Canada-United States Law Journal

Volume 20 | Issue

Article 9

January 1994

Two Paradigms for the Rule of International Trade Law

Jonathan T. Fried

Two Paradigms for the Rule of International Trade Law

*Jonathan T. Fried**

I. What Is At Issue?

An international consensus has yet to emerge on a definition of "Sovereignty" as a term of art under international law that befits modern economic realities. Consider the 8-7 split decision in the Advisory Opinion on the *Austria-German Customs Union* case[1] by the Permanent Court of International Justice. It had been asked to consider whether a proposed customs union between the two countries was compatible with Article 88 of the Treaty of Saint-Germain (1919),[2] which imposed a duty on Austria not to "alienate" its "independence" without the consent of the Council of the League of Nations, and with Protocol No. 1 of 1922, in which Austria undertook to abstain from any economic or financial engagements calculated directly or indirectly to compromise its independence. The eight judges in the majority stated:

> [I]rrespective of the definition of the independence of States which may be given by legal doctrine or may be adopted in particular instances in the practice of States, the independence of Austria, according to Article 88 of the Treaty of Saint-Germain, must be understood to mean the continued existence of Austria within her present frontiers as a separate State with sole right of decision in all matters economic, political, financial or other with the result that that independence is violated, as soon as there is any violation thereof, either in the economic, political, or any other field, these different aspects of independence being in practice one and indivisible. . .

One working hypothesis, provided to us by the majority opinion, is that sovereignty exists where a government has the sole right of decision.[3] Another view was offered by the minority. The seven dissenting

---

* Principal Counsel, Trade Law Division, Department of Foreign Affairs and International Trade, Government of Canada. Mr. Fried's remarks are offered in his personal capacity, and do not necessarily reflect the views of the Government of Canada. He is indebted to Ton Zuijdwijk, Senior Counsel, Trade Law Division, Department of Foreign Affairs and International Trade, for his comments on earlier drafts and his continued guidance on matters of European Community law. Any errors or omissions of course remain the responsibility of the author.

[1] Customs Regime Between Germany and Austria, 1931 P.C.I.J. (ser. A/B) No. 41.

[2] The Treaty of Saint-Germain, art. 88, U.K.T.S. 11 (1919).

[3] Judge Anzilotti, in a Separate Opinion, noted that:

> [T]he independence of Austria within the meaning of Article 88 is nothing else but the existence of Austria, within the frontiers laid down by the Treaty of Saint-Germain, as a separate State and not subject to the authority of any other State or group of States. Inde-

judges observed:

> A State would not be independent in the legal sense if it was placed in a condition of dependence on another Power, if it ceased itself to exercise within its own territory the *summa potestas* or sovereignty, i.e., if it lost the right to exercise its own judgment in coming to the decisions which the government of its territory entails.
>
> Restrictions on its liberty of action which a State may agree to do not affect its independence, provided that the State does not thereby deprive itself of its organic powers. Still less do the restrictions imposed by international law deprive it of its independence.
>
> The difference between the alienation of a nation's independence and a restriction which a State may agree to on the exercise of its sovereign power, i.e., of its independence, is clear. This latter is, for instance, the position of States which become Members of the League of Nations. It is certain that membership imposes upon them important restrictions on the exercise of their independence, without its being possible to allege that it entails an alienation of that independence.
>
> Practically, every treaty entered into between independent States restricts to some extent the exercise of the power incidental to sovereignty. Complete and absolute sovereignty by any obligations imposed by treaties is impossible and practically unknown.
>
> The "alienation" of the independence of a State implies that the right to exercise these sovereign powers would pass to another State or group of States. . .

On this view, sovereignty exists where a government has autonomy: the right and ability to exercise its own judgment, including to accept restrictions on freedom of action, if the acceptance is freely given.

Both majority and minority views agree, however, that at a certain point "sovereign" authority is transferred. The European Union is often cited as an example of governments having freely chosen to restrict their freedom of action to the extent that sovereignty has been transferred or surrendered. In the seminal case of *Costa v. Enel*,[4] a dispute involving a $3.00 electricity bill, the European Court of Justice stated:

> Unlike ordinary international treaties, the EEC Treaty established its

---

pendence as thus understood is really no more than the normal condition of States according to international law; it may also be described as *sovereignty (suprema potestas)*, or *external sovereignty*, by which is meant that the State has over it no other authority than that of international law.

[4] Case 6/64 Costa v. ENEL, 1964 E.C.R. 585, C.M.L.R. 425 (1964).

> own legal order, which was incorporated into the legal systems of the Member States at the time the Treaty came into force and to which the courts of the Member States are bound. In fact, by establishing a Community of unlimited duration, having its own institutions, personality and legal capacity, the ability to be represented on the international level and, particularly, real powers resulting from a limitation of the jurisdiction of the States or from a transfer of their powers to the Community, the States relinquished, albeit in limited areas, their sovereign rights and thus created a body of law applicable to their nationals and to themselves.

In the 1974 *Internationale Handelsgesellschaft* case,[5] the German Constitutional Court was faced with a question regarding the compatibility of an EC rule with Article 24 of the Constitution, which authorizes the government by legislation to "transfer sovereign powers to interstate institutions." In its judgment, the court stated that "Article 24. . .opens up the national legal system (within the limits [of maintaining the institutions of government]) in such a way that the Federal Republic of Germany's exclusive claim to rule is taken back in the sphere of validity of the Constitution and room is given, within the State's sphere of rule, to the direct effect and applicability of law from another source."

Admittedly, in today's world, "sole source" decision-making is impossible as a matter of global economic realities. To take an obvious example, no country acting alone can decide interest rates. And governments continue to freely enter into binding treaty commitments to restrict their freedom of action in their own self-interest.

The question is not whether "sovereignty" has been compromised, or whether governments have lost their ability to make decisions alone, or to be left alone, but rather the extent to which states have retained legal powers of decision in trade matters. To determine whether governments have the freedom to make their own judgments, or have the power to decide, I would suggest that it is necessary to examine to what degree states still have the freedom to "opt out" or to choose to disobey the rules.

In other words, to what extent do the rules of international trade still leave states free to choose to depart from the ostensibly governing norms?

II. Circling The Wagons: The Increasing Constraints of International Trade Rules and Their Administration

Both the substantive disciplines and the institutions built to enforce them are increasingly shrinking the outside perimeter of the play-

---

[5] Case 11/70 Internationale Handelsgesellschaft mbH v. Einfuhr & Vorratsstelle Fur Getreide & Futtermittel, 2 C.M.L.R. 540 (1974).

ing field within which governments are free to play the game of domestic trade regulation.

The GATT was established to deal with high tariffs, discriminatory quotas — the protectionists' tools of choice in 1930's and 1940's. The early rounds of GATT negotiations concentrated on tariff issues, in the belief that removing artificial tariff barriers would promote the economic principle of "comparative advantage" between industries of different countries. And they have been successful: through the 1970's, trade grew twice as fast as production.

Perversely, as tariffs came down they were replaced with less visible, more creative means of protection, through so-called non-tariff barriers (NTB's). Through the Tokyo Round, contracting parties attempted to establish limits on such rule-making, but succeeded only in adding a greater requirement for "transparency," in the belief that easier identification of barriers would facilitate negotiation of their reduction and ultimate removal.

And today, with growth in trade in services, and international direct and portfolio investment contributing an ever larger share of economic growth, governments have responded with more subtle and sophisticated means of regulation, often with the potential to distort the marketplace; to wit investment restrictions, licensing and accreditation procedures, competition policy and intellectual property protection.

It was against this backdrop that Canada sought free trade negotiations with the United States. With similar approaches to commercial regulation, both countries rightly believed that they could achieve a more meaningful agreement more quickly than in a multilateral context.

The Canada-U.S. FTA[6] was a watershed in international trade regulation in several respects. First, it represented the first international trade agreement to apply the basic GATT principles of non-discrimination to services[7] and to direct investment activities.[8] Second, it added new disciplines in such areas as temporary entry of business persons.[9] And third, it made significant improvements to the GATT-based dispute settlement regime, including automatic establishment of panels[10] and strict timetables for completion of their work.[11]

Canada and the United States took things a step further in negotiating Mexico's entry into the free trade area through NAFTA.[12] And

---

[6] Free Trade Agreement Between Canada and the United States of America, 1989 Can. T.S. No. 3 [hereinafter FTA].

[7] FTA, *supra* note 6, ch. 14 (Services), art. 1402, para. 1 (Rights and Obligations).

[8] *Id.* at ch. 16 (Investment), art. 1601, para. 1 (Scope and Coverage).

[9] *Id.* at ch. 15 (Temporary Entry for Business Persons).

[10] *Id.* at arts. 1806 (Arbitration) and 1807 (Panel Procedures).

[11] *Id.*

[12] North American Free Trade Agreement (Between the Government of Canada, the Gov-

the larger international trade community followed suit. The Final Act of the Uruguay Round[13] of multilateral trade negotiations, establishing the World Trade Organization (WTO), is the result of seven years of intensive negotiations. Many of the ideas reflected in the agreement were under consideration before the NAFTA entered into force, but will become operational only in 1995.

Both the NAFTA and the WTO incorporate the GATT's basic disciplines for trade in goods, namely, disciplines on border measures[14] and national treatment of goods in each country.[15] Both agreements incorporate significant new disciplines on a range of NTB's, particularly regarding "technical barriers to trade"[16] and "sanitary and phytosanitary" measures.[17] Both the framework for a WTO Procurement Code and NAFTA cover government procurement, requiring that procurement of goods, services and construction contracts be subject to the same rules of fair bidding and awards based on quality and price alone.[18] Negotiations on sub-national coverage are contemplated in both fora.[19] Both agreements address trade-related aspects of intellectual property (now referred to in the WTO by the acronym, "TRIPS"[20]). Both agreements recognize the importance of effective institutional arrangements and dispute settlement mechanisms for conducting trade on a non-discriminatory basis.[21] Consistent with the FTA and NAFTA, WTO panels will now be established more quickly than

---

ernment of the Mexican States and the Government of the United States of America), (done in triplicate at Ottawa, on the 11th day and the 17th day of December 1992, Mexico, D.F., on the 14th day and the 17th of December 1992, Washington, D.C., on the 8th day and the 17th day of December 1992) [hereinafter NAFTA].

[13] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (signed at Marrakesh, April 15 1994) (MTN.FA) [hereinafter WTO].

[14] For example, NAFTA Articles 302 (Tariff Elimination) and 309 (Import and Export Restrictions), WTO Annex 1A, incorporating Articles II (Schedules of Concessions) and XI (General Elimination of Quantitative Restrictions) of GATT 1994.

[15] NAFTA, *supra* note 12, at art. 301 (National Treatment), WTO, *supra* note 13, at Annex 1A, incorporating Article III (National Treatment on Internal Taxation and Regulation) of GATT 1994.

[16] NAFTA, *supra* note 12, at pt. Three (Technical Barriers to Trade), WTO Agreement on Technical Barriers to Trade.

[17] NAFTA, *supra* note 12, at ch. Seven, § B (Sanitary and Phytosanitary Measures), WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

[18] NAFTA, *supra* note 12, at ch. 10 (Government Procurement), § B (Tendering Procedures), Agreement on Government Procurement.

[19] NAFTA, *supra* note 12, at art. 1024 (Further Negotiations), Agreement on Government Procurement.

[20] WTO Agreement on Trade-Related Aspects of Intellectual Property Rights.

[21] *See*, for example, NAFTA, *supra* note 12, at chs. Nineteen (Review and Dispute Settlement in Antidumping and Coutervailing Duty Matters) and Twenty (Institutional Arrangements and Dispute Settlement Procedures), in particular, arts. 2003 (Cooperation) and 2004 (Recourse to Dispute Settlement Procedure), WTO, *supra* note 13, at Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes.

their GATT predecessors.[22] Their reports will be adopted as a matter of course,[23] and with the addition of a new Appellate Body,[24] their decisions are likely to be more carefully reasoned. And both agreements recognize that the best form of dispute settlement is dispute avoidance, and that the best way to avoid disputes is to let others know what you are planning to do, to hear the views of others, and to correct small mistakes before they fester and become political issues. So both agreements emphasize "transparency" — the need to pre-publish,[25] to hear private sector views,[26] and to provide appropriate administrative and judicial review of domestic action that might affect trade.[27]

There are, however, some significant differences between the two agreements.

First, the NAFTA, based on the FTA, extrapolates the same principles of non-discrimination that the GATT applies to goods and makes them applicable to the provision of all services across borders, except a few that one or another of the three countries specifically exempted.[28] In the WTO, the GATS (the General Agreement in Trade in Services) sets out the same principles, but applies them only to those sectors specifically offered up by member countries.[29]

Second, again based on the FTA, the NAFTA includes a comprehensive code of rules governing treatment of foreign investors and their investments, including a regime of mixed, or investor-state dispute settlement.[30] In the WTO, agreement was reached only on a few disci-

---

[22] *Compare* GATT Decision of 12 April 1989 (L/6489) (Improvement to the GATT Dispute Settlement Rules and Procedures) pt. F (Panel and Working Party Procedures) and WTO, *supra* note 13, at Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 6 (Establishment of Panels).

[23] WTO, *supra* note 13, at Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 16 (Adoption of Panel Reports).

[24] *Id.* at art. 17 (Appellate Review).

[25] *See* NAFTA, *supra* note 12, at art. 1802 and the more specific obligations set out in arts. 718, 909, 1411 and ch. 18; General Agreement on Trade and Services, art. III, WTO Agreement on the Application of Sanitary and Phytosanitary Measures, Article 7 which refers to Annex B (Transparency of Sanitary and Phytosanitary Regulations), WTO Agreement on Technical Barriers to Trade, art. 2.9.

[26] *See* NAFTA, *supra* note 12, at art. 1802 (2) (Publication) and the more specific obligations set out in art. 723, 913, Annexes 913.5.a-1 to 913.5a-4 and art. X of GATT 1994, incorporated in WTO Agreement.

[27] See NAFTA, *supra* note 12, at arts. 1803 (Notification and Provision of Information), 1804 (Administrative Proceedings), and the more specific obligations set out in arts. 510, 1805, 1903, 1904, 1907; WTO Agreement on Trade Related Aspects of Intellectual Property Rights, art. 42, WTO Agreement on Implementation of art. VII of the General Agreement on Tariffs and Trade 1994, art. 23 and art. X of GATT 1994, incorporated in WTO Agreement.

[28] *See* reservations set out pursuant to NAFTA. NAFTA, *supra* note 12, at art. 1206 (Reservations).

[29] See WTO General Agreement in Trade in Services art. XVII (1) (Additional Commitments).

[30] NAFTA, *supra* note 12, at ch. Eleven (Investment), including § B (Settlement of Dis-

plines governing trade-related investment measures (TRIMS).[31] While calling for more comprehensive future negotiations, the TRIMS agreement covers only those investment regulations that have a distorting effect on trade in goods.

Third, the FTA and NAFTA contain provisions to facilitate the temporary entry of business persons, based on the fact that trade in goods and services, and investment, necessarily involve people dealing with people.[32] WTO rules are more general, and limited only to those services sectors in which commitments are undertaken.[33]

Conversely, the WTO offers remarkable new disciplines in several areas where Canada was not able to reach agreement on a regional basis. In the area of subsidies and trade remedy laws, the WTO sets out clear and comprehensive rules regarding what kinds of subsidies are actionable,[34] regarding how trade remedy proceedings are conducted,[35] and for the first time regarding domestic programs that restrict or displace market entry or substitute for imports.[36] Until now, only subsidies causing export injury were disciplined, through "countervailing duties." The FTA-based NAFTA "Chapter Nineteen" regime imposes an international panel system of judicial review on domestic decisions, but leaves each country's existing rules on subsidies and on dumping intact.[37] In agriculture, the WTO system of "tariffication" converts a myriad of border measures and other distorting practices to transparent tariffs, and lays the groundwork for their gradual removal.[38] Textile and apparel trade will be weaned from the protections of the Multifibre Agreement and reintegrated into the GATT/WTO system.[39]

The substantive obligations of both the NAFTA and the WTO cover a broad range of domestic regulation — consider the sweep of disciplines on procurement, standard-setting, visas, banking licenses, and copyright matters all in the same document. Of course, as a general matter neither the WTO nor the NAFTA directs governments to act in a certain way. Rather, they impose prohibitions or outside con-

---

putes between a Party and an Investor of Another Party).

[31] WTO Agreement on Trade Related Investment Measures.

[32] FTA, *supra* note 6, at ch. Fifteen (Temporary Entry for Business Persons) and NAFTA, *supra* note 12, at ch. Sixteen (Temporary Entry for Business Persons).

[33] WTO General Agreement in Trade in Services (Annex on Movement of Natural Persons Supplying Services Under the Agreement) referring to pts. III and IV.

[34] WTO Agreement on Subsidies and Countervailing Measures, pt. III (Actionable Subsidies).

[35] *Id.* at pt. V (Countervailing Measures).

[36] *Id.* at art. 9 (Consultations and Authorized Remedies).

[37] NAFTA, *supra* note 12, at arts. 1901 (3) (General Provisions) and 1902 (Retention of Domestic Antidumping Law and Countervailing Duty Law).

[38] WTO Agreement on Agriculture, art. 4 (Market Access).

[39] WTO Agreement on Textiles and Clothing.

straints on what governments may do. However, as these international disciplines become more precise and address more aspects of governmental activity, the authority of a trade agreement begins to impose more significant behaviorial restraint on government conduct.

Conversely, both the WTO and NAFTA have enabled Canada and other countries to protect sensitive activities and sectors, such as Canada's cultural industries, social services, and policies favoring native interests, from unintended encroachment.

The dispute resolution regimes of NAFTA (Chapter Twenty for government-to-government disputes, Chapter Nineteen Binational Panel Review and Dispute Settlement in Antidumping and Countervailing Duty Matters, and Chapter Eleven in Investor-State matters) and the WTO provide more authoritative decision-making that should enhance the already high rate of compliance with trade dispute settlement reports.[40]

In sum, an increasingly broad range of national or domestic actions affecting trade — whether legislative, executive or quasi-judicial — are properly the subject of notification, consultation, and, if necessary, dispute settlement, according to the agreed standards and common object and purpose established in the NAFTA and WTO.

III. The European Community and Union Compared: Two Paradigms for the Rule of International Trade Law

Despite these remarkable successes of the FTA, NAFTA and the WTO, many informed observers point to the single market of the European Communities, now the European Union, as evidence that neither the free trade agreements nor the multilateral trade regime come close to meeting their stated objective of removing trade barriers. Many suggest that only the permanence, authority and direct applicability of community rules, as enforced by the European Court of Justice, can assure maintenance of a free trade regime that "works."[41] The question is worthy of more detailed consideration.

The system for enforcing the rules of the NAFTA is *decentralized*. In large measure, NAFTA is designed to make use of, and depend on, domestic law, administrative agencies and ultimately courts for the enforcement of the substantive obligations of the agreement. Compliance is assured through international, increasingly judicialized, means of control: the treaty's dispute settlement procedures provide

---

[40] *See* Hudec *et. al.*, *A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989*, 2 Minn. J. Global Trade 1 (1993).

[41] Others allege that the World Trade Organization will seize sovereign control of domestic regulation from member states. For a convincing response, *see* Sutherland, The World Trade Organization and the Future of the Multilateral Trading System, address to the St. Gallen Symposium (May 30, 1994) (GATT Press Release 1634, 30 May, 1994).

comprehensive oversight, with the possibility of severe economic penalties (compensation or retaliation up to the value of trade harmed by the non-conforming measure) helping to deter governments from breaching their obligations in the first place.

Dispute settlement in the NAFTA might be best understood as resting on four pillars.

First, and most importantly, the NAFTA provides comprehensive procedures for government-to-government dispute settlement. Building on the GATT and experience gained under the FTA, the NAFTA dispute settlement procedures comprise three stages: consultation,[42] Commission conciliation,[43] and panel proceedings.[44] Panel proceedings largely resemble those conducted in the GATT or pursuant to Chapter 18 of the FTA. Again, however, the NAFTA offers some significant improvements.

Instead of separate national rosters, as was provided under the FTA, the NAFTA calls for a consensus roster of persons acceptable to all member countries.[45] Instead of selecting nominees from the Roster on a "labor arbitration" model, by which each government chooses from its own national list, the NAFTA calls for a process of "reverse selection," by which one country must select from among the other country's nationals on the roster.[46] Unlike the FTA, the NAFTA permits third-country and non-member country nationals to serve as Chair of a panel.[47] Unlike the FTA, disputes regarding financial services are

---

[42] WTO Agreement on Subsidies and Countervailing Measures, *supra* note 34, at art. 2006 (Consultations).

[43] *Id.* at art. 2007 (Commission - Good Offices, Conciliation and Mediation).

[44] *Id.* at art. 2008 (Request for Arbitral Panel).

[45] *Id.* at art. 2009 (Roster).

[46] *Id.* at art. 2011 (1) (c) (Panel Selection).

[47] *Id.* at art. 2011. This Article sets out a process of "reverse selection," whereby if there are two disputing Parties, each Party ". . .shall select two panelists who are citizens of the other disputing Party," and if there are more than two disputing Parties, the complaining Parties together ". . .shall select two panelists who are citizens of the Party complained against," and that Party ". . .shall select two Panelists, one of whom is a citizen of a complaining Party, and the other of whom is a citizen of another complaining Party." The chair in either case is selected by agreement, or failing agreement, the Party or Parties chosen by lot ". . .shall select. . .an individivual who is not a citizen of such Party or Parties." The NAFTA does not set out any citizenship requirement for roster members or for chairs who may be selected. Thus, if Canada and Mexico wish to challenge a U.S. measure before a Panel, and the Parties are unable to agree on a chair, assuming Canada and Mexico are chosen by lot to select the chair they may select an American or a fourth country national, but not a Canadian or Mexican, to chair the panel, and two Americans as panelists. The United States in this case would select one Canadian and one Mexican. The system is designed to ensure that each country has at least one national serving on any given panel, that complaining and complained against sides in a dispute are balanced, regardless of whether one or two countries complain (since complaints may only be in respect of "measures," there can only ever be one Party complained against), and that no side be seen to have a guaranteed "majority" on the panel. In the hypothetical example, if fourth country nationals could not serve as chairs, the United States would have three of the five panelists.

fully subject to dispute settlement, through specialized procedures to ensure appropriate panel expertise.[48] Special rules permit the use of so-called "scientific review boards"[49] to address factual issues related to environmental, safety, health or conservation measures. Binding dispute settlement is made available to determine whether one country's retaliation in response to another country's failure to comply with a panel report is itself "manifestly excessive."[50]

The second pillar of dispute settlement is Chapter 19, providing for binational panel review and dispute settlement regarding antidumping and countervailing duty matters. Like the FTA, the NAFTA places binational panels in the position of domestic courts to exercise judicial review over domestic determinations of dumping, subsidization, and injury in AD and CVD cases.[51] Again like the FTA, the NAFTA establishes an Extraordinary Challenge Committee for dealing with allegations in circumstances where a panel decision may have affected the integrity of the panel review system.[52] The NAFTA also carries forward the FTA procedure designed to "stabilize" trade remedy laws, under which future amendments are presumed not to apply to free trade partners unless specifically named; these amendments are subject to binational panel review to determine whether they are consistent with the objectives of the Agreement.[53] The NAFTA adds a new procedure to safeguard the panel process, designed to remedy instances in which application of a country's domestic law undermines the functioning of the panel process.[54] Finally, the NAFTA requires its members to consult regarding possible replacement regimes.[55] A separate Working Group on Trade and Competition is charged with reporting within five years on all aspects of the relationship between competition laws and policies and trade in the free trade area.[56]

The third pillar of dispute settlement is a regime of mixed, or investor-state, arbitration for the enforcement of obligations under the investment chapter of the Agreement. These procedures are common to Canadian Foreign Investment Protection Agreements and to U.S. Bilateral Investment Treaties. Any NAFTA investor who alleges that a host government has breached an obligation of the investment chapter may convoke an arbitral tribunal to hear the matter.[57] Investment obli-

---

[48] *Id.* at art. 1414 (Dispute Settlement).

[49] *Id.* at art. 2015 (Scientific Review Boards).

[50] *Id.* at art. 2019, para. 3 (Non-implementation - Suspension of Benefits).

[51] *Id.* at art. 1904 (Review of Final Antidumping and Countervailing Duty Determinations).

[52] *Id.* at art. 1904, para. 13 (Review of Final Antidumping and Countervailing Duty Determinations) referring to Annex 1904.13.

[53] *Id.* at art. 1903 (Review of Statutory Amendments).

[54] *Id.* at art. 1905 (Safeguarding the Panel Review System).

[55] *Id.* at art. 1907, para. 2b (Consultations).

[56] *Id.* at art. 1504 (Working Group on Trade and Competition).

[57] *Id.* at art. 1116 (Claim by an Investor of a Party on Its Own Behalf) and 1117 (Claim by

gations include requirements for national treatment and most-favored nation treatment, as well as certain disciplines on specified performance requirements, rules against restricting transfers, and against expropriation without compensation.[58]

Procedures may be based on ICSID or its Additional Facility, or on the UNCITRAL Rules for such arbitrations.[59] Special and novel procedures provide an effective means for the "consolidation" of cases,[60] to avoid procedural harassment,[61] and for the intervention of the governments responsible for the Agreement, both individually before the arbitral tribunal or collectively through the issuance of Commission interpretations of the Agreement on questions that may be before the arbitral tribunal.[62]

This regime provides an effective means for investors to remedy breaches in a manner that avoids the risk of politicization of disputes, such as through the infamous Section 301 actions in the United States, and without having to get the political attention of one's own government to intercede on behalf of the claim. Awards for monetary damages are directly enforceable in the domestic courts of the NAFTA members as if they were domestic court judgments.

The fourth and final pillar of dispute settlement is really one of dispute avoidance. Using GATT terminology, one might call this pillar one of "Transparency," or put even more simply, procedural due process. The NAFTA not only requires each country to implement the obligations of the Agreement, but also to administer the rules of the Agreement in their domestic legal systems in a "consistent, impartial and reasonable manner."[63] This transparency principle pervades the Agreement, and is reflected in several more specific obligations.

Governments are, as a general matter, obliged to make information available to traders and investors regarding any aspect of regulation covered by the Agreement.[64] Several "Enquiry Points" provide points of contact for the business community to find out directly from the government concerned, for example the standards that govern his imports, or procurement opportunities in that country.[65] Further, laws and regulations should be published or otherwise made available in advance to allow those affected to become acquainted with the measure

---

an Investor of a Party on Behalf of an Enterprise).

[58] *Id.* at ch. 11 (Investment), § A (Investment).

[59] *Id.* at art. 1130 (Place of Arbitration).

[60] *Id.* at art. 1126 (Consolidation).

[61] *Id.* at art. 1126, para. 2 (Consolidation).

[62] *Id.* at art. 1131 (Governing Law in Investor-State Arbitration).

[63] *Id.* at art. 1804 (Administrative Proceedings). *See also* Art. 510 (Review and Appeal).

[64] *Id.* at art. 1802, para. 1 (Publication).

[65] *Id.* at art. 719 (Inquiry Points), 910 (Inquiry Points) and 1019, para. 2c (Provision of Information).

and to adjust their production or business plans accordingly.[66]

Governments should provide at least one level of administrative review on matters covered by the Agreement.[67] To take a simple example, an erroneous decision by a customs officer at a port of entry can be taken to a higher level in the responsible ministry for correction.[68]

The NAFTA requires each country to adopt or maintain judicial, quasi-judicial or administrative tribunals or procedures for prompt review and correction of administrative action.[69]

Special procedures in the three countries' domestic systems will provide the certainty and predictability that I talked about earlier. For example, regarding rules of origin, any exporter may obtain a binding advance ruling on whether his product meets the test[70] — no longer will a manufacturer such as Honda run the risk of planning and producing on the basis of one set of rules, only to find that the importing country has chosen to administer them differently.

Finally, the NAFTA encourages the use of private commercial arbitration or other means of alternate dispute resolution as an effective means for settling business disputes in the free trade area.[71] A special advisory committee to the Commission will be invited to make recommendations on the availability, use and effectiveness of arbitration and other similar procedures.[72]

Chapter Nineteen panels do apply the domestic law of the importing country. Scholars will continue to debate whether the role of the panels is to apply the law as it is in fact applied, or as it should be applied.

The NAFTA provisions for advance rulings in customs matters,[73] for bid challenge review procedures in procurement,[74] for special bilateral safeguards or "escape clause" actions,[75] and more generally for administrative and judicial review,[76] as well as special rules to permit domestic courts to seek the guidance of the Commission on the interpretation of Agreement in domestic cases that raise such questions,[77] collectively suggest that under the NAFTA domestic fora may effec-

---

[66] *Id.* at art. 1802, para. 2 (Publication).

[67] *Id.* at art. 1805 (Review and Appeal).

[68] *Id.* at art. 510 (Review and Appeal).

[69] *See*, WTO Agreement on Subsidies and Countervailing Measures, *supra* note 34, at art. 1805 (Review and Appeal).

[70] NAFTA, *supra* note 12, at art. 509 (Advance Rulings).

[71] *Id.* at art. 2022 (Alternative Dispute Resolution).

[72] *Id.* at art. 2022, para. 4 (Alternative Dispute Resolution).

[73] *See*, NAFTA, *supra* note 12, at art. 509 (Advance Rulings).

[74] NAFTA, *supra* note 12, at art. 1017 (Bid Challenge).

[75] *Id.* at ch. 8 (Emergency Action).

[76] *Id.* at art. 1804 (Administrative Proceedings) and 1805 (Review and Appeals).

[77] *Id.* at art. 2020, para. 2 (Referrals of Matters from Judicial or Administrative Proceedings).

tively serve as agents to enforce the international rules of the agreement.[78]

The experience of Canada and the United States under the FTA suggests that this decentralized system for enforcing trade agreement rules indeed "works." While both countries have vigorously asserted their rights in various proceedings,[79] panel reports are considered to have been of a uniformly high quality,[80] and every report, both in respect of government-to-government disputes[81] and regarding judicial review of antidumping and countervailing duty matters,[82] has been fully respected and implemented by the government concerned.

The dispute settlement and enforcement regime of the EU offers a second paradigm for the rule of international trade law: that of *supranational* authority, with domestic, usually judicial means of oversight and control. Under the Treaty of Rome, member states have agreed both on the substantive rules to be applied and on "legislative" machinery, including certain decisions by majority rather than unanimity, for the adoption and promulgation of new rules. Further, the European Commission, with power to independently pursue enforcement of community norms, in a sense acts as guardian of the integrity of the agreed rules. This centralized system for enforcing trade agreement rules obviously also "works."

But nor is the European paradigm perfect.[83] Consider the legal situation in the United Kingdom, a country with constitutional foundations of democratic government closest to Canada and the United States.

---

[78] This increasing integration of international norms into the domestic administration of the Agreement is reflected in Section 3 of the Canadian *NAFTA Implementation Act*: "For greater certainty, this Act, any provision of an Act of Parliament enacted by Part II and any other federal law that implements a provision of the Agreement or fulfils an obligation of the Government of Canada under the Agreement shall be interpreted in a manner consistent with the Agreement."

[79] *See, e.g., Live Swine from Canada (fourth administrative review)* 14 ITRD 1748, 15 ITRD 1636, 15 ITRD 2025 (ECC); *Fresh, Chilled or Frozen Pork from Canada* 12 ITRD 2119, 13 ITRD 1024, 13 ITRD 1453, 13 ITRD 1859 (ECC); *Certain Softwood Lumber Products from Canada (Injury)* 14 ITRD 2166 (DOC), 16 ITRD 1168, panel decision (December 17, 1993) (not yet reported, ECC decision) (August 3, 1994) (not yet reported).

[80] *See* Lowenfeld, *Binational Dispute Settlement Under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal*, 24 N.Y.U. J. INT'L L. & POL. 269 (1991).

[81] *In Re* Article 304 and Definition of Direct Costs (June 8, 1992) 14 ITRD 2326; *In Re* Canada's Landing Requirements for Salmon and Herring (October 16, 1989) 12 ITRD 1026; Lobsters from Canada (May 25, 1990) 12 ITRD 1653; Canadian Durum Wheat Sales (February 8, 1993) 15 ITRD 2270; Distribution and Sale of UHT Milk from Quebec (3 June 1993) (not yet reported).

[82] For a list providing all these cases, *see Status Report, Active FTA and NAFTA Dispute Settlement Panel Review and Status Report, Completed NAFTA and FTA Dispute Settlement Panel Review.*

[83] *See* Peter W. Schroth, *Marbury* and *Simmenthal*: *Reflections on the Adoption of Decentralized Judicial Review by the Court of Justice of the European Community*, 12 LOY. L.A. L. REV. 869 (1979).

Despite its entry into the EC, Britain has not surrendered its doctrine of parliamentary sovereignty. As one commentator observed:

> The traditional view of the *European Communities Act 1972* is that it embodies a rule of construction. The effect of this rule is that UK courts should interpret subsequent legislation, if at all possible, consistently with Community law and read subsequent and inadvertently inconsistent legislation as subject to Community law. This rule preserves the ultimate sovereignty of Parliament, however, because the *European Communities Act 1972* does not state expressly that Parliament cannot repeal the *European Communities Act 1972* or pass legislation deliberately contravening Community law. . .Community law is applicable in the UK only because the European Communities Act 1972 incorporates Community law into domestic law.[84]

At a doctrinal level, the rules for statutory interpretation have the same foundation as provisions of domestic law in Canada implementing NAFTA obligations.

Although Lord Denning in *Macarthys Ltd. v Smith*[85] stated in dictum that if Parliament deliberately passes an act with the clear intention of repudiating the Treaty or any Community provision, then British courts must abide by the conflicting parliamentary statute, a more recent Queen's Bench case put the question squarely before the British courts. In the *Bourgoin* case,[86] the plaintiffs challenged the Minister's revocation of an import license for turkeys and issuance of a more restrictive license that had the effect of preventing the importation of turkeys from France. The license thus had the effect of preventing the plaintiffs from trading in the UK. On application of the Commission, the European Court of Justice held that the real aim of the revocation was to block trade rather than to prevent disease, thus constituting a breach of the free movement of goods obligations of Article 30 of the Treaty of Rome. The British government re-issued a general license, and the plaintiffs subsequently sued the Minister for damages for their loss of business. The court held that the right conferred by Article 30 on private parties was the right not to be subjected to such a measure, akin to the right in English law not to be subjected to an *ultra vires* measure even though made in good faith, for which the appropriate remedy was judicial review and not damages. No action for "breach of statutory duty" lies. Finally, the court considered that judicial review is sufficiently effective protection of the rights conferred by Article 30 for the purposes of the Treaty of Rome. However, the court

---

[84] Comment, *Regina v. Secretary of State for Transport Ex Parte Factortame Ltd: The Limits of Parliamentary Sovereignty and the Rule of Community Law*, 14 FORDHAM INT'L L.J. 778 (1990-1991).

[85] Macarthys Ltd. v Smith, 3 All E.R. 325 (C.A. 1979).

[86] Bourgoin SA and others v. Ministry of Agriculture, Fisheries and Food, 3 All E.R. 585 (1985).

did hold, on the basis that the government had conceded for the purpose of the preliminary issue that the Minister had revoked the license with knowledge that it constituted a breach of British obligations under Article 30 and would injure the plaintiff's trade, that the Minister had on those facts committed the tort of misfeasance in public office.

Thus, for the two years it took to condemn and have corrected the British measure through the European Court of Justice, the British government suffered no economic consequences for its wrongful action, and ultimate costs would have depended on a private party's pursuit of a tort claim against the government.[87]

IV. A False Dichotomy?

Shortly after Congressional approval of the Canada-U.S. FTA, House Ways and Means Trade Subcommittee Chairman Sam Gibbons urged the Adminstration to consider establishing FTA-style procedures and institutions to address disputes between the United States and Europe. The question he could not answer, however, was "Which rules are to apply?"

It is, arguably, the lack of consensus on substantive rules, rather than on institutional and dispute settlement mechanisms, that may account for the seemingly widespread resistance to approaches that would support an integrated market in the North American free trade area[88] and the seemingly widespread acceptance and support for such decisions in Europe. Many disputes in North America concern areas unregulated by international trade rules or governed by rules too general and rudimentary in scope to provide effective discipline (such as agricultural trade), or areas where in the absence of internationally-agreed rules one or another country (although usually the United States) has sought to legislate, adjudicate and enforce domestically for acts abroad that either have "effects" within the territory or affect "vital" national interests.[89]

---

[87] Possible exposure for liability may, however, be greater today. In Cases C-6/90 and 9/90 Francovich v. Italy, 2 C.M.L.R. 66 (1993), the European Court of Justice established a right to restitution for individuals, based on Community law, against a Member State for deficient or non-implementation of EC directives, under narrowly defined conditions: first, the directive must grant rights to individuals; second, the contents of the right must be identifiable on the basis of provisions of the directive; and third, there must be a causal link between the violation of the obligation and the damage suffered by the injured persons. Such actions are to be adjudicated by national courts, subject to guidance they receive from the European Court of Justice under the Article 177 procedure.

[88] See, e.g., *In Re* Article 304 and Definition of Direct Costs and Canadian Durum Wheat Sales, *supra* note 81.

[89] Space does not permit an examination of the breadth and frequency of U.S. assertions of extraterritorial jurisdiction in areas where an international consensus on the underlying regulatory principles is lacking. It is noteworthy that problems have arisen in respect of labor law (the *ARAMCO* case), export controls (Canada maintains a blocking order under its *Foreign Extrater-*

Accordingly, in areas unregulated or modestly regulated by international norms, a greater degree of "sovereignty" or "independence" in decision-making remains. In these circumstances — in the absence of international agreement on the substantive norms to be applied — disputes center instead on the propriety of unilateral enforcement. Put more simply, the question becomes whether access to the U.S. market is, or should be, a reward for "good" behavior, as determined by the United States. For example, the current debate regarding MFN treatment for China in light of human rights violations involves the question of withholding non-GATT-bound preferences.[90] In the area of export controls, the 1988 Omnibus Trade Bill's[91] sanctions for export control violations are limited to access to the U.S. defense procurement market, an area largely outside the coverage of the GATT Procurement Code.[92] And the Thai copyright and Brazilian pharmaceuticals investigations, conducted under the auspices of s. 301, each involved areas where the "target" government had, in the exercise of *its* sovereign authority, chosen not to sign on to certain international standards.[93]

The manner in which the governments of Canada, Mexico and the United States addressed labor and environment concerns raised in the NAFTA context,[94] and the GATT panel's consideration of similar issues in the *Tuna-Dolphin* case,[95] suggest that the best way to avoid the perils of unilateralism is to reach agreement on the substantive rules. Conversely, where there are agreed rules, the best measure of the effectiveness of international rules may well be how often member governments comply with the obligations they have undertaken. Whether the

---

ritorial Measures Act to respond to the U.S. *Cuban Democracy Act*), criminal law (the *Alvarez Machain* case), taxation (the *Alcan* and *Barclay's* cases on unitary taxation), and of course, antitrust. Nor are these problems limited to the international plane. Courts and academics still actively debate conflict of law developments on minimum contacts and judicial jurisdiction — *International Shoe* continues to be revisited. *See* William A. Voxman, *Jurisdiction over a Parent Corporation in Its Subsidiary's State of Incorporation*, 141 U. PA. L. REV. 327 (1992), and especially Earl M. Maltz, *Visions of Fairness - The Relationship Between Jurisdiction and Choice-of-Law*, 30 ARIZ. L. REV. 751 (1988).

[90] *See* Jeffrey A. McCredie, *Human Rights Concerns in the People's Republic of China: an Appraisal of Recent Events*, 3 TEMP. INT'L & COMP. L.J. 217 (1989).

[91] 50 U.S.C. app. § 2410a as enacted by Pub. L. No. 100-418, § 2444 102 Stat. 1366 (1988).

[92] *See* Daniel J. Fitzpatrick, Note, *Of Ropes, Buttons, and Four-By-Fours: Import Sanctions for Violations of the COCOM Agreement*, 29 VA. J. INTL L. 249 (1988) (discussing the so-called Toshiba incident).

[93] *See* Tedd L. McDorman, *U.S.-Thailand Trade Disputes: Applying Section 301 To Cigarettes and Intellectual Property*, 14 MICH. J. INT'L L. 90 (1992). *See also* Chris Shore, Note, *The Thai Copyright Case and Possible Limitations of Extraterritorial Jurisdiction in Actions Taken Under Section 301 of the Trade Act of 1974*, 23 LAW & POL'Y INT'L BUS. 725 (Spring 1992).

[94] *See* North American Agreement on Environmental Cooperation, 1994 Can. T.S. No. 3 and North American Agreement on Labor Cooperation, 1994 Can. T.S. No. 4.

[95] Restriction on Imports of Tuna, Report of the Panel, August 16, 1991. GATT Doc. DS21/R, *reprinted in* 30 I.L.M. 1594 (1991).

decentralized or supranational paradigm for enforcing compliance with the agreed rules is the better system is beside the point.

So what are the common elements that lead to a reasonably good track record of compliance both in the FTA/NAFTA and European systems? I would suggest that there are two essential elements.

First, member governments must have an appreciation of and a commitment to the substantive rules that they have previously accepted, regardless of whether they are implemented by way of incorporation into domestic law or by way of asking supranational institutions to directly enforce, or in the case of Europe even to promulgate, on their behalf. This perspective suggests that the differences between the European and FTA/NAFTA enforcement systems are ones of form rather than of substance.[96] Member states in both systems have equally firm commitments to the principles of non-discrimination and national treatment. The two regimes arguably reflect only a choice of different means for the enforcement of these principles: one, by the inter-mediation of domestic law, and the other by direct application of Community law.

But even this distinction of form is becoming blurred. For example, under NAFTA the three governments promulgated a lengthy document to further elaborate the agreement's rules of origin, called *The Uniform Regulations for the Administration of Customs Rules*.[97] This trilaterally negotiated and agreed document was subsequently adopted verbatim by each country as a domestic regulation.[98] The rulemaking in this instance had its origins in a trilateral context. The *Uniform Regulations* were drafted by an international team of bureaucrats, comprising Mexican, Canadian and American representatives. They were adopted by each country through the vehicle of domestic regulation. The means chosen to implement the rules reflect no less a commitment to accept international rules and disciplines than a member state of the European Union adopting domestic measures to implement a Commission decision or directive.

Second, compliance is furthered to the extent that the system pro-

---

[96] This is not to belittle to the fundamental distinction, described in Section I of this paper, between systems in which a government maintains its own right of decision and those where a government has accepted the legitimacy of another entity legislating on its behalf, even where that government votes against such action, as occurs under the majority voting rules applicable to the Council of Ministers and pursuant to authority granted to the European Parliament in the European Union.

[97] *Uniform Regulations for the Interpretation, Application and Administration of Chapter Four (Rules of Origin)*, C. Gaz., pt. I, vol. 128, no.3, c.4 (January 15 1994) p.301 and *Uniform Regulations for the Interpretation, Application, and Administration of Chapters Three (National Treatment and Market Access for Goods) and Five (Customs Procedures) of the North American Free Trade Agreement*. C. Gaz., Part I, vol. 128, no. 3, c.3 and c.5 (January 15 1994) p.477.

[98] Canada's domestic Regulation is *NAFTA Rules of Origin Regulations*, C. Gaz., pt. II, vol. 128 no.1 (January 12 1994) p.60.

vides some means of enforcement that permits the imposition of economic costs sufficient to have a deterrent effect. In the FTA/NAFTA context, the GATT-based system of requiring compensation to be offered, failing which the country complained against may face retaliation, has been adequate to ensure that every one of the government-to-government panel reports issued to date has been respected. In Europe, the penalty procedure created under the Treaty of Maastricht suggests that member states share the view that economic leverage is an important compliance tool.[99]

So, are countries of the European Community or Union less free to decide to opt out, less free to exercise their own judgment than are the parties to NAFTA? In legal terms, obviously so. Even the British courts accepted that the Minister's subsequent inconsistent regulation could not be effective when faced with a prior Community rule. But in terms of actual compliance, and adherence to the international disciplines involved, the record under the FTA/NAFTA regime reflects the fact that decentralized institutions and means of implementation, and less international bureaucracy, can be just as effective as supranational authority in constraining government action within the bounds established by agreed trade disciplines.

[99] The *Treaty of Maastricht* amends Article 171 of the *Treaty of Rome* to provide for the possibility of the European Court of Justice imposing a lump sum or penalty payment for non-compliance with a judgment in which it ruled that a Member State had failed to fulfil an obligation under EC law. Such a judgment would result either due to action by the Commission against a Member State or by one Member State against another Member State. The former action is common; the latter is very rare. The initiative to request the Court to impose a penalty lies with the Commission, which is required to first put the Member State on notice through a "reasoned opinion" that must include a deadline for compliance with the original judgment and specify the lump sum or penalty the Commission considers appropriate in the circumstances.