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International Trade Agreements, Internationalist Policy Consciousness, and the Reform of Canadian Private International Law

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I. Introduction

This talk will focus on the connection between international trade agreements and reform in Canadian private international law, as a means of exploring this panel's theme of the value and effectiveness of international instruments in private law. In doing so, I would like to compare the *direct* effects of international treaty instruments with some *indirect* effects of internationalization, through a mode of legal reform that I label "internationalist policy consciousness". In the field of private international law in Canada, I argue that this second mode of legal reform has been the more important vehicle for the advancement of international trade concerns.

I am pleased to discuss this topic in private international law at this leading venue of public international law in Canada. Much of my research has concerned the links between public and private law in various areas of international economic law, including international trade regulation and private international law. Indeed, part of my concern with common structures of policy argumentation shared by these subjects has been an interest in the impact of public international law values, processes and sensibilities on areas of private international law.

In this talk, I will first look at the limited role of international treaties in the reform of Canadian private international law. I will then look farther afield and ask how international trade agreements may begin to have effects in areas of Canadian private international law and private law. I will then compare such effects of international treaties with the reform of Canadian private international law based on the acceptance by Canadian law-makers of certain internationalist policy values, in particular, reform in the name of international commerce.

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II. International Trade, Canadian Private International Law and the Role of International Treaties

As a matter of policy, national private laws as much as national public laws, could be potential barriers to international trade. For example, national private laws or the operation of national legal institutions such as courts may be the source of *de jure* or *de facto* discrimination in treatment of foreign and domestic goods or services.[2] Moreover, variation in and uncertainty in national private laws may be the source of increased transactions costs and lowered efficiency in international trade.[3] In Europe, while these economic policy concerns were not sufficient to overcome other obstacles to unification and harmonization of European private law,[4] such concerns about international commerce were at least part of the policy background to the reforms in private international law found in treaties such as the Brussels and Rome Conventions.[5]

Although public international law, in particular international treaties, are understood to be the main mode of internationalization of Canadian law, international treaties in private law or private international law have not been a principal means of advancing concerns about international commerce.

Canada is a party to a few of the conventions developed through the Hague Conference on Private International Law; however, most deal with relatively minor topics such as service of documents abroad.[6] One major exception is the Convention on the Civil Aspects of International Child Abduction,[7] which Professor Bailey has

2. General Agreement on Tariffs and Trade, Article III; General Agreement on Trade in Services, Article XVII. For a representative analysis based on international trade principles, see R. Brand, "Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law" in J. Bhandari & A. Sykes, eds., *Economic Dimensions in International Law: Comparative and Empirical Perspectives* (Cambridge: Cambridge University Press, 1997).
3. Including through overlapping litigation, and strategic behavior such as forum shopping. More generally, see See *e.g.* M. Whincop & M. Keyes, *Policy and Pragmatism in the Conflict of Laws* (Aldershot U.K.: Ashgate, 2001) c. 8.
4. For one excellent account, see D. Caruso, "The Missing View of the Cathedral: The Private Law Paradigm of European Integration", (1997) 3 European L.J. 3.
5. See *e.g.* Report on the Convention on the law applicable to contractual obligations, 1979 O.J. (C59) 1, 4-5 (the Giuliano-Lagarde Report), reprinted in R. Plender, *The European Contracts Convention: The Rome Convention on the Choice of Law for Contracts,* Annex V (London: Sweet & Maxwell, 1991); Brand, *supra* note 2.
6. Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, 15 November 1965, 658 U.N.T.S. 163.
7. Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Can. T.S. 1983 No. 35.

addressed earlier on this panel. These conventions do not touch on the main topics of private international law relevant to international trade such as jurisdiction, choice of law and recognition and enforcement of judgments. There are current efforts based at the Hague Conference to complete a convention on recognition and enforcement of judgments.[8] However, the difficulties in completing those negotiations and the significant discretion that will likely be left to municipal laws suggest how limited internationalization through international treaties has been in private international law. The Canadian situation can be contrasted with the situation in Europe, where a large number of states have, in addition to their support for arbitration treaties and for more of the Hague Conference conventions, agreed to European conventions on such core topics of private international law as jurisdiction and recognition and enforcement of judgments[9], and on choice of law in the law of contracts.[10]

The one area where international treaties and instruments have played an important role in Canada is in the related area of international commercial arbitration. Canada is a party to New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[11] and federal and provincial legislation implemented the Convention. Subsequently, Canadian jurisdictions have implemented legislation based on the 1985 UNCITRAL Model Law on International Commercial Arbitration.[12] Although international commercial arbitration has many policy justifications, one has been that arbitration avoids parochial state bias of

8. The Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters was adopted by the Special Commission of the Hague Conference on October 30, 1999; see <http://www.hcch.net/e/conventions/draft36e.html> (last modified: 30 October 1999). For background, see "Symposium Enforcing Judgments Abroad: The Global Challenge", (1998) 24 Brooklyn J. Int'l L. 1; V. Black, "Commodifying Justice for Global Free Trade: The Proposed Hague Judgments Convention" (2000) 38 Osgoode Hall L.J. 267.
9. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968, 1262 U.N.T.S. 1653 [hereinafter Brussels Convention]; Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 16 September 1988, 1659 U.N.T.S. 13 [hereinafter Lugano Convention]. The recent Brussels Regulation replaces the Brussels Convention with respect to EU members; see Council Regulation (EC) No.44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
10. Convention on the Law Applicable to Contractual Obligations, 19 June 1980, 1605 U.N.T.S. 59 [hereinafter Rome Convention].
11. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 U.N.T.S. 38, Can. T.S. 1986 No. 43 [the New York Convention].
12. UNCITRAL Model Law on International Commercial Arbitration, 21 June 1985, (1985) 24 I.L.M. 1302.

litigation in national courts and also provides an efficient, expert dispute resolution procedure that will help reduce transaction costs of international trade.[13]

III. International Trade Agreements: the Future of Canadian Private Law?

Perhaps the future source of internationalist reform in private international law and private law in Canada may be located in international treaty instruments not specifically directed at private law, in particular Canada's international trade treaties.

Private law has not traditionally been a major concern of international trade treaties such as the World Trade Organizations agreements or the North American Free Trade Agreement.[14] However, as the scope of the trade agreements has expanded, it may be that matters of private law and civil procedure may be addressed under these treaties. Some recent examples suggest that international trade treaties could be applied with respect to domestic rules of private law and private international law.

One example involves the provisions of Part III of the Agreement on Trade-Related Intellectual Property Rights (the TRIPS Agreement).[15] The TRIPS Agreement is controversial for a number of reasons including its detailed provisions concerning the substance of WTO member states domestic intellectual property protections. In addition, Part III includes an unusual amount of specific provisions concerning domestic procedures for enforcement of intellectual property rights. For example, Article 44 requires that domestic judical authorities have the authority to grant injunctions, and Article 45 provides that domestic judicial authorities shall have the right to order the payment of damages. These kinds of particular provisions are unusual in the WTO Agreements, but they indicate how international trade treaties may be closing in on both the substance and procedure of private law.

A second example is found in the provisions of the controversial investment chapter of the NAFTA, Chapter 11. The chapter offers potentially broad protection to foreign investors against governmental measures that might involve discriminatory treatment, violate minimum standards of treatment at international law, or constitute expropriation.[16] These protections are backed by an arbitration

13. See, for example, the strong support for arbitration based on its value to international commerce in *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth Inc.*, 473 U.S. 614 (1985), at 629-639 (per Blackmun J.).
14. The North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can T.S. 1994 No.2, 32 I.L.M. 289 [hereinafter NAFTA].
15. Annex 1C to the WTO Agreement.
16. E.g. Article 1102 (National Treatment), Article 1105 (Minimum Standard of Treatment) and Article 1110 (Expropriation and Compensation).

procedure that permits private party claims directly against state parties to the NAFTA.[17] A current complaint, *The Loewen Group, Inc. v. United States of America,*[18] demonstrates that the protections of Chapter 11 at least arguably extend to domestic private law and civil procedure. In that complaint, The Loewen Group, a funeral home company based in Burnaby, British Columbia, and Ray Loewen, its former CEO and main investor, are seeking compensation from the US government with respect to a US $500 million civil jury award in Mississippi made against Loewen Inc. with respect to a commercial dispute.[19] The jury award, which included $400 million of punitive damages, had originated in a breach of contract dispute involving contracts valued at US$1 million and an exchange of business properties valued at no more than $4 million. Loewen's allegations include that the Mississippi trial involved discriminatory treatment of Loewen and its investments due to inappropriate bias based on the Canadian nationality of Loewen. In addition, Loewen argues that the Mississippi procedures for appeal of jury verdicts, which required that it post a 125% performance bond, amounted to either discriminatory treatment, lack of fair or equitable treatment, or expropriation.[20] The final award has not been determined, but a Chapter 11 arbitration panel has issued a preliminary ruling that there is nothing that prohibits Chapter 11 claims related to private law and civil procedures.[21]

Although these examples do not directly address private international law, they indicate the potential application to private law involved in the expanded scope of international trade treaties. However, at this time it remains doubtful whether the existing international trade treaties will be extended so broadly as to become a significant source of reform of Canadian private law or private international law.

Much more important will probably be if Canadian legislators or judges accept the policy values associated with international trade treaties, and in turn use this concern to justify internationalist reform of Canadian private laws. It is this mode of

17. Section B of the NAFTA, *supra* note 14, Chapter 11.
18. Notice of Claim, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 (registered 19 November 1998).
19. *O'Keefe v. The Loewen Group Inc.*, 91-67-423 (Circ.Ct, Hinds Co., Miss. 1995).
20. The substantive claim is based on Articles 1102, 1105 and 1110 of the NAFTA. See "NAFTA Panel Expected to be Constituted Soon in Canadian Firm's $725 Million NAFTA Claim" 20 January 1999, BNA Int'l Trade Reporter 81; M. Krauss, "NAFTA Meets the American Torts Process: *O'Keefe v. Loewen*" (2000) 9 George Mason. L. Rev. 69.
21. See *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB (AF)/98/3), Decision of the Arbitral Tribunal on Hearing of Respondent's Objection to Competence and Jurisdiction (5 January 2001).

reform, reform by internationalist policy consciousness, which I argue has already been the most important source of reform in the area of private international law.

IV. The Values of International Commerce and Internationalization through Internationalist Policy Consciousness

In contrast to traditional internationalist reform through international treaties, internationalist reforms of private international law have been achieved through what can be described as *internationalization by policy consciousness*. Rather than being motivated by a desire for direct enforcement or compliance with international customary law or treaties, legal decision-makers—whether judges, legislators, administrators, or private citizens—can instead be driven more by what David Kennedy has called a pragmatic, "cosmopolitan" approach, common in the field of international economic law, in which internationalist reforms would be achieve not by traditional international law treaties, but rather by the "widespread and vigorous liberal spirit" of support for shared internationalist goals.[22]

My recent research has focused on the way in which private laws have been reformed by domestic legal actors who have accepted a set of policy values related to the international system that they and many others find convincing. In making this case, I have focused in particular, on the four judgments of the Supreme Court of Canada in private international law from 1990 to 1994: *Morguard v. De Savoye Investments*,[23] *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*,[24] *Hunt v. T&N plc*,[25] and *Tolofson v. Jensen*.[26] These judgments are remarkable examples of the internationalist transformation of Canadian private law. In result, these four judgments both instituted doctrinal change in all of the major areas of private international law in Canada, and, also, gave constitutional status to certain private international law restrictions in Canada.[27] Most important for my theme today, these judgments evidence the significance of internationalist policy values in motivating and justifying legal change.

22. D. Kennedy, "The International Style in Postwar Law and Policy" [1994] Utah L. Rev. 7 at 28-29.
23. [1990] 3 S.C.R. 1077 [hereinafter *Morguard*].
24. [1993] 1 S.C.R. 897 [hereinafter *Amchem*].
25. [1993] 4 S.C.R. 289 [hereinafter *Hunt*].
26. *Tolofson v. Jensen; Lucas (Litigation Guardian of)* v. *Gagnon*, [1994] 3 S.C.R. 1022 [hereinafter *Tolofson*].
27. I discuss the cases in detail in R. Wai, "In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law", [2001] 39 Can. Y.B. Int'l L. 117.

A cosmopolitan internationalist spirit is well exemplified by the text of these judgments. To take but one example, we can recall the often quoted, and moving, passage from Justice La Forest, writing for the Court in *Morguard v. De Savoye Investments*, the breakthrough judgment at the Court:

> The world has changed since the above rules were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.[28]

Beyond a cosmopolitan "spirit", I believe that these private international law judgments of the Supreme Court of Canada also evidence more specific policy values that are found across different subject areas and jurisdictions with respect to internationalist reform of law. Elsewhere, I have argued that these judgments share a set of mutually reinforcing policy values including a political goal of support for inter-state cooperation and comity, an ethical goal of cosmopolitan fairness and non-discrimination, and an economic goal of the promotion of liberal international trade.[29] In turn, these policy values are individually, or together, believed to provide justification for specific kinds of doctrinal reforms by judges. In *Morguard*, these policy values sustained more liberal recognition and enforcement of foreign judgments. In *Amchem*, they sustained greater restraint in the assumption of jurisdiction and in the granting of anti-suit injunctions with respect to bringing suits in foreign jurisdiction. In *Hunt*, they sustained restrictions on the use of blocking statutes that interfered with the production of evidence for foreign litigation.

There is much to unpack in such passages and elsewhere in the judgments of the Court. Here, I simply note that policy goals related to international commerce not only informed the decision in *Morguard*, but other judgments of the Court on private international law. For example, in *Hunt*, one concern with blocking statutes was that their existence "discourages international commerce and the efficient allocation and conduct of litigation."[30] In *Tolofson*, Justice La Forest justified a rigid *lex loci delicti*

28. *Morguard*, *supra* note 23, at 1098.
29. See Wai, *supra* note 27, at 157-177.
30. *Hunt*, *supra* note 25, at 327.

rule for choice of law in tort partly based on a concern for "[s]tability of transactions and well grounded legal expectations."[31]

Internationalization through an internationalist policy consciousness on the part of Canadian law-makers can be a reform alternative to international treaties. In some respects, internationalization through policy consciousness is *more* direct rather than less direct, as it does not depend on any actual completion of international treaty negotiations nor on the implementation of such treaties by relevant Canadian jurisdictions. Elsewhere I have argued that these kinds of internationalist policy values are especially effective in the contexts of a national tradition favourably disposed towards internationalism, and a set of legal actors who are professionally sympathetic to internationalist values.[32]

In other respects, internationalization through policy consciousness can complement internationalization through treaty implementation. Indeed, one way to view the decisions of the Supreme Court of Canada in private international law is that it involves the adoption in municipal laws of some of the values and reasoning of public international lawyers. The notion of reform by internationalist consciousness also helps to explain the observation that Canadian courts are somewhat undisciplined in their use of international law in their judgments.[33] If policy consciousness is the relevant mode of reform, then the existence of partly related treaties—whether they be arbitration treaties or trade treaties—can help to justify the adoption by Canadian law-makers in related areas of what they see as the shared international policy values that inform those treaties.[34]

V. Conclusion

Aside from noting their presence as part of the justificatory context for the judgments of the Court, I will not discuss the validity of these policy claims. Such policy goals with respect to international commerce have a long tradition in scholarship on private international law.[35] Elsewhere, I have noted that as policy justification, the concern with international commerce, like concerns about inter-state cooperation and

31. *Tolofson*, *supra* note 26, at 1051.

32. See Wai, *supra* note 27, at 144-155.

33. S. Toope, "Canada and International Law" in *The Impact of International Law on the Practice of Law in Canada* (The Hague: Kluwer, 1999) 33.

34. In *Morguard*, for example, *supra* note 23, the Court notes developments in the Europe and in the United States in support of the changes.

35. See, for example, U. Huber, *De Conflictu Legum*, translated in D.J. Llewelyn Davies, "The Influence of Huber's *De Conflictu Legum* on English Private International Law" (1937) 18 Brit. Y.B. Int'l L. 49 at 65-66; J. Story, *Commentaries on the Conflict of Laws* (Boston: Hilliard, Gray and Co., 1834) at 34.

cosmopolitan fairness, has many limits. For example, such general principles are often inadequate to provide justification for particular doctrinal results. Moreover, the policy goal of advancing international commerce clearly does not exhaust the range of relevant policy goals for private international law. Such objectives could include, for example, concerns about transnational regulation,[36] distributive consequences, or federal-provincial relations.[37]

To conclude, let me simply observe that whether one supports or resists the policy values associated with international trade, concerned actors must recognize that internationalization in the name of these values is occurring both through the implementation of international treaties and the acceptance, through other channels, of internationalist policy values by Canadian law-makers. It may be that the recent experience of Canadian private international law demonstrates that the value and effectiveness of international instruments, including the expanding scope of international trade agreements, may depend as much on the transmission of their associated policy values, rather than the formal instruments themselves.

36. R. Wai, "Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization" (2002) 40 Colum. J. Transnat'l Law 209

37. See Wai, *supra* note 27, at 188-192. One effect may be that this mode of internationalization can operate without the limits placed on the federal treaty implementation power.