



Canada-United States Law Journal

Volume 20 | Issue

Article 33

January 1994

Sovereignty and Federalism: U.S. and Canadian Perspectives Challenges to Sovereignty and Governance

Earl H. Fry

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>

 Part of the [Transnational Law Commons](#)

Recommended Citation

Earl H. Fry, *Sovereignty and Federalism: U.S. and Canadian Perspectives Challenges to Sovereignty and Governance*, 20 Can.-U.S. L.J. 303 (1994)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol20/iss/33>

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

Sovereignty and Federalism: U.S. and Canadian Perspectives Challenges to Sovereignty and Governance

*Dr. Earl H. Fry**

Groups identified with economic nationalism in Canada and the United States vociferously opposed the approval of the North American Free Trade Agreement (NAFTA), claiming it would lead to a loss of national, political and economic sovereignty.¹ In certain respects, they are absolutely correct, but this erosion of sovereignty would have continued with or without the formal ratification of the NAFTA.

In an increasingly complex and interdependent global system, the sovereignty of nation-states is under siege. Today, all nation-states, including the United States and Canada, are more vulnerable to actions and decisions rendered outside their respective borders than ever before. Indeed, the contemporary international system faces the paradox of increasing political fragmentation juxtaposed with growing regional and global interdependence in such areas as economics, the environment, energy, resources, health, and the proliferation of weapons of mass destruction.

Moreover, both the issue of sovereignty and the efficacy of governance by nation-states are further complicated by the growth in subnational cleavages within many of these nations. Indeed, most of the recent growth in the membership of the United Nations is attributable to the dissolution of states such as the Soviet Union, Yugoslavia, and Czechoslovakia, and the creation of new nations from what were once subnational constituent units. Subnational cleavages linked to ethnicity, race, religion, language, economic disparities, territorial disputes, and other factors are challenging the viability of certain nation-states and are rendering effective policy-making much more difficult in many others.

The intersection of the international with the grassroots and the growth in "intermestic" politics (the overlap of international and domestic issues) represent the third major challenge to sovereignty and effective governance in the modern nation-state. In effect, as decisions are made and events transpire outside the boundaries of the nation-state which may have an immediate and profound effect on citizens at

* Professor of Political Science, Endowed Professor of Canadian Studies, Brigham Young University.

¹ The New Democratic Party (NDP) and Mel Hurtig's National Party were the core part of this opposition group in Canada, whereas Ross Perot's United We Stand organization and Pat Buchanan's America First movement represented the core in the United States.

the grassroots' level, these citizens demand that their interests be protected and enhanced not only by their national governments, but also increasingly by the subnational or non-central governments which are closest to local populations. These subnational governments have always attempted to protect and enhance local constituency interests, but in an era of complex global interdependence, they have discovered that this effort requires being actively involved beyond the frontiers of their own nation-states and occasionally adopting policy positions which do not coincide with those of the national capital. A schematic representation of the challenges to sovereignty in the post-Cold War era is provided in Figure I.

The intent of this paper is to focus on NAFTA and to examine how such a formalized continental trading system may affect sovereignty and federalism in two of its three member states, namely the United States and Canada.

AN OVERVIEW OF NAFTA

After engaging in months of behind-the-scenes negotiations and at times bitter debate, the members of the U.S. House of Representatives finally voted to approve NAFTA 234 to 200 on November 17, 1993, even though a majority of President Bill Clinton's own party members refused to support the accord.² Three days later, the U.S. Senate also gave its approval 61 to 38, and only two more days would elapse before the Mexican Senate endorsed the pact 56 to 2. Several months earlier, when Brian Mulroney was still Prime Minister of Canada, his Progressive Conservative parliamentary majorities had approved NAFTA both in the House of Commons and the Senate. The new Liberal government headed by Jean Chrétien announced in early December that it would permit the accord to go into effect as scheduled.³

The implementation of NAFTA in the United States, Mexico, and Canada began on January 1, 1994 and will create within 15 years a free trade area extending from the Yukon to the Yucatan, with a current population base of 370 million people in an area of over 21.3 million square kilometers, a combined annual gross domestic product of

² As an illustration of how divisive NAFTA was in the United States, a majority of Democrats voted against the agreement both in the House and in the Senate. The final vote in the House was 132 Republicans and 102 Democrats in favor and 43 Republicans and 156 Democrats opposed. In the Senate, the vote was 34 Republicans and 27 Democrats in favor, and 10 Republicans and 28 Democrats in opposition.

³ In Canada, final approval of NAFTA still required an official proclamation from the government. Chrétien announced at a press conference on December 2 that the United States and Mexico had agreed that they would not expect large-scale exports of fresh water from Canada and that the three parties would discuss over the next two years common rules for defining subsidies and dumping. Chrétien stated that these "concessions" were sufficient to receive his government's approbation for the implementation of NAFTA. See WALL ST. J., Dec. 3, 1993, at A2 & A12.

6.7 trillion dollars, and three-way merchandise trade exceeding 270 billion dollars per year.⁴ It will also unite economically three federal systems in which authority to govern is divided constitutionally between the national government and state and provincial governments. Indeed, businesses which hope to take advantage of NAFTA must learn to contend with a governmental maze consisting of 3 national governments, 91 state and provincial governments, 2 federal districts, 5 major territorial governments, and tens of thousands of county and local governments.

NAFTA was generally patterned after the Canada-U.S. Free Trade Agreement (FTA) which went into effect in 1989. The FTA will be fully implemented in 1998, although some of the provisions in the agreement will be superseded by new NAFTA rules. Canada-U.S. bilateral economic linkages are the most extensive in the world with 192 billion dollars in goods and 27 billion dollars in services crossing the 49th parallel in 1992 alone. Canada is the leading national market for U.S. exports and ranks second behind the United Kingdom as a destination for U.S. direct investment, with U.S.-owned companies providing 912,000 jobs in Canada in 1991. It is also the number one source of foreign tourists who travel to the United States, accounting for an estimated 18.4 million of the 46.5 million foreigners who visited the country during 1993.⁵ Americans also account for almost 90% of the foreigners who visit Canada each year, and Canada is the second leading foreign destination for U.S. travelers, trailing only Mexico.⁶ For their part, Canadians shipped 77.6% of their merchandise exports to the United States in 1992, with American buyers purchasing 25% of everything that Canada produces. Canadian companies with subsidiaries in the United States also provided job opportunities in 1991 for 718,000 Americans, 11,000 more than Japanese-owned firms and 199,000 more than German-controlled enterprises.⁷ In total, approximately three million jobs on each side of the border are attributable to bilateral trade, investment, and tourism linkages.⁸

Mexico entered the trade-negotiation stage in June 1990, when President Carlos Salinas de Gortari and President George Bush agreed to commence Mexico-U.S. bilateral trade discussions. The United

⁴ Before implementation, NAFTA first had to be ratified by the three executives and then approved by both chambers in the Canadian Parliament and the U.S. Congress, and by the Senate in Mexico. This process was completed between December 1992 and December 1993.

⁵ These estimates are provided by the United States Travel and Tourism Administration. See *N.Y. TIMES*, Oct. 31, 1993, V, at 3.

⁶ In 1992, 11.8 million (26% of total U.S. travelers abroad) visited Canada. See *STATISTICAL ABSTRACT OF THE UNITED STATES* 259 U.S. Government Printing Office (1993).

⁷ Steve D. Bezirgianian, *U.S. Affiliates of Foreign Companies: Operations in 1991*, in *SURVEY OF CURRENT BUSINESS* 103 (May 1993).

⁸ See EARL H. FRY, *CANADA'S UNITY CRISIS: IMPLICATIONS FOR U.S.-CANADIAN ECONOMIC RELATIONS* 1-13 (Twentieth Century Fund 1992).

States is the largest market for Mexican exports, the leading foreign direct investor (with U.S. investment almost tripling between 1986 and 1992), and the number one source of foreign tourists.⁹ Mexicans are the second leading source of foreign tourists for the United States, with roughly 8.7 million visiting during 1993.¹⁰ Approximately 70% of Mexico's imports and exports is also directly linked to the U.S. marketplace, including 85% of Mexico's manufactured exports.¹¹ Mexicans are also the twenty-first leading foreign direct investors in the United States with 1.2 billion dollars at the end of 1992.¹²

NAFTA will be fully implemented within 15 years, but 99% of trade barriers (94% in the agricultural sector) will be phased out within a decade or less.¹³ Furthermore, Mexico eliminated on January 1, 1994 nearly 50% of the tariffs on industrial goods it imports from the United States and Canada. In addition, NAFTA is perhaps the most expansive free trade accord yet formulated, because it will not only eliminate tariffs, but it will also do away with many onerous barriers linked to the flow of investment, services, and agricultural commodities (liberalized direct investment is especially important because approximately 65% of Canada's manufactured exports to the United States and 60% of Mexico's are intra-firm transactions).¹⁴ Procurement restrictions for both government agencies and state-owned enter-

⁹ Christopher L. Bach, *U.S. International Transactions, Fourth Quarter and Year 1992*, SURVEY OF CURRENT BUSINESS 79 (March 1993); Russell B. Scholl, Jeffrey H. Lowe, & Sylvia E. Bargas, *The International Investment Position of the United States in 1992*, SURVEY OF CURRENT BUSINESS 51 (June 1992). U.S.-owned companies provided 577,000 jobs in Mexico in 1991. See Raymond J. Mataloni, Jr., *U.S. Multinational Companies: Operations in 1991*, SURVEY OF CURRENT BUSINESS 58 (July 1993). Of the 44.7 million U.S. travelers who ventured to another country in 1992, 17.1 million (38%) visited Mexico. See STAT. ABSTRACT, *supra* note 6, at 259.

¹⁰ N.Y. TIMES, Oct. 31, 1993, V, at 3.

¹¹ Sidney Weintraub, *NAFTA and the Realities of Trade Regimes and Regionalism in the 1990s*, in THE CHALLENGE OF NAFTA 324 (Robert G. Cushing et al., eds., Lyndon B. Johnson School of Public Affairs, 1993).

¹² Scholl, et al., *supra* note 9, at 54, provides direct investment statistics for 1992. Mexican direct investment in the United States is still very small, but it has increased from 136 million dollars in 1980 to 293 million dollars in 1987 and to 1.2 billion dollars in 1992, according to U.S. Department of Commerce statistics. Mexican-owned companies provided 15,500 jobs in the United States in 1991. See Bezirgianian, *supra* note 7, at 103.

¹³ ECONOMIST, Nov. 13, 1993, at 23-24. Some of the agricultural provisions are bilateral instead of trilateral, with Canada choosing not to be included in some parts of the agreement.

¹⁴ Weintraub, *supra* note 11, at 324. More than ten billion dollars in new investment flowed into Mexico during the first ten months of 1993, with about one-half destined for the Mexican stock exchange. Under a new foreign direct investment law proposed by the Salinas Administration in November 1993, foreigners for the first time would be permitted to invest in industrial, commercial, hotel, and time-share developments along the coast and the Mexico-U.S. border. They will also be permitted to purchase up to a 25% share in airlines, and 100% in secondary petrochemicals and mining. These new regulations will effectively repeal Mexico's highly restrictive 1973 Law to Promote Mexican Investment and Regulate Foreign Investment. See WALL ST. J., Nov. 26, 1993, at A6.

prises will be eased, intellectual property protected, standard technical specifications made fair and transparent, and trade dramatically liberalized in sectors as diverse as land transportation and telecommunications. Rules of origin will also be simplified, with 50% North American content sufficient for duty-free treatment for most products, although this increases to 60% for automotive parts and to 62.5% for automobiles and light trucks, with textiles and apparel also being subject to special regulations.¹⁵ The innovative dispute-settlement mechanism found in the FTA will be transferred to the NAFTA. It is a mechanism which can potentially be highly effective, especially in the resolution of anti-dumping and countervailing duty cases.

Once the implementation of NAFTA has been under way for a period ranging from several months to a few years, negotiations may begin with Chile and then possibly with other nations in Latin America, giving impetus to the *Enterprise for the Americas' Initiative* originally proposed by President Bush.¹⁶ The Clinton administration has already extended an invitation to most nations in North, Central, and South America to attend a major economic summit to be held in Miami at the end of 1994, perhaps serving as the precursor to a hemispheric free-trade arrangement.¹⁷ Moreover, such long-range deliberations may not be limited exclusively to the Western Hemisphere, for several nations along the Pacific Rim have expressed an interest in joining NAFTA. Indeed, discussions on freer trans-Pacific trade took place among the 15 member-states of the Asia-Pacific Economic Cooperation (APEC) forum which gathered in Seattle during the very same week that the U.S. Congress approved NAFTA.¹⁸

The three founding members of NAFTA would each have veto

¹⁵ Duty-free treatment for textiles and apparel will require that yarn or fiber used in the finished goods be produced within North America.

¹⁶ Roy MacLaren, Canada's Minister of International Trade, has stated that unless there is a major problem in the U.S. Congress, negotiations with Chile should begin no later than 1995.

¹⁷ This invitation was extended by Vice President Al Gore during his visit to Mexico City on December 1, 1993. Those invited would include "democratically elected heads of state," with Clinton administration spokespersons emphasizing that Fidel Castro and the leaders of the military junta in Haiti do not qualify as democratic leaders.

¹⁸ The members of APEC include Australia, Brunei, Canada, China, Hong Kong, Indonesia, Japan, Malaysia, New Zealand, the Philippines, Singapore, South Korea, Taiwan, Thailand, and the United States. At the Seattle meeting, they agreed to expand the organization to include Mexico and Papua New Guinea. In March 1994, the finance ministers met again in Hawaii to discuss enhanced trans-Pacific cooperation.

In 1992, the United States exported 128 billion dollars in goods and services to the 14 other APEC members, and by the year 2000 U.S. trans-Pacific trade and investment flows are expected to be double its trans-Atlantic flows. These nations now account for 50% of global GDP and 40% of total U.S. trade, but the United States also had a 80 billion dollar merchandise trade deficit with these nations in 1992, whereas it had small trade surpluses with the European Community and Latin America. See Frank B. Gibney, *Creating a Pacific Community*, 72 FOREIGN AFF. 20-25 (Nov.-Dec. 1993); ECONOMIST, Nov. 13, 1993, at 35.

power over new entrants, although each would remain free to negotiate separate bilateral trade accords with any other country.¹⁹

NAFTA AND NORTH AMERICAN SOVEREIGNTY AND FEDERALISM

The NAFTA will integrate trade relations between the world's largest, eighth largest, and fifteenth largest national economies.²⁰ It will also affect some of the most powerful political and economic non-central governments in the world. California alone ranks ahead of Canada in both population and GDP and controls 20% of the votes needed to select the President of the United States in the electoral college. Both California and New York would rank among the ten largest national economies in the world, and 16 states and 2 provinces would rank among the top 25 economies, 33 states and 4 provinces among the top 50, and all 50 states and 8 of the 10 provinces among the top 75 national economies.²¹ Ontario is an even more dominant force on the Canadian political and economic landscape, accounting for 36% of Canada's population, 34% of the seats in the House of Commons, and 41% of GDP. In contrast, California and New York together account for only 19% of the total population, 19% of the seats in the House of Representatives, and 22% of GDP.²²

Many of these subnational government units have welcomed the FTA and NAFTA, insisting that a regional free trade area will help their business communities to become more competitive both on a continental and global basis. Texas, in particular, has been enthusiastic about its prospects under NAFTA, because it alone encompasses over one-half of the U.S. border with Mexico. In 1992, Texas exported 19 billion dollars in products to Mexico, three times more than the second

¹⁹ For example, Mexico agreed to join with Venezuela and Colombia in the formation of a free trade area beginning in 1994.

²⁰ The Paris-based Organization for Economic Cooperation and Development (OECD) estimates that Spain passed Canada to become the seventh largest economy in 1992 as measured by GDP. However, on the basis of purchasing power parity, Canada remains substantially ahead of Spain.

²¹ Figures based on 1990 GDP statistics for states and provinces and for 189 nations, plus Hong Kong and Taiwan (a few national GDPs were either for the years 1989 or 1991). See *THE 1994 INFORMATION PLEASE ALMANAC* 143-294 (Otto Johnson, ed., Houghton Mifflin, 1994); *1992 CORPUS ALMANAC AND CANADIAN SOURCEBOOK* (Barbara Law, ed., Southam Information and Technology Group, 1991); *SURVEY OF CURRENT BUSINESS*, Dec. 1993, at 38-41. For an earlier survey, see Earl H. Fry, *U.S. States in the International Economy*, in *STATES AND PROVINCES IN THE INTERNATIONAL ECONOMY* 26 (Douglas M. Brown & Earl H. Fry, eds., Institute of Governmental Studies Press, University of California, and Institute of Intergovernmental Relations, Queen's University, 1993). This book features articles by scholars in the United States and Canada who examine various dimensions of the international economic activities of state and provincial governments. Only Newfoundland and Prince Edward Island would not rank among the top 75 nations ranked by GDP.

²² FRY, *supra* note 8, at 50-51.

leading exporter, California.²³

Although still suffering significant merchandise trade deficits, the United States has emerged as both the world's largest importer and exporter, with merchandise trade equaling 976 billion dollars in 1992, and trade in services an additional 303 billion dollars.²⁴ The United States also enjoyed in 1992 a 56 billion dollar surplus in trade in services, a sector where many tariff and non-tariff barriers will be eliminated once NAFTA is fully enacted.²⁵ Canada has also increased both its exports and merchandise trade surplus with the United States since the creation of the FTA, and this pattern should continue for the foreseeable future, especially if the Canadian dollar remains at or below the level of 80 cents to a U.S. dollar.²⁶ In the half decade prior to 1993, Mexico was also the fastest-growing economy in North America. In addition, Mexico has enjoyed a dramatic increase in trade volume with its two regional neighbors, although its merchandise trade balance with the United States was transformed from a modest surplus in 1986 to a modest deficit in 1992.²⁷

State and provincial governments are also better prepared than ever before to compete in the North American and global economies. Over the past dozen years, state governments have almost tripled the number of overseas offices they sponsor for trade, investment, and tourism promotion purposes, operating nearly 150 offices overseas at the beginning of 1993 (see Figure II).²⁸ Approximately 40 of the governors also lead at least one international trade mission every year. In addition, all 50 state governments provide export assistance to local businesses, with states such as California, Maryland, Minnesota, Kansas, Florida, New York, Texas, and Massachusetts also providing loan guarantees to companies engaging in export activity.²⁹ As an illustration, between the commencement of the program in 1985 and June 1993, the California Export Finance Office (CEFO) provided 480 loan guarantees valued at 132 million dollars to 410 companies. In turn,

²³ N.Y. TIMES, Nov. 19, 1993, at A10. These statistics were compiled by the U.S. Department of Commerce.

²⁴ Scholl, *supra* note 9, at 63.

²⁵ *Id.*

²⁶ The increase in Canada's merchandise trade surplus is calculated by using 1988 and projected full-year 1993 statistics provided by the U.S. Department of Commerce.

²⁷ According to U.S. Department of Commerce statistics, Canada's merchandise trade surplus with the United States increased during 1993, whereas the U.S. surplus with Mexico decreased.

²⁸ Almost one-quarter of these offices are in Europe, with annual budgets ranging from 50,000 dollars to 600,000 dollars, with one-half of the offices being in the 150,000 dollar to 350,000 dollar range. Staff sizes range from one to ten people, with the median being three. See Jerry Levine and Fabienne Vandenbrande, *American State Offices in Europe: Activities and Connections*, INTERGOVERNMENTAL PERSP. 43-46 (Fall 1993-Winter 1994).

²⁹ Mary Ann Ring, *Export Financing at the State Level*, BUSINESS AMERICA, Nov. 15, 1993 at 2-5.

these guarantees helped generate an estimated 698 million dollars in export sales and almost 16,000 jobs. CEFO provides individual loan guarantees up to 750,000 dollars to businesses which produce goods with at least 51% California content.³⁰

In 1990, eight Canadian provinces also operated offices abroad, and provincial governments continue to spend more in the aggregate than their U.S. counterparts on international trade and investment activities, even after most provinces have recently closed or pared back the staffing in many of their overseas trade offices.³¹ Indeed, excluding the costs of investment incentive packages and tax-exempt industrial revenue bonds, it is quite possible that just one province, Quebec, devotes more personnel and spends more money on its international programs than the 50 U.S. states combined. For example, Quebec's Ministry of International Affairs employed over 1,000 people in 1992, with 400 of them stationed abroad in 29 foreign cities. The Ministry's budget for that year was in the range of 126 million dollars (Canadian).³² In comparison, the 50 U.S. states spent approximately 92 million dollars in 1990 for their international programs and their overseas offices.³³

Foreign direct investment is also an integral part of the Canadian economy, with a larger percentage of foreign ownership in the business sector than in any other major advanced industrial society. Exports of goods and services also account for 30% of Canada's GDP, almost twice the level of Japan and three times the level of the United States. With international trade and investment being so vitally important to Canada's economic well-being, it should not be surprising that provincial governments are so actively involved in economic pursuits abroad.

Ottawa also consulted on a regular basis with the provincial governments during both the FTA and NAFTA negotiations. In Washington, D.C., on the other hand, only sporadic meetings were held between representatives of the National Governors' Association (NGA) and the Office of the U.S. Trade Representative (USTR). The NGA has recently asked for much closer coordination with federal officials in regional and multilateral negotiations and an expanded role in the dis-

³⁰ CALIFORNIA WORLD TRADE COMMISSION, TRADE AND COMMERCE AGENCY, *Bulletin* 8 (Winter/Spring 1994).

³¹ Faced with unprecedented debts and annual interest payments, the Ontario provincial government directed by Bob Rae decided in 1993 to close all 17 of its foreign offices as part of a deficit-reduction package. Saskatchewan also closed down offices in Hong Kong and Zurich, British Columbia did the same in Hong Kong, Singapore, Taiwan, and Germany, and Alberta and Quebec cut back on some of their overseas staff.

³² GLOBE AND MAIL, April 20, 1992 at A6. See also Ivan Bernier, *Remarks*, AM. SOC'Y INT'L L. PROC. 133-135 (1991).

³³ GOVERNORS' WEEKLY BULLETIN, March 30, 1990, at 1, and NATION'S CITIES WEEKLY, July 1, 1991, at 6.

pute-settlement process.³⁴

Conversely, subnational governments are also capable of playing obstructionist roles in the implementation of NAFTA. For example, provincial governments representing over one-half of Canada's population have voiced their opposition to NAFTA (the NDP governments of Ontario, British Columbia, and Saskatchewan), and the government of Ontario has already filed a court challenge, claiming that provisions in NAFTA which fall within the jurisdiction of provincial governments cannot be enforced without the prior approval of each provincial government, as stipulated in the 1937 *Labour Conventions* and related cases.³⁵ Several leaders of state and municipal governments in the United States, including Governor Mario Cuomo of New York, have also voiced displeasure with the agreement in its present form.

Consequently, the Chrétien and Clinton administrations must pay close attention to the role played by subnational governments in the implementation phase of both NAFTA and the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). The Commerce and Supremacy clauses in the U.S. Constitution provide federal officials with the legal right to enforce NAFTA provisions at the state and local governmental levels and even preempt certain non-central government actions, but politicians in Washington, D.C. generally loathe paying the political price of confronting these regional governments. As an illustration, neither Congress nor the White House was willing in the early 1980s to order state governments to abandon their unitary taxation formulas, although bilateral treaties (and the accepted practice of the supremacy of treaty obligations over state laws) arguably gave federal officials the right to do so. Quite simply, the politicians were unwilling to face the wrath of government leaders and their constituents in states ranging from Florida to California; as a result, they were basically bystanders as foreign-based multinational corporations pursued their case in the federal court system, with the Supreme Court finally hearing the case in March 1994.³⁶

³⁴ GOVERNOR'S BULLETIN, February 7, 1994, at 5.

³⁵ The Labour Conventions decision by the Judicial Committee of the Privy Council sought to restrain the federal government from using its treaty-making power to encroach in areas of traditional provincial jurisdiction. See A. Kim Campbell, *Federalism and International Relations: The Canadian Experience*, AM. SOC'Y INT'L L. PROC., *supra* note 32, at 1272.

³⁶ The Supreme Court heard two related unitary taxation cases in March 1994 filed by British-based Barclays Bank and the U.S.-based multinational corporation, Colgate-Palmolive. Both argued that California's unitary method of taxation interferes with the ability of the federal government to speak with "one voice" when regulating commercial relations with other countries. The Clinton administration has sided with California in the case, heeding a pledge which Mr. Clinton made during the presidential campaign. In contrast, the Carter, Reagan, and Bush administrations opposed unitary taxation, although not vigorously enough to promote legislation which would have overturned the practice.

The United Kingdom, supported by 19 other countries, filed an amicus brief siding with Bar-

If jurisdictional problems do arise in the U.S. federal system, they may be linked to government procurement and subsidy issues. NAFTA will open up many more government contracts to outside bidders, even though minimum thresholds, *Buy America*, and minority offsets may be maintained in most cases.³⁷ In 1992, state and local governments spent much more in the non-defense sector than did the national government in Washington, D.C., and many lucrative opportunities will be available at the subnational level for Canadian and Mexican contractors. For example, excluding the defense sector, the U.S. federal government spent 7.4 billion dollars in 1992 for durable goods, whereas state and local governments spent 37.0 billion dollars; Washington spent 8.4 billion dollars for non-durable goods, while the regional governments spent 58.5 billion dollars; Washington expended 43.2 billion dollars for services (exclusive of employee compensation), compared with 22.4 billion dollars for subnational governments; and the federal government allocated 11.1 billion dollars for structures, compared with 93.2 billion dollars expended by the non-central governments.³⁸ As of 1992, 16 state governments had *Buy America* provisions such as Georgia prohibiting state agencies from buying beef not raised in the United States, or Kansas permitting its director of purchases to reject a product because it is manufactured or assembled outside the United States.³⁹ In addition, 37 states had *Buy In-State* procurement preferences in one of three forms: (1) those that prefer in-state bidders when all else is equal (a "tie-bid" preference); (2) those that give a percentage preference to in-state bidders or to those willing to use in-state products (a "percentage" preference); and (3) those that prefer in-state bidders over bidders from other states that provide a preference to their own in-state bidders (a "reciprocal" preference).⁴⁰ For example, Alabama has a tie-bid preference, Oklahoma a five percentage point preference for in-state bidders, and Florida a reciprocal preference.⁴¹

clays Bank, claiming unitary taxation should be invalid under the foreign commerce clause in the U.S. constitution.

With California's unitary tax dating back to the 1960s, a loss in the Barclays case would probably result in 1.4 billion dollars in refunds, assessments, and interest. If it loses both cases, its liabilities could approach 6 billion dollars. Six other states have various forms of unitary taxation and several others have abandoned this taxation formula over the past few years. A victory by Barclays Bank and/or Colgate-Palmolive would most likely be very expensive for these states as well. See J.D. Foster, *Taxing Test for California*, WALL ST. J., Mar. 24, 1994, at A18.

³⁷ The Uruguay Round will also insist that "national treatment" be extended to foreign contractors who bid on state, provincial, and local government contracts, and may ultimately hold Washington, D.C. and Ottawa responsible for insuring that subnational governments comply with these international rules.

³⁸ SURVEY OF CURRENT BUSINESS, Jan. 1993, at 13.

³⁹ James D. Southwick, *Binding the States: A Survey of State Law Conformance with the Standards of the GATT Procurement Code*, 13 U. PA. J. INT'L BUS. L. 73-74 (Winter 1992).

⁴⁰ *Id.* at 76.

⁴¹ *Id.*

Almost all state and many large municipal governments also provide some financial assistance to businesses as inducements to locate or expand operations at the local level or to engage in export activity. In 1992, South Carolina anted up 150 million dollars to attract a new BMW assembly facility. In 1993, Alabama agreed to provide Mercedes-Benz with incentives which ranged from 250 to 300 million dollars so the company would establish an assembly plant in that state. Kentucky also pledged 140 million dollars to convince Canadian-based Dofasco Inc. to build a steel mill within its area of jurisdiction (amounting to 350,000 dollars per job to be created directly by Dofasco), and in March 1994 the Iowa state legislature approved 73 million dollars in incentives to entice Saskatchewan-based Ipsco Inc. to build within its area of jurisdiction a 360 million dollar steel minimill.⁴² In the case of New York City, it also provides incentives just to keep major businesses from shifting operations to other parts of the country.⁴³ In certain instances, these practices may be subject to countervailing duties and may lead to a confrontation between Washington, D.C. and some of the state capitals.

The potential for confrontation may be even greater in Canada where sectors under provincial jurisdiction are carefully mapped out in Section 92 of the *Constitution Act* of 1867. Areas of particular concern would include the procurement practices of non-central governments and Crown corporations; public pension plan preferences; export, manufacturing, energy, transportation, and regional subsidies; and selected activities of agricultural marketing boards.

Most studies indicate that once NAFTA is fully implemented, all three North American nations will benefit economically and the North American business community will be better prepared to compete against enterprises headquartered across the Atlantic and the Pacific.⁴⁴ Nevertheless, the costs and benefits of NAFTA will be distributed unevenly across regions and business sectors. Some manufacturing, service, and agricultural concerns will simply not be able to compete, lead-

⁴² FINANCIAL POST, Mar. 5, 1994, at 9; WALL ST. J., Mar. 24, 1994, at A8.

⁴³ New York City, sometimes in cooperation with the state of New York, has provided almost 400 million dollars in incentives since mid-1992 to convince firms to stay within the municipal boundaries. For example, City Hall has agreed to provide CBS Inc. with 37.5 million dollars in city and state tax incentives and 12.2 million dollars in subsidized power. In return, CBS has pledged to remain in New York City for at least 15 years and to invest at least 300 million dollars in a variety of projects. See WALL ST. J., Mar. 12, 1993, at B8, and Robert Guskind, *The New Civil War*, NATIONAL J., Apr. 3, 1993, at 817.

⁴⁴ In particular, see Gary Clyde Hufbauer & Jeffrey J. Schott, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS (Institute for International Economics, 1992), as well as the study completed by the U.S. International Trade Commission. Hufbauer and Schott estimate that 175,000 net new jobs would be created in the United States by 1995, but that job gains would be negligible or might even turn into a slight net loss after 15 to 20 years. See N.Y. TIMES, Feb. 22, 1993, at C1 and C2.

ing to significant job losses. Many large businesses are also in the process of creating North American divisions and may no longer see the need to maintain extensive facilities in all three of the North American countries.⁴⁵ Some regions within each nation-state may also benefit much more than other regions. For example, over 40% of U.S. exports to Mexico is funneled through just one state, Texas. Several states and provinces along the two borders are also located near major population centers in the other country, providing both new market opportunities as well as heightened competition.

On the whole, state, provincial, and municipal governments in North America are gearing up for freer trade, although some support the multilateral route through GATT more than the regional route through NAFTA. They generally understand that the world economy is becoming more complex and more interdependent, and that protecting and enhancing the interests of their constituents require active involvement both continentally and globally. The Canadian government has done the best job of keeping its non-central counterparts abreast of NAFTA developments and of inviting input from these governments. The record of the U.S. government is not nearly as good, and Mexico City simply does not have a tradition of vigorous two-way give-and-take consultations with its state governments.

SOVEREIGNTY AND FEDERALISM IN NORTH AMERICA: THE ISSUE IN PERSPECTIVE

The implementation of the FTA, NAFTA, and GATT's Uruguay Round accord will definitely impact upon the sovereignty of the United States and Canada and influence the development of their federal systems. In terms of sovereignty, the creation of North American commissions on the environment and labor may influence how national and subnational governments conduct themselves in the future in these important issue areas. In addition, some national autonomy will also be transferred to the binational or trinational dispute-settlement panels which will render decisions on dumping, subsidy, and other alleged trade-distorting practices.⁴⁶

Moreover, national and subnational governments must now perceive economic competitiveness through a continental set of lenses. Companies will have the option of locating anywhere in North America but they will still enjoy unimpaired access to domestic markets in all

⁴⁵ This conclusion is borne out by a survey of selected Fortune 500 corporations which was administered by the Americas Society. See Stephen Blank, Stephen Krajewski, & Earl H. Fry, *Toward a New 'Architecture' of North America: NAFTA's Impact on Corporate Restructuring* (Mar. 27, 1993) (paper prepared for the annual convention of the International Studies Association, Acapulco).

⁴⁶ One should remember, however, that these panels are only empowered to rule on whether the government being accused of trade-distorting practices has followed its *own* laws faithfully.

three countries. Consequently, economic development strategies, particularly at the subnational level, will have to be adjusted to continental conditions, especially in areas related to taxation, regulation, export assistance, investment incentive packages, etc. Thus, a U.S. state must not only consider competition from other states, but also from Canadian provinces and Mexican states.

Conversely, some of the freedom of action once available to subnational governments will be curtailed by the FTA, NAFTA, and GATT. Many of the subnational government procurement policies which deviate from "national treatment" guidelines will have to be eliminated or the national government could face economic sanctions. Other policies linked to taxation, direct financial assistance to local companies, export financing, investment and import restrictions, and investment incentives may also be deemed as trade-distorting practices.⁴⁷ For example, one of

⁴⁷ Representatives of the European Union claim that discriminatory provisions in U.S. state and municipal laws prevent European businesses from bidding on 200 billion dollars in procurement awards each year. See Southwick, *supra* note 39, at 62).

In addition to the usual litany of complaints about unfair trade practices, Pete du Pont suggests that the Uruguay Round accord could call into question state-level consumer, safety, and environmental laws such as California's auto-emission standards. He also suggests that Oregon's prohibition on the export of unprocessed timber taken from state-owned land may be in violation of new GATT regulations. See Pete duPont, *Federalism in the Twenty-First Century: Will States Exist?*, 16 HARV. J. L. & PUB. POL'Y 143-144 (Winter 1993).

Du Pont adds that U.S. court decisions are also eroding the powers of state governments, citing such cases as *United States v. Darby* (1941) and *Garcia v. San Antonio Metropolitan Transit Authority* (1985). Pete du Pont, *supra*, at 140.

In a companion article, Lino A. Graglia discusses other cases which he considers have contributed to the decline in state-level authority, including *McCulloch v. Maryland* (1819), *Gibbons v. Ogden* (1821), *Champion v. Ames* (1903), and *McCray v. United States* (1904). He also argues that the Fourteenth Amendment, which he refers to as "our second constitution," has transferred a great deal of authority to the U.S. Supreme Court. See Lino A. Graglia, *From Federal Union to National Monolith: Mileposts in the Demise of American Federalism*, 16 HARV. J. L. & PUB. POL'Y 130-133 (Winter 1993).

Other U.S. cases linked to federalism and foreign relations include: *Missouri v. Holland* (1920). See Ruth Wedgwood, *Remarks*, 85 AM. SOC'Y INT'L L. PROC. 140 (1991); *United States v. Curtiss-Wright Export Corp.* (1936), *United States v. Belmont* (1937), *Container Corp. of America v. Franchise Tax Board* (1983). For these three cases, see Glenn S. McRoberts, *Federalism and Foreign Affairs: Toward a Dormant Foreign Affairs Doctrine*, 11 LOY. L.A. INT'L & COMP. L. J. 641-642, 644 (1989); *Zschernig v. Miller* (1968). See Detlev F. Vagts, *Remarks*, AM. SOC'Y INT'L L. PROC. 142 (1991); and *Bethlehem Steel Corp. v. Board of Commissioners* (1969) and *Trojan Technologies, Inc. v. Pennsylvania* (1990). See Southwick, *supra* note 39, at 58, 69.

Martha A. Field argues that constitutional provisions and court decisions, including those of the Judicial Committee of the Privy Council prior to 1949, have given the Canadian provincial governments much more exclusive power over local commerce than their counterparts in the United States. See Martha A. Field, *The Differing Federalisms of Canada and the United States*, 55 LAW & CONTEMP. PROB. 108 (Winter 1992).

Kim Campbell (see Campbell, pp. 127-128) and Harvey Lazar, Andrée Mayrand, and Keith Patterson also discuss the contentious issue of having the Canadian government's treaty obligations conflict at times with provincial government laws in areas which fall constitutionally within provincial jurisdiction. See Harvey Lazar, Andrée Mayrand, and Keith Patterson, *Global Compe-*

the first cases considered by some to be eligible for a NAFTA tribunal involves New Brunswick and its practice of placing a special tax on goods which its residents bring back from their trips to the United States.

Federalism will also be affected by the FTA, NAFTA, and GATT. The most extreme example is found in Quebec. If it wins the provincial elections scheduled for 1994, the Parti Québécois (PQ) has pledged to hold a new referendum on Quebec's sovereignty within one year of returning to office in Quebec City. A major strategy of the PQ is to emphasize that the standard of living of Quebec's residents will not be jeopardized by opting for political sovereignty, because Quebec will continue to enjoy unimpaired access to North American markets as a result of the FTA and NAFTA.

Other subnational units will continue to push forward in a vigorous fashion to enhance the economic interests of their constituents. This will include maintaining or opening new offices continentally and overseas, sponsoring trade missions and trade fairs, offering export assistance to local companies, attracting new businesses on a continental and international basis, and entering into special arrangements with both national and subnational governments abroad (Quebec alone had entered into 230 ententes with foreign governments by the beginning of the 1990s).⁴⁸ Some of these activities may run afoul of the new Uruguay Round provisions which will for the first time cover state, provincial, and local government procurement codes and some other practices.⁴⁹ For example, a 1992 GATT panel already ruled against state government taxation and distribution preference policies, claiming they discriminate against imported beer and other alcoholic beverages. Such cases may multiply under the much more expansive Uruguay Round agreement.⁵⁰

As NAFTA is being implemented, it will be imperative to work out "rules of the game" outlining in each North American nation what is acceptable conduct on the part of non-central governments and in what designated sectors.⁵¹ Otherwise, disputes which arise will go be-

tion and Canadian Federalism: The Financial Sector, 20 CAN. BUS. L. J. 38-40 (March 1992).

⁴⁸ Bernier, p. 134.

⁴⁹ For the moment, NAFTA does not include subnational government procurement practices, but there are proposals to permit it to do so in the future. Even if this occurs, minority business, small business, and economic distress (enterprise or empowerment zones) programs will be exempted.

⁵⁰ See Conrad Weiler, *GATT, NAFTA and State and Local Powers*, INTERGOVERNMENTAL PERSP., Fall 1993-Winter 1994, at 38-41.

⁵¹ The U.S. Advisory Commission on Intergovernmental Affairs identifies three major potential problem areas between Washington, D.C. and state and local governments: 1) taxation and regulation of business; 2) the exercise of foreign policy; and 3) the negotiation of international agreements and treaties. See *State and Local Governments in International Affairs: ACIR Findings and Recommendations*, INTERGOVERNMENTAL PERSP., Fall 1993-Winter 1994, at 35.

yond the purview of Washington, D.C., Ottawa, and Mexico City, and may provoke questions about the proper functioning of federalism in each of the three North American nations. These potential areas of friction may insure that in an age of complex continental and global interdependence, both sovereignty and federalism will evolve rather substantially before NAFTA is fully implemented in 2008.⁵²

⁵² With this in mind, there may be some overlap between North America's version of federalism within a continental free trade zone, and Western Europe's version of subsidiarity. Subsidiarity, the notion that an issue should be addressed at the level of government which can deal with it most effectively, is a guiding principle of the European Union which went into effect in November 1993. For a discussion of this issue, see Joel P. Trachtman, *L'État, C'est Nous: Sovereignty, Economic Integration, and Subsidiarity*, HARV. INT'L L. J. 459-473 (Spring 1992).

