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Regional Integration Mechanisms in the Law of the United States: Starting Over

FREDERICK M. ABBOTT*

The theme of this conference is the globalization of world markets and the ramifications of this trend for national legal and political systems. One of the principal factors which has accelerated the globalization or transnational extension of markets has been the formation of regional trading arrangements (RTAs). The archetypal RTA is of course the European Community. There has perhaps been no more compelling example of the harmonization and integration of national legal systems undertaken on a voluntary basis than the harmonization or approximation undertaken by the Member States of the EC over the past thirty-five years, and particularly over the past several years in consequence of the implementation of the 1992 Program.¹ The United States is a party to RTAs both with Israel and Canada, and is negotiating the formation of a third, the North American Free Trade Agreement (NAFTA).² RTAs are a prominent feature of the Latin American legal landscape, with reference for example to the new Southern Cone arrangement involving Argentina, Brazil, Paraguay, and Uruguay,³

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1. Moreover, the extension of the Community into the European Economic Area involves the wholesale adoption of existing Community harmonization and approximation legislation and regulation by an additional six countries, expanding considerably the range of application of the European integration effort. See Frederick M. Abbott, *Integration without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime*, 40 AM. J. COMP. L. 917, 940-43 (1992); Thomas Cottier, *Constitutional Trade Regulation in National and International Law: Structure-Substance Pairings in the EFTA Experience*, in 8 NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 409 (Meinhard Hilf and Ernst-Ulrich Petersmann eds., 1993) [hereinafter NATIONAL CONSTITUTIONS]. The pace at which the EC is extending its preferential trading regime into the former Soviet sphere of influence is breathtaking. See European Community Commission, *EC Trade with Central and Eastern Europe: A New Relationship*, EUROPEAN ECONOMY No. 52, 27, 27-45 (1993).

2. North American Free Trade Agreement, done Dec. 8-17, 1992, reprinted in 32 I.L.M. 289 (1993); 32 I.L.M. 605 (1993) [hereinafter NAFTA]. At this writing, the NAFTA is awaiting final ratification by each signatory country. See generally, Abbott, *supra* note 1 (regarding the Canada - United States Free Trade Area and the NAFTA). See *infra* note 25 for citation to the Israel - United States Free Trade Area implementing legislation.

3. See Argentina-Brazil-Paraguay-Uruguay: Treaty Establishing a Common Market, (Mercosur) done March 26, 1991 at Asuncion, reprinted in 30 I.L.M. 1041 (1991).

and the Andean Pact.⁴ RTAs have been formed and are under discussion in Asia.⁵

An RTA is brought into being through the legal mechanism of a treaty among the constituent member states of the arrangement.⁶ This treaty constitutes the charter of the RTA and becomes the mechanism by which the member states of the organization both guide their implementation of the arrangement and evaluate each other's conduct for conformity with the joint expectations embodied in the charter. This charter may take effect in the domestic law of the RTA member states without national implementing legislation or such legislation may be required to give the charter domestic effect. This charter may or may not provide the basis upon which individual citizens⁷ within the RTA may assert legal rights under it. The charter may establish dispute resolution mechanisms independent of the national court structures of the member states of the RTA. The charter may envision that the national courts of the member states play a role concurrent with, subordinate to, or independent of the dispute resolution mechanisms which may be created pursuant to the charter.

Whether the national courts of the member states of an RTA may directly interpret and apply the charter of the organization without intervening national legislation, and whether individual citizens within the member states of an RTA are entitled to rely on the charter as a direct source of rights, are questions fundamental to the constitutive structure of the RTA. The answers to these questions may in large measure determine the overall pace of the integration effort, the consistency with, or conformity to the charter of member state actions taken pursuant to it and the degree to which individual citizens within the RTA consider themselves directly connected with the integration process (implicating the democratic or popular support for the integration process).

Because the *raison d'être* of an RTA is the removal of barriers to inter-member trade, all such arrangements to some extent envisage the

4. See Frederick M. Abbott, *Bargaining Power and Strategy in the Foreign Investment Process: A Current Andean Code Analysis*, 3 SYRACUSE J. INT'L L. & COM. 319 (1975).

5. For example, regarding the ASEAN Free Trade Area, see Japanese External Trade Organization, *1993 Report on Unfair Trade Policies*, 1993 JETRO, 236-37.

6. On the legal status of RTAs within the framework of the GATT, see Frederick M. Abbott, *GATT and the European Community: A Formula for Peaceful Coexistence*, 12 MICH. J. INT'L L. 1, 13-18 (1990).

7. The word "citizen" is used here in a non-technical sense and may encompass individuals who do not technically qualify for citizenship within an RTA member state.

harmonization or approximation of laws regulating the internal market. This may be explicit, as in the case of the European Economic Community Treaty,⁸ or it may be largely implicit as in the case of the proposed NAFTA. In either case, the harmonization or approximation of laws is a natural byproduct of regional integration. As the EC acknowledged in the adoption and implementation of its ambitious 1992 Program, differing national regulatory standards are a major impediment to achieving the economies of scale envisaged by regional integration. Harmonization or approximation of standards must to some extent be undertaken to take advantage of an expanded market. If private actors are encouraged to enforce rights under regional integration treaties (hereinafter "regional integration mechanisms" or "RIMs"), the process of integration will be accelerated. Pressure to eliminate barriers to intra-regional trade will be created, and this in turn will accelerate the process of "denationalization" or "globalization" of legal regimes.

The tendency of RTAs to harmonize or approximate laws is a positive feature of these arrangements, though care must be taken in this process to pay sufficient attention to national and local conditions which may militate against efforts at complete uniformity. For example, in the area of environmental regulation it may well be necessary and desirable to accommodate different social and economic demands within RTA member states regarding appropriate levels of protection.

The compelling reason to prefer giving direct or self-executing effect to RIMs is not, however, their tendency to promote harmonization or approximation of laws. The compelling reason lies in the area of social, political, and economic policy preference; a realm where certain subjectivities necessarily enter the analytical framework. The policy preference to which I refer is that of deepened regional integration, by which I refer to an intensification not only of economic interaction and interdependence, but also to increased social interaction and political cooperation. This policy preference for deepened integration is based upon the beliefs that such integration enhances regional wealth generation and, with appropriate care, will not result in adverse global welfare effects; that such integration increases social tolerance by facilitating personal

8. See, e.g., TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [hereinafter EEC TREATY] arts. 173, 175 & 177, reprinted in GEORGE A. BERMAN, ET AL., EUROPEAN COMMUNITY LAW: SELECTED DOCUMENTS (1993). The EEC Treaty is sometimes referred to as the Treaty of Rome.

interaction; that it enhances the prospects for political maturation and cooperation through the creation of regional political structures.

No single juridical mechanism or principle will alone create a deep regional integration. According a self-executing character to RIMs may facilitate the process in several ways. First, if a RIM takes domestic effect without the requirement of implementing legislation, the tendency of national legislatures to interfere with or restructure the arrangement will be diminished, thereby increasing the prospect that the norms established by the RIM will be interpreted and applied consistently among the constituent member states. By enhancing the consistency of interpretation and application of the RIM at the national level, the frequency and intensity of inter-member disputes should be diminished. This should be the case even if national legislatures retain ultimate authority to enact inconsistent *ex post facto* legislation, though such legislation might well give rise to conflicts between members of the RTA. It should be recalled that the national legislature generally must approve the entry into force of the RIM in the first instance so that questions of popular legitimacy are implicated, if at all, only to a very limited extent.

Second, by giving individuals the right to rely on the RIM directly as a source of rights in the national court system, the integration process will be accelerated as a broad range of issues are brought before the courts through individual activism. Moreover, providing individuals with direct access to the courts should enhance the popular legitimacy of the RIM by allowing an important source of self-expression. As a secondary matter, permitting the courts to play an active role in interpreting and applying the RIM should, to a certain extent, reduce the level of executive discretion in its implementation, a result to be favored when the legal charter upon which the assertion of rights is founded embodies open market principles.

This contribution will focus on the legal system of the United States and will consider the recent bias of the U.S. Congress toward according a non-self-executing character to RIMs to which the United States has become party. It will also consider the theoretical case for according a self-executing character to the proposed NAFTA, though recognizing that as a matter of political expediency, the NAFTA will almost certainly be denied a self-executing character (at least initially), and that the NAFTA may not in fact come into force. Regardless of the outcome of the NAFTA approval process, the question of whether the economic integration commitments of the United States will be accorded a self-executing character will be

important as the future of U.S. trading commitments unfolds. Consistent with the general thesis of this contribution, it is suggested that there is no persuasive reason for denying a self-executing character to all or at least substantial parts of the NAFTA and similar future U.S. RTA commitments. It is suggested that the U.S. Congress may play an important role in encouraging U.S. trading partners to respect international economic norms by permitting RIMs to take direct effect in the United States, thereby allowing the United States to serve as a model to other nations.

I. THE SELF-EXECUTING OR NON-SELF-EXECUTING CHARACTER OF RIMs

A. *Self-Execution and Trade Treaties*

RIMs are treaties under international law.⁹ Under international and U.S. constitutional law, a treaty may be self-executing. A self-executing treaty does not require national implementing legislation before it can be relied upon by an individual as a source of rights.¹⁰ The Supreme Court of the United States has long recognized that treaties may be self-executing and have direct effect in the law of the United States.¹¹ Whether or not a treaty is self-executing is a matter to be determined by the courts through the application of international legal rules of treaty interpretation in the context of the national constitution. U.S. courts have articulated the test of

9. According to Article 2 of the Vienna Convention on the Law of Treaties, May 23, 1969, a treaty is an agreement between states in written form governed by international law. See generally Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 574-76 (1991) [hereinafter Riesenfeld & Abbott]; *Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 CHI.-KENT L. REV. 293 (1991) [hereinafter *Foreword*]. As of June 1993, the NAFTA, while signed by the heads of state of Canada, Mexico, and the United States, had not yet been approved by the legislatures of the three countries and had not yet been ratified, so that it has not yet come into force. On the signing of the agreement, see Keith Bradsher, *Trade Pact Signed in 3 Capitals*, N.Y. TIMES, Dec. 18, 1992, at D1. For a complete text of the NAFTA as signed on December 17, 1992 see *Canada-Mexico-United States: North American Free Trade Agreement*, 32 I.L.M. 289 (1993); 32 I.L.M. 605 (1993).

10. See *Foreword*, *supra* note 9, at 295-99.

11. See, e.g., *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

self-execution in a variety of ways. In *People of Saipan v. United States Dept. of Interior*,¹² the Court of Appeals for the Ninth Circuit said:

The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution.¹³

Both in the United States and in other countries, courts addressing whether an individual may directly rely on a treaty look to whether the terms of the treaty are sufficiently precise to be applied in a concrete case or controversy.¹⁴

Treaties relating to trade have frequently been construed to be self-executing, both in the law of the United States and in other countries or regions.¹⁵ Foreign parties have regularly relied on the terms of Treaties of

12. 502 F.2d 90 (9th Cir. 1974).

13. *Id.* at 97.

14. Regarding Switzerland, see, e.g., Remarks of Luzius Wildhaber in PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES: A COMPARATIVE STUDY (Stefan Riesenfeld & Frederick Abbott eds., forthcoming 1993) (manuscript at 496-97) [hereinafter PARLIAMENTARY PARTICIPATION].

15. An important scholarly literature has developed on the issue of whether trade-related treaties should be given a self-executing character. An excellent collection of scholarship on this subject is in NATIONAL CONSTITUTIONS, *supra* note 1. This literature is a subset of a more general literature on the self-executing character of treaties. See *Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 CHI.-KENT L. REV. 293 (1991); THE EFFECT OF TREATIES IN DOMESTIC LAW (Francis Jacobs & Shelley Roberts eds., 1987); John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1992). Considering the effect of trade treaties in national constitutional systems, a distinction must be drawn between the issue of whether the treaty will be applied directly as a source of individual rights and whether the treaty will have a higher status than ordinary legislation or treaty law. Many constitutional systems accept that self-executing treaties may be a direct source of rights for individuals, although the British constitutional model does not admit of this possibility. See *Foreword*, *supra* note 9, at 298-99, 310-11. In most constitutional systems which accept the doctrine of self-executing treaties, the legislature retains ultimate control over the domestic implementation of treaty law because the legislature can override the treaty by passing subsequent inconsistent legislation which is effective internally. The United States follows this model. Some national constitutions, such as the French and Dutch, provide that a treaty may not be superseded by legislative action for internal purposes. See François Luchaire, *The Participation of Parliament in the Elaboration and Application of Treaties*, 67 CHI.-KENT L. REV. 341, 350-52 (1991) (in France the superior rank of a treaty is conditional on its being applied by the other party(s)); Pieter van Dijk &

Friendship, Commerce and Navigation (FCN Treaties) with the United States to protect themselves against discriminatory or allegedly discriminatory governmental conduct and U.S. parties have successfully invoked FCN Treaties in U.S. courts to substantiate claims against foreign governments, for example, in support of demands for compensation following expropriation.¹⁶ The status of the General Agreement on Tariffs and Trade (GATT) in the law of the United States has not been settled by the Supreme Court or by a direct pronouncement at the Court of Appeals level.¹⁷

According to the European Court of Justice (ECJ), the law of the European Community:

is a separate legal system, created by the treaties establishing the European Communities, which is integrated into the legal systems of the Member States and, in the proper cases, directly applicable in the national tribunals and whose subjects are not only the

Bahiyih Tahzib, *Parliamentary Participation in the Treaty-Making Process of the Netherlands*, 67 CHI.-KENT L. REV. 413, 422 (1991). In these countries treaty law has a higher status than ordinary legislation. The Member States of the EC have each accorded a special status to the EEC Treaty and secondary Community legislation so that Member States' legislatures may not override these measures for internal purposes. See, e.g., J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2414-15 (1991). This is in recognition of the EEC Treaty's special status as an integration mechanism. See, e.g., *Administration de Douanes v. Soci t  Caf s Jacque Vabre*, Cour de Cassation (Combined Chamber), 2 C.M.L.R. 336 (1975) (France); *Decision of the Federal Constitutional Court of the Federal Republic of Germany in the case of the mushroom importer*, 73 BVerfGE 339 (1986), translated and reprinted in Stefan A. Riesenfeld, *International Trade Law Vol. II* 184 (1993) (unpublished course materials). Regarding the trend toward the granting of self-executing effect to free trade agreements in Europe, see Cottier, NATIONAL CONSTITUTIONS, *supra* note 1 at 418-21.

16. *Infra* text accompanying note 35.

17. Professor Jackson suggests that while the GATT is capable of being given self-executing effect in the United States, its somewhat unique method of coming into effect internationally and being proclaimed by the President give it an effect in U.S. law not through self-execution, but rather through proclamation. See John H. Jackson, *U.S. Constitutional Law Principles and Foreign Trade Law and Policy*, in NATIONAL CONSTITUTIONS, *supra* note 1, at 65, 81 (1993); and for an earlier, more detailed analysis by Jackson, see John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249 (1967). Professor Hudec is in essential agreement with Professor Jackson that the GATT has entered into U.S. law through presidential proclamation, but, at least at this date, is more inclined to regard the GATT itself as non-self-executing because of language in the Protocol of Provisional Application which might be construed to have required implementing legislation at the national level. See Robert E. Hudec, *The Legal Status of the GATT in the Domestic Law of the United States*, in THE EUROPEAN COMMUNITY AND GATT at 187, 200-01 (Meinhard Hilf et al. eds., *Studies in Transnational Economic Law Vol. 4*, 1986); Fred L. Morrison & Robert E. Hudec, *Judicial Protection of Individual Rights Under Foreign Trade Laws of the United States*, in NATIONAL CONSTITUTIONS, *supra* note 1, at 91, 129-30 (1993). Federal courts in the United States have referred to the GATT in determining the proper interpretation of federal trade law. See Hudec, *The Legal Status of the GATT in the Domestic Law of the United States*, *supra* at 215-18, 235-37.

Member States but also their nationals, with the consequence that it not only may create duties for such nationals but also rights which constitute legal assets of them.¹⁸

The directly applicable or self-executing character of the EEC Treaty and secondary Community law (in proper cases) is of course a central feature of the Community legal order and flows from the language of the charter.¹⁹ The case law of the ECJ has substantially evolved on the basis of complaints brought by citizens of the Member States, and decisions of the ECJ have played a pivotal role in determining the course of development of the Community political and legal order.²⁰ Though it is possible only to speculate on this point, it seems doubtful that the EC might have achieved

18. *Francovich v. Italian Republic and Bonifaci et al. v. Italian Republic*, Joint Cases C-6/90 and C-9/90, Judgment of 19.11.1991 (not yet officially reported), *cited and quoted in* Riesenfeld, *supra* note 15, at 145. Professor Riesenfeld advises that:

From this general proposition the ECJ has concluded that:

1. Community law, to the extent that it is directly applicable, prevails over the domestic law, including the constitutions, of the Member States.
2. The Court alone has jurisdiction to interpret or invalidate Community law.
3. The Member States must organize their legal systems and legislative procedures so as to provide the necessary remedies and processes for fulfilling their obligations under the treaties.

Id. at 145-46, (citations omitted).

In the EEC Treaty structure, the European Court of Justice is granted authority to decide whether the acts of Member States are compatible with the treaty. Over a period of years, the ECJ established a jurisprudence which held that the EEC Treaty is directly applicable in the Member States and that the Member States may not by domestic legislation override either the EEC Treaty or the secondary legislation of the Community. Also, over a period of years the various supreme judicial authorities of the Member States of the Community have held that, in areas of Community competence, Community law is superior to that of the Member States, so that Community law and decisions of the ECJ control in the Member States.

It is important to note that the EEC Treaty is not explicit on these points, and that the ECJ and the Member State courts gradually carved this relationship from the EEC Treaty. Thus, for example, Member States enjoy different traditions with respect to the effect of treaties in domestic law. In some Member States, a treaty supersedes domestic legislation and may not be overridden by statute. In most Member States, ordinary treaties and statutes are *pari passu* and the later-in-time controls.

Despite the differences among Community Member States with regard to constitutional traditions with respect to the effect of treaties, the EEC Treaty was accorded a special status, and this special status meant not only that the EEC Treaty would have direct effect in the Member States, but that the Member States would create a special constitutional situation in which the legislature would not override the treaty. *See, e.g.,* Weiler, *supra* note 15, at 2414-22.

19. *See, e.g.,* EEC TREATY, *supra* note 8, arts. 173, 175 & 177.

20. *See, e.g.,* Riesenfeld, *supra* note 15, at 143-242. *See generally* Meinhard Hilf, *The Single European Act and 1992: Legal Implications for Third Countries*, 1 *EUR. J. INT'L. L.* 94 (1990); Ernst-Ulrich Petersmann, *National Constitutions and International Economic Law*, in *NATIONAL CONSTITUTIONS*, *supra* note 1, at 3 (1993); Weiler, *supra* note 15.

the level of integration that it today enjoys had the ECJ entertained causes of action emanating only from the European Communities Commission or the Member States themselves. The complaints of individual Community citizens have brought a rich array of issues before the Court, the breadth of which is unlikely to have been matched if governmental action had been required to initiate petitions. Also, the Community may well have taken a different course had each Member State been required to implement the EEC Treaty and all secondary Community law prior to its taking effect for that Member State. Though the extent of the slowdown in the Community law implementation process is debatable, it is very difficult to imagine that the process of integration would have been accelerated by such a change in the Community legal order.

The ECJ has permitted individual complainants to rely directly on trade treaties other than the EEC Treaty as a source of rights.²¹ The GATT has been held to be non-self-executing by the ECJ.²² However, the ECJ has interpreted the GATT in the context of Commission proceedings under the so-called New Instrument and this may well signal a movement toward reconsideration of its position on the question of self-execution.²³

Beginning with the free trade agreement between the United States and Israel, and continuing with the Canada-United States FTA (CUSTA), the U.S. Congress has provided in implementing legislation that these free trade agreements would not be given direct effect in U.S. law.²⁴ Ordinarily under the U.S. constitutional system, the courts decide whether or not a treaty is self-executing. Congressional legislative action in the case of the free trade agreements took the form of statutory language to the effect that the trade agreements would not provide a source of rights to individuals and could not be relied upon to challenge federal or state action.²⁵ This policy

21. See, e.g., Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg*, 1982 E.C.R. 3641, [1981-1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8877 (1982).

22. See Cases Nos. 51-54/71, *International Fruit Company N.V. et. al. v. Produktshap voor Groeten en Fruit*, 1971 E.C.R. 1107, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8158 (1971).

23. See *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission*, 1989 E.C.R. 1781, 2 C.M.L.R. 489 (1991).

24. See generally *Free-Trade Agreement*, Dec. 22, 1987-Jan. 2, 1988, U.S.-Can art. 1902, reprinted in 27 I.L.M. 281 (1988). See *Riesenfeld & Abbott*, *supra* note 9, at 639-40; *Jackson*, *supra* note 15, at 324, n. 80.

25. The Act approving and implementing the Israel-United States Free Trade Agreement provides: Sec. 5. Relationship of the agreement to United States law.

(a) United States statutes to prevail in conflict.

of legislating the non-self-executing character of free trade agreements was adopted with a minimum of fanfare or public debate and without detailed explanation in the legislative history. The limited legislative history suggests that Congress legislated the non-self-executing character of these free trade agreements in order to avoid a blanket preemption of existing federal trade law.²⁶ Whatever the historical basis for this decision, the

No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is in conflict with—

- (1) title IV of the Trade and Tariff Act of 1984, or
- (2) any other statute of the United States,

shall be given effect under the laws of the United States.

....

(d) Private remedies not created.

Neither the entry into force of the Agreement with respect to the United States, nor the enactment of this Act, shall be construed as creating any private right of action or remedy for which provision is not explicitly made under this Act or under the laws of the United States.

19 U.S.C. § 2112 (1988).

The United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. 100-449, 100th Cong., [hereinafter The CUSTA Implementation Act] sec. 102 provides:

SEC. 102. Relationship of the Agreement to United States Law.

(a) United States Laws to Prevail in Conflict. —No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is in conflict with any law of the United States shall have effect.

(b) Relationship of Agreement to State and Local Law.—

(1) The provisions of the Agreement prevail over—

(A) any conflicting State law; and

(B) any conflicting application of any State law to any person or circumstance; to the extent of the conflict.

....

(c) Effect of Agreement with Respect to Private Remedies. —No person other than the United States shall—

(1) have any cause of action or defense under the Agreement or by virtue of congressional approval thereof, or

(2) challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with the Agreement.

19 U.S.C § 2112 (1988).

The Israel-United States FTA and the CUSTA approving and implementing legislation thus provided that preexisting, contemporaneous, and subsequent federal statutes would prevail over the agreements. This is more inclusive than the last-in-time doctrine which grants supremacy only to subsequent inconsistent federal legislation.

26. See UNITED STATES-CANADA FREE-TRADE AGREEMENT IMPLEMENTATION ACT OF 1988, S. REP. NO. 509, 100th Cong., 2nd Sess. 105 (1988), reprinted in 1988 U.S.C.C.A.N. 2395, [hereinafter S. REP. NO. 509] which stated, *inter alia*: "The Agreement is not self-executing and has no independent effect under U.S. law. For example, to the extent not altered by this implementing bill, existing U.S. trade laws, including the antidumping and countervailing duty laws, are not superseded by any provision of the Agreement." *Id.* at 2404. See also, Jackson, *supra* note 15, at 324, n. 80 (regarding presidential

result is that these agreements may not be applied by U.S. courts as a direct source of rights in favor of individuals.²⁷ Because of the past trend in decision making, it is perhaps not unreasonable to conclude that the Executive will consider proposing, and that Congress may well request, that NAFTA approving and implementing legislation include a bar against direct application of that RIM.

B. The NAFTA as a Case Study for Self-Execution

The NAFTA does not expressly state whether it is intended to be self-executing. This is the typical case with respect to treaties. Two important factors to consider in evaluating whether Congress should exercise restraint and permit the courts to directly apply the NAFTA are whether the treaty language is susceptible to direct application and whether the courts are

statement that Congress wished to avoid blanket preemption of federal statute).

27. Yet with respect to this legislation, consider *Trojan Technologies v. Pennsylvania*, 916 F.2d 903 (3rd Cir. 1990). In this case, plaintiffs were a Canadian manufacturer/exporter and its exclusive Pennsylvania distributor of products which arguably may have been subject to a Pennsylvania "buy American" statute. *Id.* at 905. They sought a declaration of unconstitutionality and an injunction against enforcement of the statute on grounds, among others, that the CUSTA required elimination of restrictive procurement legislation at the State level. *Id.* at 905. The Court of Appeals cited the provisions of the CUSTA implementing act which gave the agreement priority over inconsistent State law, but went on to hold that the CUSTA by its express terms and by implication was not intended to preempt State procurement laws. *Id.* at 907-08. While this interpretation of the CUSTA is unremarkable, what is remarkable is that the court addressed this question at all in light of section 102(c) of the implementing act which provides that "no person . . . shall . . . (1) have any cause of action or defense under the Agreement or by virtue of Congressional approval thereof, or (2) challenge, in any action brought under any provision of law, any action or inaction by . . . any State . . . on the ground that such action or inaction is inconsistent with the Agreement."

The Brief for the United States as Amicus Curiae in this case is equally puzzling (No. 90-5057) (in author's files). The Department of Justice accepts plaintiff's premise that what is at issue is whether Congress, in approving the CUSTA, intended to preempt State procurement statutes. It observes that "Appellants first contend . . . that the U.S. Canada Free Trade Agreement, and in particular, Part Three of the Agreement concerning 'Government Procurement' preempts the Commonwealth's statute." *Id.* at 6. After referring to the language of the CUSTA, the Justice Department concludes that "[t]o read a generalized statement of purpose as invalidating state and local procurement restrictions would extend the Agreement beyond its specified scope." *Id.* at 6-7.

In fact, the language of the CUSTA was not relevant because the plaintiff was not entitled to bring a cause of action under the treaty, and the plaintiff was not entitled to challenge an action of the Commonwealth of Pennsylvania on the ground that its action was inconsistent with the treaty. Neither the Court of Appeals, the District Court (*Trojan Technologies v. Pennsylvania*, 742 F. Supp. 900 (M.D. Pa. 1990)), or the Justice Department mention the express statutory bar against direct reliance on the CUSTA. The CUSTA Implementation Act did not purport to grant a private right to challenge State government procurement laws—or any government procurement laws for that matter.

experienced in interpreting the kind of language in question.²⁸ Other

28. Professor Jackson has employed the shorthand terms of “direct application” and “higher status” to refer to the distinct concepts of whether a treaty is self-executing and whether it is superior to ordinary legislation. Jackson, *supra* note 15, at 313. Professor Jackson suggests that “considerable caution” be exercised in according self-executing status to treaties, principally because of the relatively minor role often played by national legislatures in their negotiation and conclusion. *Id.* at 313, 321-29. He similarly expresses reservations with respect to according treaties a higher status than ordinary legislation, again because of the potential lack of democratic participation in the treaty-making process, and because of the weakness or inadequacy of international institutions responsible for their administration. *Id.* at 330-32, 337-39. Professor Jackson does, however, suggest a case for direct application and higher status in some situations, for example, when a treaty may be used to secure human rights or free-market reforms in countries or regions which lack traditional protections in these areas. He suggests, with respect to treaties involving membership in international, and perhaps regional, economic organizations, that direct effect and supremacy over subsequent inconsistent national legislation may be desirable, at least with respect to countries in which policymakers desire to secure a long-term commitment to market orientation. *Id.* at 323-24, 338.

Professor Petersmann, in the context of contending for a constitutional right of free trade in favor of individuals, suggests five policy reasons for encouraging higher status and direct effect for international trade treaty obligations, such as those embodied in the GATT. See Petersmann, *supra* note 20, at 3, 26-28. In his view, giving individuals a right to bring claims on the basis of a constitutional right of free trade or a treaty embodying free trade principles will:

1. provide legal security, encourage reliable expectations and thereby increase the value of international trade transactions;
2. provide a mechanism for permitting individuals to correct market failures such as by challenging restraints on competition;
3. provide a mechanism to individuals for protecting themselves against government failures such as trade protectionism;
4. increase the scope of judicial review and thereby increase the chances that trade restrictions will be adopted and maintained for a legitimate public purpose; and
5. act to assure that individuals are treated equally and that trade restrictions are transparent, non-discriminatory and proportional.

Id.

More generally, international and domestic tribunals have begun to take note of the special character of treaties constituting integration mechanisms. The Swiss Federal Tribunal, in a recent decision arising out of the *Belilos* decision of the European Court of Human Rights, disallowed a Swiss reservation to the European Convention on Human Rights on grounds, *inter alia*, that the Swiss approach to the Convention was inconsistent with the integrationist spirit of the Convention. See Luzius Wildhaber, *Parliamentary Participation in Treaty-Making, Report on Swiss Law*, in PARLIAMENTARY PARTICIPATION *supra* note 14, text accompanying notes 72-74 (discussing the case *F. v. R. and Thurgau*, Federal Tribunal Decision, Doc. 5C.103/1992/Ban (Switzerland)). The French Cour de Cassation, in the celebrated *Cafés Vabre* case, referred to the integrationist spirit of the EEC Treaty as one of its reasons for affirming that the Treaty and secondary Community law are superior to subsequent inconsistent French legislation. Judgment of May 24, 1975, (*Administration de Douanes v. Société Cafés Jacques Vabre*), Cour de Cassation (Combined Chamber), 2 C.M.L.R. 336 (France).

While Professor Jackson expresses concern that legislatures will be resistant to accepting treaty obligations if they do not control their implementation (see, e.g., Jackson, *supra* note 15, at 340), he notes that in countries such as the United States where the last-in-time doctrine is accepted, the legislature ultimately retains control over treaty operation. See, e.g., *id.* at 333. Even if a treaty is self-executing in the United States, under the last-in-time doctrine Congress will, in any event, retain the right to pass legislation to override the domestic effect of the treaty and it will thereby retain ultimate control

factors to consider are whether the parties intend the treaty to provide a direct source of rights, whether trade policy goals will be furthered by allowing the treaty to be applied directly, and whether there are significant risks associated with self-execution.

1. Treaty Terms and the Judiciary

The NAFTA is drafted in a highly detailed manner and certainly would in most instances be readily susceptible to judicial interpretation and application. With respect to rules of origin, tariffs, and quotas, the NAFTA by design leaves little to the imagination of executive officials.²⁹ It is important to note that Canadian negotiators articulated as one of Canada's principle reasons for joining the NAFTA negotiations the wish to achieve greater clarity in these treaty provisions, particularly the rules of origin.³⁰ The various chapters of the NAFTA refer to detailed annexes for statutorily-based exceptions to general rules which are clearly identified.³¹ If a court concluded that a particular provision of the agreement was overbroad and subject to multiple interpretations, the court could deny self-executing effect to that provision and thereby place the dispute in the hands of executive authority.³²

The judiciary is clearly capable of interpreting and applying treaties which address complex international trade issues. The federal courts already

over its domestic application. The last-in-time doctrine is a judicially created doctrine said to be based on the constitutional equivalency of statutory law and treaty law. It provides that the last adopted of a statute or treaty will prevail as to an inconsistency. Riesenfeld & Abbott, *supra* note 9, at 577. This would distinguish the situation of the United States and a self-executing regional integration mechanism, such as the proposed NAFTA, from that of the situation of a Member State of the European Community and the self-executing EEC Treaty. Under ECJ doctrine, the Member States of the Community do not retain the power to legislatively override the EEC Treaty. Thus, if Congress were to permit the NAFTA to maintain a self-executing character, it nevertheless would be able to react to a perceived judicial misapplication by legislating to limit the effect of such a decision.

29. NAFTA, *supra* note 2, at ch. 4. NAFTA Chapter Four, concerning Rules of Origin, provides a clear example of the detailed drafting intended to avoid disputes concerning interpretation of the agreement.

30. See, *Press Conference with Michael Wilson, Canadian Minister of Trade and Industry on the North American Free Trade Agreement*, Federal News Service, Aug. 12, 1992, available in LEXIS, Nexis library, Omni file.

31. NAFTA, *supra* note 2, at ch. 12. See, e.g., NAFTA, Chapter Twelve on Trade in Services and related Annexes I and II.

32. Treaties may be self-executing in whole or in part. See Riesenfeld & Abbott, *supra* note 9, at 575.

are the final arbiter of trade-related disputes under federal statute. The Court of International Trade and the Court of Appeals for the Federal Circuit presently spend much of their collective energy interpreting and applying complex federal trade legislation. The state and federal courts as a whole routinely consider complex problems involving business relations among nations. There is no reason to believe that interpretation of the NAFTA would involve issues more complex than application of the Sherman Act to activities of multinational business organizations, or of interpreting the tax codes as they relate to multinational apportionment.

The federal courts have long acted to interpret FCN Treaties between the United States and its trading partners. The issues addressed with respect to these treaties have been both complex and of considerable political sensitivity. Moreover, the operative language of these treaties, for example with respect to the articulation of the national treatment principle, is quite similar to that incorporated in the NAFTA.³³

A good example is the *Sumitomo* line of cases which address the question whether provisions in FCN Treaties, which guarantee to foreign enterprises the right to employ executives of their own choosing, exempt those foreign enterprises from application of Title VII of the Civil Rights Act of 1964. In these cases, the FCN Treaties either expressly or by implication have been held to be self-executing and to have provided foreign companies with a basis for challenging the application of federal antidiscrimination law.³⁴

33. *E.g.*, Treaty of Friendship, Commerce and Navigation, April 2, 1953, U.S.-Japan, art. VII (1), 4 U.S.T. 2063, 2069, October 30, 1953, provides:

Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful judicial entity. . . . Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.

Article 1202(1) of the Trade in Services Chapter of the NAFTA provides: "Each Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service providers." NAFTA, *supra* note 2, at art. 1202(1).

34. This is not intended to suggest that the courts have found the FCN Treaties to in fact constitute a bar to the application of Title VII. The Circuits have divided on this question with various middle ground results. See *Avigliano v. Sumitomo Shoji America*, 638 F.2d 552 (2d Cir. 1981), *rev'd*, 457 U.S. 176 (1982); *MacNamara v. Korean AirLines*, 863 F.2d 1135 (3rd Cir. 1988); *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984); *Spiess v. C. Itoh*, 643 F.2d 353 (5th Cir. 1981).

Another good example of the interpretation and application of FCN Treaties with respect to complex and politically sensitive cases is the line of cases involving foreign expropriations of U.S.-owned property. In these cases the federal courts have held that provisions in FCN Treaties regarding compensation for takings of property provide a legal standard adequate to survive the *Sabbatino* presumption of nonjusticiability.³⁵

Since they have historically played an active role in interpreting and applying FCN Treaties in complex legal and factual settings, there is little reason to conclude that the federal courts would be unable to interpret and apply the NAFTA. It perhaps might not be unreasonable to include in the NAFTA approving legislation a jurisdictional provision to the effect that claims under the NAFTA must be brought before the Court of International Trade and appealed to the Court of Appeals for the Federal Circuit, though it seems doubtful that such a step is necessary. It might in fact be quite judicially healthy for the circuits to divide on questions of interpretation and for the Supreme Court to play a more active role as final arbiter of trade-related disputes. As the U.S. economy is part of an interdependent global trading system, it is appropriate for U.S. courts to play an active role as arbiter of transnational disputes. U.S. courts can and should play an important role in the development of equitable rules of trade.

2. *Intent*

The intent of the negotiators of the NAFTA with respect to the question of self-execution is not stated expressly. Since two earlier U.S. free trade agreements were denied a self-executing character by Congress, it might be suggested that U.S. negotiators, if not the Canadian and Mexican negotiators, operated under the assumption that the NAFTA would be non-self-executing. Perhaps light will be shed on this issue in congressional testimony. Whatever the stated intent of the U.S. negotiators, the first task of the courts will be to determine whether the treaty is intended to be self-executing from the language of the instrument itself.³⁶ The precise nature

35. See, e.g., *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984); *American International Group, Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522 (D.D.C. 1980).

36. See *U.S. v. Enger*, 472 F. Supp. 490 (D.N.J. 1978) (holding that the Vienna Convention on Diplomatic Relations was self-executing despite an executive representation to the contrary). While the testimony of executive branch officials is to be given great weight in treaty interpretation, it is not

of the terms of the NAFTA gives reason to believe that the treaty is intended to be relied upon as a direct source of rights. Moreover, it is important to note that the question of whether a treaty is self-executing is not to be determined by examining the unilateral intent of one country's negotiators, but rather the collective intention of the country parties.³⁷

The NAFTA provides for the possibility of joint interpretation of the agreement by submission to national judicial or administrative tribunals through agreement at the Commission level.³⁸ If the country parties fail to agree on interpretation, any country party may submit its own view in accordance with rules of the forum.³⁹ Thus, the NAFTA clearly admits of the possibility that domestic courts and administrative tribunals will construe the agreement. This suggests that the parties considered that the agreement might be directly applied by the courts in the country parties.

The fact that the NAFTA establishes its own dispute settlement institutions⁴⁰ does not determine whether or not the treaty is intended to be self-executing. When the ECJ first decided that the GATT was non-self-executing in the EC, the court alluded to the fact that the GATT established its own dispute settlement procedure as a basis for concluding that the treaty did not constitute a direct source of rights.⁴¹ However, in two very

conclusive. See Riesenfeld & Abbott, *supra* note 9, at 607-09.

37. See Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892 (1980).

38. NAFTA, *supra* note 2, at art. 2020(2).

39. *Id.* at art. 2020(3).

40. The NAFTA incorporates a number of dispute settlement institutions or arrangements. There is a generally applicable arbitration mechanism intended to resolve disputes between the country parties with respect to questions of interpretation and application of the agreement. Access to this arbitration mechanism is open only to the governments of the parties. The financial services chapter of the agreement provides for certain modifications of the general arbitration mechanism to be used in connection with disputes arising under that chapter. Access to this mechanism is likewise limited to the government parties. A separate arbitration mechanism is established for the resolution of disputes relating to antidumping and countervailing duty laws and proceedings. This mechanism removes the national courts of the parties from review of final administrative determinations in antidumping and countervailing duty cases and subjects such appeals to arbitral panel review. Although country parties will nominally remain the petitioners and respondents in such review proceedings, they are required to initiate the proceedings at the request of private parties to final administrative determinations and such private parties are permitted to appear before the arbitral panels. The NAFTA makes provision for the use of third party arbitration regarding investment-related disputes. Private parties will have access to third party arbitration in cases involving the application by country parties of the investment provisions of the NAFTA. The country parties to the NAFTA are negotiating supplemental agreements concerning environmental and labor issues which may incorporate additional dispute settlement mechanisms.

41. See Cases Nos. 51-54/71, *International Fruit Company N.V. et al. v. Produktschap voor Groeten en Fruit*, 1971 E.C.R. 1219 [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8158 (1971).

important subsequent decisions, one involving a free trade agreement between the Community and Portugal⁴² and the other involving the GATT itself,⁴³ the ECJ said that the fact that the agreements contained their own dispute resolution mechanisms did not determine that they were non-self-executing. The form and operative characteristics of the NAFTA dispute settlement institutions do not appear to exclude a determination that the treaty is self-executing. The fact that the antidumping and countervailing duty mechanism precludes access to the courts may in fact suggest that the parties otherwise contemplated that private parties might have direct access to the courts.

3. Trade Policy and Self-Execution

Permitting a regional integration mechanism such as the NAFTA to have direct effect in U.S. law will promote the rule of law in the international trading arena. If a RIM is implemented only to a limited extent into U.S. law, the United States, and foreign parties seeking to assert a claim in the United States based on the terms of the treaty, will be required to rely on the actions of Executive Branch representatives to enforce its terms by political action or through the formal dispute resolution mechanisms established by the agreement. U.S. nationals will not be able to directly enforce the agreement in the courts *vis à vis* the federal government or state governments, though they will be entitled to do so on the basis of its implementing legislation. Under the NAFTA, a Canadian or Mexican national will not be able to directly challenge application of the agreement in the U.S. courts. However, they may be able to persuade their government to act as champion in a formal dispute resolution proceeding against the United States and will be able to rely on implementing legislation.

Permitting individuals to vindicate in the courts rights established by a RIM such as the NAFTA will act to promote implementation of the agreement. Without private action, the pace of implementation will be left to the Congress and the actions of Executive Branch administrative officials. The political branches are unlikely to have as compelling an interest in the

42. Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg*, 1982 E.C.R. 3641, [1981-1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8877 (1982).

43. *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission*, 1989 E.C.R. 1781, 2 C.M.L.R. 489 (1991).

rapid introduction of trade-related legal developments as do private parties. Private action is therefore likely to act as a spur to a more rapid pace of integration. If the NAFTA, for example, will have a positive impact on the U.S. economy by stimulating export-related investment and promoting foreign investment into the United States, then accelerating the new legal framework brought about by that RIM will enhance this positive economic development. It seems substantially certain that foreign-owned enterprises doing business within an RTA such as the NAFTA would favor direct effect because they will be entitled to invoke basic free market rules, such as the national treatment principle, without the need for federal or state action to implement their rights.

The more complete integration of the NAFTA or a comparable RIM into the U.S. legal framework would likely assist private parties seeking to vindicate rights in areas such as limited free movement of labor, protection of intellectual property rights, and protection of the environment.⁴⁴ While the NAFTA, for example, extends only limited rights to Canadian and Mexican labor, principally temporary mobility of business persons,⁴⁵ the individual seeking access to the United States should benefit by being able to challenge final Immigration and Naturalization Service action on the direct basis of a treaty rather than relying on administrative regulation.

44. Both U.S. citizens/resident aliens and foreign parties have access to federal courts for proceedings against the United States government (U.S.G.) under ordinary federal trade law and treaty law. See 28 U.S.C § 1346 (United States as defendant); 28 U.S.C § 1491 (1988) (United States Claims Court); 28 U.S.C §§ 1581-1585 (1988) (Court of International Trade); 28 U.S.C § 2631-2646 (1988 & Supp. III 1991) (civil actions before Court of International Trade against U.S.G. based on various federal trade laws); and 2631(k) (defining "interested party" and "party-at-interest"). This is not to suggest that executive determinations under the federal trade laws may be successfully challenged. As Morrison and Hudec point out, many presidential trade-related determinations have been held to be unreviewable. Morrison & Hudec, *supra* note 17, at 114-23. The most likely claims under the NAFTA would involve a U.S. importer of a Canadian or Mexican product seeking to challenge a customs-related interpretation of NAFTA, for example in respect to a tariff rate. A Canadian or Mexican exporter in the United States also may seek to vindicate its rights in U.S. courts. For example, a Mexican exporter may seek to challenge application of customs regulations issued under NAFTA. It may bring an administrative action in the Treasury Department and a civil suit before Court of International Claims. See Morrison & Hudec, *supra* note 17, at 123-24 (regarding the right of foreign producers to challenge administrative determinations under the customs laws, observing that "[t]he review procedure does not appear to have a demonstrable bias favoring either foreign or domestic producers"). A party also may seek to enforce its intellectual property rights in the United States against a Canadian or Mexican company doing business in the United States. A claimant from nonparty country, e.g., Germany, may make a claim under a pre-existing treaty (FCN treaty) and a court might consider a potential conflict between rights granted to that party under the prior treaty and rights alleged to be denied by the NAFTA.

45. NAFTA, *supra* note 2, at ch. 16.

Although the United States legal system, perhaps more than any in the world, is amenable to the protection of intellectual property rights, it should nevertheless be of benefit to U.S. intellectual property rights holders to be able to invoke the extensive protections mandated by the intellectual property rights provisions of the NAFTA.⁴⁶ The NAFTA contains detailed provisions with respect to health and safety and technical standards, as well as provisions regarding the relationship of the NAFTA to specified environmental treaties and restriction on the use of environmental measures to attract investment.⁴⁷ Although according the NAFTA direct effect might not permit interested parties in the United States to challenge the application of the NAFTA by the Mexican government in Mexico,⁴⁸ it would provide a basis for challenging the compliance of imported products with specified environmental standards. It might also provide a basis for assuring that the U.S. government did not permit the NAFTA to trump the specified U.S. environmental treaty commitments or attract investments by offering to lower environmental standards.

Affording individuals the right to rely directly on the terms of the NAFTA and similar regional integration mechanisms may to some extent restrain Executive Branch discretion in the application of trade law in the United States. If a regional integration mechanism is not directly applicable, the Executive may base trade-related decisions on the RIM even though individuals will not have the right to challenge those decisions on the basis

46. NAFTA, *supra* note 2, at ch. 17. The NAFTA provisions on intellectual property rights were based directly on the GATT Uruguay Round Dunkel Draft proposal which reflected a comprehensive system of intellectual property rights protection. Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991).

47. See Frederick M. Abbott, *Regional Integration and the Environment: The Evolution of Legal Regimes*, 68 CHI.-KENT L. REV. 173 (1992).

48. The issue of private action in U.S. courts against the governments of Canada and Mexico involves a series of jurisdictional issues. Canada and Mexico may not be sued in U.S. courts both per the express terms of the NAFTA and the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1988 & Supp. III 1991) [hereinafter FSIA]. The NAFTA specifically precludes private action against foreign country parties in local courts: "[n]o Party may provide for a right of action under its domestic law against any other Party on the ground that a measure of another Party is inconsistent with this Agreement." NAFTA, *supra* note 2, at ch. 20, art 2021.

Even were this not provided, a private claimant would face the hurdle of the FSIA, 28 U.S.C. § 1605, which would bar suits against foreign governments unless one of the express exceptions apply. It is unlikely that the waiver, commercial, or tort exception would apply.

This article was written prior to the completion of supplemental agreements to the NAFTA and therefore does not reflect any grants of rights of access to the courts of the country parties which might be reflected in those agreements.

of the RIM. Professors Morrison and Hudec point out that the Executive is frequently granted wide discretion by the Congress in federal trade legislation and the courts routinely find that trade-related Executive decisions involving findings of fact or national policy are unreviewable.⁴⁹ The cases in which direct effect would be most likely to restrain Executive discretion are those in which the language of a RIM such as the NAFTA is precise and does not itself rely on Executive fact-finding or policy determination. This is the same as with respect to federal statutes as to which the courts are more likely to engage in substantive review when the standards for application are specific.⁵⁰ Thus, even if a RIM is self-executing, there is no assurance that Executive discretion will be substantially restrained.⁵¹ This will depend on the way the courts interpret Executive discretion with regard to particular provisions, just as with respect to federal trade statutes.

4. *Free Market and Redistributive Rules*

It perhaps should not be automatically assumed that private actors and the judiciary are preferable to executive discretion in respect to the implementation of international trade rules. Professor Hudec has written insightfully on this question, reflecting on suggestions made by Jan Tumlir.⁵² Tumlir suggested that there are two different kinds of trade rules

49. Morrison & Hudec, *supra* note 17, at 114-23.

50. *Id.* at 123-28.

51. Ordinarily a U.S. complainant can bring a claim under section 301 of the Trade Act of 1974 seeking a determination by the United States Trade Representative (USTR) that a trade remedy should be pursued against a foreign government for an unjustifiable or unreasonable trade practice. However, because of the wide latitude granted to the USTR in making determinations under section 301, it is widely assumed that a challenge to USTR action other than on purely procedural grounds could not be maintained. See, e.g., Morrison & Hudec, *supra* note 17, at 120-21. One area in which a directly effective NAFTA might have an effect in limiting executive discretion is in respect to actions taken by the executive with respect to non-U.S. parties outside the United States should such action contravene the NAFTA. If, for example, the President were to impose trade sanctions on Mexico, perhaps an embargo of a Mexican-produced product, and this action affected a U.S. importer of that product, and that importer wished to challenge that action by the President, under current law the importer might well be foreclosed. If the NAFTA were non-self-executing, the only party which could challenge U.S. government action directly on the basis of the treaty (as opposed to implementing legislation) would be the Mexican or Canadian governments under the panel arbitration procedure. If, however, the NAFTA were deemed self-executing, and the importer could demonstrate a harm to itself, and the embargo contravened the terms of the NAFTA, then the importer might have a mechanism for challenging the use of executive discretion in a manner historically foreclosed.

52. Robert E. Hudec, *The Role of Judicial Review in Preserving Liberal Foreign Trade Policies*,

from the standpoint of evaluating the role of the judiciary and private rights of action. The first kind of rule is intended to provide the platform for the conduct of liberal trade—a free market rule. Examples of this kind of rule are the four freedoms enumerated in the EEC Treaty, free movement of goods, services, persons and capital, and the GATT most favored nation principle.⁵³ Both Tumlrir and Professor Hudec suggest that private judicial enforcement of this kind of rule is likely to have a positive welfare effect because a judge, in neutrally applying the rule in accordance with its terms, will be following a coherent and rationale theory of liberal trade.⁵⁴

Another kind of trade rule, which Tumlrir and Hudec refer to as “redistributive,” is designed to remedy alleged unfair trade practices or distortions through “contingent protection.”⁵⁵ Examples for the United States are anti-dumping and countervailing duty laws and section 301 of the Trade Act of 1974. Hudec suggests that judicial construction of these rules may be more likely than Executive implementation to result in protectionism and distortion of liberal trade. His thesis is that Congress either has no coherent idea of what it is intending to accomplish when it enacts these laws (as in the case of the anti-dumping laws) or deliberately crafts these laws to give the impression of a tough approach to foreign trade practices, while granting the Executive considerable discretion in applying these rules (as in the case of section 301).⁵⁶ With respect to incoherent statutes, judicial application may result in *ad hoc* decisions with spurious rationales. Executive decisions with respect to these statutes, while *ad hoc*, can at least be made flexibly.⁵⁷ With respect to trade laws passed to give the impression of firm congressional resolve, judicial application is likely to result in protectionism not intended by Congress.⁵⁸ The Executive is expected to act with restraint because it must maintain a balanced relationship with foreign trading partners who themselves have the right to reciprocally apply restrictive measures to American exports or investments. The judiciary would act unencumbered from the constraints of reciprocity.

in NATIONAL CONSTITUTIONS, *supra* note 1, at 503.

53. *Id.* at 507-08, 510.

54. *Id.* at 507, 514.

55. *Id.* at 511.

56. *Id.* at 512-13.

57. *Id.* at 512-13.

58. *Id.* at 513.

In sum, Hudec suggests that positive welfare effects of enhanced judicial involvement in the implementation of international trade law may largely depend on the kind of trade law which the judiciary is asked to apply. Application of redistributive laws which lack a coherent basis may result in increased protectionism. On the other hand, application of coherent free market rules may have a positive welfare effect.

A regional integration mechanism embodies free market rules, e.g., national treatment, and redistributive rules, e.g., safeguards against import surges. Nevertheless, under the NAFTA, the preponderance of the operative rules grant free market-oriented rights to regional private actors, such as, national and Most Favored Nation treatment. There also are redistributive rules, for example, quotas in the textile sector, a general safeguard against import surges, and restrictive rules of origin. However, these rules are narrowly drafted because all of the country parties, particularly Canada, feared the granting to executives of broad discretion to take protective measures. One of Professor Hudec's major concerns with court interpretation of redistributive rules is that, in the United States at least, some of these rules grant the Executive broad discretion and are subject to arbitrary interpretation by the courts. The narrow drafting of the protective provisions in a RIM (such as found in the NAFTA) might alleviate concern over court interpretation and application of these rules. Although there is no way to conclusively answer the question of whether the benefits of judicial involvement in applying the free market rules in the particular case of the NAFTA would outweigh the harms of judicial involvement in enforcing its redistributive rules, this author suggests that judicial application of the basic constitutive principles of the agreement would have an overall liberalizing effect. This would exceed the protectionist effect of judicial application of the redistributive rules. A RIM, including the NAFTA, must be viewed as a whole. The NAFTA, as a whole, is a constitutive charter for trade liberalization and not a blueprint for protection.

5. Secondary Effects

A secondary effect of permitting a RIM to have self-executing effect in U.S. law is the example this would set for other countries. With respect to the NAFTA as a case study, Canada and Mexico are of the most immediate and direct significance. It appears that in Canada, at least some parts of the

NAFTA may be self-executing.⁵⁹ Mexico, like the United States, appears to accept the doctrine of self-executing treaties. However, there is no authoritative Mexican Supreme Court holding to this effect.⁶⁰ It would seem that a U.S. exporter, service provider, or investor would consider it an advantage to be able to challenge a decision by the government of Mexico in the Mexican courts directly on the basis of the NAFTA as opposed to on the basis of implementing legislation. This would particularly be the case if the U.S. party could point to NAFTA jurisprudence from United States courts also based on a directly applicable NAFTA. Such a mutual jurisprudence might influence the decisions of NAFTA arbitral tribunals. Although the decision by the U.S. Congress as to whether or not the NAFTA may be self-executing will not bind Canada or Mexico, and while U.S. courts do not consider whether a foreign country regards a treaty as

59. According to an International Trade Commission report on the NAFTA, treaties require implementing legislation in Canada if they amend existing legislation, require the expenditure of public money, or affect the rights of private citizens. This information was obtained by interviewing Canadian and American government officials. A more in-depth inquiry would be required to determine the extent to which the NAFTA provisions would be deemed to require implementing legislation. However, it seems reasonable to assume that at least parts would require such legislation. *Cf.* U.S. INT'L TRADE COMM'N, PUB. NO. 2596, POTENTIAL IMPACT ON THE U.S. ECONOMY AND SELECTED INDUSTRIES OF THE NORTH AMERICAN FREE-TRADE AGREEMENT app. at E-3 (1993) [hereinafter ITC Report].

60. Article 133 of the Mexican Constitution is similar to Article VI of the U.S. Constitution. Article 133 provides:

This Constitution, the laws of the Congress of the Union which emanate therefrom, and all treaties made, or which shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the Supreme Law throughout the Union. The judges of each State shall conform to the said Constitution, the law, and treaties, notwithstanding any contradictory provisions that may appear in the Constitution or laws of the States.

See 1 DOING BUSINESS IN MEXICO A.2-105-06 (Michael W. Gordon, ed.; 1993). According to the ITC Report:

The extent to which NAFTA will be self-executing in Mexico is unclear. There is no provision of the Constitution that addresses the question of priority between international treaties and existing statutes. Nor are there any Mexican Supreme Court cases that resolve this question completely. It is the position of the Government of Mexico, however, that where there is a conflict between an earlier statute and a later international agreement, or vice versa, the later of the two would prevail. This is a matter which may need to be addressed by the Mexican Supreme Court before it can be fully resolved.

I.T.C. REPORT, *supra* note 59, at E-4.

Nevertheless, U.S. commentators who have surveyed the Mexican literature on the question conclude that treaties may be self-executing in Mexico and that the last-in-time doctrine will be followed. *E.g.*, VIRGINIA A. LEARY, INTERNATIONAL LABOUR CONVENTIONS AND NATIONAL LAW: THE EFFECTIVENESS OF THE AUTOMATIC INCORPORATION OF TREATIES IN NATIONAL LEGAL SYSTEMS 45, 70 (1982); James F. Smith, *Confronting Differences in the United States and Mexican Legal Systems in the Era of NAFTA*, 1 U.S.-MEX. L.J. 85, 96-97 (1993).

self-executing as a basis for determining whether it is self-executing in the United States,⁶¹ it certainly seems reasonable that the legislatures of Canada and Mexico would take note of the actions of the U.S. Congress in determining the extent to which the NAFTA requires implementing legislation in their own constitutional and legislative frameworks.

The U.S. architects of the NAFTA foresaw the progressive integration of the entire western hemisphere into a single integrated free trade area. Granting the NAFTA or a successor RIM a self-executing effect in the United States might not have a great impact in this country since the United States has a long history of economic governance by the rule of law. Direct application of a RIM in other countries of this hemisphere may have a significantly more important effect. In countries in which the market economy has not been the norm, or in which the military or other autocracy has governed economic affairs, the adoption of a self-executing trade treaty which evidences the characteristics of the free market may help to secure, both for local inhabitants and foreign investors, significant advantages. If the use of courts to vindicate treaty-based economic rights is encouraged, this will tend to reduce the discretionary powers of executives. This perhaps will enhance economic security by promoting stability in expectations and may lead to a more rapid economic expansion throughout the hemisphere. Economic development should promote further the democratic reforms evident over the past decade in the western hemisphere. Though it is not possible to predict the extent to which self-execution and direct effect will promote economic growth and the securing of democratic reforms, it seems reasonable to conclude that in countries which lack a free market tradition, the direct application of treaty-based norms will have a positive effect.

6. Conflict with Existing Legislation

A principal motivation of Congress in giving the CUSTA a non-self-executing character was that it wanted to assure that the agreement did not supersede the existing body of federal trade law.⁶² The legislative history of the CUSTA Implementation Act explicitly referred to the antidumping and countervailing duty laws as examples of legislation it wanted to assure

61. See Riesenfeld, *supra* note 37, at 895, 901.

62. See S. REP. NO. 509, *supra* note 26.

were not overridden by the CUSTA.⁶³ Congress evidenced an overcautious attitude. It was quite clear from the text of the CUSTA that it was not intended to supplant the domestic antidumping and countervailing duty laws of Canada and the United States. A federal court interpreting the CUSTA directly would have found this conclusion virtually inescapable.⁶⁴ The CUSTA implementing legislation largely transformed into federal law the CUSTA rules on tariffs, rules of origin, and related measures,⁶⁵ to be put into effect through the administration of the usual federal agencies, and authorized the Executive to issue regulations to implement the agreement.⁶⁶

The CUSTA services liberalization rules contained express exemptions for existing legislation. Since United States legislation generally does not discriminate against foreign service providers, there was not a significant basis for congressional concern over direct application of the CUSTA with regard to the services sector.⁶⁷

This question must also be looked at from the standpoint of federal/state preemption. The CUSTA Implementation Act specifically precludes reliance on the CUSTA to challenge state regulation. If the CUSTA (or NAFTA)

63. *Id.*

64. Free-Trade Agreement, Dec. 22, 1987-Jan. 2, 1988, U.S.-Can., art. 1902, *reprinted in* 27 I.L.M. 281, 386 (1988).

65. *See, e.g.*, United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. 449, 102 Stat. 1851, 1855-61 (1988). For example, the Senate Report on the Act said with respect to implementing legislation regarding rules of origin, *inter alia*:

Sections 202(a) through (c) and (f) closely tracks the provisions of Agreement Articles 301, 302, 304 and the interpretation section of Annex 301.2. It therefore provides direct legislative implementation of these provisions into U.S. law.

Subsection (d) authorizes the President to implement by proclamation the section of Annex 301.2 entitled "Rules," which establishes the specific rules for determining whether a third country article has undergone sufficient change in the United States or Canada to qualify under the Agreement because of change in coverage under the Harmonized System. Subject to the consultation and layover rules, the President is authorized to proclaim modifications of these rules agreed to with Canada in the future.

Subsection (e) contains specific authority for the President to proclaim such modifications to the definition of Canadian articles covered by the Automotive Products Trade Act of 1965 as are necessary to conform that definition with the Agreements rules of origin. S. REP. NO. 509, *supra* note 26, at 2409-10.

66. United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. 449, 102 Stat. 1851, at § 102(d) [hereinafter CUSTA Implementation Act].

67. The CUSTA Implementation Act, for example, amended federal banking law to permit U.S., Canadian, and other foreign banks to deal in debt obligations fully backed by the government of Canada. CUSTA Implementation Act, *Id.* at § 308. However, this change in federal law would have been accomplished by direct implementation of the later-in-time treaty which would supersede prior existing federal legislation. *See* S. REP. NO. 509, *supra* note 26, at 67.

were self-executing, inconsistent state law would be preempted.⁶⁸ It would seem consistent with the underlying principles of such an agreement that inconsistent state law should be preempted. One of the central purposes of a RIM is to provide for the consistent application of rules to all parties to the agreement. This purpose is not furthered by the maintenance of multiple, inconsistent state rules.⁶⁹

This does not mean that it is possible to spell out in advance every possible effect of a RIM in the domestic law of the United States. The NAFTA is a complex arrangement which will have effects in many areas of domestic law. Nevertheless, the major operative principle of the NAFTA, the reciprocal grant of national treatment among the three country parties, embodies the concept of nondiscrimination familiar to the judiciary and largely followed in U.S. law with respect to foreign nationals today. Moreover, one reason that favors permitting a RIM a self-executing character is that it is difficult to determine or foresee all areas in which congressional implementing legislation may be desirable. If the rules of a RIM are fundamentally sound, it is beneficial that private parties will be able to rely on it to challenge and thereby reform inconsistent rules.⁷⁰

68. See generally Fred L. Morrison and Rüdiger Wolfrum, *The Impact of Federalism on the Implementation of International Treaty Obligations*, in NATIONAL CONSTITUTIONS, *supra* note 1, at 519.

69. Permitting a RIM to have direct effect might preclude any commerce clause challenges from the states alleging that Congress lacks the power to implement the RIM by federal legislation. Thus it is well accepted that the treaty power permits the federal government to preempt state law in the field of commerce among nations. This is not to suggest that there would be a serious commerce clause argument with respect to implementing the NAFTA. Since congressional implementing legislation in any event would be issued in order to implement treaty obligations, this legislation would presumably share in the character of the treaty from a constitutional perspective. *Missouri v. Holland*, 252 U.S. 416 (1920), would render the chances of a successful challenge against use of the treaty power to preempt state commercial regulation extremely remote.

70. Evaluating the potential impact of permitting the courts to interpret and apply a RIM, such as the NAFTA, directly is necessarily better done after the terms of the congressional implementing legislation are known. As this article is written, such legislation has not yet been introduced. If Congress elects to largely transform the NAFTA into a federal statute, then the question of direct application is not terribly significant from the practical perspective of its application by courts in the United States. In other words, private parties will rely on the terms of the NAFTA in the courts, but as those terms have been transformed by Congress into domestic law. If Congress intends to take this approach, then it may as well permit the NAFTA to have a self-executing character and adopt limiting legislation where it deems necessary. This at least would encourage other parties to the agreement to permit the NAFTA a self-executing character. On the other hand, if Congress provides that the NAFTA will only have effect to the extent of legislation, and Congress legislates in a limited way, then private parties may find themselves substantially deprived of rights which they might otherwise be entitled to invoke in the courts.

7. *A Trend in NAFTA Toward Private Enforcement*

The NAFTA evidences a trend among the RIM commitments of the United States to permit private parties to enforce RIM-based rights. The NAFTA would (a) be construed and applied as to the country parties by ordinary dispute settlement panels; (b) be applied by antidumping and countervailing duty panels to pending cases or controversies involving private claimants who may appear and be represented by counsel (though country parties will be the formal parties); and (c) be interpreted and applied by private arbitral panels pursuant to the investment chapter.⁷¹ It would also be applied by national courts of the parties to the extent it is either self-executing or transformed into national law.

Disputes between the country parties are intended to be resolved through the general arbitration mechanism.⁷² There is, however, a decided trend toward permitting the private parties to make claims against these governments. First, as with respect to the CUSTA, private parties are entitled to initiate arbitration with respect to review of antidumping and countervailing duty final determinations. Since antidumping and countervailing duty proceedings are among the most politically sensitive trade cases, the country parties have accorded substantial recognition to a regional rule of law and have created important rights in favor of individuals. That each country party is willing to cede the sovereign prerogative of its local court system in this area is a positive step toward deeper integration.

Second, and more significant from the standpoint of trend analysis, the parties have provided for third-party arbitration with respect to investment disputes. Parties which elect to pursue third-party arbitration will be entitled to a neutral and well-respected decision process. Courts will act to enforce the judgments of these arbitration panels and, by doing so, will exercise a

71. These relationships will be complicated by the fact that a U.S. federal statute adopted subsequent to the entry into force of the agreement (or a provision of a NAFTA implementing act), will take precedence over the treaty for domestic law purposes. See *In the Matter of Fresh, Chilled and Frozen Pork, United States-Canada Binational Panel Review*, U.S.A. 89-1904-06 (Sept. 28, 1990), reprinted in 3 *WORLD TRADE MAT.* 39, 62-63 (1991).

72. It is worth briefly noting that in their review of the CUSTA members of the GATT Working Party expressed concern that reliance by Canada and the United States on the CUSTA dispute settlement mechanism might undermine the authority of the GATT. See *Working Party on the Free-Trade Agreement between Canada and the United States Report*, GATT Doc. L/6927 (Oct. 31, 1991, adopted by GATT Council Nov. 12, 1991), reprinted in 4 *WORLD TRADE MAT.* 5, 11-14, 30-31 (1992).

vote of confidence in the legal authority of the NAFTA rules. Private parties may alternatively pursue investment-related claims in the courts to the extent permitted by the NAFTA and relevant implementing legislation.

The NAFTA will be applied by the courts of the United States in cases or controversies involving individuals, either directly or indirectly. If Congress denies the NAFTA a self-executing character in its implementing legislation, private parties will rely on the implementing legislation through which the NAFTA is transformed into national law. There will certainly be substantial litigation in the courts, for example, with respect to challenging customs service determinations regarding the origin of goods. The role of the courts and the ability of individuals to make claims in the courts under the NAFTA will be enhanced if Congress does not deny a self-executing character to the treaty. If Congress acts to deny self-execution and transform the agreement, some parts of it will almost certainly remain outside the purview of the courts. Though at this stage the precise areas which will be so excluded cannot be determined, there is little reason to expect that private parties will benefit from the exclusions.

II. RIMS AND HIGHER STATUS IN THE U.S. CONSTITUTIONAL SYSTEM

Even assuming that Congress permits a RIM to be self-executing, under U.S. constitutional custom, Congress will retain the power to override its terms by subsequent inconsistent legislation. At any time it is dissatisfied with the trend of application of the RIM, Congress will be entitled to dictate a different result for domestic law purposes. In order for a RIM such as the NAFTA to assume a status in U.S. law similar to that of the EEC Treaty in European Community law, it would need to achieve a special constitutional status, a status not unlike that of the EEC Treaty in the Member States. In other words, in the spirit of integration, the Supreme Court would need to suspend application of the last-in-time doctrine and refuse Congress the power to override the treaty. Alternatively, a constitutional amendment could be pursued to accord the RIM a special constitutional status.

Should the NAFTA, as an example, follow the approach of the European Community with respect to the higher status of norms?⁷³ That

73. It should be noted that since the NAFTA dispute settlement institutions would not have the power to direct the country parties to comply with decisions, a power that is held by the ECJ, there is a fundamental lack of institutional symmetry with the European Community. In the absence of a

depends on the goals which are ascribed to it. The principle motive which political leaders have articulated for U.S. involvement in the NAFTA is to enhance American business opportunities in Mexico by (a) lowering tariff and non-tariff barriers to trade in goods, (b) liberalizing access to the Mexican services market, (c) providing a stable and nondiscriminatory climate for investment, and (d) providing adequate and effective protection for American-owned intellectual property rights.⁷⁴ The articulated secondary goal of the United States is to encourage political stability and democratic reform in Mexico toward the goal of reducing illegal immigration into the United States and discouraging the emergence of a radicalized state on the southern U.S. border.⁷⁵ It may be hoped that by achieving the foregoing goals, the United States might also enhance the promotion and protection of human rights and improve local health, safety and environmental conditions in Mexico. At this moment, however, there is insufficient evidence that integration of the North American continent would be considered a socio-political "meta-value" in the U.S. body politic so as to justify recommending that NAFTA norms be considered superior to ordinary federal legislation.⁷⁶ Commitment by the United States to a RIM with norms superior to subsequent national legislation would depend on a shift in the tide of public sentiment.

supreme judicial institution, final determinations as to the meaning of the NAFTA would be made by the political branches of the country parties. These determinations might be at variance with the interpretations of NAFTA dispute settlement panels.

74. Since the United States and Canada are already parties to the CUSTA, the policy issues will be considered as a United States-Mexico question.

75. U.S. goals in respect to the NAFTA also include providing for free movement of persons to a limited extent, reducing border environmental pollution and providing a counterbalance to European Community regional economic power.

76. Demand for supranational regional institutions, which have the power to override national institutions, must be a precondition to creating regional institutions or to granting RIMs a status superior to national norms. In addition, there must be a commitment to recognizing the norms of the charter of the regional arrangement as superior to national legislation. Both must be present at some level among committed political leaders and their constituencies. Political and social demands for more complete integration were clearly in the minds of political leaders at the formation of the European Community. While the Community experiences shifting tides of sentiment with respect to whether the pace of integration should be slowed or accelerated, and while EC political leaders may sometimes be at odds with their constituencies or each other over the pace of integration, clearly in the EC, integration is proceeding at a deep political and social level. The basis for European integration is substantially different than that for North American integration, arising as it did out of a long history of military conflict.

III. CONCLUSION

According to regional integration mechanisms a self-executing character or direct effect will accelerate and deepen the integration process. The U.S. Congress has perhaps unconsciously fallen into the practice of denying a self-executing character to RIMs to which the United States is a party. Unconsciously perhaps because the legislative record does not reveal a reflective legislative debate on this subject.

Denying a complex integration treaty direct effect is no doubt less troublesome than permitting it direct application. Direct application carries with it the prospect that the courts will apply the RIM in some unforeseen way or to some unforeseen subject matter. This prospect should not be frightening. Application of the RIM by the courts in unforeseen ways and to unforeseen subjects will accelerate and deepen the integration process. If the courts go horribly wrong, Congress can remedy the mistake through overriding legislation.

This is not to suggest the substitution of judicial activism for legislative control. According to a RIM a self-executing character will expand the role of the courts in implementing it. But this is only a byproduct of the real expansion. Principle beneficiaries of direct effect will be the individuals who use the courts to champion the rights they perceive to be accorded them. The ultimate beneficiary is the society which enjoys the rights that are vindicated.

Regional trading arrangements accelerate the process of integrating national economies ahead of the global integration process. The accelerated harmonization or approximation of national regulatory frameworks is a necessary byproduct of this process. Regional integration enhances social values by fostering mutual understanding and facilitates political cooperation through the creation of regional implementing structures. No single judicial mechanism or principle will alone determine the success or failure of the integration process. Directly effective regional integration mechanisms should operate to accelerate and deepen the process of regional integration and should therefore be encouraged. When the U.S. Congress has its next opportunity to approve a regional integration mechanism, it should reconsider the policy of denying such mechanisms self-executing effect, and start over.