesses by providing them with an educated workforce. Yet all contracting parties agree that public education is a legitimate function of government and therefore, the benefits of public education are not countervailable. Unfortunately, public education is one of the few points on which all contracting parties could agree. For the most part, the Contracting Parties were unable to agree on exactly what constitutes a legitimate domestic purpose and what does not. Because of the differing views on this issue, the Subsidies and Countervailing Duty Code, apart from the procedural requirements, is generally considered weak international law.[180]

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[179]Supra, note 36 at Chapter 1, pg. 3.

[180]Supra, note 171 at 5.

(i) AD/CVDs Under Canadian Law

Canada implemented the Tokyo Round codes through the Special Import Measures Act (SIMA).[181] SIMA provides both the substantive and procedural rules governing the imposition of ADs and CVDs in Canada. Under SIMA, an unfair trade practice action is brought by a representative of the majority of domestic producers, alleging either subsidization or dumping of an imported good and a corresponding material injury or threat of material injury. The Department of National Revenue, Customs and Excise (National Revenue), investigates the claims brought by the representative on the issue of whether dumping or subsidization has occurred. The Canadian International Trade Tribunal (CITT) investigates whether the dumping or subsidization has caused or is threatening to cause a material injury to a domestic industry.[182] The CITT is comprised of nine members appointed by the government to five year terms. If both National Revenue and the CITT make positive determinations, National Revenue imposes either an AD or a CVD. The importer can apply to the Federal Court for judicial review of the determination of either National Revenue or the CITT. Under the FTA, a system of binational panel review replaced the Federal Court for judicial review of determinations involving the United States.

(ii) AD/CVDs Under American Law

In the United States, the Tokyo Codes were implemented through the Trade Agreements

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[181]R.S.C. 1985, c. S-15.

[182]Alan M. Rugman and Samuel D. Porteous, "Canadian and U.S. Unfair Trade Laws and Administrative Structures" (1990) 15 North Carolina Journal of International Law and Commercial Regulation 67 at 70.

Act of 1979 (TAA).[183] The TAA created a similar process to the one established in Canada by SIMA. The process is initiated when a petition alleging an unfair trade practice against a foreign government is made by an American manufacturer to the Department of Commerce. After the initial petition is made, the first stage of the investigation is conducted by the International Trade Commission (ITC), an independent body appointed by the President that decides whether or not the import in question is causing or is threatening to cause a material injury to an American industry. If the ITC makes a positive determination, the ITA, an arm of the Department of Commerce, makes a preliminary determination of whether the import is being dumped or subsidized, and if so, to what extent. After the preliminary determination, the ITA conducts a more detailed investigation. Following the detailed investigation, the ITA makes a final determination of whether or not dumping or subsidization has occurred. If the ITA makes a positive determination, the ITC, after also conducting a detailed examination, makes a final determination on the issue of injury. If all these steps are positive, the ITA will impose either a CVD or an AD.[184] An importer has the option of applying to the Court of International Trade (CIT) for judicial review of any determination. Under the FTA, binational panels replace the CIT if Canada is involved.

(iii) AD/CVDs Under Mexican Law

When Mexico became a member of the GATT in 1986, it instituted a regime similar to that of Canada and the United States. Mexico's legislation governing ADs and CVDs consists

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[183]Trade Agreement Act of 1979 (93 Stat. 144) codified as amended in scattered sections of 19 U.S.C. (Supp V. 1981).

[184]N.M. Gretener, "Canada-U.S. Trade Update" (1992) 5 Canada-U.S. Business Law Review 333 at 339.

of the Foreign Trade Regulatory Act[185] and Regulations Against Unfair International Trade Practices.[186] Under this legislation, an AD or CVD investigation may be commenced by manufacturers or wholesalers whom either individually or as part of a group, produce 25 percent of domestic production of goods similar to the foreign goods allegedly dumped or subsidized. They do so by filing a complaint with the Secretariat of Commerce and Industrial Development (SECOFI), an arm of the budget and finance ministry.[187] Up to the time of the NAFTA, SECOFI conducted two preliminary investigations which could result in the assessment of a provisional duty.[188] Following an assessment, SECOFI would conduct a third and final investigation and then make a final determination which had to be based on a finding of either dumping or subsidization and a corresponding injury or threat of injury to domestic industry. Positive determinations could be appealed by importers first to SECOFI and later to the Federal Fiscal Tribunal.[189]

2. AD/CVDs and the NAFTA

Under the NAFTA, each Party retains its domestic AD/CVD laws and the right to

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[185]Diario Official, January 13, 1986.

[186]Diario Official, May 19, 1988.

[187]Neil Longley and Terry Wu, "Mexican and U.S. Antidumping and Countervailing Duty Policies: Issues in the Free Trade Negotiations" (1992) 23 Law and Policy in International Business 891 at 896.

[188]Under Annex 1904.15 of the NAFTA, Mexico is committed to amending its laws in an attempt to improve both the transparency and efficiency of the procedures governing the imposition of ADs and CVDs. Among the required amendments is the elimination of the provisional assessment.

[189]Supra, note 171 at 18.

administer them.[190] Those laws may be amended as long as the amending statute specifically states that the amendments are applicable to the Parties and provided that such amendments are consistent with both the provisions of GATT and the objects and purposes of the NAFTA.[191] If any of the Parties believe that the amendment is inconsistent with either the GATT or The NAFTA, they may request the formation of a binational panel. The Panel may determine whether there is an inconsistency and if so, it may make recommendations to remedy the inconsistency. Following the Panel's determination, both the Amending Party and the Complaining Party are required to consult to agree to a resolution of the matter. If a mutually satisfactory resolution cannot be reached, following the consultations, the Amending Party may enact comparable amendments or terminate the NAFTA in regard to the Amending Party.[192]

The heart of Chapter 19 is found in Article 1904. Pursuant to Article 1904, ad hoc panels may be established to review the final AD/CVD determination of the relevant investigating authority. The purpose of the review is to ensure that the determination was made in accordance with the AD/CVD law of the Importing Party.[193] The appropriate standard of review which each panel must apply is the standard which would be applied by the court of the Importing Party.[194] The formation of a panel may be initiated by any party, either on its own initiative, or on the request of any person entitled to judicial review under the law of the Importing Party.[195] Both the relevant investigating authority and any other person entitled to

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[190]Supra, note 2, Article 1902(1).

[191]Ibid. Article 1902(2).

[192]Ibid. Article 1903.

[193]Ibid. Article 1904(2).

[194]Ibid. Article 1904(3).

[195]Ibid. Article 1904(5).

judicial review of the law of the Domestic Party shall have the right to appear before the Panel and be represented by counsel.[196]

The Panel may either uphold the final determination or remand it to the investigating authority for action not inconsistent with the Panel's decision. After the investigating authority has taken action, following a remand, any Party to the action may request that the original panel review the action for consistency with its decision.[197] Any decision of a Panel is binding as between the Parties to the particular matter before the Panel.[198]

The Panels are to be comprised of five panelists. The Panels will be binational in character, in that they will be made up of people from the Importing Party and the complaining Party. There will be no representative of the third, uninvolved Party.

Each Party will appoint two panelists. The panelists will normally be chosen from a roster of 75 people which the Parties established on January 1, 1994.[199] Each Party has the right to four peremptory challenges to disqualify the other Party's appointment. The Party whose appointee is challenged must then select another panelist.

After four panelists have been selected, the Parties must agree upon a fifth panelist. If the Parties cannot reach agreement, the fifth panelist will be chosen by lot.[200] On appointment of a fifth panelist, the panelists must select a Chair by agreement of a majority of the panelists. If no agreement can be reached, the chair will be appointed by lot.[201] Decisions are to be

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[196]Ibid. Article 1904(7).

[197]Ibid. Article 1904(8).

[198]Ibid. Article 1904(9).

[199]Ibid. Annex 1901.2(2).

[200]Ibid. Annex 1901.2(3)

[201]Ibid. Annex 1902.2(4).

made by a majority vote. The Panel is to issue written reasons for its decision, together with any dissenting or concurring opinions of panelists.[202]

Where a Party, after a decision of the Panel, alleges that:

(a) a member of the Panel was guilty of gross misconduct, bias or a conflict of interest;
(b) the Panel seriously departed from a fundamental rule of procedure; or
(c) the Panel manifestly exceeded its powers, authority or jurisdiction; and

such activities materially affected the Panel's decision and threatens the integrity of the binational review process, that Party may invoke the extraordinary challenge procedure.[203]

Once a Party invokes the extraordinary challenge procedure, the Parties must establish an extraordinary challenge committee (ECC). The ECC is to be comprised of three judges or former judges from the Parties. The ECC members are to be chosen from a roster of 15 established by the Parties. Each Party is to appoint one member to the ECC. The third member is to be chosen by lot.[204]

Decisions of the ECC are binding on the Parties with respect to the particular matter. If the grounds set out above are established, the ECC may either vacate the original Panel decision or remand it to the original Panel for a decision not inconsistent with the ECC's decision. If the grounds are not established, the decision of the original Panel will stand.[205]

One major difference between the NAFTA and the FTA is that the NAFTA contains a safeguarding procedure for the binational panel review system whereas the FTA does not. Pursuant to Article 1905, if a Party alleges that another Party's domestic law interferes with the

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[202]Ibid. Annex 1901.2(5)

[203]Ibid. Article 1904(13).

[204]Ibid. Annex 1904.13(1).

[205]Ibid. Annex 1904.13(3).

binational review system, that Party may request consultations. Explicit examples of interfering with the review system include preventing the establishment of a Panel requested by the Complaining Party and denying a Panel's decision force and effect.[206]

If consultations fail to resolve the matter, the complaining Party may request the establishment of a special committee. The special committee is established in the same manner as an ECC.[207]

Where the special committee rules in favour of the complaining Party, the involved Parties shall once again commence consultations to resolve the dispute. If consultations fail to resolve the dispute, the complaining Party may either:

(a) suspend the operation of Article 1904 with respect to the offending Party; or
(b) suspend such benefits to the offending Party as may be appropriate.[208]

Following a suspension of benefits, the offending Party may request that the special committee reconvene to determine whether the suspension outlined in (b) above is excessive, or whether the offending Party has corrected the problems outlined in the decision of the special committee. If after reconvening, the special committee determines that the offending Party has corrected the problems outlined, the complaining Party is obliged to terminate its suspension of benefits to the offending Party.[209]

A further difference between the NAFTA and the FTA is that the NAFTA specifically obligates the Parties to regular consultation on their respective AD/CVD procedures. Under Article 1907 (1), the Parties agreed to consult annually on problems which may arise in the

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[206]See Article 1905(1) for a full list of acts which may invoke safeguarding procedures.

[207]Ibid. Article 1905(4) and (5).

[208]Ibid. Article 1905(8).

[209]Ibid. Article 1905(10).

implementation of Chapter 19. Moreover, the Parties agreed to consult on the potential for developing more effective rules for dealing with dumping and government subsidization.[210] The Parties also agreed that the relevant investigating authorities of each Party should meet annually to consult on issues surrounding the transparency of their internal procedures.[211]

Pursuant to Article 1908 (1), the Parties agreed to establish divisions within their sections of the Secretariat, created under Chapter 20, to facilitate the operation of Chapter 19. The secretaries of each section are to act as clerks for all panels and committees. They are to prepare a record of any proceedings in which their Party is involved.[212] They are to receive and file all briefs and documents.[213] They are to ensure that the involved Parties receive copies of all briefs and documents filed. Upon request, the secretaries may send public documents, including public portions of the record, to a Party not involved in any particular proceeding.[214]

In addition to the provisions of the NAFTA itself, the Parties have issued rules of procedure by which the panel proceedings will be conducted. Several rules have significant implications for the analysis herein. Such rules will be discussed in the course of the analysis.

3. Analysis

The purpose of this analysis is to assess the degree to which the NAFTA negotiators were

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[210]Ibid. Article 1907(2).

[211]Ibid. Article 1907(3).

[212]Ibid. Article 1908(2).

[213]Ibid. Article 1908(3).

[214]Ibid. Article 1908(4).

successful in creating a system that reflects the ideological or political goals of free trade. The overriding ideological goal of free trade is the enhancement of free market forces in the economy. The analysis will be carried out by assessing the provisions in terms of the following essential elements of a free market legal system: access, transparency, certainty and predictability, and enforcement.

A. Access

Access to the binational panel system is quite open. Article 1904(5) states that a Party may request panel review of a final determination either on its own initiative or on the request of a person entitled to judicial review under the law of the importing country. This may suggest that the governments of the three Parties will play a gatekeeper role, deciding which actions will go before a panel and which will not.

However, the NAFTA Rules of Procedure for Article 1904 Binational Panel Reviews[215] ("1904 Rules") suggest a different story. Rule 33(1) provides that any interested person may serve a Notice of Intent to Commence Judicial Review on the involved Secretariat and all other persons involved in the final determination proceedings. An interested person is defined in the 1904 Rules as a person who "pursuant to the laws of the country in which the final determination is made, would be entitled to appear and be represented in a judicial review". In both Canada[216] and the United States[217] any person with a direct interest in the AD/CVD

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[215]North American Free Trade Agreement Rules of Procedure for Article 1904 Binational Panel Reviews issued in February 1994 reprinted in 1 NAFTA Treaty Materials (Dobbs Ferry, N.Y.: Oceana Publications, 1994).

[216]Supra, note 181, s. 171 and s. 96.1

[217]Supra, note 187 at 903.

proceedings is entitled to apply for judicial review. Before the NAFTA, only domestic importers could apply for judicial review in Mexico. However, NAFTA commits Mexico to amending its laws to allow full access to judicial review proceedings.[218] Therefore, under the 1904 Rules, any private person involved in the AD/CVD proceedings will be able to serve a Notice of Intent to Commence Judicial Review.

Once the Notice of Intent to Commence Judicial Review has been served, the actual request for panel review is made by the government of the appropriate Party. However, the governments do not have the power of discretion in this matter. Rule 34 provides that the request is to be made in accordance with the relevant statues of the respective Parties. In each Party, the relevant statutes provide that the appropriate government department must request a panel review if asked to do so by an interested person.[219]

Once a request for judicial review has been made, any interested person alleging an error of either fact or law on the part of the investigating authority may file a Complaint. The Complaint must set forth the particulars of the allegations of error.[220] Additionally, the investigating authority and any other interested person who has not filed a Complaint, including persons in support of the final determination may file a Notice of Appearance.[221] Any interested person who has filed a Complaint or a Notice of Appearance has the right to make

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[218]Supra, note 2, Annex 1904.15(c).

[219]For example, s. 77.11(2) of SIMA provides as follows:

On a request made to the Canadian Secretary by any person who, but for section 77.12 would be entitled to apply under section 28 of the Federal Court Act or section 96.1 of this Act or to appeal under section 61 of this Act in respect of a definitive decision, the Minister shall request, in accordance with paragraph 4 of Article 1904 of the Free Trade Agreement the definitive decision be reviewed by a panel.

[220]Supra, note 215, Rule 39(1) and (2).

[221]Ibid. Rule 40(1).

representations to the Panel through the counsel of their choice and to participate fully in the proceedings.[222]

Therefore, any interested person has access to the binational panel review system.[223] Under the laws of the three Parties, this would include both domestic importers and foreign exporters. Private parties can therefore be assured of avenues of redress if they feel aggrieved by the application of a country's AD/CVD laws. As will be discussed below, access to avenues of redress was of particular concern to Canadian exporters during the FTA negotiations. The negotiators appear to have achieved assured access for interested parties. As this will put to rest the concerns of those worried over the lack of a means of refuting the unfair application of ADs/CVDs, this should encourage trade among the three countries. Consequently, in terms of access, the NAFTA negotiators appear to have been successful in converting ideology into law.

However, one area of concern is the ECC procedure. As noted above, Article 1904(13) does not provide participants with a route of appeal. It does, however, provide a means of addressing matters of procedural unfairness in the conduct of proceedings. The NAFTA Extraordinary Challenge Committee Rules (ECC Rules)[224] limit the right to initiate ECC proceedings to the governments of the three Parties. Moreover, the decision of whether to initiate such proceedings is completely discretionary. Rule 37(1) of the ECC Rules states: "Where a Party, in its discretion, files with the responsible secretary a Request for an Extraordinary Challenge Committee....." The private exporters or importers, those directly

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[222]Ibid.

[223]Ibid. Rule 67

[224]North American Free Trade Agreement Rules of Procedure for Article 1904 Extraordinary Challenge Committees issued in February, 1994 reprinted in 1 NAFTA Treaty Materials (Dobbs Ferry, N.Y.: Oceana Publications, 1994).

effected by the outcome of a panel decision have no right to commence ECC proceedings. They do, however, have the right to file a Notice of Appearance once ECC proceedings have been commenced.[225] Once they have filed a Notice of Appearance, they have the right to participate fully in the proceedings.[226]

However, by not possessing the right of initiation, private parties are left exposed to the whims of their governments. Governments, for political reasons, may be reluctant to commence ECC proceedings. Private parties who find themselves unable to address issues of unfairness in the binational panel system due to the uncertainty of politics, may become discouraged from using the system. Therefore, the NAFTA negotiators were not successful in converting ideology into policy in the area of access to the ECC procedure.

The obvious reason for not providing private parties the right to commence ECC proceedings is that the negotiators of the NAFTA wanted the panel review system to remain speedy and inexpensive.[227] However, the decision of how long proceedings should take, and how expensive they should be, should be left to those who must bear the costs, the importers and exporters themselves. If they feel that the costs of further proceedings are justified, they should have the right to direct access to the ECC procedure.

B. Transparency

As in the area of access, the Rules indicate a more liberal approach to transparency than do the NAFTA provisions. For example, Article 1908, which outlines the role of the

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[225]Ibid. Rule 40.

[226]Ibid. Rule 42.

[227]Supra, note 14 at 64.

Secretariat, suggests that documents of the proceedings will only be made available to the Parties.[228] No mention is made of an individual's right to obtain documents.

However, Rule 8 of the 1904 Rules states that each national section of the Secretariat shall be open to the public between 9:00 A.M. and 5:00 P.M. each work day of the week. Furthermore, each Secretariat is to maintain a file on each panel review which contains all documents filed in the course of that review.[229] Any person is to be permitted access to the information in each file unless such information is classified as proprietary or privileged information.[230]

Proprietary information is information over which businesses claim confidentiality for business purposes.[231] An example of information over which a business could claim confidentiality is trade secrets. Information classified as proprietary information may only be released to those individuals who have applied for and have been granted a Proprietary Information Access Order.[232]

Privileged information is essentially information which is granted the right of privilege under the common law.[233] Privileged information may only be disclosed where a Panel believes that access to such information is necessary in their deliberations. Where a Panel orders disclosure of privileged information, such information may only be disclosed to persons

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[228]See Article 1908(4).

[229]Supra, note 215, Rule 10

[230]Ibid. Rule 16.

[231]Ibid. Rule 3.

[232]Ibid. Part IV.

[233]Ibid. Rule 3.

whom the Panel specifically names.[234]

There may be several legitimate reasons why businesses or government agencies may not want certain information disclosed. Businesses may be discouraged from using the DRMs provided under the NAFTA if there were not mechanisms to ensure the protection of such information. The NAFTA Rules provide a reasonable means of addressing the concerns of business while ensuring that panels can make reasonable decisions based on the totality of the evidence.

Another element of the 1904 mechanism by which transparency is ensured is that oral proceedings are open to the public. Only those parts of the proceedings in which proprietary or privileged information is presented are to be held in camera.[235]

Furthermore, the 1904 Rules provides that every panel decision must be written and accompanied by reasons. The Secretariat of each section is required to publish those reasons.[236]

The rules by which ECC proceedings are to be governed contain similar provisions in regard to transparency. The one exception is Rule 41 under which a panelist against whom misconduct, bias, or conflict of interest is alleged, may apply to have the ECC proceedings held in camera. This is a reasonable exception to the provisions that allow transparency. The panel review system is dependent upon qualified individuals willing to lend their expertise to assist in the resolution of disputes. Some qualified individuals may be discouraged from agreeing to provide this service if they were open to public attacks on their characters by disgruntled parties.

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[234]Ibid. Rules 52-54.

[235]Ibid. Rule 69.

[236]Ibid. Rules 70-72.

The Rule 41 exception to transparency is, therefore, necessary to ensure the proper running of the panel review system.

Accordingly, on the issue of transparency, Chapter 19 provides adequate protection of private interests. Provisions have been made to ensure access to the proceedings, the pleadings generated by the proceedings and panel decisions. Where confidentiality is important to protect business interests, provisions have been included that ensure non disclosure. Transparency should inspire confidence in the system. Confidence in the mechanisms designed to address grievances should encourage business activity. On the issue of transparency therefore, the NAFTA negotiators have successfully converted ideology into policy.

C. Predictability

An understanding of the importance of this element requires an understanding of how Chapter 19 came into being. Chapter 19 of the NAFTA replicates Chapter 19 of the FTA, with only a few changes.[237] The history of Chapter 19 of the NAFTA, therefore, is really the history of the same chapter of the FTA.

Chapter 19 of the FTA stemmed from a Canadian concern that the Americans were using the provisions of the TAA, designed to implement the terms of the Tokyo Round codes as a form of "administered protectionism."[238] Between 1985 and 1987, the United States imposed 92 percent of all CVDs in the world.[239] Between 1979, when the TAA was enacted and 1987 when the FTA was being negotiated, 55% of all CVD actions against Canada were launched by

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[237]Supra, note 18 at 708.

[238]Alan M. Rugman, "A Canadian Perspective on U.S. Administered Protection and the Free Trade Agreement" (1988) 40 Maine Law Review 306.

[239]Supra, 182 at 71.

the Unites States. This represented $4.2 CDN Billion of Canadian exports in 1986.[240] By contrast, Canada only took one CVD action against the United States in the same period. The action affected $9.0 US Million in exports from the United States.[241]

In the AD arena, Canada initiated more than twice as many actions against the United States than did the Americans against Canada. The Americans took nine actions against Canada, representing $295 CDN million in trade. Canada took 23 actions against the Americans representing $375 US million of imports from the Unites States.[242]

With obvious reason, therefore, Canadian business became very concerned over the American use of its CVD laws. Canadians came to view the use of these laws as an attack on the Canadian system of internal transfer payments from the Federal Government to the regions, heightening concerns over the security of access to their largest market.

The result was a very unstable trading environment in North America. Canadians were confused by the fact that while the Reagan administration spoke of the virtues of free trade with great rhetorical flourish, both the ITA and the ITC were increasingly coming under the influence of a protectionist Congress. As the political influence of Congress grew, the decisions of both the ITC and the ITA became increasingly unpredictable. This apparent contradiction in the behaviour of the American government caused George Will to comment that in American politics, "free trade ranks just below Christianity and above jogging on the lists of those things constantly praised but only sporadically practised."[243]

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[240]Supra, note 238 at 317.

[241]Ibid.

[242]Ibid.

[243]George Will as quoted in William C. Graham Q.C., "Dispute Resolution Involving States" (1992) 37 McGill Law Journal 544 at 551.

The unpredictability of the Canada - United States trading relationship was no more apparent than during Round I of the dispute over softwood lumber.[244] Section 771(5)(B) of the TAA contains the American test for determining whether a subsidy should be classified as domestic and therefore non-countervailable. The section defines a domestic subsidy as a benefit "provided by [government action] to a specific enterprise or industry or group of enterprises or industries." In American trade law, this has given rise to the specificity test. Round I of the softwood lumber dispute showed Canadians how far the specificity test could be stretched to ensure the protection of American industry.[245]

The softwood lumber dispute between Canada and the United States originally began in 1982 when the U.S. Department of Commerce began a CVD investigation into softwood lumber imported from Canada. The investigation was commenced at the behest of a coalition representing American lumber producers. The coalition complained that both Federal and Provincial "stumpage programs" in Canada amounted to a subsidy of Canadian softwood lumber. "Stumpage programs" allowed Canadian producers to acquire the right to cut and remove timber from Crown lands. The Americans complained that the rates at which the various Canadian governments sold those rights were artificially low.[246]

The ITA completed its final investigation on May 31, 1983 when it issued a report which found that the Canadian stumpage programs did not constitute a countervailable subsidy. The

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[244]The Softwood lumber dispute between Canada and the United States flared up again after the FTA came into effect. For the purposes of this paper, Round I of the dispute refers to the pre-FTA period of the dispute.

[245]Alan M. Rugman and Samuel D. Porteous, "The Softwood Lumber Decision of 1986: Broadening the Nature of the U.S. Administered Protection" (1988) 2 Review of International Business Law 35 at 36.

[246]See In the Matter of Softwood Lumber from Canada U.S.A.-92-1904-01.

finding was based upon the ITA's determination that the stumpage programs were not provided to a specific group of industries.[247] This finding was premised on the following three factors:[248]

1. The stumpage programs were "available within Canada on similar terms regardless of the industry or enterprise of the recipient";

2. Any limitations on the type of industry that used stumpage programs were a result of the "inherent characteristics" of softwood lumber and not due to any activities of any of the governments in question";

3. The stumpage programs were used by four separate industries within Canada. Those industries were said to include:

   (a) the lumber and wood products industry;
   (b) the veneer, plywood and building boards industries;
   (c) the pulp and paper industries;
   (d) the furniture manufacturing industries.

Because of these three findings, the ITA found that the stumpage programs were generally available and therefore, they were not specific and not countervailable. However, as protectionist sentiment in the United States grew, the ITA's application of the specificity test began to change. By 1986 it had changed sufficiently, that the American lumber industry decided to initiate a second investigation into softwood lumber.

The change in the application of the specificity test can be traced[249] to a decision of the CIT in Cabot Corp v. The United States.[250] In that case, which was concerned with the Mexican Government's provision of carbon blackstock and natural gas to Mexican producers of

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[247]Supra, note 245 at 41.

[248]Ibid.

[249]Ibid. at 44

[250]620 F. Supp. 722 (1985).

black carbon,[251] the CIT held that the proper application of the specificity rule involves not only an examination of de jure general availability but also an examination of de facto general availability. In other words, the ITA must look at whether the benefit was in fact being targeted to a specific industry. It was not enough for the program to simply appear to be generally available on its face.

In its preliminary determination[252] on softwood lumber from Canada, the ITA adopted the approach taken by the CIT in Cabot for the first time.[253] In doing so, the ITA completely reversed the position it took during the 1983 softwood lumber investigations. The ITA listed the following as factors to be examined in the determination of whether a subsidy was in fact specifically bestowed:[254]

1. The extent to which a foreign government acts to limit the availability of a program;
2. The number of enterprises, industries, or group thereof which actually use the program including an examination of any disproportionate or dominant user;
3. The extent to which the government exercises discretion in making the program available.

In applying the above factors, the ITA found that the governments in question exercised considerable discretion in the allocation of stumpage rights. Moreover, the ITA found that the exercise of this discretion benefitted a specific group of industries. The ITA further found that the softwood lumber industry had greater access to the stumpage programs than it would have had if governments had not exercised such considerable discretion. On this basis, the ITA found

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[251]Supra, note 245 at 44.

[252]The ITA did not make a final determination. After the ITA's preliminary determination, the Canadian Government negotiated the Memorandum of Understanding with the United States whereby the Canadian Government agreed to impose a 15 percent export tax on softwood lumber on the condition that the ITA end its investigation.

[253]Supra, note 245 at 44.

[254]Ibid. at 48.

the stumpage programs to be specific and therefore they could not be classified as a domestic subsidy.

While Canada was learning the lessons of American trade law, it was also negotiating the FTA with the American Government. The Canadian Government hoped to negotiate rules on subsidization and dumping which would allow Canada to be exempted from the American AD/CVD laws. However, as negotiations began it soon became apparent that the two countries had two completely different views on the issue of subsidization. The United States viewed Canada's system of transfer payments to the regions as subsidization which distorted the theory of comparative advantage. The Canadians, on the other hand, viewed transfer payments as a necessary means of redistributing wealth within Canada.[255] The Americans refused to exempt Canada from its AD/CVD laws unless Canada gave up its regional development programs. Canada refused to enter into an agreement with the Americans without some form of protection from America's AD/CVD laws. An impasse had been reached.

To complicate matters, both governments imposed strict time deadlines on their respective negotiating teams. Those deadlines did not allow the parties time to resolve this impasse. The result was that in order to reach an agreement the parties compromised by including Chapter 19 in the FTA. Lisa B. Koteen of the United States Department of Commerce described the situation as follows:[256]

> Essentially, we ran out of time in the negotiations. Canada would not relinquish its subsidies and the U.S. was not willing to derogate its AD/CVD laws without such an agreement. So under 1904, the parties agreed to a binational panel review process and under 1907, they established working groups to continue discussion in these areas.

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[255]Supra, note 164 at 361-362.

[256]Ibid. at 262.

Under Article 1907, the working groups were to meet over a five to seven year period to establish a new regime to address problems of dumping and subsidization. Failure to agree to implement a new regime within the five to seven year period would entitle either party to terminate the agreement on six months notice.[257] While the new regime was being negotiated, the Chapter 19 mechanism was to be implemented to address Canadian concerns over the lack of predictability in U.S. trade law.

Chapter 19, therefore, was really a stop gap measure. It was negotiated as a means to an end rather than an end in itself. It allowed Canadians some measure of control over the American process while at the same time allowing Americans protection from what they viewed as the distorting effects of Canadian subsidization. It also committed the two sides to working together to build a stable, predictable trading environment in the future, through the negotiation of a new set of rules governing AD/CVD laws.

Unfortunately, the working groups were no more successful in resolving the impasse than the original negotiators of the FTA had been. Consequently, the two sides decided to postpone bilateral talks in the hope that the Uruguay Round of GATT would produce a solution.[258]

However, the other part of the compromise, the DRM, has met with much greater success. Most jurists are of the opinion that the Chapter 19 DRM has worked effectively. Professor Lowenfeld, in an article which appeared in the McGill Law Journal wrote:[259]

Overall, the process, in my judgment and in that of most participants and

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[257]Canada, The Canada-U.S. Free Trade Agreement (Ottawa: Ministry of External Affairs, 1987), Article 1906.

[258]Supra, note 171 at 10.

[259]Supra, note 12 at 599.

> observers on both sides of the border, has been quite successful. Hard fought disputes have been resolved in much less time than would have been taken if appeals had been submitted to the courts in each country; sloppy findings by administrative agencies have been corrected; and the joint participation of public officials and private parties in a single international proceeding has worked better than could have been expected.

Given this kind of procedural success, the NAFTA negotiators decided to incorporate Chapter 19 of the FTA into the NAFTA. One of the few changes made to Chapter 19 under the NAFTA is the elimination of the working group provision. This has been replaced by annual consultations on issues of dumping and subsidization under Article 1907. But under this Article none of the Parties have committed themselves to reaching agreement on these issues. The DRM set forth in Chapter 19 has become a permanent means of dealing with differences over dumping and subsidization.

But has it led to a more predictable trading environment in North America? Canada entered into the FTA negotiations with the Americans because Canadian business was concerned over the lack of secure, predictable access to the United States. Has Chapter 19 alleviated this concern or has it simply changed the means of addressing it?

Following is a review of the cases in which binational panels have dealt with one of the key issues in the debate over subsidization, specificity. Only those parts of the cases which considered the specificity test are reviewed. The purpose of this review is to determine whether Chapter 19 is currently capable of producing a predictable trading regime in North America. The lack of a regime that will allow businesses to make plans with some degree of certainty will no doubt discourage business activity in North America. The United States has not yet challenged a Canadian decision on CVDs. Consequently, the cases which follow deal only with the issue of specificity as it is applied under American law.

(i) The Pork Case - Round I

The first case in which a binational panel examined the specificity test was In the Matter of Fresh, Chilled and Frozen Pork from Canada.[260] This matter was initially commenced by an American pork producers group, the National Pork Producers Council, who filed a petition with the Department of Commerce on January 4, 1989. The petition sought countervailing duties against fresh, chilled and frozen pork from Canada. The ITA found that 18 federal or provincial programs provided countervailable benefits to Canadian producers of fresh, chilled or frozen pork. Four Canadian governments challenged this determination in regard to 7 programs. One of the key issues before the panel was the ITA's application of the specificity test.

This issue was first examined in the context of the Tripartite Program (TP). In 1985, the Canadian Government amended the Agriculture Stabilization Act (ASA)[261] to create the TP. The ASA provided price stabilization to certain listed commodities. Because the ASA listed particular products that could benefit from the program the Department of Commerce made a determination in 1985 that the ASA provided benefits to a specific industry. The TP was designed to get around the determination. The TP authorized the Government to enter into agreements with the provinces and producers for the price stabilization of any agricultural product. The TP put the onus on the various producers to request the benefit.[262] At the time of the ITA investigation, nine tripartite agreements had been signed, including one with hog producers. Three producers had requested agreements but had been turned down.

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[260](1990), 4 T.T.R. 64.

[261]R.S.C. 1985, c. A.8.

[262]Supra, note 54 at 98.

In examining the issue of specificity, the ITA employed a three prong test. First it examined whether the program was specific on its face. This is really a test of whether a program is de jure foreign specific. Secondly, it examined the actual number of producers that actually used the program, with particular attention to disproportionate or dominant users. Thirdly, the ITA examined the extent to and manner in which the foreign government exercised discretion in making the program available.

The ITA held that the TP was not specific on its face. However, the ITA held that the TP was specific on the basis that only nine producers actually benefitted from the program. In regard to the third prong of the test, the ITA held that the Federal Government exercised a high degree of discretion in determining who received benefits under the program. Accordingly, the TP was held to benefit a specific group of industries and was therefore countervailable.

The Panel remanded this determination to the ITA on the basis that the ITA did not apply a proper test of specificity.[263] The Panel agreed with the ITA that the TP was not specific on its face. However, the Panel said that specificity cannot be determined simply by an analysis of the number of industries that receive a particular benefit. The Panel said that "specificity is not demonstrated simply because not all industries applied for aid or received aid, or because some decisions regarding eligibility appear random or arbitrary".[264] In order to find specificity, the ITA must find evidence that indicates that the exporting government intentionally limited benefits to a definable group of industries. The Panel held that the evidence simply did not support such a finding. The Panel therefore remanded the decision to the ITA with instructions to develop a test to determine whether "the number of products or enterprises aided

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[263]Ibid., at 123.

[264]Ibid., at 104.

is disproportionately small in terms of the predictable number that would be expected to apply in light of the criteria for aid, the availability of alternative types of aid and the relevant economic conditions of the covered industries".[265]

In regard to the third prong of the test, the Panel held that the ITA failed to show that the Canadian Government exercised its discretion to favour a definable group of industries. Accordingly, the Panel instructed the ITA on remand to determine whether the benefits received by the hog industry were disproportionately higher than for any other agricultural industry, or any other definable group for reasons that could not be explained by economic and other conditions.

The Panel went on to apply the reasoning set out above to the other six programs which the Canadian complainants had argued were not specific. Upon consideration of the evidence, the Panel remanded the decisions of the ITA in regard to four of these programs. The decisions of the ITA in regard to two of these programs were affirmed on the evidence contained in the record.

(ii) The Pork Case - Round II

On remand, the ITA again found that both the TP and a program administered by the Quebec Government, the Farm Income Stabilization Insurance Program ("FISI"), were not generally available and therefore countervailable. Again these decisions were challenged. The Panel delivered its second decision on the issue of pork subsidization on March 8, 1991.[266]

In regard to the TP, the Panel reiterated its previous ruling that a program cannot be

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[265]Ibid., at 105.

[266]In The Matter of Fresh, Chilled or Frozen Pork From Canada, (1991) 6 T.T.R. 52.

countervailable solely on the basis that it benefits a small number of recipients. Moreover, the Panel remained dissatisfied with the failure of the ITA to set forth a clear rule for determining when a small number of beneficiaries might prove fatal.

However, the Panel did decide to affirm the ITA's determination on the basis that in light of the deference it is required to afford the ITA, the ITA had provided sufficient evidence to support its determination. The Panel said that the evidence on remand showed that the total number of possible participants in the TP was well over one hundred. The fact that only ninety of those actually participated in the program raised a prima facie indication of de facto specific subsidy.[267] The Panel went on to say that "[l]egislatures, like persons, may be legally presumed to intend the foreseeable consequences of their actions".[268] The disproportionate benefit to hog producers was held to have been a foreseeable event.

The Panel did say that a foreign government could rebut a purely statistical analysis by showing that disproportionate benefits to a certain industry were due to unforeseeable economic trends. As the Canadian Government could not do this, the TP was held to be a specific subsidy.

In regard to FISI, the Panel held that the ITA had failed to bring forth additional information on remand to show that the "fewness" of beneficiaries indicated an intent on the part of the Quebec Government to limit the program. In the absence of additional information, the Panel was left with the purely statistical analysis which it had already been held to be unsatisfactory. The ITA's decision on FISI was therefore remanded.

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[267]Ibid. at 61.

[268]Ibid.

(iii) Live Swine - Round I

On May 19, 1993, a binational panel issued its report which considered the fourth administrative review by the ITA of a CVD order against live swine from Canada.[269] A CVD order against live swine from Canada was originally issued by the ITA in August, 1985. Each year following the order, the ITA initiated and conducted an administrative review of that order. The fourth administrative review covered the period between April 1, 1988 to March 1, 1989. During the fourth administrative review, the ITA investigated forty-one Canadian programs. Of these, nine were found to be countervailable. The Canadian Pork Council and the Canadian Government (the "complainants") challenged the ITA's affirmative determination in regard to seven of these programs. As in the Pork Decisions,[270] the issue of specificity was examined in the context of the TP.

The ITA listed the following as the factors it considered in determining that the TP was de facto specific:

(a) whether the law of the foreign government acts to limit the availability of a program;
(b) the number of industries or groups thereof that actually use the program;
(c) whether there are dominant users of a program, or whether certain industries or groups thereof receive disproportionately large benefits under the program;
(d) the extent to which a government exercises discretion in conferring benefits under a program.

These factors were originally enunciated by the ITA in its 1986 preliminary determination on softwood lumber. The U.S. Department of Commerce later codified these factors at 5.355.43(b) of their Proposed Regulations (the "Proposed Regulations").

The complainants argued that this was not the correct legal standard for determining specificity. They argued that the correct test was whether the benefits are intentionally targeted

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[269]In the Matter of Live Swine from Canada, Q.L. [1992] F.T.A.D. No. 2.

[270]Supra.

at swine. The complainants relied on the Panel decision in Pork I that held that the American CVD law required "convincing circumstantial evidence that the program..... has been targeted at hogs".[271] However, the Panel rejected this assertion, noting that in Pork II, the Panel suggested that "intent to target or to limit benefits may not be necessary and might be replaced by a slightly looser evidentiary surrogate, such as predictability of limited usefulness or disproportionality of benefits".[272] Taken together, the Panel held that Pork I and Pork II are not persuasive authority. Accordingly, the Panel upheld the standard articulated by the ITA and codified in the Proposed Regulations as the appropriate standard for determining whether or not a subsidy is de facto specific.

However, the Panel remanded the decision of the ITA based upon the ITA's application of this standard. Specifically, the Panel said that the ITA placed undue emphasis on the fact that the TP actually benefitted only nine groups of industries out of a potential universe of one hundred. The Panel said that a ruling of de facto specificity requires a consideration of all of the factors set out above. Accordingly, the Panel asked the ITA to consider the following questions:

(a) In examining whether the law limited the number of recipients, is it relevant to consider that the number of recipients has increased during each year of the programs existence?
(b) In considering whether the hog industry benefitted disproportionately from the program, is it appropriate to consider the effect of other programs that may be in effect to aid other industries?
(c) In considering the extent to which government discretion limited availability of the TP, is it necessary to find evidence that a government actually limited availability, or, is it enough to find merely that the potential exists?

(iv) The Panel's Decision on Remand

The ITA released its second determination on remand on July 20, 1992. Again, the ITA

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[271]Supra, note 63 at 34.

[272]Ibid., at 35.

held that the TP benefitted a specific industry on the basis that only a small number of beneficiaries actually participated in the program. Again, the complainants brought the decision before the Panel for review. The Panel released its decision on October 30, 1992.[273]

This time the Panel remanded the decision of the ITA with specific instructions that the ITA find that the TP was not a countervailable subsidy during the period under review. The Panel reiterated its assertion that in order to make a finding of de facto specificity, it was necessary for the ITA to consider not only the number of beneficiaries, but also the issues of dominant use, disproportionality and government discretion. The Panel said "[ITA's] fundamental reliance on the finding of a "small" number of beneficiaries constitute a purely mathematical analysis. It is not in accordance with law. As a result, the ITA's decision could not stand.

(v) The Decision of the Extraordinary Challenge Committee

The Office of the United States Trade Representative challenged the Panel's decision on remand before the Extraordinary Challenge Committee ("ECC"). The basis of the challenge was that the Panel exceeded its jurisdiction by overturning the ITA's specificity determination and supplanting it with "an appropriate test" decided by the Panel.

The ECC upheld the Panel's decision,[274] on the basis that the Panel had properly articulated and applied the standard of review mandated by American law. However, the ECC did appear to cast doubt upon the specificity test articulated by the Panel. In discussing this test, the ECC said, "although we need not and will not reach a decision on the merits of these

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[273]In the Matter of Live Swine from Canada, Q.L. [1992] F.T.A.D. No. 8.

[274]In the Matter of Live Swine from Canada, Q.L. [1993] F.T.A.D. No. 4.

conclusions, the Panel may have erred".[275]

(vi) Live Swine II

The Panel's decision, released August 26, 1992, concerned a review of the ITA's fifth administrative review of the CVD Order imposed on live swine from Canada in August 1985.[276] The fifth review concerned the period between April 1, 1989 and March 31, 1990. As in the fourth review, the ITA found that the TP was de facto specific and was therefore countervailable.

The determination of de facto specificity was based upon the following three factors:

(a) During the Review Period, the TP covered only eleven beneficiaries from a potential universe of one hundred.
(b) Swine producers were the dominant users of the program, accounting for 81 percent of total payouts made during the review period.
(c) No explicit government criteria existed for evaluating requests by producer groups for acceptance into the TP.[277]

The complainants[278] challenged the ITA's positive determination on two grounds which are relevant for the purposes of this paper. First, they argued that the ITA did not apply the proper test of specificity as it did not make a finding on the issue of targeting. Secondly, the complainants argued that the test which the ITA did apply was applied incorrectly.

In regard to the complainants first argument, the Panel held that American law did not require a finding that the foreign government in question intended to target a specific industry.

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[275]Ibid., at 20.

[276]In the Matter of Live Swine from Canada, Q.L. [1992] F.T.A.D. No. 6.

[277]Ibid. at 20.

[278]The complainants who participated in Swine I also were the complainants in Swine II.

In making this finding, the Panel adopted the reasoning of the Panel in Swine I.[279]

The complainants second argument focused upon the ITA's application of the test it utilized. The test utilized by the ITA was the same test found in the Proposed Regulations.[280] The complainants raised the following four issues in regard to the application of that test:

(a) Should the ITA consider the availability of other government programs?
(b) Did Commerce use an impermissible statistical analysis in making its determination?
(c) Should the ITA take notice of the trend indicating that the TP is expanding the number of its beneficiaries as the program becomes older?
(d) In order to satisfy the government discretion criterion, must the ITA find actual evidence of discretion being used to limit availability.

In regard to the first issue, the Panel held that the ITA need only consider the availability of other programs if they are integrally linked to the TP. However, the ITA need not make a determination regarding integral linkage unless it is raised by the parties. As the complainants did not raise this before the ITA, the Panel upheld the ITA on this point.

In regard to the second issue, the Panel stated that the test of de facto specificity required an analysis of the number of industries benefitting from the TP. However, the Panel stated that specificity could not be determined merely on the basis of that statistical analysis. The Panel was unable to discern the extent to which the ITA relied on other factors in making its positive determination. The Panel therefore remanded the decision of the ITA asking for clarification.

In regard to the third issue, the Panel agreed with the complainants that the ITA must consider evidence indicating trends of increasing use of the TP. As the ITA had not taken evidence of trends into consideration in making its determination, the Panel remanded.

Fourthly, the Panel agreed, with the complainants that the issue of whether it was

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[279]Supra, note 63.

[280]Supra.

necessary to find evidence of actual use of governmental discretion was an important issue. However, the Panel said that it was unable to decide this issue until it received a better explanation of the ITA's position on this issue. Consequently, the Panel remanded on this issue as well.

(vii) The Panel's Decision on Remand

On October 30, 1992, the ITA made its final redetermination on remand. The ITA redetermined that the TP conferred subsidies upon specific industries or groups of industries between April 1, 1989 and March 31, 1990. The complainants challenged this redetermination before the Panel. The Panel released its decision on remand on June 11, 1993.[281]

On remand, the Panel upheld the ITA's redetermination that the TP conferred benefits on a specific group of industries. The Panel upheld the redetermination on the basis that on remand, the ITA had found evidence to sufficiently support a conclusion that the number of users of the TP was small relative to the potential universe of users.[282] Moreover, the Panel found that the ITA had found sufficient evidence to support a conclusion that the hog industry benefitted disproportionately from the TP.[283]

However, the Panel also found that the evidence on remand could not support a conclusion that the Canadian Government exercised discretion to limit the availability of the

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[281]In the Matter of Live Swine from Canada, Q.L. [1993] F.T.A.D. No. 8.

[282]The Panel found that the record did not support a finding that there were one hundred potential beneficiaries. However, the Panel did find that the record supported a finding of forty-five potential beneficiaries. Based on this figure, the Panel found that less than twenty percent of potential beneficiaries actually benefitted from the program.

[283]The Panel found that 81 percent of all TP benefits went to hog producers and that hog producers received 72 percent of all TP payments to the date of the Panel decision.

program. The Panel could not even find evidence to support a conclusion that the Canadian Government had the ability to limit availability through the exercise of discretion.[284] This, however, did not cause the Panel to remand its decision. The Panel said that the ITA's findings that the TP benefitted a small number of producers and that hog producers benefitted disproportionately from the TP were enough to support the ITA's redetermination.

This caused the complainants to raise an important issue which the Panel failed to address satisfactorily. The complainants argued that in order to find de facto specificity the ITA was required to evaluate all of the factors enumerated in the Proposed Regulations. The ITA countered that the presence of only one of the factors was enough to find de facto specificity. The Panel declined to resolve this issue. The Panel said:

> The Panel ... has concluded that [the ITA] is required to consider each of the factors specified in the Proposed Regulations, in addition to any other factors that may be relevant in a particular case. However, the Panel need not and has not decided whether a finding on more than one factor is necessary to support the conclusion that a given program is de facto specific. We address only [ITA's] findings as to the specificity of the programs at issue on this administrative record.[285]

But the Panel based its decision only on the issues on which the ITA had made determination supported by substantial evidence, those of the number of actual beneficiaries relative to potential beneficiaries and disproportionality. However, there were other issues on the administrative record which were ignored. Those issues included the exercise of governmental discretion, the existence of comparable governmental programs and the existence of a trend indicating that the number of beneficiaries of the TP increased over time.

So, while the Panel said that each of the four factors must be evaluated, it failed to say

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[284]Supra, note 75 at 35.

[285]For the purposes of this paper, Softwood Lumber II refers to the phase of the Softwood Lumber dispute which began after the FTA came into force.

how many factors must exist in order to support a finding of de facto specificity. It simply found the existence of two factors and ignored all others without providing reasonable explanations for doing so.

(viii) Softwood Lumber II

On October 4, 1991, Canada exercised its right to terminate the Memorandum of Understanding[286] between it and the United States. On October 31, 1991, the ITA self-initiated a third CVD investigation into softwood lumber imports from Canada. This was unusual as ITA investigations are usually initiated by domestic producer groups. However, the ITA determined that Canada's unilateral termination of the Memorandum of Understanding constituted "special circumstances" sufficient for it to self-initiate a CVD investigation.[287]

The ITA released its Final Determination in this matter on May 28, 1992. The ITA determined that the Canadian stumpage programs were specific to the "primary timber processing industries" and assessed a CVD on softwood lumber from Canada at a weighted average rate of 6.51 percent.[288]

This specificity determination was challenged before a binational Panel by various Canadian governments together with several lumber producer groups ("the complainants").[289]

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[286]The Memorandum of Understanding between Canada and the United States resolved Softwood Lumber I. Please see Supra, note 35.

[287]In the Matter of Certain Softwood Lumber Products from Canada, Q.L. [1993] F.T.A.D. No. 5 at 21.

[288]Ibid., at 33.

[289]Specifically, the ITA's final determination was challenged by the Government of Canada, the provincial governments of Alberta, British Columbia, Manitoba, Ontario, Quebec, and Saskatchewan, the territorial governments of the Yukon and the Northwest Territories, the Canadian Forest Industries Council, the Quebec Lumber Manufacturers'

The Panel released its report on May 6, 1993.[290]

The complainants challenged the specificity determination on two grounds. First, the complainants argued that the ITA had based its determination solely upon their finding that only a small number of producers benefitted from the stumpage programs and that making a determination on the basis of one factor was contrary to law. Secondly, the complainants argued that the ITA had abandoned the "inherent characteristics test" which it applied during its 1983 investigation with no reasonable explanation.

In response to the first argument, the ITA countered that it is only required to consider all four factors in the Proposed Regulations before finding that a program is **not** specific. It argued that it is allowed to find specificity upon an affirmative determination of any one of those factors. Alternatively, the ITA maintained that if it is required to consider all four factors, it did so but determined that the limited number of users required a finding of specificity.

The Panel agreed with the complainants that the ITA based its finding of de facto specificity solely on the limited number of users of the stumpage programs. The Panel then rejected the ITA's argument that a finding of de facto specificity could be based solely upon an affirmative determination on one of the four factors set out in the Proposed Regulations. The Panel said:

> As a preliminary matter, this Panel finds that Commerce [the ITA] is required as a matter of law to consider all relevant evidence in determining whether the actual recipients of a particular program form a "specific group of industries", and cannot base its decision solely on evidence of the number of industries represented by the program recipients.[291]

Association, and the Canadian Lumbermans' Association.

[290]In the Matter of Certain Softwood Lumber Products from Canada, Q.L. [1993] F.T.A.D. No. 5.

[291]Ibid., at 33.

And later, the Panel said:

> We find that it is simply not reasonable for Commerce to posit, as it has in this case, that it is not required to consider evidence relating to all four of the factors listed in the Proposed Regulations, as well as other relevant record evidence, before coming to a conclusion on specificity.

The Panel did however say that once the ITA has given reasonable consideration to each of the four factors contained in the Proposed Regulation, it was within the discretion of the ITA to determine the amount of weight it will assign to each factor. In the Panel's view, however, it was unreasonable to assign great weight to one factor without full consideration of all four factors. The ITA's determination of specificity was therefore remanded with instructions that the ITA expressly evaluate and weigh each of the four factors enumerated in the Proposed Regulations, as well as any other factor relevant to de facto specificity.

The complainants second argument concerned whether the "inherent characteristics test" is relevant to the issue of de facto specificity. In its 1983 investigation, the ITA made a negative determination on specificity on the basis that the availability of the stumpage programs was limited by the "inherent characteristics" of the commodity in question. The number of users of the program was small because the potential universe of producers was small. The ITA argued that changes in American law since 1983 had rendered the "inherent characteristic test" irrelevant. It argued that if it applied the test, it would be impossible to find any benefit granted to natural resource producers specific.

The Panel found that American law had changed since 1983 and that the "inherent characteristics test" had been rejected as a required test. However, the Panel also held that it was not a completely irrelevant consideration. The Panel argued that as government discretion is a required test, any possible explanation for a limited number of users of a program, apart from the exercise of government discretion, may be a relevant consideration. So while the ITA

was not required to apply the "inherent characteristic test"in every case, the Panel held that it may be a relevant consideration for the ITA on remand.

(ix) Pure and Alloy Magnesium

The Panel decision in this case was released on August 16, 1993[292], two months after the release of the Panel's decision in the Softwood Lumber dispute. The decision involved a review of the ITA's determination that producers of pure and alloy magnesium were receiving countervailable subsidies by virtue of being exempted from the payment of water bills and by receiving grants from a Quebec Government corporation. One of the central issues was whether the benefits in question were bestowed to a specific industry or group of industries.

The issue that the Panel had to resolve was the same as the one faced by the Softwood Lumber Panel two months earlier. The Panel's conclusions, however, were different.

An examination of the record showed that the ITA's affirmative determination was based upon only one of the four factors set out in the Proposed Regulations.[293] The Government of Canada, the Government of Quebec and Norsk Hydro Canada Inc (the complainants) argued that unless the ITA considers and weighs each of the four factors contained in the Proposed Regulations, it cannot properly determine specificity. The ITA argued, as it did in the Softwood Lumber Case, that it need only proceed through the factors until it finds one that will allow a finding of specificity. The ITA argued that it is only required to consider all four factors in

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[292]In the Matter of Pure and Alloy Magnesium from Canada, Q.L. [1993] F.T.A.D. No. 11.

[293]Specificity was found on the basis that the magnesium producers received a disproportionate amount of the benefits of the programs in question.

those situations where specificity cannot be found.

On this occasion, the ITA's argument carried the day. The Panel said that under American law, a review Panel was obliged to show deference to a department's reasonable interpretation of the statute it administers. It found that the case law indicated that it was reasonable to find de facto specificity on the basis of one prong of the test set out in the Proposed Regulations.

The Panel specifically said that it was not "necessarily" bound by the Softwood Lumber decision. It did, however, attempt to distinguish the Softwood Lumber decision by finding that the ITA in the Magnesium Decision had considered the other factors of the test but did not have to apply evidence to them as it had decided that the other factors were irrelevant to the matter before it. The Panel said that in Softwood Lumber, the ITA had completely failed to consider evidence "relevant to factors (3) and (4)".

On the basis, therefore, that magnesium producers received a disproportionate amount of the benefit under the programs in question, the Panel affirmed the ITA's determination of de facto specificity.

(x) Softwood Lumber III

This decision followed a Canadian challenge of the ITA's decision on remand in which the Stumpage programs had been found to be specific and therefore countervailable. The Panel released its decision on remand on December 17, 1993.[294]

The Panel remanded the decision back to the ITA with specific instructions that the ITA find the stumpage programs to be non-specific. As the Panel directed in its earlier decision, the

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[294]In the Matter of Certain Softwood Lumber Products from Canada Q.L. [1994] F.T.A.D. No. 1.

ITA explicitly evaluated all four factors enunciated in the Proposed Regulations.

In regard to the number of users test, the Panel decided that the ITA simply determined that the number of users of the program was small in comparison to the entire economy and found specificity on this basis. The Panel said that this sort of analysis was unacceptable. It said:[295]

> The lack of reasoned analysis of the number of industrial users in finding them to be "too few" reveals a mechanical and arbitrary exercise which is not supportable under U.S. law.

In regard to the dominant or disproportionate user test, the Panel concluded that the ITA's assertion that the softwood lumber producers were dominant or disproportionate users of the programs was not supported by the evidence.

In regard to the government discretion test, the Panel agreed with the ITA that there was no evidence to suggest that any of the governments exercised discretion to limit the number of users of the program. However, the Panel also agreed with the ITA's conclusion that if the ITA found that the governments had limited the number of users through their actions then it would not matter whether the government used discretion or not to limit the number of users.

Finally, the Panel agreed that the governments limited the number of users of the programs through their actions. However, the Panel said that this was not indicative of specificity because there was no evidence that the range of users was limited beyond that which the inherent characteristics of the resource would permit. The Panel noted that the ITA did consider the inherent characteristics test but, in the Panel's view, the ITA did not give enough weight to that test.

Consequently, the decision of the ITA was remanded despite the fact that the Panel in

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[295]Supra, note 294 at 52.

the Magnesium decision determined that specificity could be found merely on the basis that one group of producers received a disproportionate amount of the benefits. However, the authority of the Softwood Lumber decision may be called into question in the future as it was the first decision under Chapter 19 in which the Panel was split along national lines. The three Canadians on the Panel voted in favour of remanding the ITA's decision. The two Americans voted to affirm the decision.

(xi) Conclusions

The case law reviewed above indicates that the Chapter 19 process has not proven to be a proper vehicle by which secure and predictable access to the American market can be achieved. The binational panel system has not been able to establish a consistent methodology that importers to the United States can apply to the specificity test. If the system has been inconsistent on an issue as central as specificity, it is unrealistic to expect it to provide an adequate means of resolving more complicated questions such as what is a domestic subsidy and what constitutes a material injury. The lessons of the 1980s demonstrate that without a resolution of these issues, a secure and predictable trading environment in North America is impossible. Without such an environment business activity in North America will not reach the levels policymakers hoped for when they adopted the free trade strategy.

In the Pork Decision, Round I, the Panel accepted the factors set out in the Proposed Regulations as the proper factors to be considered in the application of the specificity test. However, the Panel appeared to add the fifth requirement of determining whether the foreign government intended to target a specific industry or group of industries.

However, when the Canadian complainants attempted to argue that intentional targeting was a necessary component of the specificity test in Swine I, the Panel simply said that the Pork

Decisions were not persuasive authorities. The Panel said that the ITA need only apply the four factors set out in the Proposed Regulations. It may then have been assumed that this would have brought a degree of predictability to the issue of specificity. However, the factors set out in the Proposed Regulations have raised many questions which the panels have been unable to answer.

The most significant of these questions is whether a finding of specificity can be made on the basis of only one the four factors. Swine I appeared to answer this question. In its decision on remand, the Panel said that a determination of specificity cannot be made on the sole basis that a program benefitted a small number of users. A positive determination required consideration of all four factors. However, doubt was soon cast upon this decision by an ECC panel, when it said that the Swine I Panel "may have erred."

The uncertainty has increased since that decision. In Softwood Lumber II, the Panel clearly stated that the ITA must give express consideration to all four factors, together with any other relevant factors including the inherent characteristics test. However, in two panel decisions which followed Softwood Lumber II, Swine II on remand and Magnesium, the Panels held that a positive determination could be made upon an affirmative ruling on less than all four factors without giving express consideration to the remaining factors. However, the Softwood Lumber III decision again confused the situation by affirming that express consideration of all four factors was required. The Panel confused the situation even further by suggesting that the ITA should have put more weight on the inherent characteristics test when considering whether the governments limited the availability of the programs, thus indicating that the intention of the government may be a relevant factor after all.

The inconsistency in the application of the specificity test makes it impossible for exporters and importers to predict whether or not their products will have duties imposed upon them. This makes it impossible to make solid business plans. The lack of consistently applied

standards leads to the impression that decisions are discretionary. This was the impression that Canadians had prior to the FTA. Chapter 19 has made little substantive difference.

The failure of Chapter 19 to create a predictable trading environment stems from two elements in the Chapter 19 process. First, each case is decided by a different ad hoc panel. Consistency cannot be developed when every case is decided by different people, each with differing views on how rules should be applied. Secondly, and even more importantly, the negotiators of the FTA expressly removed the principle of stare decisis from the binational panel review system. Article 1904.9 states, "the decision of a Panel under this Article shall be binding on the Parties with respect to the particular matter between the Parties that is before the Panel."

The panels have been quick to invoke this provision when faced with a decision with which they disagree. For example, in the Magnesium decision, after considering the decision in Softwood Lumber II, the Panel said:[296]

> The Softwood Lumber panel decision, while thorough, is, as a matter of law, not necessarily binding on this or other Panels.

As the above review of the cases demonstrates, this has led to diverse and in some cases, contradictory decisions. As a result, no norms have yet developed through the binational review system which can assist businesses in planning their affairs.

The negotiators of the NAFTA included a provision similar to that of Article 1904(9) of the FTA.[297] But unlike Chapter 19 of the FTA, Chapter 19 of the NAFTA has an unlimited duration. It may become a permanent mechanism for addressing AD/CVD issues in North America. It is understandable why such an arrangement may be good for the governments of the three Parties. Traders are provided with a mechanism through which they can air their

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[296]Supra, note 292 at 58.

[297]Supra, note 2, Article 1904.9.

concerns about unfair treatment. Governments, on the other hand, unable to reach agreement on these issues, can continue to make rules that please protectionist elements within their societies. By not giving the panel system the power of stare decisis they have given up only the minimal amount of sovereignty to the review system.

But businesses cannot plan around potential backroom deals. A stable trading environment requires rules that will be applied with consistency. By incorporating a system into the NAFTA which has been unable to secure predictable access in the past and does not have the capacity to do so in the future, the NAFTA negotiators have failed to convert ideology into law.

D. Enforceability

To date, enforceability has not proven to be a problem under the Chapter 19 procedure. Where panels have made final determinations under the FTA, the governments of the two parties have complied with the terms of those determinations. Nevertheless, the Parties decided to strengthen the enforcement mechanism through the inclusion in the NAFTA of the safeguarding procedure.

The safeguarding procedure is established in Article 1905 of the NAFTA and is accompanied by its own set of procedural rules which the Parties issued in February, 1994, (the "1905 Rules").[298] On its face, the procedure provides an effective means of ensuring compliance with the Chapter 19 panel system. If a Party interferes with the operation of a Panel or the implementation of one of its decisions, another Party can request the formation of a

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[298]North American Free Trade Agreement Rules of Procedure for Article 1905 Special Committees issued in February, 1994 reprinted in 1 NAFTA Treaty Materials (Dobbs Ferry, N.Y.: Oceana Publications, 1994).

Special Committee. The Special Committee will hear arguments on both sides. If the Special Committee rules in favour of the Complaining Party, the two sides must consult with a view to resolving the dispute. If such consultations prove unsuccessful, the Complaining Party may suspend either the entire operation of Article 1909 in respect of the Offending Party or the application of benefits under the NAFTA to that Party.

The problem with this procedure is that it leaves no role for those most interested in the enforcement of panel decisions. Article 1905(2) states that a Complaining Party may request the establishment of a Special Committee. The 1905 Rules define "Party" as the Government of Canada, the Government of Mexico, or the Government of the United States.[299] Moreover, only the Parties are allowed to make written submissions to the Special Committee.[300] Once oral hearings commence, only the Parties are able to argue before the Special Committee.[301] The hearings, deliberations, initial report and all submissions to the Special Committee are to be kept confidential.[302] The final report may be made available to the public but the Parties could block the publication of the report if they agree to do so.[303]

Individual exporters and importers have no recourse available to them under these procedures if their government decides not to take action against another government. The decision of whether to request a Special Committee is completely within governmental discretion. Even if private parties can convince their respective governments to commence

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[299]Ibid. Rule 3.

[300]Ibid. Rules 12-17.

[301]Ibid. Rule 21.

[302]Supra, note 2, Annex 1905.6(c).

[303]Supra, note 298 Rule 29(4).

actions, they have no input into how that action is run. Governments have complete control over the carriage of the action. This is not to suggest that in every case governments will fail to vigorously pursue actions against another government. However, a government simply cannot provide the same amount of direction to the carriage of a case as would those who have an immediate interest in its outcome.

Even if a government did pursue another government vigorously, the process is completely confidential until the final report is issued and even then, the Parties may agree to keep it from the public. Moreover, final reports only serve as the basis for consultations between governments. The interests of private parties are left open to secret deals between governments who may have little to gain in protecting those interests.

E. Conclusions

The Parties, therefore, have created a mechanism by which private parties may air their grievances about how foreign governments apply their AD/CVD laws. However, once it comes to enforcement of panel decisions, the role of the individual is supplanted completely by government. This is contrary to classical liberal ideology on which free trade is premised. Moreover, it may reduce reliance on the mechanisms provided in the NAFTA if private interests find themselves powerless in enforcing the decisions which flow from those mechanisms. While the existence of the safeguarding procedures will in all likelihood prevent governments from attempting to interfere with the panel process, some avenue of recourse should be left open to individuals in the event that the safeguarding procedures fail.

Chapter 19 makes adequate provisions for rights of private access and procedures that ensure transparency. However, a stable trading environment in which market forces will flourish requires more than a sounding board. The experiences of the 1980's showed Canadians

that they needed secured, predictable access to the American market. Unfortunately, the Parties have been unable to establish rules that will accomplish this. The mechanism created in lieu of rules has proven a poor substitute. While the Chapter 19 DRM may be procedurally efficient, it is incapable of providing North Americans with a predictable trading regime. Accordingly, political goals have not been accomplished by Chapter 19. Moreover, Chapter 19 fails to accomplish the ideological goals of free trade. As demonstrated by the enforcement mechanism contained in Chapter 19, the Chapter increases the role for governments at the expense of private interests.

CHAPTER IX. CHAPTER 20

1. The Main Institutions and General DRM Under The NAFTA

Chapter 20 is entitled "Institutional Arrangements and Dispute Settlement Procedures." It is modeled closely on the provisions of Chapter 18 contained in the FTA. Where changes have been incorporated into the NAFTA, such changes address matters of implementation rather than structure.[304] Accordingly, part of the analysis which follows considers the experience of Canada and the United States under Chapter 18 of the FTA.

The central institution created by the NAFTA is the Free Trade Commission (FTC). The FTC fulfils both a norm formulation function and an applying/implementing function. It is comprised of cabinet-level representatives of the Parties. The representatives from each Party will ordinarily be the Parties' Minister of Trade.

The functions of the FTC are set out in Article 2001(2). They are as follows:

1. to supervise the implementation of the NAFTA;
2. to oversee the further elaboration of the NAFTA;
3. to resolve dispute that may arise over the interpretation or application of the NAFTA;
4. to supervise the work of all committees and working groups established under the NAFTA;
5. to consider any other matter that may affect the operation of the NAFTA.

The FTC is to meet at least once a year in regular session.[305] All decisions of the FTC must be taken by consensus unless the FTC agrees otherwise.[306]

The FTC is also responsible for establishing the Secretariat which is comprised of

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[304]Jose Luis Siquerios, "NAFTA Institutional Arrangements and Dispute Settlement Procedures" (1993) California Western International Law Journal 383 at 384.

[305]Supra, note 2, Article 2001(5).

[306]Ibid. Article 2201(4).

national sections.[307] The Secretariat is to provide administrative assistance to the FTC, all panels established under the NAFTA and all other working groups and committees as the FTC may direct. This represents a large expansion of the role of the Secretariat. Under the FTA the role of the Secretariat was mainly limited to acting as support for panels established under Chapter 19.[308]

Section B of Chapter 20 sets out the dispute settlement functions of the FTC. The DRM provided for by Chapter 20 is the general DRM for the NAFTA. Unless a dispute comes within a specific DRM created under one of the other NAFTA chapters it will be resolved under the Chapter 20 procedure.[309]

The emphasis of the Chapter 20 procedure is on cooperation between the Parties and the avoidance of disputes. Article 2003 states that, "The Parties shall at all times...make every attempt through cooperation and consultation to arrive at a mutually satisfactory resolution of any matter that might effect its [the NAFTA's] operation."

Accordingly, the first step in the process under Chapter 20 is consultation. Any Party may request consultations with any other Party in an attempt to resolve any matter which may affect the operation of the NAFTA. In furtherance of this end, the Parties have agreed to provide each other with sufficient information to enable a full examination of how a measure may affect the operation of the NAFTA.[310]

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[307]Ibid. Article 2002(1).

[308]Supra, note 8 at 262.

[309]Supra, note 2 Article 2004.

[310]Ibid. Article 2006.

If consultations between the Parties fail, either Party may request a meeting of the FTC.[311] Within 10 days of receiving such a request, the FTC must meet in an attempt to resolve the dispute. In doing so, the FTC may employ a variety of alternative dispute resolution techniques including: good offices, conciliation, mediation and the formation of working groups or expert groups.[312]

If the Parties fail to resolve the dispute through the techniques set out above, either Party may request the FTC to establish an arbitral panel.[313] Within seven days of the arbitral panel being established, a third Party is entitled to join the proceedings if it considers that it has a substantial interest in the matter.[314]

Members of the arbitral panels will be selected through an innovative process designed to guarantee equal representation and to eliminate concerns over decisions being made along national lines. Where there are two disputing Parties there shall be five panelists. The Parties must first agree upon the chair. If the Parties cannot agree upon the chair, the disputing Party chosen by lot will select an individual who is not a citizen of that Party as the chair. Within 15 days of the chair being selected, each Party may select two citizens of the other disputing Party to serve as panelists.[315]

If all three Parties are involved in the dispute, there will again be five panelists. Again, the Parties must first agree upon a chair for the panel. The Party complained against must then

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[311]Ibid. Article 2007(1)

[312]Ibid. Article 2007(5)

[313]Ibid. Article 2008(2)

[314]Ibid. Article 2008(3)

[315]Ibid. Article 2011(1)

select two panelists. One selection must be from each of the complaining Parties. The complaining Parties must then select two citizens of the Party complained against to serve as the remaining two panelists.[316]

The panelists will normally be chosen from a roster established by the Parties on January 1, 1994. Individuals are appointed to the roster for renewable terms of three years.[317]

The panels are to be conducted in accordance with Model Rules of Procedure which the Parties established in January 1994.[318] The Parties must provide specific terms of reference within twenty days after a request for a panel has been made. If the Parties cannot agree upon the terms of reference, the NAFTA contains standard terms which may be employed by the Panel.[319] Either on its own initiative or on the request of the Parties, the Panel may seek technical advice from a group of experts or a scientific review board. The Panel may take such advice into account in the preparation of its report.[320]

Within ninety days of the Panel being selected, the Panel must submit an initial report to the Parties. The report must contain the Panel's findings of fact, its determination on the matter contained in the terms of reference, and its recommendations for a resolution of the dispute.[321] The disputing Parties then have fourteen days in which they may review the report

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[316]Ibid. Article 2011(2)

[317]Ibid. Article 2009(1)

[318]Ibid. Article 2012(1)

[319]Under Article 2012(3) the standard term of reference are as follows:
> To examine, in light of the relevant provisions of the Agreement [the NAFTA], the matter referred to the Commission (as set out in the request for a Commission meeting) and to make findings determinations and recommendations as provided in Article 2016(2).

[320]Supra, note 2, Article 2014-2016

[321]Ibid. Article 2016(2)

and make any comments they wish to make. The Panel may consider such comments and then within thirty days of the initial report being released, issue a final report to the FTC. The final report must include any dissenting opinions. However, it cannot identify which panelists form the majority and which form the minority. The FTC may publish the final report within fifteen days unless the Parties agree otherwise.[322]

On receipt of a final report, the Parties must attempt to agree on a resolution of the dispute. Normally, the resolution should conform with the determinations and recommendations of the Panel.[323]

If a resolution of the dispute cannot be agreed to within thirty days, and if the Panel has determined that a measure is inconsistent with the terms of the NAFTA or is causing nullification or impairment of a benefit which the complaining Party could reasonably have expected under the NAFTA the complaining Party may suspend the application of the non-complying Party's benefits under the NAFTA.[324] The complaining Party should attempt to suspend benefits in the same sectors as the one affected by the non-complying Party's actions. If it is not practicable or effective to suspend benefits in that sector, the complaining Party may suspend benefits in other sectors.

Section C of Chapter 20 sets out the role of the FTC in domestic proceedings and the obligations of the Parties in regard to the settlement of disputes between private parties.

If an issue of interpretation or application of the NAFTA arises in the course of a judicial or administrative proceeding in a Party, that Party may, either on its own initiative or at the

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[322]Ibid. Article 2017(4)

[323]Ibid. Article 2018(1)

[324]Ibid. Article 2019(1).

request of the particular court or administrative body, submit the issue to the FTC for review. The FTC must meet to attempt to agree on an appropriate response. If the members of the FTC can reach agreement its views can be submitted to the court or administrative body for consideration. If the FTC is unable to agree on an appropriate response, any Party may submit its views on the issue to the court or administrative body.[325]

Article 2021 prevents the Parties from providing private interests with a cause of action against another Party on the grounds that the Party enacted measures inconsistent with the terms of the NAFTA.

Pursuant to Article 2022, the Parties agreed to encourage and facilitate the use of arbitration in the settlement of international commercial disputes between private parties in North America. The Parties will have fulfilled this obligation by being a member of either the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") or the 1975 Inter-American Convention on International Commercial Arbitration (the "Panama Convention").[326] Both the New York Convention and the Panama Convention enables private parties to enforce international arbitral awards against private parties in foreign jurisdictions. Each of the Parties had been a signatory of at least one of these conventions prior to signing the NAFTA.

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[325]Ibid. Article 2020.

[326]Ibid. Article 2022(3).

2. Norm Formulation Function

A. Public Participation

The NAFTA does not contain formal procedures by which the norm formulation function will be performed. However, it is clear from the FTC's function as set out in Article 2001(2), that the FTC is the body responsible for performing this function. It will oversee the progress of the working groups and decide which recommendations should be acted upon. The respective ministers of trade will bring the concerns of their nationals with them to the regular session meetings of the FTC. Presumably, the FTC will act upon these concerns. In performing its function of overseeing the further elaboration of the NAFTA, the FTC will no doubt establish precedents and customs, and where more formal mechanisms are required, recommend amendments to the Parties. The Parties must agree to any amendments.[327]

The Parties appear to be relying upon the democratic processes in each Party to bring forth the concerns of the public in regard to the NAFTA. This should prove to be a fairly effective means of allowing public participation in the formulation of rules and procedures in both Canada and the United States. Both countries have long standing democratic traditions that have proven themselves reasonably responsive to public concerns. It appears to be envisaged that public concerns will be brought through democratic channels to the minister of international trade in Canada and the United States trade representative in the United States. They will then voice their concerns in regular session meetings of the FTC. The FTC will presumably act upon these concerns.

There are, however, three problems with this mechanism of norm formulation in terms of ensuring some means of public participation. First, Mexico's political system has only just

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[327]Ibid. Article 2202(1).

begun to open itself up. For the last sixty-five years it has been governed by one political party, the Institutional Revolutionary Party (PRI). The PRI has maintained power throughout this period through corruption, fraud, and extensive control over popular organizations, trade unions, and the country's business activity.[328] With Mexico's economic reforms, the government has begun the process of reforming the political system. The government has passed tougher campaign financing laws, strengthened the independence of the commission that monitors elections and increased penalties for election fraud.[329] But Mexico still has a long way to go before it can call itself a democracy as that term is understood in the rest of North America. Its institutions to channel public participation are still weak. Opposition parties have yet to prove themselves effective. Consequently, while reliance on internal institutions may be an effective means of allowing public participation in both Canada and the United States, it does not ensure an equal voice for the majority of Mexicans.

The second problem in terms of public participation is that the FTC is only committed to meeting in regular session once per year. Consequently, there is no mechanism available for addressing public concerns on a daily basis. The nature of democracy dictates that only the most immediate and pressing issues are dealt with at any one time. Therefore it is likely that annual meetings will be dominated by the most pressing issues of the day or by interests powerful enough to influence governmental agendas. Lesser issues may fall by the wayside. In order to facilitate meaningful public participation in the formulation of norms there must be mechanisms that ensure issues are dealt with in a timely fashion.

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[328]Drew Fagan, "Murder of Colosio will not Kill his Party" The Globe and Mail (25 March 1994) A1.

[329]_____ "The Opportunity in Mexico's Tragedy" The Globe and Mail (25 March 1994) A18.

The third problem with the norm formulation process in the NAFTA is with transparency. There is no way of the public ensuring that their concerns are brought before the FTC. Once public concerns are brought before the FTC there is no way of determining how such concerns are dealt with. For example, there is no means of determining how vigorously public concerns are represented by their ministers before the FTC. Meetings of the FTC are confidential. Many will be held on an informal basis. Only the final results will be made public. Effective public participation requires responsive institutions. Under the current mechanism there is no means by which the public can monitor the effectiveness with which their concerns are being addressed.

If the NAFTA is to spur market activity, market forces must have some role in the formulation of rules by which the free trade area will be governed. Reliance on the democratic processes in each Party is a fairly effective means of facilitating public participation in both Canada and the United States. But public participation cannot be assured in Mexico where democratic reforms are only just taking hold. Consequently, mechanisms must be developed that will enable Mexicans to have an effective voice in the arrangement which is expected to have great impact upon their economic futures. Moreover, even in the Parties with strong democratic traditions, procedures should be implemented that ensure that the role of the public in the formulation of norms is not compromised. This can only be achieved through the implementation of measures that ensure that issues are dealt with in a timely manner under a reasonable amount of public scrutiny.

3. Applying/Implementing Function

A. Access

There is no avenue of private access to the DRMs established under Chapter 20. Each

of the processes involved in the Chapter 20 mechanism can only be initiated by one of the Parties. Moreover, Article 2021 specifically prevents the development of a private right of action against a Party that takes action that is inconsistent with the terms of the NAFTA. Once initiated only the Parties may participate in the process. Yet it is private interests that will be relying upon the NAFTA rules on a day to day basis. It will therefore be private interests that will be damaged by the unfair application of those rules. Their only recourse is to request assistance from their government. If their government, for political reasons, chooses not to act, there is little private parties can do.

Under the current regime, governments establish the rules, implement the rules, apply the rules and decide when and how to challenge the rules. Yet the NAFTA is an agreement meant to encourage both market reliance and market activity. Businesses will not respond if the only means by which they can protect their interests is to lobby government officials who have little personal interest in the outcome of disputes. With no rights of private access, Chapter 20 becomes an ineffective mechanism for converting the ideology of free trade into law.

B. Transparency

There is little transparency in the DRM under Chapter 20. Article 2012(1)(b) states that, "the panel's hearings, deliberations and initial report and communications with the panel shall be confidential." Article 2017 does provide for the publication of a final report, however publication can be blocked if the FTC decides to do so. The lack of transparency in the NAFTA's general DRM fosters a view that the NAFTA's general DRM was designed more with the concerns of politicians in mind than the concerns of those who must actually operate under the NAFTA regime.

C. Predictability

There have only been five cases submitted to Chapter 18 panels under the FTA since the FTA came into effect. Each of those cases have dealt with different issues. Consequently, it is impossible to follow the development of a single issue under Chapter 18 as was done in the examination of Chapter 19. However, each of the cases which have been decided under Chapter 18 will be reviewed with particular attention paid to the aftermath of each decision. The purpose of this review will be to determine whether the Chapter 20 process, which is modeled upon Chapter 18 is capable of producing decisions that will lead to the development of a predictable and stable business environment in North America in which businesses can make plans with a degree of certainty.

(i) Pacific Coast Salmon and Herring[330]

This panel decision was initiated by the United States. It stemmed from regulations under the Canadian Fisheries Act[331] which required that all salmon and roe herring caught in Canadian waters land in Canada prior to being exported. The United States argued that these regulations were incompatible with Article XI of the GATT which prohibited all restrictions on the exportation of products destined for a contracting party. Article XI had been incorporated into the FTA by Article 407 of the FTA. Canada countered that the regulations were not a restriction on the exportation of salmon and herring, but if they were, they were justified under Article XX(g) of the GATT. Article XX(g) of the GATT provides that as long as a contracting party did not attempt to disguise restrictions on international trade, it could enact measures

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[330]In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring Q.L. [1989] F.T.A.D. No. 1.

[331]R.S.C. 1985, c. F-14.

relating to conservation of exhaustible natural resources. Article XX(g) had been incorporated into the FTA by Article 1201 of the FTA.

Canada had enacted the landing requirement in an attempt to comply with a GATT panel decision which had been handed down in 1987. The Panel said that regulations prohibiting the export of unprocessed salmon and herring were "contrary to Article XI:1 and were justified neither by Article XI:2(b) nor by Article XX(g)."[332] The United States argued that the new regulations which did not prohibit the export of unprocessed salmon and herring but did require that 100 percent of all salmon and herring caught in Canadian waters land in Canada were "designed to have the same effect as the GATT illegal export restrictions."[333] Canada again argued that the landing requirement was not an export restriction, but if it was, it was essential for proper conservation of the fish stocks and therefore justified under Article XX(g).[334]

The FTA panel agreed with the United States. It took the view that the regulations were a restriction on exports because its primary effect was to regulate export transactions and those regulations had the "effect of imposing a materially greater commercial burden on exports than on domestic sales.[335] Fishermen using domestic processors could deliver their product by boat; however, those wishing to use American processors were forced to go to the added expense of transporting their product by truck.[336]

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[332]Supra, note 330 at 7.

[333]Ibid. at 8.

[334]Ted L. McDorman, "Using the Dispute Settlement Regime of the Free Trade Agreement: The West Coast Salmon and Herring Problem" (1990) 4 Canada-U.S. Business Law Review 177 at 180.

[335]Supra, note 330 at 34.

[336]Ibid. at 36.

The Panel further held that the regulations could not be justified under Article XX(g). The Panel said that in order to justify an export restriction under Article XX(g), Canada had to demonstrate that the restriction was "primarily aimed" at the conservation of an exhaustible resource.[337] In order to determine whether the measure was primarily aimed at conservation, the Panel said it was necessary to determine whether the conservation benefits of the landing requirement would have been large enough to impose the inconvenience on Canadians.[338]

The Panel held that there were data collection benefits to the landing requirements but that they were not large enough to justify the necessity of imposing the inconvenience on 100 percent of all salmon and herring caught in Canadian waters. Therefore the restrictions were not primarily aimed at conservation and accordingly were not justified under Article XX(g).[339]

However, the Panel did not rule out the possibility that a less restrictive landing requirement may be primarily aimed at conservation. It took the view that a measure that exempted the proportion of a catch whose exportation without landing would not impede the data collection process may be justified under Article XX(g). It suggested that an exemption of 10-20 percent of the salmon and herring caught in Canadian waters might be acceptable.[340]

The Panel's report was taken before the Canada-U.S. Trade Commission who under the FTA was supposed to decide on a resolution of the issue in dispute. Article 1807(8) directs that the Commission is to agree on a resolution of the dispute "which normally shall conform with the recommendation of the Panel."

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[337]Ibid. at 43.

[338]Ibid. at 49.

[339]Ibid. at 75-76.

[340]Ibid. at 77-78.

Unfortunately decisions of the Commission must be reached by consensus and the two sides could not agree on the interpretation of the report. Canada took the view that a restriction could be justified under Article XX(g) as long as the restriction exempted 10-20 percent of the catch. The United States took the view that any restriction had to be justified as being "designed to meet specific data-collection needs."[341] Presumably, the Americans believed that reasonable data collection could be achieved with a much less restrictive landing requirement than 80 percent of the catch.

After four months of negotiation, a compromise was reached.[342] Canada was allowed to maintain its landing requirement regulations but it agreed to exempt 20 percent of salmon and herring from the regulation until 1991 at which time it agreed to exempt 25 percent. This agreement was to remain in effect until 1993. The matter is currently under review by the Commission.[343]

The Chapter 18 process produced a resolution to a dispute between Canada and the United States and therefore could be viewed as a success. However, the solution only produced short term certainty for the fishing industry. The fishing industry must now await the results of confidential meetings between government officials to discover what the new regulations might entail. In the meantime, it must carry on business and attempt to make plans for the future. The percentage of fish required to land in Canada could have significant impact upon those plans. But as that percentage will be decided upon by bureaucrats through confidential meetings, it is impossible for them to predict with any degree of certainty the long term landing

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[341]Supra, note 334 at 184.

[342]Ibid. at 185.

[343]Ibid. at 186.

requirements while making those plans. The Panel's decision provides few guidelines on which to base such predictions and, in any event, is not binding on the parties. The decision, therefore led to an acceptable resolution of the dispute politically, but did little in regard to the development of a predictable and stable business environment in the west coast fishing industry.

(ii) Lobsters from Canada[344]

On December 12, 1989, the United States amended the Magnuson Fishing Act to prohibit the sale or transport of whole live lobsters smaller than the minimum possession size in effect under American law (the "Amendment").[345] Previously, American law prevented the sale of lobsters harvested in American waters if the lobsters were smaller than 81.8 mm. However, the law did not affect lobsters harvested in waters outside American jurisdiction. The Canadian government did not impose a minimum size for lobsters. However, provincial requirements varied from 63.5 mm to 81.0 mm. Under the prior American law, someone found selling small lobsters could avoid conviction by showing evidence of purchase of the lobsters from Canada. The Amendment eliminated the possession of lobsters harvested from another jurisdiction as a means of escaping conviction.

Canada feared that its fishermen would lose a significant market for up to 34 percent of the lobsters legally caught in Canadian waters under the Amendment.[346] It therefore argued that the Amendment was a violation of Article XI of the GATT as it was an import restriction.

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[344]Lobsters from Canada Q.L. [1990] F.T.A.D. No. 5.

[345]Section 8 of the 1989 National Oceanic and Atmosphere Administration Coastal Programs Authorization Act, Public Law 101-224, 103 Stat. 1905, 16 U.S.C. 1857 (1) (J).

[346]Ted L. McDorman, "Dissecting the Free Trade Agreement Lobster Panel Decision" (1991) 18 Canadian Business Law Journal 445 at 447.

As consultations failed to resolve this dispute, the parties referred the matter to a Chapter 18 panel.

The Panel was asked to determine whether the Amendment was inconsistent with Article XI of the GATT. If it was, the Panel was next asked to determine whether the Amendment was justified under Article XX(g) of the GATT. Moreover, if the Amendment was a violation of Article XI, the Panel was asked to determine the degree of adverse trade effects, if any. Finally, and of great importance, as things turned out, the Panel's terms of reference included the following statement:[347]

> the United States is not precluded from arguing that the legislation in question is properly within the terms of, and consistent with the national treatment provisions of the FTA and the GATT.

The national treatment obligation, found in Article III of the GATT, and incorporated into the FTA under Article 501 of the FTA allows internal measures to be applied to imported goods at the time of importation.[348] So once a good is imported, the importing country can impose the same restrictions that it imposes on similar domestic goods to ensure imported goods are treated no better than domestically produced goods.

Moreover, in the terms of reference, the parties restricted the Panel to answering the narrow questions of law presented. The Panel was not to make any recommendations relating to the possible resolution of the dispute.[349] Apparently, the Canada-U.S. Trade Commission did not want the Panel to attempt to resolve the dispute as the Salmon and Herring Panel

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[347]Ibid. at 451.

[348]Supra, note 344 at 51.

[349]Ibid. at 71.

had.[350]

Canada argued that the Amendment violated Article XI and that the United States had failed to meet its burden of showing that the Amendment was justified under Article XX(g).[351] The United States argued that Article XI was not the appropriate provision under which to decide the issue. It argued that Article XI applied only to measures which affected imported goods exclusively. The Amendment, it argued, affected both imported and domestic goods. If the Amendment were not upheld, Canadians would receive better treatment in the United States than would Americans.[352]

The majority of the Panel accepted the American view that the proper provision to be applied to the Amendment was Article III. However, the Panel refused to rule on the question of whether the Amendment was consistent with the national treatment requirements of that article since such a determination would be outside the terms of reference.[353]

The Amendment was therefore upheld, but from a practical standpoint, the issue remained unresolved. It was clear, following the Panel's decision, that the Amendment should be examined under Article III rather than under Article XI. What was not clear was whether the Amendment was legal under Article III.

Sectors of the fishing industry in both Canada and the United States attempted to work out a compromise plan that would resolve the issue. The plan called for a delay in the implementation of further American size restrictions in exchange for an increase in Canadian

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[350]Supra note 346 at 450.

[351]Supra, note 344 at 41.

[352]Supra, note 346 at 452.

[353]Supra, note 344 at 456.

size requirements. Unfortunately, the Canadian Department of Fisheries and Oceans refused to endorse this plan, arguing that it was not in the best interests of the independent lobster fishermen in Atlantic Canada.[354]

Again the Chapter 18 panel system failed to resolve a dispute in a manner that brings a degree of stability and predictability to the market. Canada still has the option of bringing a second action before a panel to decide whether or not the Amendment is consistent with Article III of the GATT. Since the parties specifically prevented the Panel from making recommendations, no guidelines for an interim resolution exist. Consequently, until a final resolution is decided upon Canadians are forced to adhere to American regulations, despite the fact that they differ vastly from Canadian regulations.[355] The American regulatory scheme, therefore, becomes part of its comparative advantage, at least for a while.[356]

(iii) Article 304 and the Definition of Direct Cost of Processing[357]

This was an unusual case in that it involved a dispute between the American government and the Canadian government, but this time the governments were representing the interests of particular parties. CAMI Automotive Inc. ("CAMI") was an Ontario joint venture between

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[354]Supra, note 346 at 456.

[355]The Canadians argued that part of the reason for the difference in regulations is that because of the cooler waters in Canada, lobsters mature at an earlier age in Canadian waters and therefore enjoy a comparative advantage over lobsters in American waters. See Lobsters from Canada, supra, note 344 at 43.

[356]Supra, note 346 at 458.

[357]In the Matter of Article 304 and the Definition of Direct Cost of Processing Q.L. [1992] F.T.A.D. No. 3

General Motors and the Suzuki Motor Corporation.[358] Cars were assembled in Canadian plants, using, in part, automotive parts supplied by Suzuki. The cars were then exported to the United States. Toyota Motor Sales U.S.A. Inc. asked the United States Customs Service to launch an investigation into whether the cars produced by CAMI complied with the territorial content requirements under the rules of origin contained in the FTA.[359]

At issue was whether interest payments on loans necessary to purchase equipment used in the production of automobiles could be included in the definition of "direct cost of processing" or "direct cost of assembling" under Article 304 of the FTA. The United States Customs Service concluded that such payments could not be included in the definition of direct costs of processing or assembling. If the ruling was upheld, the cars produced by CAMI would not meet the rules of origin requirements under the FTA. Consequently, Canada initiated panel proceedings under Chapter 18 to address the issue.[360]

The Panel ruled in favour of Canada, holding that interest payments on loans necessary to purchase equipment could be included in the definition of direct cost of processing or assembling. The Panel said that the proper test when considering the definition of direct cost was whether the costs in question could be reasonably allocated for the production of goods.[361] In assessing reasonableness, the Panel examined illustrative lists which Canada and the United States included in Article 304 when they originally negotiated the FTA. This examination led the Panel to the conclusion that the key to the reasonableness test is the relationship of the cost

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[358]R.K. Paterson and M. Bend, eds. Canadian Regulation of International Trade and Investment 2d ed. (Toronto: Carswell, 1994) Chapter 2 (forthcoming).

[359]Supra, note 357 at 6.

[360]Ibid. at 10.

[361]Ibid. at 33.

in question to the cost of production, rather than the form of payment.

So it did not matter whether the cost in question was the cost of servicing a loan or a mortgage. What mattered was the relationship of the cost to the total costs of production. The Panel noted that under both Canadian law and American law mortgage interest on real property included both interest on the land and interest on fixtures such as building and equipment. The cost of interest to service a loan used to purchase equipment was therefore a direct cost of processing or assembling under Article 304.[362] The Panel went on to say that as the test of reasonableness was the relationship to production rather than the form of the loan, it did not matter whether the loan was secured or unsecured.[363] The only requirement which a debtor needs to fulfil is the ability to demonstrate that:

1) the interest is bona fide;
2) the interest is payable on arm's length terms;
3) the loan has been undertaken in the ordinary course of business; and
4) the proceeds of the loan are objectively assignable to the production of goods.

The report of the Panel was presented to the Canada-United Free Trade Commission. However, in the course of the NAFTA negotiations a special deal was worked out which resolved the dispute. Under the deal, CAMI is allowed to average the content of its vehicles produced in Canada with those of General Motors, so long as General Motors owns at least 50 percent of CAMI and General Motors acquires at least 75 percent of CAMI's production for sale in North America.[364]

In this case, the Chapter 18 process was used successfully to bring about a resolution to a dispute in a manner which created a predictable and stable business environment. The Panel's

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[362]Ibid. at 33.

[363]Ibid. at 77.

[364]Supra, note 358.

decision no doubt played a role in the positions the parties took during the NAFTA negotiations. However, it should be noted that the respective governments were representing the interests of particular parties rather than whole industries. This presumably allowed the governments to work directly with the parties involved in the outcome of a dispute. Governments cannot do this in more generalized disputes in which they must represent a variety of interests. Moreover, the parties whose interests were at stake in this dispute, most notably General Motors and Toyota Motor Sales, Inc. are among the largest corporations in North America. The jobs of hundreds of thousands of voters depend upon the futures of these corporations. Most companies simply do not have the ability to command the attention of governments which these companies have. A DRM needs the ability to create a stable business environment for the entire market, not just those companies large enough to command a special place on the negotiating agendas of the Parties.

(iv) Durum Wheat[365]

Between 1986 and 1992, Canadian production of durum wheat more than doubled from 2 million metric tons in 1985-1986 to 4.6 million metric tons in 1991-1992.[366] In 1992, 509,000 metric tons of Canadian durum wheat were exported to United States. This represented 20 percent of American consumption of durum wheat and brought a return to Canadian farmers of $95.5 million.[367]

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[365]In the Matter of and Canada's Compliance with Article 701.3 with Respect to Durum Wheat Sales Q.L. [1993] F.T.A.D. No. 2.

[366]Ibid. at 10

[367]Drew Fagan, "Bully-boy Tactics Keep Spurious Wheat War Going" The Globe and Mail (22 April 1994) A1.

This large increase in Canadian exports of durum wheat caused American farm organizations to investigate Canadian pricing practices. This investigation turned up two complaints which the farm organizations seized upon as evidence of Canadian unfair trade practices. Their first complaint was against the Canadian Wheat Board. The Canadian Wheat Board acts as a sales agent for farmers in international markets. The Canadian Wheat Board pays farmers an initial price of 85 percent of the expected market price after the wheat is delivered. A second payment is then made after the exact market is known.

In 1990-1991, the Canadian Wheat Board overestimated the eventual market price and overpaid durum wheat farmers. The American farm organizations claimed that this demonstrated that Canadian farmers were subsidized which allowed them to dump wheat in the American market.

The second complaint against Canadian practices involved transportation subsidies provided for rail shipments from western Canada to Thunder Bay under the Western Grain Transportation Act.[368] American farm organizations claimed that these subsidies gave their Canadian counterparts an unfair advantage.

In 1992, the United States launched a Chapter 18 procedure against Canada. The purpose of the action was to determine whether the above practices violated Article 701.3 of the FTA. Article 701.3 states:

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

The United States argued that the acquisition price included both the initial amount paid to farmers and the second amount paid after the wheat had been marketed. Therefore if the

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[368]R.S.C. 1985, c.W-8.

Canadian Wheat Board overestimates the eventual market price as it did in 1990-91, Canada would be selling wheat at a price below the acquisition price and thereby violating Article 701.3. Canada argued that the acquisition price included only the initial price paid by the Canadian Wheat Board to farmers. It argued that if the American view were accepted the Canadian Wheat Board would be unable to sell its wheat in the United States if the price of durum wheat, which is notoriously volatile fell below the initial price paid.[369] This would put tremendous pressure on the Canadian Wheat Board as there is often a time lapse of 17 months between the time when the initial price is paid and the time when the wheat is actually marketed.[370]

The Panel employed a purposive method in interpreting Article 701.3. It said that a reading of the whole of Article 701 indicates that the purpose of Article 701.3 is to eliminate export subsidies, not domestic subsidies. While the services of the Canadian Wheat Board may amount to domestic subsidies, they are not export subsidies as they apply to all grain whether it is exported or not. Consequently, Article 701.3 does not prohibit the practices of the Canadian Wheat Board.[371]

The Panel employed a similar method to the question of whether the freight costs incurred under the Western Grain Transportation Act could be included in the phrase "other costs" under Article 701.3. Again the panel held that the purpose of Article 701.3 was not to eliminate export subsidies but to allow each Party to continue to grant domestic subsidies. As the scheme under the Western Grain Transportation Act amounted to a domestic subsidy it was

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[369]Supra, note 367 at A2.

[370]Supra, note 365 at 41-43.

[371]Ibid. at 60-61.

not caught under the phrase "other costs."[372]

The Panel concluded that there was insufficient evidence on which to properly determine whether Canada actually violated the terms of Article 701.3. However, the Panel suggested that the Parties should be able to resolve the dispute in light of the interpretations which the Panel gave to Article 701.3. To assist the Parties in coming to a resolution, the Panel suggested that a group of auditors should be hired to investigate the evidence in light of the Panel's interpretations.

Pursuant to these recommendations an accounting firm was hired and issued its first report in March 1994. The report found that 102 of 105 durum wheat contracts from 1989 - 1992 were fully in compliance with the provisions of the FTA.[373]

Despite the assistance of both the panel report and the auditor's report Canada and the United States have been unable to resolve their differences on this issue. On April 22, 1994 the United States escalated the dispute by announcing it intended to impose tariffs on Canadian grain imports under the GATT. The tariffs are scheduled to go into effect in July 1994. Canada, on the other hand, threatened to retaliate by imposing tariffs on a number of American imports including chicken, wine, pasta and canned fruit.[374]

While politicians continue to argue, farmers, processors and distributors must attempt to continue with business in a volatile environment. Bob Roehle, an official with the Canadian Wheat Board advised farmers that current projections favour the planting of durum wheat over

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[372]Ibid. at 62.

[373]Supra, note 367 at A2.

[374]Barrie McKenna and Drew Fagan, "U.S. Fires Salvo in Wheat War" The Globe and Mail (23 April 1994) B1.

spring wheat.[375] However, Larry Maguire, a farmer from Brandon, Manitoba, expressed uncertainty. He told the Globe and Mail, "The American politicians are using this as a political football to get re-elected. It's quite popular to bash Canadian farmers."[376] To farmers like Larry Maguire, the Chapter 18 DRM has done little to bring greater certainty to his industry.

(v) U.H.T. Milk from Quebec[377]

This dispute arose out of a 1991 decision by the Puerto Rico Department of Agriculture to cancel the licence of the Quebec Lactel Group to import ultra-high temperature (UHT) milk into Puerto Rico. Prior to 1991, UHT milk from Quebec had been imported into Puerto Rico on the basis that it was produced under conditions and standards that were "essentially equivalent" to those under the health regulations then in force. However, in 1989 Puerto Rico joined the National Conference on Interstate Milk Shipments ("NCIMS"). NCIMS is the governing body for American interstate milk shipments. All 50 states and the District of Columbia belong to it. Its mandate is to "promote the best possible milk supply for all the people."[378] In an effort to fulfil this mandate, NCIMS adopted a certification process to ensure that the industries in each state complied with health and safety standards. Once a dairy is certified it can sell its products in any state. The certification procedures are set out and enforced through the Pasteurised Milk Ordinance (PMO), the model regulations established by the United States Food and Drug Administration. Puerto Rico adopted the PMO in 1989 and

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[375]Ibid. at B12.

[376]Larry Maguire, Ibid.

[377]In the Matter of Puerto Rico Regulations on the Import Distribution and Sale of UHT Milk from Quebec Q.L. [1993] F.T.A.D. No. 7.

[378]Ibid. at 14.

implemented its provisions in 1991.[379]

As Quebec was not a member of NCIMS and accordingly did not implement the provisions of the PMO, Lactel could not be certified in accordance with Puerto Rico's new regulations. Accordingly, Lactel's import license was cancelled. Puerto Rico argued that it had no choice but to prevent the sale of any milk which was not certified in accordance with NCIMS procedures. Lactel argued that the milk should be allowed into Puerto Rico on the basis that it met equivalent Canadian health and safety requirements. As the matter could not be resolved by the Canada-United States Free Trade Commission, a Panel was appointed to rule on the issue.

The Panel held that Puerto Rico's cancellation of the import licence did not amount to a violation of the FTA. However, the Panel went on to conclude that the cancellation, without an attempt to determine the equivalency of the Canadian procedure amounted to a nullification and impairment of the benefits Canada reasonably expected when it entered into the FTA.[380] Consequently, the Panel recommended that American officials undertake an equivalency study of the Canadian procedure. If the Canadian standards are found to have the same effect as the PMO, the Panel recommended that UHT milk from Quebec should be readmitted to Puerto Rico.

It appears that the Panel's decision led to a resolution of the dispute in a manner that brought certainty and predictability to the market. However, the following points should be kept in mind. First, again the Canadian Government was acting on behalf of only one Party and consequently was able to work directly with the Party who had a direct interest in the outcome of the dispute. Secondly, Lactel is a very important member of an important industry in a

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[379]Ibid. at 16.

[380]Ibid. at 147.

politically important province. Not every company or industry group will be able to command the attention of the federal government as Lactel did in this case. Thirdly, and perhaps most importantly, the outcome of this dispute held few political consequences for the American Government. Puerto Rico is not yet a state. It has a comparatively small population. Lactel had previously served the Puerto Rican market for 14 years with no evidence of risk to the population. Even if Lactel's milk is readmitted to Puerto Rico, an eventuality which might be considered a "loss" for the American Government, the worst that happens is a return to a relationship which had proven itself mutually rewarding for a considerable period of time. It remains to be seen whether Chapter 18 will prove as effective in disputes involving higher political stakes.

D. Enforceability

It does not appear that the NAFTA negotiations intended panel decisions to be binding under Chapter 20.[381] There are several indications of this. First, the text itself omits the word "binding." Under Chapter 18 of the FTA, the parties specifically agreed to refer disputes to "binding arbitration."[382] Secondly, the only remedy under Chapter 20 is retaliation. A reading of the text of Chapter 18 of the FTA suggests that the first step after non-implementation of a Panel's findings is to attempt to agree on some form of "compensation or other remedial action."[383] A Complaining Party could not force the other Party into remedial action but the wording of the text at least suggests culpability. The NAFTA text eliminates any such

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[381]Supra, note 14 at 69.

[382]Supra, note 257, Article 1806(1).

[383]Ibid. Article 1806(3).

suggestions. Thirdly Article 1806(3) of the FTA allows the suspension of benefits when a Party "fails to implement... the findings of a panel." The text of the NAFTA, on other hand, does not use such strong language. Article 2019(1) allows a suspension of benefits when "the Party complained against has not reached agreement... on a mutually satisfactory resolution." These textual changes suggest that the Parties sought to lessen the degree to which they would be bound by Chapter 20 panels.

Moreover, the NAFTA places some restrictions on retaliatory measures which the FTA did not. Article 1806(3) of the FTA states that the complaining party "shall have the right to suspend the application of equivalent benefits." The NAFTA requires that a Complaining Party first seeks to suspend benefits in the same sector as the sector affected by the measures of the non-complying Party.[384]

If the non-complying Party believes that the suspension of benefits is manifestly excessive, a panel may be established to determine whether that is indeed the case. However, the NAFTA is silent on what is to happen in the event of a positive determination. Presumably the suspending Party would have to take some form of action but it is not clear what that action might be.[385]

It is difficult to assess how effective retaliation might be as no Party has yet evoked retaliatory measures under either the FTA or the NAFTA. Several commentators have suggested, however, that retaliatory measures against the United States would be ineffective because of the size difference and relative trade dependence of Canada and Mexico on the United

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[384]Supra, note 2, Article 2019(2).

[385]Ibid. Article 2019(3).

States.[386]

However, what is clear is that the decisions of whether to evoke such measures is completely within the discretion of the respective governments. Private parties with direct interests in the outcome of the Panel decisions are powerless if one of the Parties fails to implement a Panel decision. The only option for a private party is to attempt to convince its government to force the issue with the other Party. If the government, with its own agenda, fails to force the issue, the Private party has no legal remedy. Article 2021 specifically eliminates the possibility of a private right of action against Parties that enact measures inconsistent with the terms of the NAFTA.

The potential effectiveness of the enforcement provisions of Chapter 20 is questionable in light of the reluctance of the Parties to state explicitly that they will be bound by panel decisions. Moreover, retaliation has yet to prove itself as an effective remedy in the North American context. With no avenue available to private parties with direct interest in the implementation of Panel decisions' effective enforcement of panel decisions may not be possible. Ineffective enforcement of Panel decisions will undermine confidence in both Chapter 20 and in the NAFTA itself. Lack of confidence in the NAFTA will discourage business activity in North America. Accordingly, the NAFTA negotiators have failed to convert ideology into policy in the area of enforcement of Panel decisions.

4. Conclusions

Chapter 20 is the general DRM contained in the NAFTA. An effective general DRM is important to the overall success of the NAFTA because business people must have confidence

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[386]See for example, Rosa, supra, note 8 at 298.

that their concerns will be effectively dealt with if they are going to invest both the effort and capital necessary to spark the business activity which policymakers intended when they entered into the NAFTA negotiations. However, there is little in the Chapter 20 procedure to inspire such confidence. The process which policymakers have created precludes direct public participation in the formulation of norms. The DRM established under Chapter 20 requires the private citizens of each Party to be completely dependant upon the cooperation and good will of their respective governments. There are no rights of private access. The process allows only a minimal amount of public scrutiny. The model for Chapter 20, Chapter 18 of the FTA, has been unable to resolve disputes in a manner that has led to a more stable, predictable business environment. The enforcement provisions are weak. A general DRM that does not inspire public confidence in the NAFTA does not meet the ideological goals of the NAFTA.

CHAPTER X. CHAPTER 11

1. Introduction

Among the NAFTA's stated objectives is the desire to substantially increase investment opportunities in the Parties.[387] This objective is carried out through its chapter which governs investment, Chapter 11.

Chapter 11 is divided into two parts. Section A sets out the substantive obligations of the Parties on matters concerning the treatment of foreign investment.[388] Section B creates a system of binding arbitration for resolving disputes between private investors and states accused of breaching their obligations under Section A.[389]

Section B represents a ground breaking achievement in several respects. First, it is the only provision in any of the world's major trade agreements which permits private investors to take governments to binding arbitration over violations of their treaty obligations.[390] The FTA, for example, contains rules to govern investment similar to those found in Section A but provides no direct recourse to investors who suffer losses as a result of a state's violations of those rules.[391] Secondly, Section B represents the first time that Mexico has entered into an international agreement that provides for arbitration between itself and a foreign national.[392]

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[387]Supra, note 2, Article 102.1(e).

[388]Daniel M. Price "An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement" (1993) 27 International Lawyer 727.

[389]Ibid.

[390]Supra, note 14 at 52.

[391]Supra, note 257, Chapter 16.

[392]Supra, 388 at 731.

Thirdly, Section B contains several provisions which are innovations in the field of arbitration.[393]

This Chapter will describe the provisions of Chapter B and then analyze those provisions in terms of the criteria set out in Chapter XII. Chapter 11 does not contain its own norm formulation procedures. Any amendments to the rules set out in Section A will be made through the Chapter 20 procedure. Section B sets forth an applying/implementing procedure. It will therefore be analyzed in terms of rights of private access, transparency, the ability to create certainty and predictability, and enforceability.

2. Section B Provisions

Section B of Chapter 11 enables an investor from one Party to submit a claim to arbitration that another Party breached an obligation under Section A and thereby caused the investor loss or damage.[394] For example, Article 1110(1) which is contained in Section A, provides that no Party may nationalize an investment of an investor from another Party without paying the investor compensation at a rate equivalent to the fair market value of the investment. If Mexico, for example, attempted to nationalize a factory located in Mexico but owned by a Canadian corporation, it is foreseeable that a dispute may arise over the method by which the fair market value of the investment would be determined. Under Section B, the Canadian firm could require the Mexican government to submit to arbitration to determine the dispute.

An investor must wait a period of six months from the time that the claim arises before

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[393]Supra, note 23 at 2175.

[394]Supra, note 2 Article 1116.

the investor can submit the claim to arbitration.[395] Ninety days prior to the claim being submitted to arbitration the investor must deliver to the Party complained against a notice of its intention to submit its claim to arbitration.[396] It appears that the notice of intention may be delivered to the Party prior to the time that the six month waiting period elapses. In any event, the investor must make its claim within three years of the time when the investor first acquired or should have acquired knowledge of the breach of Section A and the resulting loss or damage.[397]

The investor has the choice of submitting its claim under any one of the following sets of rules:[398]

1) The rules arising from the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention"), provided that both the NAFTA country and the country of the investor are parties to the ICSID Convention.

2) The Additional Facility Rules of the International Centre for Settlement of Investment Disputes ("ICSID"), provided that either the involved Party or the Party of the investor is a member of the ICSID Convention.

3) the UNCITRAL Arbitration Rules.

The ICSID Convention was agreed to in Washington, D.C. on March 18, 1965. It created ICSID which was established under the auspices of the World Bank as a centre dedicated to resolving disputes between states and foreign nationals through arbitration.[399] The ICSID Convention established its own set of rules to govern such arbitrations. These rules are

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[395]Ibid. Article 1120.

[396]Ibid. Article 1119.

[397]Ibid. Article 1116(2).

[398]Ibid. Article 1120.

[399]K.S. Jacob, "Reinvigorating ICSID with a New Mission and With Renewed Respect for Party Autonomy" (1992) 33 Virginia Journal of International Law 123.

completely self- contained and therefore function independently of domestic laws.[400] The only role played by national courts in arbitrations administered by ICSID is in the execution process. Article 54 of the ICSID Convention provides that execution of awards made under ICSID is governed by "the laws concerning the execution of judgments in force in the State in whose territories such execution is sought." The administration of ICSID is overseen by a Secretary-General appointed the World Bank.

Currently the United States is the only NAFTA country that belongs to the ICSID Convention.[401] Consequently, no Section B dispute can be submitted to arbitration under the ICSID Convention at the present time. Presumably, the fact that Article 1120 provides investors with the option of submitting claims under the ICSID Convention, indicates that either Canada or Mexico, or perhaps both intend to join the ICSID Convention in the near future.

The Additional Facility Rules of ICSID were created to govern investment arbitrations where only one of the disputing parties is a member of the ICSID Convention.[402] At present, only claims brought against the United States could be heard under the Additional Facility Rules.

The UNCITRAL Arbitration Rules are a set of rules developed by the United Nations Committee on International Trade Law to govern international commercial arbitrations. They were approved by the United Nations General Assembly on December 15, 1976. The UNCITRAL Arbitration Rules are a loose set of procedural guidelines, which unlike the rules under the ICSID Convention are not completely self-contained.[403] Where there is a conflict

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[400]Ibid. at 127.

[401]Supra, note 388 at 732.

[402]Supra, note 14 at 53.

[403]K.S Bockstiegel, "The Relevance of National Arbitration Law for Arbitrations under the UNCITRAL Rules" (1984) 1 Journal of International Arbitration" 223 at 224.

between the UNCITRAL Arbitration Rules and the mandatory provisions of the law applicable to the arbitration, the mandatory provisions arbitration prevail.[404]

As arbitration is a consensual procedure, Section B contains provisions which ensure that each party to an arbitration has consented to the procedures mandated by the NAFTA. Pursuant to Article 1121, an investor must deliver the following to the involved Party at the time that the investor submits its claim to arbitration:

1) A document indicating that the investor consents to arbitration in accordance with the procedures set out in the NAFTA.

2) A document indicating that the investor waives any right to pursue the claim in any other forum.

By virtue of Article 1122 each Party provided its consent to the Section B process at the time that the NAFTA took effect. Therefore each Party will be deemed to have consented to any arbitration in which it becomes involved under Section B.

Each tribunal set up under Section B will be comprised of three members. Each of the disputing parties will appoint one member. The third member, who will be the presiding arbitrator will be appointed by agreement of the parties to the dispute.[405] If the parties to the dispute cannot agree upon the third member of the Tribunal, the member will be appointed by the Secretary-General of ICSID.[406] The Secretary-General will appoint the third member from a roster of forty-five names which the Parties established on January 1, 1994.[407] The third

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[404]The UNCITRAL Rules, Article 1(2).

[405]Supra, note 2 Article 1123.

[406]Ibid. Article 1124(2).

[407]Ibid. Article 1124(3).

member, if appointed by the Secretary-General cannot be a national of either the involved Party nor the country of the investor.

Unless the disputing parties agree otherwise, the arbitration will be held in the territory of a Party that is a member of the New York Convention.[408] This provision is meant to ensure the enforceability of the award under the New York Convention.[409] If the disputing parties cannot agree upon a location for the arbitration, the location will be selected in accordance with the applicable set of arbitration rules.

Under Article 1130, the governing law of Section B arbitrations is the law as set out in the NAFTA and the "applicable rules of international law."

A final award made by a tribunal may be in the form of either monetary damages and applicable interest or the restitution of property. A Party may pay damages in lieu of restitution. A tribunal may also award costs in accordance with the applicable arbitration rules.[410]

Article 1136 governs finality and enforcement of awards. Article 1136(3) provides that enforcement should not be sought until the appropriate period for requesting a review of an award has expired under the applicable set of arbitration rules. Enforcement may be sought under the ICSID Convention, or if not, under either the New York or the Panama Convention.[411]

Moreover, if a Party fails to comply with an award, the investor may request that the Party in which the investor resides take the matter before the FTC. Pursuant to Article 1136(5)

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[408]Ibid. Article 1130.

[409]Supra, note 388 at 734.

[410]Supra, note 2, Article 1135.

[411]Ibid. Article 1136.

upon receipt of a complaint, the FTC must establish a Chapter 20 Panel. Before such a Panel, the Complaining Party may seek first a determination that the failure to abide by the arbitral award is inconsistent with the Party's obligations under the NAFTA, and secondly, a recommendation that the Party comply with the award. Failure to comply with the award allows the complaining Party to suspend benefits in accordance with Chapter 20.[412]

3. Analysis

A. Access

An investor of a Party may initiate a claim against another Party. The NAFTA defines an investor of a Party as a national or enterprise of a Party "that seeks to make, is making or has made an investment."[413] Therefore access to the Chapter 11 DRM is open to any Party who invests or is looking to invest in the territory of another Party and suffers a loss as a result of that Party not complying with its obligations under Section A. There is no requirement that the investor pursue its claim through its government. Investors have direct access to the Section B procedure.

Moreover, once a claim is initiated, the investor has carriage of the action. The investor can choose the rules which will apply to the proceedings. The investor can participate fully in the appointment process of the tribunal. The investor may initiate interlocutory actions.[414] The investor may prepare its own briefs and argue its own case before the tribunal.

The Parties included the Section B process in Chapter 11 in order to dampen investor

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[412]Supra, note 388 at 735.

[413]Supra, note 2, Chapter 11, Section C.

[414]Ibid. Articles 1126, 1133, and 1134.

fears that their investments may suffer as a result of actions taken by foreign governments. Section B provides such investors with an avenue of recourse. The right of direct access ensures investors the ability to use this avenue when they believe it is necessary without having to worry about their own government's agenda. This should ease fears over the actions of other governments and provide some level of comfort to potential foreign investors. The right of direct access to the Chapter 11 DRM should therefore encourage investment activity in North America.

B. Transparency

Neither the rules under the ICSID nor the UNCITRAL Arbitration Rules provide for public scrutiny in the arbitral procedure. One of the advantages of the arbitral process is confidentiality. This is an especially important consideration where trade secrets may be involved.[415] Chapter 11 is curious in that it is part of a public international law document which provides a right of action, yet the process remains as true as possible to the arbitral process which is a private, consensual method of dispute resolution. This is an effective means of converting the ideology of free trade into law. A private, consensual process provides both investors and disputing Parties with a maximum amount of control over the procedure. This should ease concerns of potential investors over the prospect of becoming involved in disputes with foreign governments which in turn should encourage investment. Confidentiality must be maintained in the process to ensure that investors, concerned about trade secrets are not discouraged from taking risks associated with investment.

Even though the proceedings and any associated documents are confidential, final awards

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[415]Lord Wilberforce, "Resolving International Commercial Disputes: The Alternatives" in R.K. Paterson and B.J. Thompson eds. Uncitral Arbitration Model in Canada 7 at 10.

may be published at the request of the involved parties. Annex 1137.4 provides that where either Canada or the United States are involved in the dispute, the final award may be published by either disputing party. Where Mexico is involved, the award may only be published upon agreement of both Mexico and the disputing investor. [416] Chapter 11 therefore, provides a reasonable compromise between the need for public scrutiny and the protection of business concerns over confidential information. The ability to protect confidential information is necessary if businesses are to feel comfortable in relying upon the Chapter 11 DRM. As it was believed to be essential that a DRM have the ability to address investor concerns if foreign investment were to be stimulated, the Chapter 11 process is successful in converting ideology into law.

C. Predictability

The Chapter 11 procedure will not produce rules that the market can rely upon with a degree of certainty and predictability. Many decisions will not be published. Arbitral tribunals will be ad hoc and will not be obligated to either follow or even refer to decisions of prior tribunals. Article 1136(1) states that an award shall have no binding effect "except between the disputing parties and in respect of the particular case." However, Chapter 11 serves a different function from either Chapter 19 or Chapter 20. It was not designed as an alternative to a set

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[416]Annex 1137.4 provides:

> Where Mexico is the disputing Party, the applicable arbitration rules apply to the publication of an award.
>
> Article 32(5) of the UNCITRAL Arbitration Rules provides:
> The award may be made public only with the consent of both parties.
>
> Article 48(5) of the ICSID Convention provides:
> The Centre shall not publish the award without consent of the parties.

of rules that would bring stability to the market, as was Chapter 19. It was not designed as the primary mechanism for the interpretation and application of the NAFTA's rules as was Chapter 20. Rather it was designed with the specific purpose of alleviating investor concerns over losses caused by government action. It was modeled upon the procedure established by the ICSID Convention which has proven itself to be an effective means of addressing investor concerns.[417] This procedure calls for a resolution of disputes on a case by case basis. Broad questions over the interpretation or application of the Section A rules will still be decided under the Chapter 20 mechanism. As Chapter 11 was not designed to fulfil the same broad roles intended for Chapters 19 and 20, it should not have the same expectations applied to it.

The Parties could have chosen to address investor concerns in another manner. For example, they could have provided aggrieved investors with access to a trilateral court which would also be responsible for the interpretation of the NAFTA. However, the Parties chose to employ the ICSID model to address investor concerns. Broader questions of interpretation and application are to be dealt with under other DRMs. The inability of Chapter 11 to create a predictable legal environment should not therefore necessarily be viewed negatively.

D. Enforceability

Chapter 11 provides two avenues of enforcement which together should prove effective. First, an investor may seek enforcement under the ICSID Convention, the New York Convention, or the Panama Convention.[418] Each Party is a member of at least one of these conventions. Each convention obligates its signatories to both recognizing and enforcing a

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[417]See Jan Paulson, "ICSID's Achievements and Prospects" (1991) 6 ICSID Review 380.

[418]Supra, note 2, Article 1136(6).

foreign arbitral award as if it were rendered by its national court. So an investor who has been successful in arbitration against a Party can register it with a court in the territory of that Party and the Court will enforce it as if it were a final judgment. The investor can initiate enforcement proceedings under these conventions on its own. It is not dependent upon the cooperation of its government.

The second avenue of enforcement requires government involvement. Where a Party fails to comply with a final award, the Party of the investor may request that the FTC establish a Chapter 20 Panel to recommend compliance with the award.[419] If the non-complying Party fails to follow the Panel's recommendations, the Party of the investor may retaliate under Chapter 20. The prospect of international embarrassment, strengthened by the threat of economic sanction should ensure compliance in most situations.

The decision of whether or not to utilize the second avenue of enforcement is within government discretion. However, it is only one of two methods of enforcement available under Chapter 11. The first avenue can be taken by investors independent of government action. This two avenue approach should prove an effective means of enforcing Chapter 11 decisions. Effective enforcement will inspire confidence in the Chapter 11 DRM. Confidence in the Chapter 11 DRM should alleviate concerns over risks associated with investing in a foreign country. Alleviation of such concerns should encourage investment in North America.

E. Conclusions

It therefore appears that the Chapter 11 DRM is an effective means of converting the ideological goals of free trade into law. It provides private rights of access to a mechanism

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[419]Ibid. Article 1136(5).

designed to mitigate the risks of foreign investment. It does so in a manner which protects confidentiality. Moreover, it provides an effective means of enforcing tribunal decisions and enables investors to protect their interests regardless of the concerns of their governments. These factors should encourage business activity in North America, which is the overriding purpose of pursuing the policy of continental free trade.

CHAPTER XI. THE ENVIROMENTAL SIDE AGREEMENT

1. Introduction

One month after the NAFTA was signed by the Parties on December 17, 1992, the United States inaugurated a new president. During his campaign, Bill Clinton announced that he supported the NAFTA, in principle, but that he would not allow it to come into force unless a means of addressing some of his concerns could be found. Specifically, Clinton wanted assurances that each Party would enforce their environmental and labour standards.[420] After Clinton came into office the three Parties commenced a new round of negotiations in an attempt to find a means of addressing these issues. These negotiations culminated on August 13, 1993 when the Parties signed the North American Agreement on Environmental Cooperation[421] and the North American Agreement on Labour Cooperation[422] (the "Side Agreements").

The Side Agreements entered into force on January 1, 1994, immediately after the entry into force of the NAFTA.[423] The Side Agreements establish new institutional frameworks and DRMs designed to encourage cooperation between the Parties in the areas of the environment and labour. As the mechanisms contained in the two Side Agreements are similar this paper will only focus on one, the environmental agreement. The observations on the mechanisms established by the environment agreement contained herein will apply equally to the mechanisms

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[420]Supra, note 4 at 60.

[421]Canada, North American Agreement on Environmental Cooperation (Ottawa: Minister of Supply and Services, 1993).

[422]North American Agreement on Labour Cooperation (Ottawa: Minister of Supply and Services, 1993).

[423]Supra, note 421, Article 47, Supra, note 422, Article 51.

established by the labour agreement. This Chapter will examine the provisions of the environmental agreement and then analyze those provisions in an effort to determine whether they further the ideological goals of free trade in North America.

2. The Provisions of the Environmental Side Agreements (ESA)

Before examining the specific provisions of the ESA, it is useful to explore the relationship between the ESA and the NAFTA. The NAFTA is the first agreement of its kind to expressly recognize environmental objectives and issues.[424] This is evident from the Preamble to the NAFTA in which the Parties undertake to pursue various commercial objectives in a manner that is consistent with environmental protection and conservation. Additionally, the NAFTA contains provisions which deal with the relationship between the NAFTA and various international environmental agreements[425], sanitary and phytosanitary measures[426], technical barriers to trade[427], potential investment incentives and environmental protection[428], and intellectual property rights and environmental protection.[429]

An examination of these provisions indicate that the Parties did not attempt to craft a comprehensive set of rights which exhaustively define the relationship between trade and environmental regulation. Rather they addressed specific trade-related environmental matters

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[424]Christopher Thomas and Gregory A. Tereposky, "The NAFTA and the Side Agreement on Environmental Co-operation" (1994) 27 Journal of World Trade 5 at 7.

[425]Supra, note 2, Article 10 4 and Annex 104.1.

[426]Ibid. Chapter 7, Section B.

[427]Chapter 9.

[428]Article 1114.

[429]Chapter 17.

on an issue by issue basis. The NAFTA does not address the issue of ensuring proper enforcement of domestic environmental laws. The issue was however addressed subsequently in the ESA.[430]

In addition to enforcement mechanisms the ESA contains measures designed to increase public participation, provide for the resolution of disputes between the Parties, and to encourage collaboration between the Parties.[431] The ESA does not obligate the Parties to harmonization of their environmental regulations.

The ESA creates mechanisms designed to fulfil both norm formulation and end applying/implementing functions. At the heart of the norm formulation function is the Commission for Environmental Cooperation (the "Commission"). The Commission is comprised of a council, a secretariat, and a joint public advisory committee. The Council is the guiding body of the Commission. It is structured and performs a function similar to that of the FTC. However, the ESA improves upon the FTC. The ESA contains mechanisms designed to make the Council an open, responsive institution which allows meaningful public participation in the norm formulation process.

The Council is comprised of a cabinet-level representative from each of the Parties.[432] Ordinarily the representative will be the minister of environment of the Party. The Council must meet at least once a year in regular session.[433] In the course of all regular sessions the Council must hold public meetings. Any other meetings of the Council may be public where the Council

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[430]Supra, note 424 at 8.

[431]Ibid. at 5.

[432]Supra, note 421, Article 9.

[433]Ibid., Article 9(3)(a).

so decides.[434] The Council's main function is to serve as a forum of discussion for environmental matters and then to develop and make recommendations to the Parties regarding such matters. The other functions of the Council include overseeing the implementation and further elaboration of the ESA, overseeing the Secretariat, approving the annual program and budget of the Commission, addressing questions over the interpretation of the ESA and promoting the environmental cooperation of the Parties.[435]

All decisions and recommendations of the Council must be made by consensus unless the Council agrees otherwise. All decisions and recommendations of the Council must be made public, unless the Council agrees otherwise.[436]

The Council will also assist the FTC by acting as a point of inquiry and receipt for comments from non governmental organizations and persons concerning the environmental matters that arise under the NAFTA. Additionally it will advise the FTC on the avoidance of environment related disputes between the Parties.[437]

Within three years the Council is to make recommendations to the Parties in regard to ensuring proper assessment, notification and mitigation of the effects of projects which may have transboundary implications.[438]

The Council will be assisted in the exercise of its functions by the Secretariat. Unlike the FTC's secretariat the secretariat established under the ESA is more than simply an

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[434]Ibid., Article 9(4).

[435]Ibid., Article 10(1).

[436]Ibid., Article 9(6) and (7).

[437]Ibid., Article 10(6).

[438]Ibid., Article 10(7).

administrative body. It has a considerable amount of independence and can act as both a forum and an advocate for public opinion.

The Secretariat is to be headed by one executive director. The executive director will be appointed by the Council to a three year term which may be renewed once. The executive director is responsible for appointing and supervising the Secretariat's staff.[439] Neither the executive director nor the staff of the Secretariat may seek or receive instruction from any government.[440] Pursuant to Article 11(4) each Party is obligated to respect the international character and responsibilities of the Secretariat and to refrain from attempting to influence it in the discharge of its responsibilities.

The Secretariat will provide both the Parties and the public with information on how they can obtain technical advice on environmental matters. It will also prepare an annual budget and program for the Commission which will be submitted to the Council for approval.[441]

Among the Secretariat's most important functions is to act as the environmental watchdog in North America. It performs this function through the preparation of various reports. It must prepare an annual report for the Commission. The annual report will be prepared in accordance with instructions from the Council and must be released to the public. The annual report may cover a variety of issues. Article 12(2) of the ESA specifically states that the annual report will cover the activities and expenses of the Commission during the previous year; the approved program and budget of the Commission for the next year; the actions taken by the Parties on matters covered by the ESA, including data on each Party's environmental enforcement

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[439]Ibid., Article 11(2).

[440]Ibid., Article 11(4).

[441]Ibid., Article 11(6).

activities; views and information submitted by non governmental organizations and persons, and recommendations on any matter within the scope of the ESA.

In addition to the annual report, the Secretariat may prepare a report on any other matter within the scope of the agreement. In preparing its report the Council may draw on information from non governmental organizations and persons, the Joint Public Advisory Committee, a Party, public consultations, conferences, seminars, or symposia. The report must be submitted to the Council and will be made public within sixty days unless the Council decides otherwise.[442]

The third arm of the Commission is the Joint Public Advisory Committee (the Committee). The Joint Public Advisory Committee will be made up of fifteen members. The members will be appointed by the Parties. Each Party will appoint an equal number.[443]

The Committee will meet at least once a year at the time of the Council's regular session. The Committee may advise the Council on any matter within the scope of the ESA.[444] It may also provide information to the Secretariat including information to assist the Secretariat in the preparation of its reports.

The Secretariat must provide the Joint Public Advisory Committee, at the time they are submitted to the Council with copies of the proposed annual budget, draft annual report and any report the Secretariat purposes.[445]

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[442]Ibid., Article 13.

[443]Ibid., Article 16(1).

[444]Ibid., Article 16(4).

[445]Ibid., Article 16(6).

3. Analysis

A. Norm Formulation Function

The ESA does not significantly change the actual rule making function under the NAFTA. The Commission is guided by a political body which is answerable to the FTC, another political body. The FTC is answerable to the Parties. Any amendments to the NAFTA or the ESA may only be made by the agreement of the Parties.

The guiding body of the Commission, the Council is modeled on the FTC. As such, heavy reliance is still placed on the democratic procedures within each Party. However, the addition of an independent Secretariat and the Joint Public Advisory Committee to the Commission does much to ensure effective public participation in the formulation of norms. In doing so, the Commission under the ESA addresses many of the concerns surrounding the FTC discussed in Chapter IX herein.

One of those concerns was the lack of a mechanism to ensure that issues of public concern were brought before the FTC in an effective and timely manner. The ESA creates a formal body to address this concern. The Secretariat will receive public comments on an ongoing basis and include such comments in the annual reports which must be made public. This should ensure that matters of concern to the public are actually placed on the Council's agenda in a timely manner. The Committee may also solicit public opinion and relay such opinion to the Council.

Another concern surrounding the FTC was the lack of transparency in the norm formulation process. The public has no means of monitoring how their concerns are being addressed. The ESA addresses this concern in several ways. First, regular session meetings of the Council must include public sessions. Secondly, the annual report must be released publically. The annual report will include a summary of the Commission's activities over the

previous year and its objectives for the upcoming year. Such reports will allow members of the public to gauge the progress of their concerns. Thirdly, members of the public may work with the Secretariat in the preparation of reports for the Council. Such reports will ordinarily be made public. This mechanism allows the members of the public a means of ensuring matters are brought before the Council. It also provides the public with another avenue of participation in the formulation of norms.

A third concern over the method of norm formulation outlined in Chapter 18 of the NAFTA was the delicate state of Mexican democracy which may not allow many Mexicans an effective voice. In addition to establishing the institutions and procedures outlined above, the ESA also commits the Parties to strengthening their domestic institutions to allow greater public participation. Under Article 4 of the ESA, the Parties committed themselves to ensuring that their laws, regulations, and administrative rulings are promptly published to enable interested parties to become acquainted with them. The Parties have also agreed, pursuant to Article 4(2), to publish proposed measures in advance and to allow interested persons a reasonable opportunity to comment on such proposed measures.

Additionally, under Article 6 the Parties have committed themselves to ensuring that interested persons may request that government authorities investigate alleged violations of environmental laws. Pursuant to Article 6(2) each Party has agreed to provide private access to administrative, quasi-judicial and judicial proceedings for issues involving environmental laws and regulations. Under Article 7 the Parties have agreed to ensure that such proceedings are fair, open and equitable. Such measures should strengthen public access to the decision making process in each country which in turn should ensure that citizens from all Parties are provided a reasonable opportunity to participate in the formulation of environmental norms under the NAFTA.

Classical liberalism, upon which free trade policy is premised, is based upon the idea of freedom of the individual. Freedom of the individual requires an effective means of participating in the formulation of norms. While the ESA retains a tremendous amount of power for the governments of the three Parties, the mechanisms outlined above should ensure members of the public with an effective voice in the development of environmental policy in North America.

B. Applying/Implementing Function

The Secretariat also performs an important role in the implementing/applying function. Pursuant to Article 14 the Secretariat may receive submissions from any nongovernmental organization or person that asserts that a Party is failing to effectively enforce its environmental laws. The Secretariat may then determine whether the submission has merit. If it determines that the submission has merit, the Secretariat may request a response from the Party alleged to be failing to enforce its environmental laws.[446] The Party then has thirty days in which to respond. It should be noted that the ESA does not require that the Party take any action. The Party is merely required to respond to allegations.

If the Secretariat, in light of the Party's response believes that the allegation is warranted, the Secretariat may commence developing a factual record.[447] In developing the factual record, the Secretariat may consider information from a variety of sources, including independent experts, the Joint Public Advisory Committee or nongovernmental organizations or

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[446]Ibid., Article 14(2).

[447]Ibid., Article 15.

persons.[448]

The factual record may be submitted to the Council after which any Party may have forty-five days in which to respond.[449] The Secretariat may then prepare a final factual record in light of the Party's response. The factual record may then be released to the public if the Council votes to do so by a two-thirds vote.[450] The Secretariat cannot force the offending Party to take any particular action through this procedure. Rather it appears that the purpose of the procedure is to put pressure on the Party to enforce its laws by exposing the Party's failures, first to the other Parties and later to the public.

Where there has been a persistent pattern of failure on the part of one Party to enforce its environmental laws, one of the other two Parties may initiate the DRM established under Part Five of the ESA. This DRM may be commenced by a request from one Party for consultations on the alleged failure to enforce.[451] If the Parties fail to resolve the matter through consultations, either Party may request a special session of the Council. The Council may then attempt to resolve the issue through a variety of alternative dispute resolution techniques including mediation, conciliation, or good offices.[452]

If the Council fails to resolve the matter, the Council may then establish an arbitral Panel to consider the issue. In order to be referred to a Panel, the alleged persistent pattern of failure to enforce must relate to sectors that produce goods or services traded between the Parties or

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[448]Ibid., Article 15(4).

[449]Ibid., Article 15(5).

[450]Ibid., Article 15(7).

[451]Ibid., Article 22.

[452]Ibid. Article 23(4).

that compete in the territory of the Party complained against with goods or services provided by persons of another Party.[453]

Where there are two disputing Parties, the Panel shall be comprised of five members. The Parties will first attempt to agree upon a chair for the Panel. Where the Parties cannot agree upon a chair, the Party chosen by lot will appoint a chair who is not a citizen of that Party. Each disputing Party will then select two panelists who are citizens of the other disputing Party.[454] Where all three Parties are involved in a dispute, the Parties will attempt to agree upon a chair. The Party complained against will then choose a panelist from each of the complaining Parties. The complaining Parties will then select two panelists who are citizens of the Party complained against. The panelists will normally be chosen from a roster of 45 individuals established and maintained by the Council.[455]

The Parties to a dispute have the right to make both oral and written submissions to the panel.[456] As long as the Parties agree the Panel may seek technical advice from any person or group it deems appropriate.[457]

Within one hundred eighty days of the last panelist being selected, a Panel must deliver an initial report to the disputing Parties containing findings of fact; a determination as to whether there has been a persistent failure; and if there has been a persistent failure, a recommendation for the resolution of the dispute. A disputing Party may then submit any comments on the report

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[453]Ibid., Article 24(1).

[454]Ibid. Article 27(1).

[455]Ibid. Article 27(2).

[456]Ibid., Article 28(1) and (2).

[457]Ibid., Article 30.

to the panel within thirty days.[458]

Within sixty days of the presentation of the initial report, the Panel must deliver its final report to the disputing Parties. The disputing Parties must deliver the final report to the Council. Five days after the final report is transmitted to the Council, it must be published.[459]

If in its final report the Panel makes a positive determination, the disputing Parties must convene to agree upon a mutually satisfactory action plan.[460] If within sixty days of the final report, the Parties cannot agree upon an action plan, or cannot agree upon whether the action plan is being implemented, the Council may reconvene the Panel.[461] The Panel, may, if no action plan has been agreed to recommend a plan consistent with the law of the Party complained against.[462] If a plan has been agreed to but the Panel is of the opinion that it is not being implemented, the Panel may impose a monetary enforcement assessment against the offending Party.[463]

The level of the monetary enforcement assessment may be no higher than $ 20 Million U.S. for the first year of the NAFTA's operation. Thereafter, the monetary enforcement assessment may be no greater than .007 percent of the total trade in goods between the Parties.[464] If either the United States or Mexico fail to pay the monetary enforcement assessment then the complaining Party may suspend the application of NAFTA benefits in an

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[458]Ibid., Article 31.

[459]Ibid., Article 32.

[460]Ibid., Article 33.

[461]Ibid., Article 34(1).

[462]Ibid., Article 34(4).

[463]Ibid., Article 34(5).

[464]Ibid., Annex 34.

amount no greater than that sufficient to collect the assessment.[465] If Canada fails to pay a monetary enforcement assessment, then the Commission may file the panel determination with a court of competent jurisdiction. The monetary assessment may be enforced against Canada or one of its provinces (if, pursuant to Annex 41 the province is one for which Canada has declared it will be bound) as though it were an order of the court.[466] All monetary enforcement assessments will be placed in a fund established by the Council to improve or enhance the environment or environmental law enforcement in the Party complained against.[467]

(i) Access

Again the Parties have prohibited private parties from initiating actions against other Parties. Only the Parties may initiate or participate in panel proceedings under Part Five of the ESA. Moreover, under Article 38 a Party is prohibited from providing private parties with a right of action against Parties for failure to act within the terms of the ESA. This may cause problems if the Parties decide not to pursue actions against other Parties. Private parties may receive the impression of being forced to participate on an "nonlevel playing field" if they have to comply with the environmental laws of their country but their competitors do not. This may erode confidence in the effectiveness of the NAFTA which may dampen business activity. Alternatively, it may encourage businesses to relocate to the Party that does not enforce its environmental laws. The interests of businesses are not always the same as the interests of their governments. It is therefore unrealistic to expect that governments will always initiate the Part

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[465]Ibid., Article 36.

[466]Ibid., Annex 36A.

[467]Ibid., Annex 34(3).

Five DRM simply because one of the businesses within its territory believes it is being forced to play on an nonlevel playing field. Yet a mechanism that does not address such concerns cannot completely fulfil its purpose. Without allowing access to those parties with a direct interest in the outcome of Part Five disputes, Part Five cannot completely fulfil its purposes.

However, the ESA does go further in providing private parties with an avenue of direct recourse than does Chapter 20. Article 14 of the ESA provides private parties with access to the Secretariat who may then demand that Parties respond to allegations of nonenforcement. If the Secretariat is not satisfied with the response, it may investigate the allegations and prepare a factual record which may then be made public. It is hoped that this form of public exposure will prove effective in ensuring enforcement of environmental laws. However, this procedure may not provide private parties with a satisfactory level of assurance. Once the private party makes the allegation, the decision of whether and how to proceed is completely within the discretion of the Secretariat. If the Secretariat is not responsive to the public in the manner in which it pursues Parties, Articles 14 and 15 will not prove to be effective procedures for addressing the concerns of private parties.

(ii) Transparency

It is difficult to fully assess the transparency of the Part Five DRM as under Article 28, the Council is committed to establishing Model Rules of Procedure to govern Part Five proceedings. As of June 1, 1994 the Council is yet to release such model rules. However, one of the stated objectives of the ESA is to promote transparency.[468] This objective has been reflected in many of the ESA's provisions outlined above, including Article 32(2) that requires

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[468]Ibid., Article 1(h).

the Council to publish final reports of the panel. This provides reason to believe that the model rules will contain provisions that ensure adequate transparency in the Part Five DRM.

(iii) Predictability

The Part Five procedure is not designed to interpret provisions of the NAFTA or the ESA. Any questions over the interpretation or application of terms will be determined under Chapter 20. The Part Five procedure, however, does provide a mechanism that gives adequate assurance that the Parties will enforce their environmental laws. Knowledge that Parties will enforce their environmental laws should do much to foster a certain and predictable environmental regime in North America.

(iv) Enforceability

Part Five does provide sanctions for Parties that fail to comply with panel decisions. It is difficult to assess whether these sanctions will prove effective as none of the Parties have ever before subjected themselves to a regime of fines imposed by an international organization. It is however unreasonable to believe that a $ 20 Million US fine will prove to be an effective deterrent against a government that believes it is in its interests to not enforce its own environmental laws.

However, what may prove effective is the degree of transparency in the procedures established by the ESA. Such transparency should mobilize public opinion in the three Parties in favour of encouraging the governments to comply with their international obligations. Most business groups will want to protect the integrity of the NAFTA. Most environmental groups will want to protect the integrity of domestic environmental laws. Therefore, as long as the protection of the environment remains near the top of the public agenda, the ESA's procedures

should act as a reasonable deterrent against non-compliance. It must be remembered that each of the Parties are sovereign states and there is only so much that can be done to force them to comply with their obligations. Short of war, mobilization of public opinion may be the most effective means of enforcing compliance.

C. Conclusion

While the general rule in the classical liberal tradition is non-interference there are some recognized exceptions. Among the most important of these exceptions is the regulation of polluting activity. The pursuit of individual advantage often encourages individuals to pollute. Yet pollution by one individual can cause damage to thousands of people. Milton Friedman refers to this as "neighbourhood effects."[469] As the interests of business are often in opposition to the interests of the environment, governments must regulate the environment in order to prevent neighbourhood effects.

But such regulation must be based on norms agreed upon by society. Those regulations must also be enforced equally and fairly so that no one individual can gain by not complying with the regulations once they are established. The ESA adequately provides for these concerns. It provides procedures that ensure effective public participation throughout North America in the formulation of norms. It also contains provisions that should lead to effective enforcement of the laws which flow from those norms. The ESA therefore adequately converts the ideology of free trade into law.

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[469]Supra, note 150 at 12.

CHAPTER XII. CONCLUSIONS ARISING FROM PART THREE

Part Three of this paper has examined the main institutional and DRMs contained in the NAFTA. This examination reveals an incongruence between the ideological goals of free trade and the agreement that actually implements free trade in North America. An examination of both free trade theory and the historical forces which caused each Party to embrace free trade, indicates that the ideological goal of free trade is to reduce the involvement of government in the market so that there could be greater reliance on market forces. Greater reliance on market forces is to lead to greater efficiency in the North American economy and thus to greater prosperity.

Yet an examination of the NAFTA's text contemplates a larger role for the governments of the Parties and less freedom for the market. The NAFTA's main institutional chapter, Chapter 20, contains few mechanisms that ensure effective public participation in the formulation of norms. The NAFTA's main DRMs are generally closed to private parties and preclude public scrutiny. Where the DRMs do provide avenues of access to private parties, private parties are not provided the right of carriage of actions, and following a decision are provided with no avenues of direct enforcement.

The result of this incongruence is a system of dispute resolution that does not work. The analysis of the case law above indicates that the trading environment in North America is no more stable in 1994 than it was in 1987. The Canadian Minister of International Trade, Roy MacLaren, has recognized that the current DRMs need to be revisited. In a recent speech on the subject, Mr. MacLaren said, "What is going wrong? Despite five years of bilateral free

trade and now trilateral free trade, the disputes don't go away."[470]

The perception that the DRMs do no work may explain why businesses have not responded to free trade as expected. A survey of Canadian CEOs taken in 1991, revealed that 75 percent said that their sales had not been effected by the FTA. Only 27 percent said that the FTA had created a better business environment for their companies.[471] When asked why there was such ambivalence toward the FTA, Sydney Goldstein, vice chairperson of Mitsubishi Electric Sales Canada Inc. responded that the DRMs are too cumbersome and fail to protect Canadians from American protectionist measures. He said, "Every time the shoes start to squeeze, they scream, then the mechanism for resolving disputes ties you up for ten years."[472]

It is the position of this paper that the problems with the DRMs stem from the fact that those who negotiated the FTA and later the NAFTA failed to create mechanisms that reflect the ideological goals of free trade. The mechanisms created make governments the main participants. This leaves the rules established by the NAFTA open to political manipulation. This may please the governments of the Parties, wishing to please certain segments of their electorates. However, it does little to generate economic growth as it does not create the level of predictability necessary in a stable business environment. Most businesses cannot afford to take the risks necessary to take advantage of the NAFTA's provisions unless they have the ability to protect their interests. Businesses must be assured of this ability prior to making an

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[470]Roy MacLaren as quoted by Drew Fagan,"MacLaren Blasts U.S. on Trade" The Globe and Mail (25 May 1994) A1.

[471]Ronald Rotenberg, "Ban the Barricades" 64 Canadian Business 47.

[472]Ibid.

investment. As David Wippman a Washington D.C. trade lawyer wrote:[473]

> It is generally accepted that a reasonable degree of predictability is essential to the success of any kind of foreign investment or other agreement. Before companies are willing to commit the kinds of resources in terms of capital, technology and time that are necessary to a major investment, they want to know in advance what will happen if the deal goes bad and they have to resolve disputes. Indeed, many companies will try to structure their trade agreements in a way that will give them some certainty as to the form in which disputes will be resolved.

The NAFTA simply does not provide businesses with this ability. It does not allow for the development of predictable rules. It does not even provide business with the assurances that their concerns will be addressed. In many instances only governments have access to the DRMs. But the interests of particular businesses often collide with the broader interests of their governments. Where they do, the current NAFTA regime leaves business with few avenues to protect their interests.

The remainder of this paper will explore means by which the NAFTA may be amended to allow it to meet its ideological goals. It will attempt to develop mechanisms, which do not eliminate the role of governments because governments are needed to protect the broad interests of the three Parties, but rather which are capable of assuring individuals that their interests will be protected. The paper will then examine the implications for the concept of sovereignty of providing individuals with such assurances. The goal of developing mechanisms that meet the NAFTA's ideological objectives is to enable the NAFTA to deliver the full benefits predicted under the theory of comparative advantage.

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[473]David Wippman, "Free Trade - Changes in the Legal Environment Mexico and Beyond - Dispute Resolution" (1993) 7 Florida Journal of International Law 93.

PART FOUR: LOOKING FOR CHANGE

CHAPTER XIII. THE NAFTA vs. THE EC

1. Introduction

The EC has been in existence in various forms since 1957 when six countries signed the Treaty Establishing the European Economic Community (the "EEC Treaty").[474] Since that time it has grown to become the second largest trading bloc in the world, behind only the free trade area established by the NAFTA. It is comprised of twelve nations[475], an area of 2.36 million square kilometres, and a population of 346 million people. It currently accounts for 22 percent of world trade.[476]

This chapter will outline the institutional framework employed by the NAFTA's largest rival. It will then assess that framework against the criteria set out in Chapter VII. The purpose of this exercise will be to compare the compatibility of the EC's provisions with free market ideology with that of the NAFTA's. By employing this comparative approach, this chapter will attempt to bring to light the strengths and weaknesses of the world's two largest trading blocs. The proposed recommendations which will follow, in Chapter XIV will attempt to create a system which draws from the strengths of the two systems but mitigates their weaknesses.

It is important throughout the analysis which follows, that the reader keep in mind that while the EC and North America are both trading blocs and therefore share some similar objectives, they are at the same time fundamentally different creatures with completely different

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[474]March 25, 1957, 298 U.N.T.S. 1.

[475]The EC is comprised of Belgium, Denmark, France, Greece, Iceland, Italy, Luxembourg, the Netherlands, Portugal, Spain, the United Kingdom and West Germany.

[476]Martin E. Elling, "The Emerging European Community: A Framework for Institutional and Legal Analysis" (1990) 13 Hastings International and Comparative Law Journal 511 at 514.

purposes. The NAFTA creates a free trade area.[477] The objectives of the NAFTA are purely economic. Those who negotiated the NAFTA hoped to create prosperity in North America through greater economic cooperation. While some degree of political interdependence was a recognized outcome of such an arrangement, social and political integration was never an objective of the Parties when they negotiated the NAFTA.

Those who negotiated the EEC Treaty, on the other hand, created a customs union which they hoped would one day lead to complete European integration.[478] This hope took a huge step toward becoming a reality when the members of the EC signed the Treaty on European Union (the "Maastricht Treaty").[479] The Maastricht Treaty transfers significant political powers from individual member states to EC institutions. It also extends the competency of the EC to the fields of external relations and defence, and commits the EC to the establishment of a common currency.[480]

It is essential that this fundamental difference between the NAFTA and the EC be kept in the foreground when comparing the institutions of these trading blocs for the differing purposes of the two arrangements may account for any differences in their respective institutional structures.

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[477]In a free trade area, the parties eliminate tariffs between themselves but leave each party free to establish its own tariffs which it applies to third countries. A free trade area is often compared to a customs union in which the parties eliminate all duties between themselves and adopt a common tariff with respect to third countries. See supra, note 33 at 140.

[478]P.J.G. Kapteyn and P. Verloren van Themaat, Introduction to the Law of the European Communities (Deventer: Kluwer, 1989 at 5-6.

[479]Signed at Maastricht on February 7, 1992, entered into force on November 1, 1993.

[480]Trevor C. Hartley, "Constitutional and Institutional Aspects of the Maastricht Agreement (1993) 42 International and Comparative Law Quarterly 213.

2. What is the EC?

An understanding of the EC's purposes requires some understanding of the EC's beginnings. The road to the EC in its present form began with a proposal made by the French Foreign Minister Robert Schuman on May 9, 1950. Schuman proposed that France and Germany place their entire coal and steel industries under the supervision of a common High Authority.[481] Schuman invited other western European nations to join France and Germany in this proposed organization.[482]

Schuman's proposal was motivated by two factors, both arising from the aftermath of World War II (the "War"). First, some form of economic cooperation was deemed essential in order to rebuild the War ravaged economies of Western Europe. Secondly, some form of Franco-German reconciliation was believed to be necessary for both lasting peace in Europe and for united action against the growing threat posed by the Soviet Union.[483]

Schuman's proposal was met with favourable reception in Belgium, Italy, Luxembourg, the Netherlands and West Germany. In April 1951, these five countries, together with France signed the Paris Treaty which created the European Coal and Steel Community (the "ECSC").[484] The Paris Treaty created a common market for coal and steel under the supervision of a supranational body, the High Authority. It was hoped that a common market in coal and steel, the traditional foundations of industrial production in Europe, would place

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[481]Supra, note 483 at 1.

[482]Ibid.

[483]Supra, note 481 at 512.

[484]Treaty Establishing the European Coal and Steel Community, April 18, 1951, Gr. Brit, T.S. No. 47 (Cmd. 455) 255.

Europe on the road to greater economic integration.[485]

Such hopes proved to be justified as on March 25, 1957, the six ECSC countries signed the EEC Treaty and the Treaty Establishing the European Atomic Energy Community (the "Euroatom Treaty").[486] The Euroatom Treaty is an attempt to promote the safe use of atomic energy in Western Europe. The EEC Treaty established a common market in the six member states that were party to it.[487]

Initially, each of the three communities, the ECSC, the EEC and Euroatom (the "Communities") had its own institutional structure. However, in 1967 the respective institutions of these communities merged into a single structure that has exercised control over the Communities ever since.[488] The institutional structure under which the Communities have been governed is based upon the structure created by the EEC Treaty. The EEC Treaty, therefore, should be regarded as the Constitution of the Communities.[489]

In 1975 Denmark, Ireland and the United Kingdom acceded to the Communities. Greece became a member of the Communites in 1981. Spain and Portugal acceded in 1986.

In February 1986, the twelve member states signed the Single European Act ("SEA").[490] The SEA introduced a series of provisions aimed at achieving greater institutional efficiency within the Communities. It thus laid the groundwork for more ambitious and rapid

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[485]Supra, note 483 at 7.

[486]March 25, 1957, 1988 Gr. Brit. T.S. No. 47 (Cmd. 455) 255.

[487]Supra, note 483 at 13.

[488]E. Noel, "The Institutions of the European Community" (1992) 15 Suffolk Transnational Law Journal 514 at 515.

[489]A. Barav, "The Judicial Power of the European Economic Community" 53 Southern California Law Review 461 at 466.

[490]Supra, note 483 at 20.

progress toward full union.[491] It also extended the powers of the Communites institutions by bringing monetary and environmental policy under their jurisdiction.

The Maastricht Treaty was the natural result of the SEA. It seeks to establish an "even closer union" founded on the Communities.[492] It amends and renames the EEC Treaty as the Treaty Establishing the European Community (the "EC Treaty") and renames the EEC as the EC.[493]

3. The Institutions of the EC

The EC is currently administered by the following five institutions:

1. The Council
2. The Commission
3. The European Parliament (the "Parliament")
4. The Court of Auditors
5. The Court of Justice

The Council is the main legislative body of the EC. It must officially approve all EC acts. Prior to the Maastricht Treaty the Council had the authority to legislate most acts on its own. However, under the Maastricht Treaty the Council must now act jointly with the Parliament. The joint procedure is set out in detail below.

The Council is comprised of representatives of the governments of the 12 member states, usually the foreign minister of each state. Each member state has one member on the Council. Each member of the Council sits as the representative of his or her government. Accordingly

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[491]Ibid., at 27.

[492]Supra, note 484, Article A.

[493]Ibid., Article G(A).

EC matters are "viewed through the spectacle of national interest" on the Council.[494]

The Commission is the executive body of the EC. The Commission formulates proposals which are then voted on by the Council and the Parliament. It also is responsible for implementing and administering EC law once the law has come into force. The Commission consists of 17 members. Each of the 12 members states has one member on the Commission. Each of the five largest states, the United Kingdom, Italy, France, Germany, and Spain has an additional member on the Commission. Each of the members are appointed to terms of four years by the common accord of the governments of the member states. Unlike the members of the Council, members of the Commission must be completely independent of the governments of the member states. Commission members are prevented from either taking or seeking instructions from any government.[495]

The Parliament currently consists of 518 members who are directly elected by the populations of the member states. Under the Maastricht Treaty, the Parliament shares legislative powers with the Council. The Commission formulates a proposal which is submitted to both the Council and the Parliament. The Council adopts a common position on the proposal which it submits to the Parliament. The Parliament then has three months to consider the position taken by the Council. If it approves the position, the Council may then adopt the act. If the Commission fails to do anything within the three month limit, then the Council may adopt the act. If, however, the Parliament rejects the position of the Council, representatives of the two institutions meet to attempt to reach a compromise on the proposal. If a compromise cannot be

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[494]Supra, note 483 at 104.

[495]Ibid. at 109.

reached, the proposal will die.[496]

The Parliament can also propose amendments to the common position of the Council. The Council then has three months to act on the amendments. The Council can either approve the amendments in which case they become part of the act or it can reject the amendments. If the amendments are rejected, representatives of the Parliament and the Council will meet to attempt to reach a compromise. If a compromise cannot be reached, the measure will die.[497]

The Maastricht Treaty also gives the Parliament the power to approve the appointments of the members of the Commission. However, the Parliament cannot disapprove individual appointments. It must either approve or disapprove of the appointments en bloc. Once appointed, the Parliament can, by a two-thirds majority vote, dismiss the members of the Commission en masse.

Article 138(b) of the EC Treaty provides that the Parliament may request that the Commission make any "appropriate proposal." The Commission is not obligated to comply. Under the Maastricht Treaty, therefore, the power to initiate legislation is still in the hands of the Commission. However, this power is mitigated, somewhat, by the Parliament's new power to amend the positions adopted by the Council.

The Maastricht Treaty further bestows upon the Court of Auditors, the status of an official institution of the EC. The Court of Auditors commenced operations in October 1977; however, it was not until 1992 that it was officially recognized in a treaty. The Court of Auditors is comprised of 12 members who are appointed to terms of six years by the Council, following consultation with the Parliament. The Court of Auditors audits EC accounts.

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[496]Supra, note 478 at 222.

[497]Ibid. at 224.

The European Court of Justice is the main arbiter of EC disputes. The purpose of the Court of Justice, pursuant to Article 164 of the EC Treaty is to "ensure that in the interpretation and application of this Treaty the law is observed." It is comprised of 13 judges appointed by the common accord of the governments of the member states to terms of six years. One judge is normally appointed from each of the 12 member states. The thirteenth judge is appointed from one of the five major states on a rotation basis.[498]

Each judgement of the Court of Justice follows a painstaking process in which the members of the Court attempt to reach a consensus on both the result and the reasoning. Where a consensus cannot be reached, the final decision is made by a majority vote. Final judgements are presented as judgements of the full court. Dissenting opinions are never prepared.[499]

The Court of Justice is assisted by six advocates-general who prepare reasoned opinions on how a case should be decided. The opinions of the advocates-general are not binding. The influence of the opinions depend solely upon the persuasive force of the argument.[500] The six advocates-general are appointed by the common accord of the governments of the member states to terms of six years. One advocate-general must be appointed from each of the four largest member states, France, Italy, Germany and the United Kingdom. The remaining two positions must be filled by nationals from one of the remaining eight states.[501]

Broadly, the Court of Justice has jurisdiction over matters involving the interpretation or

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[498]C.O. Lenz, "The Court of Justice of the European Communities" (1989) 14 European Law Review 127 at 129.

[499]U. Everling, "The Court of Justice as a Decisionmaking Authority" (1984) 82 Michigan Law Review 1294 at 1297.

[500]Supra, note 498 at 129.

[501]Ibid.

application of the EC Treaty including allegations that either the member states or any of the EC institutions have failed to comply with the terms of the EC Treaty. As the demands on the Court of Justice have grown over the last ten years the Council established the Court of First Instance in 1989. The Court of First Instance has its own members but it is not an independent body. It is attached to the Court of Justice. It was established to relieve the caseload of the Court of Justice. It therefore hears matters which do not involve complicated questions of law.[502] Decisions of the Court of First Instance may be reviewed by the Court of Justice.[503]

4. Analysis

A. Norm Formulation Procedures

The EC has three institutions involved in the norm formulation process: the Council, the Parliament and the Commission. The Council is similar to the FTC in that it is comprised of government ministers and therefore represents the views of the governments of the member states. Like, the FTC, the Council provides no means by which the public can influence decisions directly. Reliance is placed on the democratic channels of each of the member states. Like the FTC this provides the responsible ministers with discretion over the concerns which are actually presented to the Council.

However, unlike the FTC, the influence of the Council is not unfettered. The Council shares its legislative functions with the Parliament. The Parliament allows direct public participation in the norm formulation process. Members of the Parliament are elected directly by the populations of the member states. Meetings of the Parliament are public and the

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[502]Ibid.

[503]H.G. Schermers, "The European Court of First Instance" (1988) 25 Common Market Law Review 541.

proceedings of the Parliament are published.[504] As the members are directly elected, they are responsible to the public and therefore provide the public with a standing institution which must take public concerns into account. Such concerns may then be represented in the Parliament's monthly sessions. Accordingly, the public in the EC is assured of timely representation. Moreover, because of the changes set out in the Maastricht Treaty this representation is now effective. The Parliament legislates jointly with the Council and may request that the Commission make proposals which it deems appropriate.

This may be contrasted with the norm formulation process under the NAFTA which is closed to the public. The proceedings of the FTC are not published. There is no standing body available to citizens of the Party to ensure timely representation of public concerns.

The one exception is in the area of the environment and labour under the Side Agreements. The Secretariats established under the Side Agreements are standing bodies which may receive concerns over the broader issues that may arise under the NAFTA. The Secretariat established under Chapter 20 is purely an administrative body.

The role of the Secretariats established under the Side Agreements is fulfilled in the EC by the Commission. The Commission is an independent body which may receive the concerns of the public. The Commission is much more powerful than the Secretariats, however, in that it initiates proposals which are then considered by the Council and the Parliament. The two Secretariats under the Side Agreements may only make concerns public and hope that the publicity will inspire action. Accordingly, the Commission plays a very powerful role in the norm formulation process.

The role of the Commission, however, has been criticized as being too powerful for a

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[504]Supra, note 474, Article 142.

body that is independent. Commission members are not elected and are not directly responsible to elected officials from member states. This independence is tempered, somewhat, by the power of the Parliament to dismiss it en masse. However, where the Parliament dismisses the Commission, Article 144 of the EC Treaty provides that the Commission members must continue until the member states appoint new members. Consequently, if the member states fail to appoint new members or reappoint the same members, the Parliament's power of dismissal is ineffective.[505]

B. Applying/Implementing

There are three bodies responsible for the applying/implementing of the EC Treaty: the Commission, the Court of Justice, and a new body created under the Maastricht Treaty, the Ombudsman. These bodies which fulfil the applying/implementing functions in the EC will be examined through the criteria established in Chapter VII herein.

(i) Access

The office of the Ombudsman provides a direct and inexpensive means of addressing the concerns of citizens of the member states over the application/implementation of the EC Treaty. Article 138(e) of the EC Treaty provides the Parliament the power to appoint an ombudsman. The Ombudsman can receive complaints from any citizen concerning the maladministration on the part of one of the EC's institutions. The Ombudsman must investigate the complaint and if the complaint is established, refer it to the institution concerned. The institution has three months to respond. Following the institution's response, the Ombudsman prepares a report

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[505]Supra, note 480 at 221.

which is delivered to both the institution and the Parliament. The person lodging the complaint must be informed of the outcome. The Parliament does not have the power to order a remedy if the complaint is upheld. It is hoped that the institution concerned will do this on its own.[506] It is too early to assess how effective the Ombudsman might be. Much will depend upon how well staffed the office will be. However, it does provide an inexpensive means by which citizens can address their concerns. No institution under the NAFTA's regime plays a similar role.

There are currently three avenues available to private citizens under the EC Treaty. First, if the citizen is concerned about the way a member state has implemented or applied an EC Treaty provision, the citizen may complain to his or her national government. The national government may then attempt to negotiate with the offending state in an attempt to reach a resolution of the matter. If a resolution cannot be reached, the national government of the concerned citizen may file a complaint against the offending state in the Court of Justice under Article 170 of the EC Treaty. The Court of Justice will hold hearings and then rule upon whether the measure is within the provisions of the EC Treaty. This is similar to the process under Chapter 20 of the NAFTA, in that the matter is taken up by the national government and the citizen actually concerned with the outcome of the case has no right of carriage of the action.

Like in the Chapter 20 procedure, the decision of whether or not to initiate the Article 170 procedure is completely within the discretion of the government. Consequently, most business people consider this procedure ineffective because governments are generally reluctant to take other governments to court to decide politically sensitive issues.[507] Throughout the

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[506]Ibid. at 221-222.

[507]Marco Bronkers, "Private Enforcement of 1992: Do Trade and Industry Stand a Chance Against the Member States" (1989) 26 Common Market Law Review 513 at 516.

history of the EC, a member state has only taken an action against another state under Article 170 once.[508]

The second avenue of redress open to private citizens is to begin an action against the offending member state in the national court of the member state concerned. The action launched can be against either a foreign government or against the citizen's own national government for failure to properly apply or implement EC law.

The right of an individual to enforce EC Treaty law was established by the Court of Justice in van Gend en Loos v. Nederlandse Tariefcommissie.[509] In van Gend en Loos a Dutch company challenged the decision of the Dutch authorities to impose an eight percent duty on a good it was importing from Germany despite the fact that the imposition of such a duty appeared to be a violation of Article 12 of the EC Treaty. Article 12 read as follows:

> 12. Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.

The Dutch company argued that the EC Treaty created rights to individuals which they should be able to enforce in their national courts. The Dutch government argued that the EC Treaty did not provide individuals with the ability to challenge government legislation. It argued that if the duty imposed was a violation of Article 12, such a violation could be remedied through a complaint to the Commission.

Even though this matter was initiated in the Dutch National Court, the issue of whether citizens could enforce their rights directly was decided by the Court of Justice. This was because Article 177 of the EC Treaty provides that national courts may refer questions of

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[508]France v. United Kingdom [1979] ELR 2923.

[509][1963] CMLR 105

application or interpretation of the EC Treaty to the Court of Justice. If the question arises before a national court of last resort, the issue must be referred to the Court of Justice. Most of the cases decided by the Court of Justice come to it by way of referrals from national courts.[510] This should come as no surprise. It is through Article 177 that private citizens have direct access to the Court of Justice. Private citizens, as the ones with direct interest in the enforcement of their rights are the ones most likely to attempt to enforce their rights in a court of law. Therefore, there are many more private actions of enforcement initiated than public actions where only governments have direct access to the Court of Justice.

The Court of Justice held in favour of the company in van Gend en Loos. The Court of Justice said that private individuals can enforce their rights under the EC Treaty as long as the provision in question has "direct effects". A provision will have direct effects where first, the text of the provision is clear; secondly, the rights incorporated in the EC Treaty are not subject to the discretion of a member state or EC institution; and thirdly, the provision of the national government goes against a regulation or provision which binds that government.

The NAFTA provides no similar avenue to the citizens of North America. Article 2021 specifically prevents the creation of a private right of action to enforce rights under the NAFTA. North Americans must therefore rely upon the cooperation of their governments in enforcing their rights.

The third avenue available to private citizens is a complaint to the Commission under Article 169 of the EC Treaty.[511] Under this provision, the Commission first investigates the complaint. If it is justified, the Commission will send a warning letter to the member state. If

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[510]Lord Slynn of Hadley, "What is a European Community Law Judge" (1993) 52 Cambridge Law Journal 234 at 237.

[511]Supra, note 507 at 515.

the member state does not take appropriate action, the Commission will prepare a reasoned opinion to the member state outlining its grievance. If the member state still fails to take appropriate action, the Commission may take the case to the Court of Justice.

The Article 169 mechanism has proven to be a fairly effective means of providing private access to an avenue of redress. The Commission receives four to five hundred complaints per year. Roughly 90 percent of these complaints are from either private individuals or private companies, 5 percent are from the European Parliament and the remaining 5 percent are from member states.[512] Such statistics appear to be further indication that private parties are generally much more willing to initiate actions to protect their rights than governments are. Of course the Commission has discretion in deciding how to pursue a complaint. This has given rise to some concerns that the Article 169 procedure is not always the most effective means by which private concerns can be addressed.[513]

The NAFTA does not provide the citizens of North America with similar access to a watchdog institution like the Commission. The Secretariat established under the FTC performs purely an administrative function. It does not receive public complaints. The secretariats under the Side Agreements can act as a watchdog but it does not have the power to initiate actions against the Parties. Moreover the secretariats can only perform this watchdog function in the relatively narrow areas of the environment and labour. The NAFTA provides no access to an institution to deal with the broader issues involved in trade.

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[512]Ibid. at 520.

[513]Ibid. at 524.

(ii) Predictability

As a general rule, the Court of Justice is not bound by its previous decisions. However, in a recent study on the role of precedent in the court's judgements, Anthony Arnull concluded that in practice the Court rarely departs from its previous decisions.[514] In fact, the judges of the Court of Justice believe that consistency in the application and interpretation of the EC Treaty is necessary for the legitimacy of the Court. Ulrich Everling, a former judge of the Court of Justice has written:[515]

> The Court of Justice therefore creates its own legitimacy primarily by the internal logic and consistency of the actual results expressed in its judgement.

This differs from the view of the Panels under the FTA. The panel system has so far been unable to apply rules on a consistent and predictable basis. Without a degree of certainty in the way in which legal rules are applied, the business community cannot properly plan its affairs. One of the key differences between the Court of Justice and the panel systems under the NAFTA, which may explain the differing views on consistency, is that judges of the Court of Justice are appointed to six year terms whereas the panels are ad hoc. It is difficult to establish consistency when new decisionmakers are appointed to each case. This may explain the reason for the following suggestion of the Panel that decided the Chapter 18 dispute over durum wheat:[516]

> Finally, the Panel wishes to make a suggestion which transcends the resolution of the specific dispute between the Parties, but which arises from its attempt to

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[514]A. Arnull, "Owning up to Fallibility: Precedent and the Court of Justice" (1993) 30 Common Market Law Review 247.

[515]Supra, note 499 at 1330.

[516]Supra, 365 at 80.

> adjudicate it. Thus the Panel believes that panels of a more permanent nature, rather than ad hoc panels, would be very beneficial in developing expertise and consistent interpretation of the Agreement.

Additionally the Court of Justice has been able to inject a degree of consistency into EC law through its jurisdiction under Article 177. The Court of Justice has used this provision to ensure that EC law is applied in an uniform manner throughout the EC.[517] Even though many questions over the interpretation of the EC Treaty arise from disputes in national courts, Article 177 ensures that such questions are decided by the Court of Justice. As previously mentioned, Article 177 allows national courts the option of referring questions over the interpretations of EC law to the Court of Justice. If such questions arise before a national court of last resort, the national court is required to refer the matter to the Court of Justice for a preliminary ruling.

The Court of Justice decides only the question of interpretation of EC law. The national court must then decide the ultimate issue in a manner consistent with the Court of Justice's interpretation. This system allows the rulings of the Court of Justice to become part of the national law of each member state. The Court's jurisdiction under Article 177 has thus been extremely important in the development of Community law. It has ensured consistency in the interpretation of EC law and as discussed above it has provided the main route of access to Court of Justice for private parties. As Professor J.P. Jacque and J.H.H. Weiler wrote:[518]

> ... Article 177 is after all not only an instrument for ensuring the uniform interpretation of Community law but the procedure whereby Community law becomes part and parcel of the legal culture of the Member States, a veritable component of the law of the land and the principle avenue where individuals may make use of the rights (and duties) bestowed upon them by the EC legal order.

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[517]A. Arnull, "References to the European Court" (1990) 15 European Law Review 375 at 391.

[518]J.P. Jacque and J.H.H. Weiler, "On the Road to European Union: A New Judicial Architecture- An Agenda for the Intergovernmental Conference" (1990) 27 Common Market Law Review 185 at 187.

The NAFTA contains a similar provision in Article 2020. Pursuant to this article if an issue of interpretation or application arises in a domestic proceeding, the court may solicit the views of the FTC. The FTC may then provide a response. There are however key differences between referrals under the NAFTA and referrals under EC law. First, the FTC is a political body, not a judicial body. Consequently it is more likely that the views of the FTC will change as new governments are elected and join the FTC than would be the case if interpretations were based upon legal reasoning. Secondly, if the FTC cannot agree upon an interpretation, Article 2020(3) provides that each Party may submit its own views. Therefore, not only may there not be consistency between referrals, there may not be consistency within the referrals themselves. Thirdly, the views of the FTC are not legally binding on the court. Therefore, even if the court which made the referral follows the view of the FTC, there is no assurance that courts deciding later cases will also follow that view. Fourthly, even courts of last resort are not required to make referrals to the FTC. Because of national courts of last resort in EC member states are required to refer matters of interpretation to the Court of Justice, there is a strong likelihood that the same provision of the EC Treaty will receive the same interpretation in all EC member states. Under Article 2020 of the NAFTA, however, even if a Canadian court follows the FTC's interpretation of a provision, there is nothing to prevent a Mexican court from following a completely different line of interpretation.

(iii) Enforceability

The amendments made to the EC Treaty at Maastricht provide a new means of enforcing judgements of the Court of Justice. Pursuant to Article 171(2) of the EC Treaty, if a member state does not comply with a judgement, the Commission may issue a reasoned opinion specifying the ways in which the member state has failed to comply. If the member state fails

to comply after receipt of this opinion the Commission may bring the matter before the Court of Justice. If the Court of Justice finds that there has been a failure to comply the Court may impose a fine on the non complying member state in an amount which the Court of Justice considers appropriate.

Unless a Party under the NAFTA fails to enforce its own environmental or labour laws, the NAFTA regime relies upon retaliation rather than fines to enforce panel decisions. It is difficult to assess which method of enforcement would be most effective. Enforcement has not yet proven to be a problem under either the EC Treaty of the NAFTA. In the end there is probably not much difference between the two methods as short of war there is little that can be done to a independent state to force it to comply with its commitments.

However one key difference between the EC system of enforcement and that of the NAFTA's is the party who seeks enforcement. Under the NAFTA system only a Party may seek such enforcement. However, governments are often reluctant to take measures against other governments which may cause political embarrassment. Consequently it may be rare to see the enforcement provisions actually used under the NAFTA. Under the EC system, the Commission seeks enforcement. As a nonpolitical independent body the Commission should be more willing to enforce judgements than governments. Consequently the enforcement provisions of the EC Treaty may well be more effective than those of the NAFTA.

C. Conclusion

Free trade requires free markets. Free markets require free individuals willing to take risks in the pursuit of individual advantage. A legal system in a free market system must encourage rather than discourage the pursuit of individual advantage. In order to do this a legal system must contain mechanisms that allow for effective public participation in the formulation

of norms; rights of private access to mechanisms which can protect individual rights; the establishment of rules that can be applied in a predictable manner; and the effective enforcement of these rules.

The legal system created by the EC accomplishes most of these things. The Parliament provides Europeans with an democratic, permanent, and transparent forum in which to air their concerns. The changes made to Parliament by the Maastricht Treaty provide that forum with the power to effectively participate in the formulation of norms. The watchdog role of the independent Commission, Article 177 of the EC Treaty, and private rights of action against member states provide individuals with the ability to effectively protect their interests. An independent permanent body that is both capable of and willing to apply provisions of EC law in a consistent manner creates a stable legal environment in which businesses can plan their affairs. The role of the Commission in the enforcement process offers private parties greater assurance of effective enforcement than would be the case if enforcement were left solely to governments.

By contrast the norm formulation procedures under the NAFTA are closed and cannot ensure timely consideration of public concerns. Moreover, the NAFTA's general DRM does not allow private rights of access, cannot ensure consistency in the application of rules and provides only the Parties with right of enforcement. Such provisions lead to the conclusion that the NAFTA is more concerned with the protection of governmental influence and power than the encouragement of market forces. In order to allow the NAFTA to achieve the degree of success reached by the EC a new legal system must be developed which makes the encouragement of market forces its primary goal.

However, this does not mean that North America should simply adopt the EC's legal system. Historical forces made European integration a necessary goal of the EC legal order.

Political and social integration was not the goal in North America. However, greater economic integration between the Parties was deemed to be necessary for prosperity to be achieved. In order to reap the benefits of greater economic integration, North Americans must create a legal system that will protect some degree of national sovereignty but at the same time encourage market activity. Some of the mechanisms adopted by the EC might prove a useful starting point for such a system.

CHAPTER XIV. PROPOSALS

1. Introduction

A legal system under the NAFTA must have the ability to spur market activity. At the same time it must enable each of the Parties to protect their respective national interests since North American integration is not the ultimate goal of the NAFTA. Consequently, the NAFTA's legal regime must strike a balance between the rights of individuals to pursue their greatest economic advantage and the ability of governments to protect national sovereignty. An examination of the NAFTA's current regime reveals that the scales have been tipped too heavily in favour of government. Individuals have only the smallest role to play in the NAFTA's legal system. This is inconsistent with the ideology of free trade theory which favours a smaller role for governments in the hope of spurring market forces. There is a danger, which appears to be confirmed by the ambivalence of many business leaders toward the FTA, that if individuals are not left free to maximize their advantage, free trade will not deliver the benefits promised by the theory of comparative advantage.

The EC has reaped the economic benefits expected of a customs union because the member states were willing to cede national sovereignty to EC institutions. Through strong institutions individuals have been able to both influence norms and adequately protect their rights. Adequate protection of rights has encouraged risk taking. Risk taking has led to economic success.

North Americans, if they hope to reap the benefits of a free trade area, will also have to see their governments cede some national sovereignty to supranational institutions which can provide individuals access to both norm formulation and applying/implementing procedures. However, North Americans must take a more balanced approach than the Europeans. The

objectives of the NAFTA are economic rather than political. Even in Europe many now believe that the EC institutions have become too powerful at the expense of national governments and therefore many believe that the objectives of the EC need to be revisited.[519]

Accordingly, the proposals herein, attempt to strike a balance between national sovereignty and supranational institutions. The goal of this attempt is to create a system which encourages individuals to pursue economic advantage. The creation of such a system would successfully convert the ideology of free trade in North America into law.

In introducing these proposals, this paper will follow the same framework followed in previous chapters. It will first discuss the norm formulation mechanisms and secondly, the applying/implementing mechanisms.

2. Norm Formulation

The FTC should remain the ultimate institution in the norm formulation process. The protection of national sovereignty requires democratically elected governments which have the ability to protect broad national interests. The problem with the current regime however is that the public has no direct access to the FTC procedure. The public's only access to the FTC is through normal democratic channels. However, there are no mechanisms in the FTC procedure which allow the public to assess whether normal democratic channels are an effective means of addressing their trade concerns. For example, a lumber producer on Vancouver Island with a Reform member of parliament will have a difficult time discerning what Roy MacLaren said at the FTC's annual meeting.

The exception to the lack of public participation in the norm formulation process is found

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[519] _____ "What is Europe" The Globe and Mail (14 June 1994) A18.

in the ESA. Under the ESA, the Parties have established an independent secretariat capable of receiving public concerns and then attempting to influence the norm formulation process through the preparation of public reports. Such reports are designed to bring greater transparency into the norm formulation process and to mobilize public opinion.

The Parties should establish a similar body that could attempt to influence the broader issues surrounding the NAFTA. The Secretariat established under Chapter 20 should remain as an administrative arm of the FTC. However, a separate body (the "Agency") should be established to act independently of the FTC. The Agency should be headed by a committee comprised of three individuals appointed by the common accord of the Parties. Each Party should have one of its nationals on the committee. The terms of committee members should be fixed. Committee members should not be allowed to either seek or receive advice from any Party. All decisions of the committee should be taken by consensus.

Such measures should ensure the independence and legitimacy of committee decisions. Requiring that all decisions be reached by consensus should encourage cooperation between members and discourage any inclination to act as representative of national interests.

The role of the Agency would be to monitor the application and implementation of the NAFTA. It could receive concerns of the citizens of North America. It should have the ability to conduct public hearings where it believes such hearings would be appropriate. The purpose of such hearings would be to discern public concerns and possible solutions to such concerns. It should be able to prepare reports for the FTC on how the NAFTA is working. Such reports should be made public. It should have the ability to prepare recommendations to the FTC. It should have the ability to attend FTC meetings to attempt to convince the FTC of the merits of its recommendations. Such meetings between the Agency and the FTC should be regular and public. The Agency should also prepare an annual report outlining the activities of the FTC for

the previous year, the results of such activities and the objectives of the FTC for the coming year. Such reports should be made public.

The Agency should have its own joint public advisory committee which would be comprised of an equal number of individuals from the Parties appointed by the governments of those Parties. The joint advisory committee should meet annually to discuss problems which are arising under the NAFTA. The joint public advisory committee could then advise the Agency on which matters it should be investigating for the FTC.

The Agency should have no power to implement its recommendations. The power of decision should be left with democratically elected officials. However, the Agency would have the power to investigate, monitor, and recommend.

The Agency should not replace the Secretariat established under the Side Agreements. Those Secretariats should remain to perform the original functions expected of them. As political integration is not desired in North America it is desirable for power to be dispersed to the greatest degree possible. However, it would be desirable if the Agency and the secretariats would cooperate on common problems.

An independent body capable of monitoring the implementation and application of the NAFTA such as the one proposed would resolve many of the concerns over the FTC which were discussed in Chapter IX. It would provide the public with a permanent body to which it could address its concerns. It could investigate and make recommendations to the FTC in regard to such concerns. Its operation would be open and transparent to allow the public to monitor how these concerns are being handled. It would ensure Mexicans, in a developing democracy, of access to the FTC. At the same time the authority of the agency would stem completely from the coherence of its reports and recommendations. The power of decisions would ultimately remain with the FTC and through the FTC the democratically elected governments of each

Party.

3. Applying/Implementing

Unlike the EC, the NAFTA regime should not have its own bureaucracy to implement the rules established under it. The power of decision making should remain with the governments of the Parties to allow the protection of national objectives. The Parties should therefore implement the rules established under NAFTA through their own bureaucracies. The experience of the EC shows that bureaucracies often become powers unto themselves. The EC's objectives are often blurred by the constant power struggle between the Commission and the governments of the member states. The NAFTA's objective of achieving economic cooperation without complete political integration must always be kept in the foreground.

As national bureaucracies will be responsible for implementation of the NAFTA rules disputes will inevitably arise between the Parties over how these rules are interpreted and applied. Accordingly effective DRMs will be required. The DRMs must enable an atmosphere of legal certainty to develop so that businesses can properly plan their activities. They should also be capable of producing a degree of uniformity in the application and interpretation of the rules under the NAFTA so that all businesses in North America can operate on a level playing field.

At the same time however, a court should not be created which is so powerful that it takes over the role of other NAFTA institutions. If the jurisdiction of any one DRM is too great, it may become the dominant NAFTA institution and replace the norm formulation functions of those institutions that must operate by political consensus and accordingly may work slower than a court that operates under a set of legal principles. To avoid such a situation, the following proposal attempts to disperse judicial power under the NAFTA as much as possible.

At the heart of DRMs established under the NAFTA should be a permanent Court (the "High Court"). The High Court should be comprised of an equal number of judges from each of the Parties. Three judges from each Party would probably prove to be the most workable number. The judges should be appointed to fixed terms by the common accord of all Parties. The judges could sit either as a full court, or in chambers of three depending on the complexity and importance of the particular case. The High Court should attempt to reach decisions by consensus. Where a consensus is impossible the High Court should decide by majority but dissenting opinions should never be released. The Court of Justice has followed this procedure. Even though the attempt to reach consensus often involves a painstaking process it has increased the legitimacy of the Court of Justice as the interpreter of a Treaty meant to serve the people of several states by preventing it from becoming a body of national representatives.[520] Moreover by not releasing dissenting opinions the Court of Justice has prevented the authority of its judgements from being undermined as it always appears to be acting as one voice.

The broad jurisdiction of the High Court should be similar to that of the Court of Justice. It should be to ensure that in the interpretation and application of the NAFTA, the law is observed. Specifically, the High Court should have the jurisdiction to hear all disputes over the interpretation or application of the NAFTA between the Parties. It should also act as the court of appeal for other DRMs established under the NAFTA as described below. It should act as the enforcer of all judgments under the NAFTA regime. Additionally the High Court should have jurisdiction similar to that of the Court of Justice under Article 177 of the EC Treaty.

The Parties should provide that the rules of the NAFTA bestow rights and obligations upon all citizens of North America. Those rights and obligations should be enforceable against

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[520]Supra, note 499 at 1295-1296.

both private parties and each citizen's national government in the national courts of the Parties. Where a question over the interpretation or application of a NAFTA provision arises in the course of such proceedings, such question should be referred to the High Court. The High Court would provide a binding decision only on the question of interpretation or application. In order to avoid an overwhelming workload for the High Court, such referrals should only be mandatory if the matter arises before a national court of last resort.

All Court proceedings should be open to the public. All documents should be available for public viewing unless they contain information which needs to be kept confidential for either reasons of national security or legitimate business purposes. All decisions of the Court should be published as a manner of course.

A High Court as set out above would address many of the concerns raised by the current DRMs under the NAFTA. A permanent body would allow a consistent pattern of interpretation and application to develop. A referral system similar to that under Article 177 of the EC Treaty would provide private parties with access to NAFTA law without overwhelming the High Court. It would also ensure a uniform interpretation and application of the NAFTA's provision throughout North America.

The NAFTA should also allow private rights of action against any Party that fails to comply with the NAFTA and thereby causes a private party loss or damage. Private parties if they are expected to take risks need to know that if the Parties fail to comply with the NAFTA provisions, compensation will be available. Private parties must also have assured and direct access to a means of enforcing any decision it receives in its favour. Where the loss is caused by a failure to comply on the part of a citizen's own government, the citizen can sue the government in the national court of competent jurisdiction. Enforcement of any award can be accomplished through national enforcement remedies.

However, where the loss is caused by a failure on the part of a foreign government, the citizen should have recourse to an arbitral procedure similar to that established under Chapter 11 of the NAFTA. The disputing parties could follow the same procedure as that followed under Chapter 11 with the exception that the rules would have to be the UNCITRAL Arbitration Rules, as the ICSID regime applies only to investment disputes. Any appeals of an award could be made to the High Court. The Parties should provide that enforcement of any award could be made under either the New York Convention or the Panama Convention. This would allow the successful private party to register an award in accordance with the rules of the national court of the losing Party. The award could then be enforced as though it were an award of the national court.

Allowing individuals who suffer loss or damage as a result of a foreign government's failure to comply with the NAFTA's provisions, recourse to a Chapter 11-like procedure has several advantages. First, it maintains coherence within the NAFTA scheme. Those who suffer losses while trading in goods or services with foreign parties should be no worse off than those who suffer losses while making a foreign investment. Secondly, an arbitration procedure allows for the direct enforcement of awards through either the New York Convention or the Panama Convention. Thirdly, it will ensure that traders will not be discouraged from pursuing their rights because of a fear of unfair treatment by a foreign court.

In regard to Chapter 19 there is probably not much which could realistically be done to change the function performed by panels. The Parties have already proven themselves unwilling to change their AD/CVD laws until agreement can be reached on the definition of subsidies and dumping. Until the Parties can reach agreement on the issues, the Chapter 19 compromise is probably a reasonable means of ensuring some measure of protection against the unfair application of the Parties respective AD/CVD laws while allowing each Party to maintain such

laws.

However, while the function of the Chapter 19 Panels is unlikely to change the Parties should change their form. Instead of ad hoc Panels, a permanent Panel should be appointed. The Panel should be comprised of three members. The members should be appointed to fixed terms by the common accord of all Parties. The Panel should attempt to reach decisions by consensus. Where consensus cannot be reached decisions should be made by majority vote. Dissenting opinions should not be released.

Private parties should be allowed to initiate actions and run such actions as they deem fit. The role of the ECC should be taken over by the High Court. The narrow grounds for a challenge should remain the same. The Panel should also have the right to refer any question of interpretation of the NAFTA to the High Court for a preliminary ruling.

These changes to the Chapter 19 DRM would accomplish the following: first, a permanent Panel should allow the emergence of expertise and consistency in the interpretation and application of the Parties' respective AD/CVD laws; secondly, setting fixed terms for the Panel members should increase the appearance, if not the actual independence of the Panel; thirdly, by requiring the Panel to attempt to reach a consensus, the Parties would be reducing the impression that the Panel members are representatives of national interests; fourthly, preventing the release of dissenting opinions would reduce the possibility that the authority of Panel decisions would be undermined as was the case with the most recent Softwood Lumber decision[521]; fifthly, referrals to the High Court will ensure consistent application of the rules under the NAFTA; and finally, challenges to the High Court rather than the ECC will ensure consistency in the interpretation of the grounds available for challenges.

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[521]Supra, note 293.

Obviously, the best situation would be for the Parties to reach agreement on the definition of subsidies and dumping. National standards could then be harmonized and panels or the High Court could decide issues on their merits. However, until such definitions can be agreed to, Chapter 19 provides a reasonable compromise. The changes proposed above address the concerns over the present process which were outlined in Chapter VIII.

In regard to the DRMs established under the Side Agreement, the role of the panels should be taken over by the High Court. The High Court would already be charged with deciding disputes between the Parties. No purpose would be accomplished by not referring disputes under the Side Agreements to the High Court.

The one problem with the current regime under the Side Agreements is that they do not allow private parties the right to initiate and participate in the DRMs. Private parties should have the right to initiate actions against Parties for nonenforcement of their laws before the High Court as long as the private parties have exhausted all other avenues of addressing the matter under the appropriate Side Agreement. For example, under the ESA, in order to initiate an action, a private party would have to show that a complaint was made to the Secretariat, who then prepared and submitted a factual record, and that despite the preparation of such a record, the Party in question is still failing to enforce its environmental law. This requirement should ensure that only serious matters reach the High Court and that actions are not filed by environmental groups as a means of harassing a Party.

In regard to enforcement of decisions under the NAFTA's scheme, the NAFTA should provide the High Court with the option of either sanctioning retaliation, or imposing a fine against a non-complying Party. This will allow the High Court with the maximum amount of flexibility in devising a remedy that will encourage compliance with its decision. As discussed above, some commentators have expressed scepticism over whether retaliation can be an

effective remedy against the United States. Providing the High Court with the option of either ordering retaliation or imposing a fine allows it to find the remedy which will be the most effective in the situation. Private parties who have pursued a Party through one of the DRMs outlined above and have received a judgment in their favour should be able to seek enforcement before the High Court. Private parties usually have a direct interest in seeking the enforcement of decisions in its favour. Governments often do not have a direct interest in seeking enforcement, and for political reasons would often rather negotiate a settlement behind closed doors. Under the present NAFTA regime, a private party who has a case decided in its favour has no avenue of recourse if its government decides not to seek enforcement. If the enforcement of panel decisions is not vigorously pursued, and is therefore ineffective, confidence in the NAFTA's DRMs will be undermined. If confidence in the NAFTA's DRMs is undermined, confidence in the NAFTA as a whole would also be undermined. This would discourage business activity in North America. Therefore the parties with a direct interest in seeing judgments in their favour enforced should have the ability to seek enforcement.

Moreover, disputes will not only involve the Parties. Most disputes will arise between private parties. Before parties enter into arrangements with foreign parties, they usually require some assurance that they will have the ability to protect their interests. In Article 2022 of the NAFTA, the Parties have agreed to encourage and facilitate the use of arbitration between private parties in the free trade area. One of the purposes of this provision is to facilitate enforcement of awards between private parties. It is often much easier to enforce foreign arbitral awards under either the New York Convention or the Panama Convention than it is to enforce the awards of foreign courts. However, arbitration is often only an option if the parties have agreed to arbitration prior to a dispute arising. If, for example, a tort action arises between the parties, it is often difficult to convince a potential defendant to agree to arbitration. A

plaintiff's only recourse at this stage would be through one of the national court systems. In order to prevent activity between parties from being discouraged due to the difficulty of enforcing court decisions, the Parties should agree to enforce the judgments of their respective courts.[522]

4. Conclusions

The proposals outlined above attempt to correct the incongruence between the NAFTA in its present form and the ideological and political goals of those who initiated the NAFTA policy. Unless that incongruence can be corrected, the NAFTA will not allow North Americans to reap the full benefits of free trade.

Free trade is a policy dependent upon free markets. Unfortunately, the current institutional structure of the NAFTA is not designed to spur free market activity. The governments of the Parties have created too great a role for themselves. The above proposals are aimed at counterbalancing the role of government by creating mechanisms which will allow greater rights of access to both the norm formulation and the applying/implementing procedures.

Pursuant to classical liberal theory, which is the basis of the theory of comparative advantage, less government involvement in the market is required to spur economic activity. Conversely, a great degree of government involvement will discourage market activity. Accordingly, in order to encourage market activity in North America, and therefore allow North Americans to reap the benefits promised by the theory of comparative advantage, mechanisms must be created that enable individuals greater influence over both the rules under which they

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[522]Under Canada's constitutional system, enforcement of judicial awards is a matter of provincial jurisdiction on which the federal government cannot encroach. Canada would accordingly have to work with its provinces in implementing a reciprocal enforcement arrangement between the Parties.

are expected to operate and the manner in which these rules are applied and implemented. The above proposals are designed to create such mechanisms.

PART FIVE: A CALL FOR ACTION

CHAPTER XV. THE NAFTA, THE PROPOSALS, AND THE NEW WORLD ORDER

One explanation for the incongruence between the ideological goals of free trade and the NAFTA in its present form may be that the NAFTA negotiators clung to the concept that has formed the basis of international law for over three hundred years: the concept of state sovereignty. However, modern forces are increasingly rendering the concept irrelevant. Policy-makers must therefore discard the concept of state sovereignty in order that they may create international arrangements suitable to the modern world.

The concept of state sovereignty has formed the basis of international law since the Peace of Westphalia was drawn up in 1648 to end the Thirty Years War in Europe. The fall of the Roman Empire had left a power vacuum in Europe. Political leaders in Europe experienced extreme difficulty in controlling events even in regard to their own populations.[523] The Peace of Westphalia accordingly entrenched the concept of state sovereignty as a mechanism by which the power vacuum could be filled in a peaceful manner.

The concept of state sovereignty proclaims that a state is not to be restrained in the exercise of its freedom of action within its territory unless there is a rule of international law which curbs such freedom.[524] Most international legal documents are founded upon the principle of state sovereignty.[525] For example Article 2(7) of the U.N. Charter recognizes the

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[523]Louis W. Goodman, "Democracy, Sovereignty, and Intervention" (1993) 9 The American University Journal of International Law and Policy 27.

[524]H.M. Kindred, International Law: Chiefly as Applied and Interpreted in Canada, (4th edition) (Toronto: Edmond Montgomery, 1987 at 819-20.

[525]Supra, note 15 at 209.

preeminence of state sovereignty.[526]

The preeminence of the principle of state sovereignty necessitated that the actors of international law were nation states. Nation states formulated the norms of international law and were the sole participants in international DRMs. There was traditionally no role for individuals on the international stage because states were sovereign within their territory. Foreign states could only attempt to deal with other states. They could not attempt to influence the activities of individuals within another state. Accordingly the concept of state sovereignty required that states were the subjects of international law.[527]

A second result of the concept of state sovereignty was the voluntary nature of international law. Because states were sovereign, international norms could not restrict states unless they agreed to be bound by them. Even the rules of international organizations, voluntarily joined, could not be enforced upon their members unless states agreed to the rules being enforced. As a result international organizations generally adopted pragmatic approaches to dispute resolution rather than legalistic.[528] The DRMs of international organizations encouraged consultation that would produce agreement between disputants rather than adjudication based upon enforceable legal rules.

An example of an organization that adopted the pragmatic approach to dispute resolution was the GATT prior to the Uruguay Round. The "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance" which arose from the Tokyo Round codified

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[526]The Charter of the United Nations, 59 Stat. 1055, T.S. No. 993.

[527]Mark W. Janis, An Introduction to International Law (Boston: Little, Brown, 1988) at 163-170.

[528]Supra, note 10 at 109.

for the first time the GATT's DRMs.[529] Pursuant to the Understanding when a dispute arose the disputing parties first had to consult on the issue in dispute. If consultations failed the parties were referred to conciliation. If conciliation failed, the parties could request the formation of a panel to decide the dispute. However, the Contracting Parties could only establish a panel by the unanimous vote of the Contracting Parties, including both parties to the dispute. The panel once established could make recommendations on how a dispute might be resolved, but those recommendations could only be enforced if the Contracting Parties unaminously adopted the report.[530] So a GATT ruling could only be enforced against a state if the state agreed to allow enforcement. The concept of state sovereignty remained preeminent within GATT.

The concept of state sovereignty remained a useful concept in international law as long as the majority of human endeavours remained within the boundaries of a single state. States could effectively regulate individuals within their territory. Any international matters that might arise could be dealt with in negotiations between sovereign states.

However, several factors have combined to make it increasingly difficult for states to restrain human activity within a single territory. First, technological advances in communications have enabled individuals to communicate with others efficiently without regard to geography. Secondly, advances in transportation have enabled individuals to transport their goods and services to customers without regard to national borders. Thirdly, the end of the Cold War has enabled individuals from east and west to travel and do business with each other freely. Such factors have created what has come to be known as the global economy. Goods,

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[529](1980) 26 BISD 210.

[530]Supra, note 10 at 123.

services, capital, and people are now transferred around the world in a manner that is indifferent to political boundaries.

With the development of the global economy have come a host of problems which states find themselves incapable of resolving alone. Such problems include how to tax foreign interests, how to regulate foreign investment, how to impose national health and safety standards on foreign goods, and how to protect the environment.[531] As states are incapable of dealing with these transnational problems on their own, states have increasingly been forced to attempt to find solutions to these problems through cooperation with other states. However, cooperation, by its very nature implies a degree of concession to the interests of other states and therefore a reduction of national sovereignty.[532]

The NAFTA is an example of states joining in cooperation to meet the challenges of a global economy. The economic crisises which led the Parties to embrace the policy of free trade in North America resulted, in part, from the inability of the Parties to control the flow of goods and services from foreign countries, especially the newly industrialized ones such as Japan and Taiwan. As existing international organizations such as the GATT were ineffective in controlling the new global economy, the Parties decided to join together to create a regime that would give them control over the region in which their interests were most effected.

As the global economy becomes further entrenched and problems of a transnational nature intensify states are increasingly going to be forced to enter into international arrangements in order to deal with such problems. As they do the concept of sovereignty is increasingly going to become irrelevant. As the concept of sovereignty becomes irrelevant, the current international

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[531]Donald B Lenihan and Will Kymlicka, "Reforming Our Political Discourse: The National Interest in a Transnational World" (1994) 5 Constitutional Forum 49.

[532]Supra, note 15 at 209.

legal order which is premised on the notion of sovereignty will also become irrelevant.

The question is what will replace the old order? Professors Grossman and Bradlow have noted that the international legal order currently in existence distinguishes between international and domestic issues. Domestic issues receive the attention of several groups within a society while international issues involve only states, as under the present legal order, states are the only subjects of international law. However, as the line between domestic issues and international issues becomes blurred, in the new global economy this traditional distinction is increasingly difficult to justify. Professors Grossman and Bradlow have written:[533]

> We need to develop new legal norms that consider both the domestic and international dimensions of the issues to which they are applicable as well as new institutional arrangements that accommodate all the participants in the international legal process. This undertaking requires a fundamental reconceptualization of the norms and institutions of international law.

The participants in the international legal process are no longer only states. In the new global economy the participants now include multi-national corporations, non governmental organizations and individuals. The international legal order must re-invent itself to allow for the participation of all players on the international stage. In the words of Professors Grossman and Bradlow we are being pulled from a state-centred transnational legal order to a people-centred transnational legal order by the changes wrought by the new global economy.

In order to make the transition to a people centred transnational legal order states must be prepared to cede part of their sovereignty to supranational organizations in which the interests of all participants in the international legal order can be accommodated. At minimum, according to Professors Grossman and Bradlow a people centred legal order requires the following:[534]

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[533]Supra, note 21 at 23.

[534]Ibid.

1. All parties directly affected by decisions must be able to participate in the formulation of decisions.

2. All parties affected by a particular decision must have the ability to hold those who make and implement the decisions responsible for the consequences of their actions.

Evidence exists which indicates that the forces of the new global economy are already necessitating the destruction of the old state centred legal order. First, as discussed above in the Maastricht Treaty the member states agreed to cede significant amounts of their sovereignty to EC institutions. However, as the member states ceded such sovereignty they also strengthened the role of the Parliament to allow Europeans a greater voice in the formulation of EC law. This indicates movement from a state centred EC legal order toward a people centred EC legal order.

A second example of a transition away from the old legal order is the new dispute resolution system of the GATT established by the Uruguay Round Agreement.[535] The new system marks a departure from the pragmatic approach to dispute resolution based upon the concept of state sovereignty toward a legalistic approach. Panels can now be established upon the requests of any Contracting Party unless the Contracting Parties unaminously agree that a panel should not be established. Similarly a panel report may be adopted by the Contracting Parties unless the Contracting Parties unaminously agree that the report should not be adopted.[536] The adoption of a panel report by the Contracting Parties will allow the party who received a favourable decision to retaliate against a non complying party. Under the old GATT regime which required unanimity before a panel report could be adopted retaliation could only be authorized by the Contracting Parties if the non complying party voted in favour of

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[535]Supra, note 31.

[536]Supra, note 10 at 145.

authorizing the retaliation.

Moreover, the new agreement establishes the Standing Appellate Body (SAB). The SAB will be comprised of seven members appointed to a four year term. It will hear appeals of panel decisions. The creation of the SAB increases the legalistic nature of the GATT system as it is now highly likely that SAB decisions will have strong precedential value for future GATT panels.[537]

The new GATT regime does not allow private rights of access to either the norm formulation or the applying/implementing procedures of the GATT. However, it does recognize the need for greater legal certainty in the new global economy. It also represents a significant departure from the concept of state sovereignty.

The proposals set out in Chapter XIV attempt to bring the NAFTA regime in line with current international trends. The new global economy is increasingly making state sovereignty an irrelevant concept. As the concept of state sovereignty becomes less relevant policy makers must rethink the traditional concepts of international law. As more participants take their place on the international stage it is no longer possible to maintain the traditional distinction between domestic and international issues. Institutional arrangements which attempt to maintain such distinctions in the modern world are fundamentally undemocratic.

The effects of the NAFTA's regime on democracy in North America cannot be underestimated. In a recent article, David Schniederman, executive director of the Centre for Constitutional Studies in Edmonton Alberta, alludes to these effects. He writes:[538]

... what the trade agreement takes away from local governments, at both the

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[537]Ibid. at 163.

[538]David Schneiderman, "Canadian Constitutionalism and Sovereignty after NAFTA" (1994) 5 Constitutional Forum 93 at 98.

> national and sub-national level, it does not give to a supranational institution. Although the NAFTA sets up an apparatus of some eighteen standing committees, as well as ad hoc committees, panels and tribunals, it does not provide for representation at the continental level in any meaningful way. If, as Reg Whitaker has argued, Canadian federalism is agnostic about community, NAFTA is, in many ways, antagonistic to community. Although some are hopeful that continental free trade will cultivate political allegiances which transcend national boundaries, fostering new alliances and coalitions, these political forces will have no where to turn to give effect to their political agendas.

This is the greatest danger that the modern world faces as the concept of national sovereignty becomes less meaningful. Unless policymakers establish new legal orders that are people centred rather than state centred the new players in the global economy will become increasingly disenfranchised. As distinctions between domestic issues and international issues become more difficult to maintain, domestic democracies will increasingly be undermined.

The proposals outlined in Chapter XIV, if adopted, would provide political forces in North America with somewhere "to turn to give effect to their political agendas." They would provide individuals with a means of fully participating in the new global economy. Yet at the same time they recognize the desire to protect broad national interests. The national governments would remain the key decision making authorities. They would also retain the power to implement and apply the rules established under the NAFTA. Governments would therefore retain the ability to protect national sovereignty.

But the proposals would also provide those effected by the NAFTA's rules with a voice in the development of those rules and a means of ensuring their integrity. Such abilities are necessary to spur the economic activity hoped for by the NAFTA's policymakers. They are also powers which must be incorporated into a new world order which is being precipitated by forces beyond the powers of policymakers. The NAFTA represents an opportunity for North American policymakers to play a leading role in the development of this new order.

PART SIX: CONCLUSIONS

The purpose of this paper was to determine whether policymakers were successful in converting their ideological and political goals into law when they established the NAFTA's legal order. To accomplish this, the paper first undertook an examination of both the theoretical underpinnings of free trade and the historical forces which caused each Party to embrace free trade, in an effort to determine what the ideological and political goals of policymakers were when they negotiated the NAFTA. This examination indicated that the policy of free trade in North America was adopted by the Parties as one of a series of policies aimed at reducing the level of government involvement in their economies in order to increase reliance on the forces of free markets. The purpose of this restructuring was to enable their societies to meet the challenges presented by the modern economy.

Once the objectives of policymakers were identified, this paper undertook an examination of the NAFTA's provisions in an effort to determine whether these provisions met policymakers' objectives. This examination revealed that policymakers had not successfully converted their objectives into law. The NAFTA's legal order does not contain many of the essential elements of free market legal systems. There are few mechanisms designed to ensure effective public participation in the formulation of norms. The majority of the NAFTA's DSMs do not allow private parties access. The general DRM does not allow a sufficient degree of public scrutiny. The DRMs are intentionally incapable of creating a stable legal environment in which businesses can plan their affairs based on predictable legal rules. The enforcement provisions completely exclude those parties that are most interested in seeing decisions enforced.

As a result, far from furthering the goal of reducing government involvement in the economy, the NAFTA's legal order increases the role of government. This incongruence between the goals of the NAFTA policy and the actual legal order created, will prevent the NAFTA from delivering the full benefits predicted by the theory of comparative advantage. The

theory of comparative advantage is based upon the invisible hand theory developed by Adam Smith. This theory is premised upon individuals being willing to take risks in the pursuit of individual advantage. Individuals will not respond in a legal order that denies them the ability to participate fully in the formulation of rules and a means of protecting the integrity of those rules.

This paper therefore presentes a series of recommendations designed to correct the incongruence between policy objectives and actual policy. These recommendations, if enacted, would create a legal order which would provide individuals with the confidence to encourage them to take the risks necessary to provide the North American economy with the full benefits of free trade. These recommendations would make all players in the North American economy, not simply governments, and those businesses large enough to influence government decisions, full participants in the NAFTA's legal order by providing them with meaningful access to both the norm formulation and applying/implementing procedures.

While these recommendations may reduce the degree of state sovereignty of the Parties to some extent, this should not be seen as a barrier to their implementation. Changes wrought by the new global economy are making the concept of state sovereignty less meaningful. Policymakers must therefore look for new institutions that recognize that traditional distinctions between domestic issues and international issues can no longer be maintained.

Policymakers have already begun to adopt the international legal order to accommodate these changes in the global economy. The Maastricht Treaty has made the EC a more people centred system. The Uruguay Agreements recognize that state sovereignty can no longer be the preeminent principle of the GATT. Even the NAFTA, in both Chapter 11 and the Side Agreements include provisions that provide the new players on the international stage with direct routes of access.

Unfortunately such provisions are the exception, rather than the rule under the NAFTA. The general scheme of the NAFTA's legal order maintains the traditional international legal order. This must be changed. The traditional international system can no longer be maintained in the face of the new global economy. Even more importantly to North Americans concerned about their economic futures, the legal order established by the NAFTA must be changed in order to enable the policy of free trade in North America to meet its objectives.

BIBLIOGRAPHY

Articles

Abbott, K.W. "The Trading Nation's Dilemma: The Functions of the Law of International Trade" (1985) 26 Harvard International Law Journal 501.

Abbott, K.W. "The Uruguay Round and Dispute Resolution: Building a Private Interests System of Justice" [1992] Columbia Business Law Review 111.

Alexander, D.C. "The North American Free Trade Agreement: An Overview" (1993) 11 International Tax and Business Lawyer 48.

Alford, W.P. "Introduction: The NAFTA and the Need for Candour" (1993) 34 Harvard International Law Journal 293.

Altschuler, I.P. and Pasche, C.P. "The North American Free Trade Agreement: The Ongoing Liberalization of Trade With Mexico" (1993) Wake Forest Law Review 7.

Arnett, E.J. "From FIRA to Investment Canada"(1985) 24 Alberta Law Review 1.

Arnull, A. "Owning Up to Fallibility: Precedent and the Court of Justice" (1993) 30 Common Market Law Review 247.

Arnull, A. "References to the European Court" (1990) 15 European Law Review 375.

Axelrad, L. "NAFTA in the Context of Mexican Economic Liberalization" (1993) 11 International Tax and Business Lawyer 201.

Baer, W. and Birch M. "Privatization and the Changing Role of the State in Latin America" (1992) 25 New York University Journal of International Law and Politics 1.

Baker, S.A. "After NAFTA" (1993) 27 International Lawyer 765.

Barav, A. "The Judicial Power of the European Economic Community" 53 Southern California Law Review 461.

Barcelo, J.J. "Subsidies and Countervailing Duties: Analysis and Proposals" (1977) 9 Law and Policy in International Business 779.

Battram, S.P. "Expected Provisions of the North American Free Trade Agreement (NAFTA)" (1992) 7 Florida Journal of International Law 47.

Bello, J.H. and Holmer, A.F. "Midterm Report on Binational Dispute Settlement Under the United States-Canada Free Trade Agreement" (1991) 25 International Lawyer 489.

Bello, J.H. and Holmer, A.F. "The NAFTA: Its Overarching Implications" (1993) 27 The International Lawyer 589.

Bhagwati, J.W. "Challenges to the Doctrine of Free Trade" (1993) 25 New York University Journal of International Law and Politics 219.

Bialos, J.P. and Siegal, D.E. "Dispute Resolution Under the NAFTA: The Newer and Improved Model" (1993) 27 International Lawyer 603.

Bockstiegal, K.S. "The Relevance of National Arbitration Law for Arbitrations Under the UNCITRAL Rules" (1984) 1 Journal of International Arbitration 223.

Bronkers, M. "Private Enforcement of 1992: Do Trade and Industry Stand a Chance Against the Member States" (1989) 26 Common Market Law Review 513.

Bronckers, M. "Non-Judicial and Judicial Remedies in International Trade Disputes: Some Reflections at the Close of the Uruguay Round" (1990) 24 Journal of World Trade 121.

Cadsby, C.B. and Woodside, K. "Effects of NAFTA" 19 Canadian Public Policy 450.

Camil, J. "Mexico in Contemplation of NAFTA: Is the Government Abdicating the Rectoria del Estado" (1993) 15 Loyola of Los Angeles 761.

Cempa, L. "International Labour Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies" (1994) 9 The American University of International Law and Policy 117.

Deardorff, A.V. "General Validity of the Law of Comparative Advantage" (1980) 88 Journal of Political Economy 941.

Dewar, H. "NAFTA Wins Final Congressional Test" The [Washington] Post (21 November 1993) A1.

Dhar, B. "The Decline of Free Trade and U.S. Trade Policy Today" (1992) 26 Journal of World Trade 133.

Dunleavy, M.W. "The Limits of Free Trade: Sovereignty, Environmental Protection and NAFTA" 51 University of Toronto Faculty of Law Review 204.

Elling, M.E. "The Emerging European Community: A Framework for Institutional and Legal Analysis" (1990) 13 Hastings International and Comparative Law Journal 511.

Everling, U. "The Court of Justice as a Decisionmaking Authority" (1984) 82 Michigan Law Review 1294.

Fagan, D. "Bully-boy Tactics Keep Spurious Wheat War Going" The Globe and Mail (22 April 1994) A1.

Fagan, D. "MacLaren Blasts U.S. on Trade" The Globe and Mail (25 May 1994) A1.

Fagan, D. "Murder of Colosio Will Not Kill His Party" The Globe and Mail (25 March 1994) A18.

Ferguson, K.B. "Dispute Settlement under the Canada-U.S. Free Trade Agreement" (1989) 47 University of Toronto Faculty of Law Review 317.

Fitch, S.D. "Dispute Settlement Under the NAFTA: Will The Political, Cultural, and Legal Differences Between the United States and Mexico Inhibit the Establishment of Fair Dispute Settlement Procedures" (1991) 22 California Western International Law Journal 353.

Friedmann, W. "National Sovereignty, International Cooperation, and the Reality of International Law" (1963) 10 U.C.L.A. Law Review 739.

Gonzalez, G.Y. "An Analysis of the Legal Implications of the Intellectual Property Provisions of the North America Free Trade Agreement" (1993) 34 Harvard International Law Journal 305.

Goodman, L.W. "Democracy, Sovereignty and Intervention" (1994) 9 The American University Journal of Law and Policy 27.

Gordon, M.W. "Economic Integration in North America - An Agreement of Limited Dimensions but Unlimited Expectations" (1993) 56 Modern Law Review 157.

Graham, W.C. "Dispute Resolution Involving States" (1992) 37 McGill Law Journal 544.

Gretener, N.M. "Canada-U.S. Trade Update" (1992) 5 Canada-U.S. Business Law Review 333.

Grossman, C. and Bradlow, D.D. "Are We Being Propelled Towards A People Centered Transnational Legal Order" (1994) 9 The American University Journal of International Law and Policy 1.

Hartley, T.C. "Constitutional and Institutional Aspects of the Maastricht Agreement" (1993) 42 International and Comparative Law Quarterly 213.

Horlick, G.N. and DeBusk, F.A. "Dispute Resolution Panels of the U.S.-Canada Free Trade Agreement: The First Two and One Half Years" (1992) 37 McGill Law Journal 574.

Horlick, G.N. and DeBusk, F.A. "Dispute Resolution under NAFTA - Building on the U.S. Canada FTA, GATT and ICSID" (1993) 10 Journal of International Arbitration 51.

Housman, R. and Orbusch P. et al. "Enforcement of Environmental Laws Under a Supplemental Agreement to North American Free Trade Agreement" (1993) 5 The Georgetown International Environmental Law Review 593.

Huntington, D.S. "Settling Disputes Under NAFTA" (1993) 34 Harvard International Law Journal 407.

Jackson, J. H. "Reflections on the Implications of NAFTA for the World Trading System" (1992) 30 Columbia Journal of Transnational Law 501.

Jacob, K.S. "Reinvigorating ICSID With A New Mission and With Renewed Respect For Party Autonomy" (1992) 33 Virgina Journal of International Law 123.

Jacque, J.P. and Weiler, J.H.H. "On the Road to European Union: A New Judicial Architecture: An Agenda for the Intergovernmental Conference" (1990) 27 Common Market Law Review 185.

Johnson, O.T. "ADR in the International Context: The NAFTA" (1993) 46 SMU Law Review 2175.

Krajewski, S. and Blank S. "North American Business Integration" (1994) 58 Business Quarterly 55.

Kublick, N. "The Greening of Free Trade: NAFTA, Mexican Environmental Law and Debt Exchanges for Mexican Environmental Infrastructure Development" (1994) 19 Columbia Journal of Environmental Law 59.

Landa, J.F.T. "The Changing Times: Foreign Investment in Mexico" (1991) 23 New York University Journal of International Law and Politics 801.

Langley, N. and Wu, T. "Mexican and U.S. Antidumping and Countervailing Duty Policies: Issues in the FTA Negotiations" (1990) 23 Law and Policy in International Business 891.

LeMarguand, D. "The International Joint Commission and Changing Canada-United States Boundary Relations" (1993) 33 Natural Resources Journal 59.

Lenihan, D.G. and Kymlicka W. "Reforming our Political Discourse: The National Interest in a Transnational World" (1994) 5 Constitutional Forum 49.

Lenz, C.O. "The Court of Justice of the European Communities" (1989) 14 European Law Review 127.

Levy, C.S. and Weiser, S.M. "The NAFTA: A Watershed for Protection of Intellectual Property" (1993) 27 International Lawyer.

Lord Slynn of Hadley, "What is a European Community Law Judge" (1993) 52 Cambridge Law Journal 234.

Lowenfeld A.F. "Binational Dispute Settlement Under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal" (1991) 24 New York University Journal of International Law and Politics 269.

Lowenfeld, A.F. "The Free Trade Agreement Meets Its First Challenge: Dispute Settlement and the Pork Case" (1992) 37 McGill Law Journal 597.

Ludwiszewski, N. "Green Language in NAFTA: Reconciling Free Trade and Environmental Protection" (1993) 27 International Lawyer 691.

MacCormick, N. "Beyond State Sovereignty" (1993) 56 Modern Law Review 1.

McCullogh, R. "The Optimality of Free Trade: Science or Religion" [1993] The American Economic Review - Papers and Proceedings of the 105 Annual Meeting of the American Economic Association 367.

McDorman, T.L. "Dissecting the Free Trade Agreement Lobster Panel Decision" (1991) 18 Canadian Business Law Journal 445.

McDorman, T.L. "Using the Dispute Settlement Regime of the Free Trade Agreement: The West Coast Salmon and Herring Problem" (1991) 4 Canada-United States Business Law Review 177.

McGee, H.W. "Mexican Perspectives on Economic and Cultural Implications of Free Trade" (1993) 12 Chicano Latino Law Review 1.

McIlroy, J.P. "Antidumping and Countervailing Duties Dispute Resolution under the Canada-United States Free Trade Agreement - The First Year in Review" (1991) 4 Canada-U.S. Business Law Review 190.

McKenna, B. and Fagan D. "U.S. Fires Salvo in Wheat War" The Globe and Mail (23 April 1994) B1.

McPherson, D.M. "Is the North American Free Trade Agreement Entitled to an Economically Rational Countervailing Duty Scheme" (1993) Boston University Law Review 47.

Mora, M.M. "A GATT With Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes" (1993) 31 Columbia Journal of Transnational Law 103.

Moyer, H.E. "Chapter 19 of the NAFTA: Binational Panels at the Trade Courts of Last Resort" (1993) 27 International Lawyer 707.

Murphy, C.J. "Canada-U.S. Free Trade Resolution Dispute Mechanism Panel Procedures: Will They Hold" (1991) 4 Transnational Lawyer 585.

Noel, E. "The Institutions of the European Economic Community" (1992) 15 Suffolk

Transnational Law Journal 514.

Parker R.P. "Dispute Settlement in the GATT and the Canada-U.S. Free Trade Agreement (1989) 23 Journal of World Trade Law 83.

Paulsson, J. "ICSID's Achievements and Prospects" (1991) 6 ICSID Review 380.

Price, D.M. "An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement" (1993) 27 International Lawyer 727.

Rosa, A.K. "Old Wine, New Skins: NAFTA and the Evolution of International Trade Resolution" (1993) 15 Michigan Journal of International Law 255.

Rotenberg, R. "Ban the Barricades" (1991) 64 Canadian Business 47.

Rozwood, B. and Walker, A.R. "Side Agreements, Sidesteps and Sideshows: Protecting Labour from Free Trade in North America" (1993) 34 Harvard International Law Journal 333.

Rubin, E.L. "The Concept of Law and the New Public Law Scholarship" (1991) 89 Michigan Law Review 792.

Rugman, A.M. and Porteous, S.D. "Canadian and U.S. Unfair Trade Laws: A Comparison of their Legal and Administrative Structures" (1990) 15 North Carolina Journal of International Law and Commercial Regulation 67.

Rugman, A.M. et al. "The Replacement Parts - Binational Dispute Panel Cases: Reining in Administered Protection in America?" (1991) 4 Canada-U.S. Business Law Review 1.

Rugman, A.M. "A Canadian Perspective on U.S. Administered Protection and the Free Trade Agreement" (1988) 40 University of Maine Law Review 305.

Rugman, A.M. "Investing in the U.S. after NAFTA" (1993) 57 Business Quarterly 27.

Ruigrock, W. "Paradigm Crisis in International Trade Theory" (1991) 25 Journal of World Trade 77.

Schermers, H.G. "The European Court of First Instance" (1988) 25 Common Market Law Review 541.

Schneiderman, D. "Canadian Constitutional and Sovereignty after NAFTA" (1994) 5 Constitutional Forum 93.

Sigars-Mahna, L.J. "Free Trade - Changes in the Legal Environment, Mexico and Beyond" (1993) 7 Florida Journal of International Law 57.

Siqueiros, J.L. "NAFTA Institutional Arrangements and Dispute Settlement Procedures"

(1993) 23 California Western International Law Journal 363.

Smith, J.F. "The Dispute Settlement Mechanism of the NAFTA and Agriculture" (1992) 68 North Dakota Law Review 567.

Spacker, S.M. and Mertz, G.J. "Labour Issues Under the NAFTA: Options in the Wake of the Agreement" (1993) 27 International Lawyer 737.

Stewart, R.B. "The NAFTA: Trade, Competition, Environmental Protection" (1993) 27 International Lawyer 751.

Tarullo, D.K. "Beyond Normalcy in the Regulation of International Trade" (1987) 100 Harvard Law Review 547.

Tarullo, D.K. "Logic, Myth, and the International Economic Order" (1985) 26 Harvard International Law Journal 533.

Terry, J. "Sovereignty, Subsidies and Countervailing Duties in the Context of the Canada-United States Trading Relationship" (1988) 46 University of Toronto Faculty of Law Review 48.

Thomas, C.J. and Tereposky, G.A. "The NAFTA and the Side Agreement on Environmental Cooperation" (1994) 27 Journal of World Trade 5.

Thurlow, E. "Mexico and North American Insights" (1993) 9 International Insights 15.

Vasquez, X.C. "The North American Free Trade Agreement and Environmental Racism" (1993) 34 Harvard International Law Journal 357.

Warner, P.L. "Canada-United States Free Trade: The Case for Replacing Antidumping with Antitrust" (1992) 23 Law and Policy in International Business 791.

Winham, G.R. and Grant, H.A. "Antidumping and Countervailing Duties in Regional Trade Agreements: Canada-U.S., FTA, NAFTA and Beyond" (1994) 3 Minnesota Journal of Global Trade 1.

Wippman, D. "Free Trade - Changes in the Legal Environment, Mexico and Beyond - Dispute Resolution" (1993) 7 Florida Journal of International Law 93.

Wong, E.B. "Adjudication of Canada-United States Disputes" [1981] The Canadian Yearbook of International Law 158.

_____"Forum-Binational Dispute Resolution Procedures Under the Canada-United States Free Trade Agreement - Experiences to Date and Portents for the Future" (1991) 24 New York University Journal of International Law and Politics 341.

_____"The Opportunity in Mexico's Tragedy" The Globe and Mail (25 March 1994) A 1.

_____"Panel Discussion: Trade Sanctions and NAFTA" (1993) 5 The Georgetown International Environmental Law Review 623.

_____"Summary of Proceedings of the Seminar on Dispute Resolution under the Canada-United States Free Trade Agreement" 26 Standford Journal of International Law 153.

_____"Transcript of Discussion Following Presentation by Kenneth W. Abbott" [1992] Columbia Business Law Review 151.

_____"What is Europe" The Globe and Mail (14 June 1994

Books

Boaz, D. ed. Assessing the Reagan Years (Washington, D.C.: Cato Institute, 1988).

Carmicheal, E.A. and Herrera, C.M. eds. Canada's Energy Policy, 1985 and Beyond (Toronto: CD Howe Institute, 1984).

Clarkson, S. Canada and the Reagan Challenge (Toronto: James Lorimer, 1985).

Cypher, J.M. State and Capital in Mexico: Development Policy Since 1940 (SanFrancisco: Westview Press, 1990).

Doern, G.B. and Tomlin B.W. Faith and Fear: The Free Trade Story (Toronto: Stoddart, 1991).

Friedman, M. Capitalism and Freedom (Chicago: The University of Chicago Press, 1962).

Globerman, S. and Walker, M. eds. Assessing NAFTA: Trinational Analysis (Vancouver: The Fraser Institute, 1993).

Gold, M. and Leyton-Brown, D. eds. Trade-offs on Free Trade (Toronto: Carswell, 1988).

Grinspun, R. and Cameron, M.A. eds. The Political Economy of North American Free Trade (Montreal: McGill-Queen's University Press, 1993).

Heinman, R.A. et al. eds. The World of the Policy Analyst (Chantam, New Jersey: Chantam, 1990).

Hill, D.M., et al. ed. The Reagan Presidency: An Incomplete Revolution? (London: Macmillian, 1990)

Hudec, R.E. The GATT Legal System and World Trade Diplomacy 2nd ed. (Salem, New Hamphire: Butterworth, 1990).

Ionescu, G. ed. Between Sovereignty and Integration (London: Croom Helm, 1974).

Jackson, J.H. World Trade and the Law of GATT (Charlottesville, Virgina: The Michie Company, 1969).

Jackson, J.H. The World Trading System (Cambridge, Massachusetts: MIT Press, 1989).

Janis, M.W. An Introduction to International Law (Boston: Little, Brown, 1988).

Johnson, J.R. and Schachter, J.S. The Free Trade Agreement - A Comprehensive Guide (Aurora, Ontario: Law Book, 1988).

Kapteyna, P.J.G. and Verloren van Theemaat, P. Introduction to the Law of the European Communities (Deventer: Kluwer, 1989).

Kaufman, B.I. The Presidency of James Earl Carter Jr. (Lawrence, Kansas: University Press of Kansas, 1993).

Kindred, H.W. International Law: Chiefly as Applied and Interpreted in Canada 4th ed. (Toronto: Edmond Montgomery, 1987).

Kymilicka, B.B. and Matthews, J.V. eds., The Reagan Revolution? (Chicago: The Dorsey Press, 1988).

Lucas, A.R. and Hunt, C.D. Oil and Gas Law in Canada (Calgary: Carswell, 1990).

Lustig, N. Mexico: The Remaking of An Economy (Washington, D.C.: The Brookings Institute, 1992).

Mahant, E. Free Trade in American-Canadian Relations (Malabar, Florida: Kreiger Publishing Company, 1993).

Mill, J.S. Principles of Political Economy and Taxation (London: John Murray, 1821).

Neff, S.C. Friends But No Allies: Economic Liberalism and the Law of Nations (New York: Columbia University Press, 1990).

Paterson, R.K. and Bend, M. eds. Canadian Regulation of International Trade and Investment 2 ed. (Toronto: Carswell, 1994) (forthcoming).

Paterson, R.K. and Thompson, B.J. eds. UNCITRAL Arbitration Model in Canada (Toronto: Carswell, 1987).

Porter, M.E. The Competitive Advantage of Nations (New York: The Free Press, 1990).

Rayack, E. Not So Free to Choose: The Political Economy of Milton Friedman and Ronald Reagan (New York: Praeger, 1987).

Reagan, R.W. Speaking My Mind (New York: Simon and Schuster, 1989).

Ricardo, D. On the Principles of Political Economy and Taxation (London: John Murray, 1821).

Schott, J.J. ed. Free Trade Areas and U.S. Trade Policy (Washington D.C.: Institute for International Economics, 1989).

Siddigui, F. ed. The Economic Impact and Implications of the Canada-U.S. Free Trade Agreement (Queenstown: The Edwin Mellen Press, 1991).

Smith, A. An Inquiry into the Nature and Causes of the Wealth of the Nations (Whitefairs, U.K.: T. Davison, 1822).

Stacks, J.F. Watershed: The Campaign for the Presidency, 1980 (New York: Times Books, 1981).

Thomas, J.S. Subsidies and Countervailing Duties in the Canada-United States Free Trade Arrangement (LLM Thesis, University of Toronto, 1990).

Warnock, J.W. Free Trade and the New Right Agenda (Vancouver: New Star Books, 1988).

Weintraub, S. Transforming the Mexican Economy: The Salinas Sexenio (Washington D.C.: National Planning Association, 1990).

Wonnacott, R.J. The Economics of Overlapping Free Trade Areas and the Mexican Challenge (Toronto: C.D. Howe, 1991)

Wonnacott, R.J. U.S. Hub and Spoke Bilaterals and the Multilateral Trading System (Commentary (23) (Toronto: CD Howe Institute, 1990).

Governments Documents

Canada, The Canada - U.S. Free Trade Agreement (Ottawa: Ministry of External Affairs, 1987).

Canada, NAFTA - What's it All About (Ottawa: Ministry of External Affairs and International Trade, 1993).

Canada, "The National Energy Program, 1980" (Ottawa: Minister of Supply and Services, 1980).

Canada, "The National Energy Program Update, 1982" (Ottawa: Minister of Supply, 1982).

Canada, The North American Free Trade Agreement (Ottawa: Ministry of External Affairs, 1987).

Canada, North American Agreement on Environmental Cooperation (Ottawa: Minister of Supply and Services, 1993).

Canada, North American Agreement on Labour Cooperation (Ottawa: Minister of Supply and Services, 1993).

Canada, Report of the Royal Commission on the Economic Union and Development Prospects for Canada, vols. 1, 2, 3, (Ottawa: Minister of Supply and Services, 1985) (Chair: D.S. MacDonald).

Cases

In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring, Q.L. [1989] F.T.A.D. No. 1.

Lobsters from Canada Q.L. [1990] F.T.A.D. No. 5.

In the Matter of Fresh, Chilled and Frozen Pork from Canada (1990) 4 T.T.R. 64.

In the Matter of Article 304 and the Definition of Direct Cost of Processing Q.L. [1992] F.T.A.D. No. 3.

In the Matter of Fresh, Chilled or Frozen Pork From Canada (1991) 6 T.T.R. 52.

In the Matter of Live Swine from Canada Q.L. [1992] F.T.A.D. No. 2.

In the Matter of Live Swine from Canada Q.L. [1992] F.T.A.D. No. 6.

In the Matter of Live Swine from Canada Q.L. [1992] F.T.A.D. No. 8.

In the Matter of Live Swine from Canada Q.L. [1993] F.T.A.D. No. 11.

In the Matter of Certain Softwood Lumber Products from Canada Q.L. [1993] F.T.A.D. No. 5.

In the Matter of Puerto Rico Regulations on the Import Distribution and Sale of U.H.T. Milk from Quebec Q.L. [1993] F.T.A.D. No. 7.

In the Matter of Live Swine from Canada [1993] F.T.A.D. No. 8.

In the Matter of Pure and Alloy Magnesium from Canada Q.L. [1993] F.T.A.D. No. 11.

In the Matter of Certain Softwood Lumber Products from Canada Q.L. [1994] F.T.A.D. No. 1.

France v. United Kingdom [1979] ECR 2923.

van Gend en Loos v. Nederlandse Tariefcommissie [1963] CMLR 105.

Treaty Materials

General Agreement on Tariffs and Trade, opened for signature October 30, 1947, 55 U.W.T.S. 187.

North American Free Trade Agreement Rules of Procedure for Article 1704 Extraordinary Challenge Committee issued in February, 1994 reprinted in 1 NAFTA Treaty Materials (Dobbs Ferry N.Y.: Oceana Publications, 1994).

North American Free Trade Agreement Rules of Procedure for Article 1904 Binational Panel Reviews, issued in February 1994 reprinted in 1 NAFTA Treaty Materials (Dobbs Ferry, N.Y.: Oceana Publications, 1994).

North American Free Trade Agreement Rules of Procedure for Article 1905 Special Committees issued in February, 1994 reprinted in 1 NAFTA Treaty Materials (Dobbs Ferry N.Y.: Oceana Publications, 1994).

Treaty Establishing the European Atomic Energy Community March 25, 1957, Gr. Brit. T.S. No. 47 (Cmd. 455) 255.

Treaty Establishing the European Coal and Steel Community, April 18, 1951, Gr. Brit. T.S. No. 47 (Cmd. 455) 255.

Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 1.

Treaty on European Union, signed at Maastricht on February 7, 1992, entered into force on November 1, 1993.