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Deeper, Broader: A Roadmap for a Treaty with North America

Daniel Schwanen

DEEPER, BROADER: A ROADMAP FOR A TREATY WITH NORTH AMERICA

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I. INTRODUCTION**

THIS year marks the 15th anniversary of the Canada-US Free Trade Agreement (FTA) and the 10th Anniversary of the North American Free Trade Agreement (NAFTA) coming into force. While these anniversaries would rather naturally have led to increased interest in ways to broaden and deepen our North American trading relationships, the tragic events of 9/11 have added homeland security as a complicating issue to the already full free trade agenda. With this in mind, in October 2003 the IRPP convened its second "Art of the State" conference around the theme "Thinking North America: Prospects and Pathways." Outstanding experts from Canada, Mexico and the United States came together to explore new ideas, new instruments and new processes for enriching our North American experience in ways that at the same time preserve Canada's freedom to manoeuver. We attempted to remedy gaps in the public discourse and understanding of how three proud and sovereign nations could advance common causes and manage their increasing interdependence. In this context, it is a pleasure to acknowledge our partner in this endeavour, the Canadian Institute for Research on Regional Development at the University of Moncton. The concrete result of this conference is the series of papers of which this folio is an integral part. The contributions will be released individually, but together form a collection that will explore a wide range of North American issues, including:

- The trade and economic dimensions of the Canada-US relationship

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* *Daniel Schwanen* is Senior Economist at the Institute for Research on Public Policy (IRPP). Prior to joining IRPP, Mr. Schwanen was senior policy analyst at the C.D. Howe Institute in Toronto. He has also been international economist at the Canadian Imperial Bank of Commerce, where he covered G-7 economic developments and the European Community single-market process, and has worked as an economist for investment dealer Wood Gundy. Mr. Schwanen specializes in trade and economic growth issues and is the author of a number of articles and commentaries on Canada's external trade policy, the impact of free trade agreements, interprovincial economic issues and global warming policy. Mr. Schwanen holds degrees in economics from Université de Montréal and Queen's University.

** Introduction written by Hugh Segal.

- The pros and cons of an enhanced institutional structure, including the possibility of a treaty for a revitalized community of North Americans
- The deep determinants of integration; whether a North American "citizenship" can evolve from current relationships; and whether new rights should be extended to private parties to give direct effect to commitments by governments
- The management of environmental issues
- The role of states and provinces in any future trilateral relationship
- How efforts at making North American integration work better should be seen in light of other international agendas being pursued by the three nations, in particular that of the Free Trade Area of the Americas

On behalf of the IRPP, I want to express my sincerest thanks to the many contributors to these volumes and to extend my appreciation of their efforts to develop their ideas to new levels of depth, clarity and relevance to policy. This is due in no small part to the diligence of the three co-chairs of the second "Art of the State" conference and editors of this collection: IRPP Senior Scholar Thomas Courchene, Senior Fellow Donald Savoie and Senior Economist Daniel Schwanen. It is their hope and mine that this series will be useful to all those involved in the multifaceted North American relationships and that, mindful of potential pitfalls ahead, this work will also help train our eyes on the rewards that the three nations could reap from improving those relationships.

II. THE NORTH AMERICAN CHALLENGE

Ten years after the implementation of The North American Free Trade Agreement (NAFTA) and fifteen years after that of its precursor, the Canada- US Free Trade agreement (FTA), the relationship among the three countries of North America has evolved into one of greater interdependence than ever before. But it has also shown signs of malaise along the way, and its future is hard to fathom. In the US, the heightened need to address security concerns in the aftermath of September 11, 2001, has been translated in practice into an acute emphasis on more secure borders and a rethinking of that country's relations with others more generally. Despite solid evidence of overall gains from the FTA and NAFTA, trade liberalization still is regularly fingered as a culprit for mixed overall economic outcomes in the three NAFTA countries. Against this backdrop, and amid continued concerns about some high-profile trade and migration issues and increasingly aggressive competition from outside NAFTA, government officials, businesses, nongovernmental organizations and analysts in all three countries have expressed dissatisfaction about the nature, functioning and completeness of existing linkages.

A. The New North American Economy

The increase in trade and investment flows among the three countries over the past 15 years has been well documented, and is held up most often as free trade's success story.[1] It is in the nature of the flows, however, that the effects of integration are most profoundly felt. Increasingly, intra-NAFTA trade is taking the form of vertical specialization of tasks — inputs from the other NAFTA countries are becoming more important in each country's production of its own outputs and exports (for Canada-US trade, see Cross 2002; for Mexico-US trade, see Ruffin 1999) — and trade is taking place in ever more sophisticated products.[2] Although the growth of investment and services flows within NAFTA has not always kept pace with that between NAFTA and booming markets elsewhere, the nature of intra-NAFTA investment has changed — investment is now more often seen as a complement to, rather than a substitute for, trade in goods or services (see Hejazi and Safarian 2002). For example, Canadian direct investment in services industries in the US now accounts for two-thirds of total Canadian foreign direct investment in that country, up from one-third before NAFTA. Yet, relative to other countries in which Canadian services industries have invested, the US also imports more business services directly from Canada (Marth 2003). And the intensification of trade relations and the changing nature of the investment and services relationship have been accompanied by a rising tide of temporary workers across common NAFTA borders.[3]

The vertical integration of North American industries — with countries' increasingly specializing in different stages of production of the same products — underlines the sensitivity of North American production to potential border disruptions. It also emphasizes the self-defeating nature of protectionist measures against one another and the need to address the grains of sand that linger in the gears of cross-border trade flows, investment decisions and the legitimate movement of people, on

1. An empirical debate still rages about the role the trade agreements themselves have had in creating this growth in cross-border relations, but their positive contribution to the fact of greater economic interdependence itself is not in dispute.
2. Under the FTA and NAFTA, the share of nonresources in Canada's exports now significantly surpasses that of resources. Moreover, among nonresources exports, automotive trade no longer absolutely dominates (Canada 2003c, annex table 4B). Thirty percent of Mexico's exports to the United States in 2001 were considered high-technology products, compared with 21 percent in 1993, before NAFTA came into effect (United Nations Economic Commission for Latin America and the Caribbean 2002, table II.23B).
3. Between 1994 and 2001, the official number of entries by Canadian temporary workers in the US more than tripled and that by Mexicans almost quintupled. During the same period, the number of Mexicans granted temporary authorization to work in Canada more than doubled, although the number of Americans granted such status barely grew. Thirteen percent of foreign workers in Canada are now of Mexican origin (Canada 2003a, figure 4). Over the 1994–2001 period, the number of temporary work authorizations Mexico granted to individuals from the US grew by a factor of more than 10, and from Canada by a factor of almost 18 (*See* Papademetriou 2003, tables 1-3).

which all three economies — but Canada's and Mexico's, in particular — rely.

Having said this, it is fair to say that the two trade agreements — even when one takes into account the increased security-related costs of doing business across borders that have negated some of the benefits expected from tariff reductions — have failed to deliver on some of the rosy scenarios that were touted for them.

In Canada, indicators of economic underperformance relative to that of the US continue to be a matter of national debate. One key indicator is the lagging labour productivity in the business sector, which has grown by 20 percent in Canada, compared with 26 percent in the US since the FTA was implemented (OECD 2003, annex table 13). Opponents of free trade often point to this indicator as a sign that the trade agreement has failed, even though there is compelling evidence that higher productivity gains have occurred in industries where integration has brought about industrial transformation.[4] However, Canada's underperformance relative to that of the US can be explained by many other factors, such as the Canadian economy's reliance on self-employment growth in the difficult fiscal and monetary circumstances of the early 1990s (see Baldwin and Chowhan 2003) and by domestic policies that have failed to take advantage of the wider market by instituting reforms on, for example, the innovation and tax fronts (as I argue in Schwanen 2004).

In Mexico, both the extent and the distribution of gains from NAFTA have been disappointing. Some regions — particularly those that are most distant from the US border and among the poorest in the country — have actually suffered setbacks in their standards of living. Indeed, although Mexican industry saw an overall structural shift toward higher productivity in the 1990s, regional gaps in per capita incomes have widened since NAFTA was implemented, after five decades of gradual convergence — a setback that has been attributed to distance from the US market and poor infrastructure, among other causes (Esquivel et al. 2002; Hanson 2003). Overall, Mexico's economic growth continues to suffer from underdevelopment in the state-owned energy sector, deficient tax collection and, lately, difficulties of political leadership (Weintraub 2003; on taxes, see also Dalsgaard 2000). Illegal emigration by Mexicans (and by others through Mexico) into the US continues unabated, with attendant economic and security concerns on the part of that country. Outmigration furnishes an important economic lifeline to Mexico in the form of monetary transfers to families back home, but it is not a satisfactory substitute for domestic economic growth.

4. *See*, for example, Trefler (2001). A recent Statistics Canada study (Baldwin and Gu 2003) concludes that Canadian manufacturing plants that have increased their exposure to export markets accounted for three-quarters of manufacturing productivity growth in the 1990s, even though they accounted for less than 50 percent of manufacturing employment.

In the US, NAFTA has had a small but positive effect on the economy (United States 2003), which has managed to outgrow Canada's since the FTA was implemented and Mexico's since NAFTA was brought in (OECD 2003, annex table 1). However, the recent period of poor employment growth and surging trade deficits seems to have led to some rethinking in the US about trade strategies. That trade bears part of the political blame in a period of economic difficulty is not altogether surprising, but the blame is compounded by the lack of progress in trade talks at the World Trade Organization (WTO) and the proposed Free Trade Agreement of the Americas and by a sense that many well-paying services jobs are threatened by imports, adding to longer-standing concerns about manufacturing jobs.[5] While reiterating its engagement to the wider processes, the response of the US has been to move ahead with many bilateral agreements with partners as diverse as Australia, Central American countries and Morocco. These agreements contain some innovative features, including the protection of workers' rights, but there is little sense in which they help the US address strategic economic issues, such as the emergence of China, India and Brazil as powerful competitors or the promotion of more dynamic ties with its two NAFTA partners, which together dwarf other regions as a destination for US exports.[6]

It is abundantly clear in any event that many economic problems in the three NAFTA countries — such as the effects of the September 11 tragedy or the surge of imports from China — have causes extraneous to the free trade agreement. Indeed, NAFTA almost certainly has helped to sustain economic performance overall. It is widely touted, for example, as having been a stabilizing factor in Mexico following that country's politically controversial financial collapse in late 1994, allowing foreign direct investment to return quickly and trade to continue relatively unimpeded.

Furthermore, it is also very likely that some of the causes of disappointing economic performance lie in the inadequacies of NAFTA itself (with its numerous exceptions and complex rules of origin) in creating a truly open trading environment. One could argue in that vein that more effort to open up and streamline key trade-related services, such as transportation across North America, would significantly boost the economic benefits of NAFTA (Brooks 2003; Curtis and Chen 2003). In short, there is an excellent argument to be made that, to capture the full benefits of NAFTA, trade should be more completely liberalized; however, given the economic mood in all three countries and ongoing concerns about the

5. Indeed, the latter issue led to participants in a forum organized by the Brookings Institution to call for a complete examination of the basis of US trade policy (Brookings Institution 2004).

6. C. Fred Bergsten, Director of the Institute for International Economics, recently commented that the US choice of these bilateral partners was arbitrary. They were, he said, designed to minimize domestic opposition to the agreements rather than maximize domestic support, and offered little impetus to "competitive liberalization," defined as a strategy "in which multilateral, regional, and bilateral agreements reinforce and catalyze one another" (Bergsten 2004, 94-95).

impact of open trade despite its obvious successes, one cannot be optimistic about the traction of this argument.

B. Trade and Domestic Priorities

In addition to looking at the role of NAFTA as an economic engine, it is necessary to address the portrayal, by many opponents of more open trade relations, of NAFTA and other trade agreements as inimical to governments' legitimate pursuit of other important priorities. Opponents of trade agreements take specific instances where negative effects have occurred — such as trade-related environmental stress or the displacement of workers in an industry by more competitive foreign products — as demonstrating that the overall impact of trade liberalization itself is negative.

They commonly evoke "worst-case" scenarios, whereby more open trade will lead to a "race to the bottom" among jurisdictions that are competing to attract investors and jobs by relaxing labour or environmental standards, or by cutting taxes and the social programs they fund. Opponents also warn that trade agreements — intentionally, or unintentionally as a result of poorly worded commitments or rulings by rogue dispute settlement panels or tribunals — often constrain the ability of governments to act in the public interest. Many opponents argue that trade agreements lead to a democratic deficit, whereby elected officials and trade negotiators give too much weight to what are said to be the views of the business community and not enough to the views of the broader polity. Notwithstanding such claims, however, the empirical record does not show that the overall consequences of openness to trade and investment are negative.

As with any changes of a technological, social or policy nature, there will be winners and losers among individuals when a country's economy is opened to more international trade and investment. For example, a more open market may have been a factor, one of many, resulting in lower wages for less skilled Canadian workers (see Schwanen 2001b). This negative consequence, however, must be weighed against open trade's positive impact on productivity and overall standards of living. No necessary logic dictates that economies that are more open to each other will see a convergence of their labour or social standards, although, as Boychuk (2002) notes, such convergence is, of course, an empirical possibility. Indeed, Gitterman (2002) suggests that, instead of a "race to the bottom," globalization has fostered an incremental "march to a minimum floor" in labour standards, with a great deal of heterogeneity among countries above that minimum. Lammert (2004), confirming a number of earlier studies, concludes that there is no empirical support for the notion that tax levels are being driven by globalization. Similarly, with respect to environmental issues, rising trade volumes and changing trade patterns can have negative environmental effects in specific areas, although these can be mitigated through appropriate policies (see ICF Consulting 2001;

Vaughan 2003). At the same time, however, the higher incomes in more open economies can also result in the adoption of cleaner technologies, which can lead to lower pollution overall (see Antweiler et al. 1998).

In summary, one can say with some conviction that the realization of legitimate public objectives tends to be thwarted far less by the openness associated with globalization than by governments' own bungling of policies within their control (see Weiss 1998). It is true that the ire of environmentalists was raised by a number of dispute settlement panel decisions under the General Agreement on Tariffs and Trade (GATT), WTO and NAFTA that went against certain measures taken in the name of the environment. An exegesis of the GATT and WTO panel decisions concerning trade restrictions introduced for health or environmental reasons shows that, indeed, under trade agreements, governments may need to provide some justification, other than protecting a domestic industry, before imposing a trade restriction. And import bans are to be a last resort and must be results oriented. Nevertheless, trade agreements leave governments free to set their own levels of health or environmental protection, including zero risk (Hoberg 2001).

With respect to the effects of NAFTA's Chapter 11 protection of investors against expropriation without compensation and other forms of unfair treatment, it is important to distinguish between the sometimes fanciful claims of private companies and the much less numerous and costly decisions actually rendered by arbitration panels. The unsettling possibility of undemocratic impediments to governments' ability to regulate in the public interest remains mostly a matter of speculation about future decisions, even if some panel decisions seem to invite such speculation. On that score, governments can and do address such unwanted consequences by clarifying their original intentions as to the effect of Chapter 11. Nonetheless, both defenders and critics of Chapter 11 can agree that procedural reforms aimed at more transparency and greater participation by citizens in the dispute settlement process would be worthwhile.[7]

To sum up, the past few years have shown that open trade is not always by itself an engine of growth and higher standards of living, but it does provide more opportunities for both to be realized. Concerns about the impact of open trade on domestic policies are clearly exaggerated, but they understandably strike a chord because they pertain to the legitimate role of governments to protect and act in the interests of their constituents. Thus, the economic argument for more open trade needs to be aligned, in fact and in the public's mind, with other priorities such as the environment, economic and physical security, foreign policy objectives and democratic control. The successful fostering of further economic linkages requires a project that is not seen as solving the problems of a few special interests.

7. For a discussion and debate on these points, *See* Soloway (2003) with comments by Tollefson.

Greater openness, if tackled correctly, can enhance rather than restrict policy choices and outcomes. Questions about the future of North America may echo differently in Canada, Mexico and the US, but there is little doubt that the three countries can influence their future together for the better by encouraging mutually beneficial linkages — it is well understood in the US, for example, that Mexico's economic development is linked to the United States' economic security writ large.

Thus, my own feeling is that, with interdependence among the three countries having increased across the board, the dialectic between each country's domestic and external priorities will open the door to formal considerations on how to make the region work better. At that point, North American integration — already a series of market and cooperative processes sustained by rich relationships and spanning much more than strictly economic issues in the three countries — may once again become a project that governments will encourage in order to enhance benefits for North Americans and, indeed, for others.

C. Canadian Proposals

The necessarily brief *tour d'horizon* in the two previous sections outlines some key aspects of the current North American challenge. Many prominent Canadian analysts, such as Wendy Dobson (2002) and Michael Hart (2004), argue that NAFTA is insufficient to deal with that challenge. In line with that thinking, a number of different ideas have been put on the table in Canada, as well as in the United States and Mexico, as to what the next steps should be to strengthen linkages among the three countries. Some of these proposals have come about in response to the events of 9/11, but the outlines of many were beginning to circulate before then. Central to the strategy underlying many of the Canadian proposals is the notion that only an offer of a "grand bargain" on Canada's part would carry the necessary political weight in the US to spur interest in fostering integration beyond NAFTA. Other analysts argue that we should be wary of new supranational institutions (Wolfe 2003); or that we should be careful not to discard the advantages and identity that the border provides Canada (Helliwell 2002); or, from a US perspective, that the political battle in the US for a grand bargain between Ottawa and Washington would be much tougher than some assume (Barry 2003).[8] The spirit in which steps should be taken may well lie somewhere between optimism about abolishing the effects of the border and caution about the feasibility or desirability of eliminating differences that matter. In any event, I agree that for any plans for a substantial rethinking of the relationship to succeed, interest must be triggered at the highest political level in the US. After all, if such renewed political will were not needed,

8. For an excellent overview of the various sides of the Canadian debate and proposals emanating from it, *See* Goldfarb (2003) and the journal *Ideas That Matter* (vol. 2, no. 4), edited by Mary W. Rowe, many articles of which are cited separately in this paper.

many cross-border issues would simply be addressed within the current institutional framework, since NAFTA contains mechanisms to deal with a number of issues related to labour mobility, transportation standards, competition policy and tariffs.

On the other hand, the possible terms of a grand bargain would have to be carefully examined. Certainly, on the security front, many very significant changes are being made without reference to a grand bargain involving other issues — they just had to be carried out for their own sake in the face of new realities and for trade to continue to grow. It may also be that a pragmatic approach focused on a single problem, such as transportation issues or border infrastructure, is the key that could unlock both greater prosperity and security. And although most of the better-known Canadian proposals involve a bilateral deal with the US, with Mexico perhaps joining later, such proposals might not capture US attention — some of the boldest proposals for facilitating greater integration, such as those of Robert Pastor (2001), have emanated from the US and stress a trilateral, rather than a bilateral, community. And, of course, Mexico may well react to the possibility of closer US-Canadian ties by requesting some parity, which would be difficult for the US to reject.

- I believe there are several important reasons, other than capturing attention in the US, for Canadians to begin thinking now about dealing trilaterally with the issues:
- The movement of people between Mexico and Canada is becoming increasingly consequential.[9]
- Mexico's economic importance is likely to grow, despite its difficulties, and Canadian direct investments in that country, while still fairly small, have grown much faster than total Canadian direct investment abroad (Canada 2003b, 66-67).
- Recent audits reveal that Canada's exports to Mexico are approximately double the amount that official statistics show, since most transshipments through the US are counted as exports to the US (60).

Mexico is an important competitor for Canada in the US market, and both Canada and Mexico need to be able to play in that market under common rules, a point Watson (1993) made in the context of the NAFTA debate.

Another point that often surfaced at the time of the NAFTA negotiations, but that is perhaps even more salient today, is the strategic importance of demonstrating that common game rules can work with a country with significantly lower incomes, particularly in light of the difficulties experienced in multilateral trade negotiations.

Furthermore, as discussed above, negotiations on further North American integration will have to consider the interaction between commercial

9. This is not just a work-related issue — in 2002, Mexico overtook China as the third largest source country for people allowed into Canada on humanitarian grounds (Canada 2003a, figure 16).

relations and other issues of interest — such as security, immigration, development and the environment — as well as implicating a broader cross-section of the populations of all three countries in the benefits of integration and in decisions concerning that process. The traditional model of give-and-take trade negotiations is not likely to be suited for considerations of such a wider-encompassing community.

Bearing these considerations in mind, this paper sketches, in the form of a draft treaty, a new direction in which governments might wish to steer their relations. The idea of a treaty, evoked by some prominent Canadian commentators (Segal 2002; d'Aquino 2003), is solemn enough both to capture the imaginations of lawmakers and to engage those involved in or affected by the integration process in all three countries. But, as I hope to show, it is also flexible enough to provide a framework for future beneficial interaction and cooperation among the three countries on the series of interrelated fronts mentioned above, despite their significant differences.

In the next section of the paper, I describe the basic roadmap for a successful treaty by elucidating the foundations and principles that should underlie it, as well as some of the terms used in the draft text that I subsequently present. I then describe, explain and illustrate the specific articles that the draft treaty should contain. In the final substantive section, I present the suggested text of the treaty.

III. MAPPING THE ROAD WE SHOULD TAKE

The first requirement of a treaty to create a dynamic for greater integration among Canada, the US and Mexico is that it should not seek to be a one-stop, once-and-for-all solution to all the existing and future problems and requirements of the management of integration. Rather, such a treaty should be, for the most part, in the nature of a framework agreement. It should be compatible with a step-by-step approach in areas where such an approach is best suited to making progress, and it should not carelessly supersede existing processes and relationships that work well or stifle existing work ongoing in many areas to map and strengthen these processes and relationships. At the same time, the treaty should impart a new direction to the relationship, toward what I have elsewhere called "full interoperability" among the countries where lack of adaptation to one another's systems and needs in crucial areas — such as economic transactions, security, infrastructure or environmental policy — could entail serious losses (Schwanen 2001a).

A. A Community of North Americans

Most commentators agree that Canada, the US and Mexico so differ in size, political institutions, stages of development and the kinds of bilateral issues with which they are concerned that an approach to integration along the lines of that adopted by the European Union would be difficult to contemplate. At the same time, in many of the daily interactions

across their borders — personal, cultural, commercial, as well as exchanges between regulators, subfederal governments and civil society actors writ large — the respective size of the three nations and other differences among them play only a secondary role. In short, the foundations of a community exist that, to some extent, cut across the inherently unequal relationships among the three federal states. That community, if it developed more fully, would thus unlikely be a "North American community" formed of three inherently unequal countries, but a "community of North Americans," within which governments would facilitate increasingly unencumbered and fruitful relations. Building such a community would require, among other factors, the involvement of governments and lawmakers at all levels, and it would have to ensure that most individuals, businesses and civil society groups perceive that they have a stake in creating better North American linkages. One important corollary of a treaty that does not seek to build from the top down is that each country's accepted domestic legal principles should be evoked where possible; legal radicalism should be avoided. In the same vein, the treaty should appeal to proven modes of cooperation in the North American context — modes that promote interface and comity, rather than substituting themselves for domestic laws and processes. Good examples of what I mean are the Permanent Joint Board on Defense, first agreed to in 1940 by the US president and the Canadian prime minister, or the International Joint Commission, set up under a 1909 treaty between Britain and the US to deal with Canada-US boundary waters issues.

B. The Security Foundation

Clearly, one of the foundations of any community must be security, writ large. Indeed, an acceptable degree of security is so fundamental that it cannot be traded off for some improved degree of market access or for other forms of neighbourly behaviour between jurisdictions. And, in fact, in the wake of September 11, the three countries have taken significant measures to ensure greater security in North America without attempting to link them to negotiations about enhanced market access — although the threat that poor security poses to the integrity of existing trade channels is very much on everybody's mind as they implement the changes.

Even as security initiatives proceed in their own right, a treaty of the scope I envisage should contain an up-front acknowledgement that a mutually acceptable outcome of such initiatives is a *sine qua non* for the emergence of new, more fruitful North American linkages. Furthermore, as I argue elsewhere (Schwanen 2003), for both Canada and Mexico, the need to make a net positive contribution to North American security is a question not only of substance, but of perception. Specifically, to the extent that some Americans perceive that Canada and Mexico are security risks or that they are not pulling their weight on security issues, it is important that such perceptions, when they are unfounded, not be allowed

to disrupt Canadian and Mexican access to the US market. Accordingly, the draft treaty should include a general but strong commitment that the parties to the treaty will look out for each other, despite their differences — at times, even because of them. In this vein, the treaty proposes some general sets of principles and specific measures that are consistent with other initiatives under way in this area and, more important, that build on established principles and practices that are acceptable to the three countries.

C. Fair and Open Economic Linkages

One of the most important aims of the treaty would be to move toward a more dynamic and secure economic union, while better integrating the market-access dimension — the stuff of traditional trade negotiations — with other dimensions of a "community," notably those concerning security issues, access to the benefits of trade and the management of our common environment. It is important to note, however, that the treaty would not require the reopening of NAFTA, even though, as mentioned, some prominent commentators view that agreement as an increasingly inadequate framework for economic exchanges within North America. In part, this is a defensive posture, to avoid rushing "once more into the breach" against old chestnuts such as trade remedy laws, agricultural subsidies, restrictions on marine cabotage or blanket exemptions for cultural industries. In any case, the petty nationalism and rent seeking that such traditional irritants represent are increasingly out of touch with the needs and aspirations of emerging generations. Accordingly, leaving these kinds of issues in abeyance for now in order to allow productive linkages to form in other areas would, in due course, allow them to be addressed on a principled basis after a more meaningful context for resolving them has been built. Consistent with a broad view of what constitutes a community, the proposed treaty does not hold up "free trade" or "mobility" as values unto themselves. Instead, it refers to "fair and open" commercial relations and to a certain conception of "economic citizenship." Specifically, it emphasizes the principles underlying existing competition and anti-trust laws in each country; it attempts, within the ambit of applicable immigration laws and labour-related standards and practices, to expand the ability of nationals and enterprises to seek and give work; and it provides for a cohesion fund to foster development. However, the treaty also reaffirms governments' legitimate role of legislating and regulating in the interests of their constituents, although it stresses that governments should do so in reasonably nonrestrictive and nondiscriminatory ways.

The economic heart of the treaty rests on the elaboration and extension over time of these and other mutually accepted principles, which the signatories would agree to work toward with the help of a commission. The commission would have neither executive nor legislative powers, but it would have the role of producing a document similar in intent to the European Commission White Paper (Commission of the European Commu-

nities 1985), which set out a principles- based program for completing the Single European Market. This program was approved unanimously in 1986 when the then-12 members of the European Community signed the *Single European Act* (Leach 2000). The exercise proposed here for North America does not emulate the goals of political union that were inherent in the European effort, and would not need to do so to be successful. The proposed treaty is not, however, all about principles to be applied in the future. Rather, it seeks to introduce immediately some "community-friendly" requirements in the application of administrative and commercial law in the three countries and in the practice of domestic agencies. At the same time that it shuns enforced convergence, the treaty encourages a form of regulatory competition not strictly defined by borders between sovereign countries. The idea is to make these borders more fluid and functional where they need to be — for example, by acknowledging and taking advantage of cross-border networks and clusters — without sacrificing the ability of governments to regulate according to the wishes of their constituents.

D. Building a Broad Basis for Agreement

Does the expression "fair and open trade," which I used above, constitute a step back from the progress achieved to date in reducing trade barriers within NAFTA and, indeed, globally? If one considers only the "fair trade" part of the wording, there is indeed a danger that this might be so. Many of the most vocal critics of trade agreements — as well as those who favour maintaining trade remedy laws and other restrictions as a condition of supporting particular trade agreements or who wish to impose particular standards in the name of "fair trade" — are concerned mostly about shielding their constituents (whether businesses or workers) from the impact of beneficial transactions that would otherwise take place between willing parties. In effect, they would foist their constituents' products on consumers who might not want them. Anti-dumping laws, for example, often punish foreign companies for engaging in practices that would normally be acceptable domestically (Bovard 1991). Moreover, as discussed earlier, those who oppose free trade agreements are often drawn to the perception that free trade harms the environment, exploits or demeans workers and imposes rules on polities that would not choose them democratically (see Ransom 2002 for a clear exposition of that view). Indeed, this perception may be widespread enough to obstruct the emergence of a broader constituency in favour of more open economic ties. Accordingly, any integrated project such as the one I describe needs to engage, not just business interests, but also consumers, environmentalists and civil society more generally if it is to succeed. This is an ambitious aim, but necessarily so. Most free traders do, in any event, believe that open exchange (within certain conditions) promotes human and economic development and does not harm the environment. So we should be willing to address those issues explicitly, rather than fall

back on an abstract concept of "free trade" that, like "fair trade," is prone to manipulation — as is evident from the many barriers and exceptions entrenched in current free trade agreements.

In any case, some key trade-related issues — such as intellectual property rights, the protection of investments against expropriation or Third World food and textile producers' lack of access to rich markets in the developed countries — are already debated in terms of what is "fair," not just what is free of restrictions. In addition, many countries (including the three NAFTA partners) have competition and anti-trust policies that are concerned with whether or not many commercial practices are "fair." Most such policies are intended to support the economic concept of the efficient operation of markets, though they also have roots in other societal values (Ragosta and Magnus 1996). Progress toward more productive linkages in North America will require finding a way around economic interests entrenched at consumers' and taxpayers' expense, but without sacrificing — rather, in the hope of enhancing — social cohesion. Relying on the concept of "fairness," including that found in competition and anti-trust laws, addressed in a context broader than that of a traditional and adversarial trade negotiation, may be useful in this respect.

IV. AN EXPLANATION OF THE DRAFT TREATY

The Actual Text of the Proposed Draft Treaty is presented in the next section. Here, however, I outline, explain and, in some cases, illustrate the intent of each article of the treaty, and offer my reasoning for the choice of measures the treaty includes. In the language of the treaty, the three federal governments of Canada, the US and Mexico are referred to as the "parties" (the word is also sometimes used to refer to the countries as a whole), while "signatories" refers to all governments that sign the agreement, which would include willing states and provinces. The treaty may refer to the parties, signatories or both in the same article or even paragraph, but the terms are not interchangeable. It should also be noted at the outset that the draft text follows NAFTA's definitions of enterprises and nationals (contained in NAFTA Article 201).[10]

10. Thus, *enterprise* is "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association"; *enterprise of a Party* is "an enterprise constituted or organized under the law of a Party"; *national* is "a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex 201.1." In turn, Annex 202.1 says that the definition of nationals includes, with respect to Mexico, "a national or a citizen according to Articles 30 and 34, respectively, of the Mexican Constitution" and, with respect to the US, a "national of the United States" as defined in the existing provisions of the *Immigration and Nationality Act*.

A. PREAMBLE

The preamble sets out in very broad terms the purpose of the treaty. Essentially, the treaty is intended to strengthen the useful aspects of the North American partnership, by fostering more supportive and open relations among the three countries, by promoting official behaviour that recognizes the importance of interdependence among them and by ensuring a more widespread distribution of the benefits of the relationship. These goals should be accomplished without closing doors to the rest of the world, with the help of existing mechanisms that work well among the three countries (rather than by replacing them) and with due respect for each country's constitution and the prerogatives of its legislature. The treaty formally recognizes the role of subfederal governments in fostering a sense of community among North Americans, and seeks to involve citizens and legislators more directly in the affairs of North America without compromising the differences that people consider important to preserve.

B. ARTICLE I: MUTUAL SUPPORT AND COOPERATION

Article I presents a clear, principled understanding that mutual support and cooperation on the part of signatories to prevent certain types of threatening events from occurring on the territory of any of them is the basic building block for facilitating a more fruitful relationship among them. The article specifies three areas in which the parties pledge their mutual support and cooperation: to prevent illegal violent acts in any of the parties' territory and to apprehend those involved in such acts (paragraph 1); to give due diligence to preventing the commission, through one's own territory, of acts on another party's territory that would be illegal there (paragraph 2); and to prevent the circumvention through one party's territory of restrictions that another party applies to trade (such as customs duties) or the movement of people (such as visa requirements) with a third party (paragraph 3).

In practice, paragraph 1 means, most obviously, cooperation in preventing terrorist acts and bringing those involved to justice. The commitment expressed in paragraph 2 would be especially meaningful where one party's authorities express concerns that another party's different legal or market regime could encourage activities that are illegal on its territory. In practice, this would mean that Canada would watch for (and commit resources to prevent) possible infringements from its territory of, say, US laws concerning sales of pharmaceuticals or other drugs that are illegal in the US, while the US would keep an eye out for infringements from its territory of Canadian gun or conservation laws. The commitment in paragraph 3 would become operational if, for example, the US applies restrictions such as anti-dumping duties on trade with a third party or imposes new visa requirements on nationals of a third country. Under this paragraph, Canada and Mexico would formally agree to prevent the circumvention of US measures from taking place from their territory, even though they themselves may not apply similar measures

toward the third party; of course, in cases where all three countries apply the same measure, the commitment would be redundant.

These commitments are meant to modernize an existing fundamental principle of neighbourliness between Canada and the US concerning their defence relations and to expand it to security concerns in general. US president Franklin Roosevelt stated this principle in 1938 when he declared: "the people of the United States would not stand idly by if domination of Canadian soil is threatened by any other empire." Canadian prime minister William Lyon Mackenzie King reciprocated a few days later by stating: "We, too, have our obligations as a good friendly neighbour, and one of them is to see that. . .should the occasion ever arise, enemy forces should not be able to pursue their way either by land, sea, or air to the United States from Canadian territory" (Mason 2003, 2). The commitments in this article are also consistent with many existing security agreements and initiatives between Canada and the US, such long-standing export controls of sensitive technology, the Smart Border Action Plan initiated at the end of 2001 and coordination between Transport Canada and the US Coast Guard of their maritime security operations.[11]

In paragraph 4, each party is prevented from imposing on another party specific "levels" or guarantees of low-risk security that it would not be willing to implement on its own territory or citizens. In the current context, this would mean, for example, that Canadian and Mexican nationals — their governments having fulfilled their general security obligations under Article I and the specific ones following in Article II — would not be subject to, say, an onerous entry-exit visa system imposed by the US, unless it became clear either that Canada or Mexico were unable to provide a comfort level on security comparable to that prevailing at US ports of entry or that the US was imposing similar requirements on its own nationals as they leave or re-enter that country. Implicit in this commitment is that the US would address any important vulnerabilities in its own security systems before asking its neighbours to bear the cost of any security improvements that might, in fact, be less useful than improvements in the US's own procedures to prevent threats to any of the parties.

Finally, paragraph 5 specifies that any measure a party takes to conform with its general obligations under Article I must also conform with its domestic laws, particularly those related to the security and integrity of persons. In other words, the paragraph is intended to ensure that commitments the parties make under the treaty do not trump domestic laws.

It may be more difficult for Mexico than for Canada to enter into such security commitments, given what Serrano (2003, 47–48) calls "the depth of Mexico's alienation from the US" and a pattern of difficult relations between the two countries precisely when cooperation is most warranted

11. On the latter and on the upgrading of securityat Canadian ports, *See* Chase (2004).

on normative and practical grounds. It is certainly in contrast with Canada's long-standing relationship with the US on military matters, for example — although Serrano makes it clear that the US and Mexico historically have found ways to co-operate formally on issues of common strategic interest, if often with uneven results.[12] The draft treaty proposed here would likely entail, for example, an increased commitment on the part of Mexico to control illegal immigration to the US both by its nationals and by others through Mexico. But such a commitment could be significantly less onerous in both a pecuniary and political sense if it were accompanied by a program to regularize economic migrants, as Article V (Economic Citizenship) of the treaty proposes. Fundamentally, Article I reiterates the protection that highly integrated neighbours owe one another against possible threats to the integrity of their laws, just as closer economic integration has increasingly entailed closer cooperation on security-related issues elsewhere in the world (in the European Union and between Australia and New Zealand, for example). Indeed, the commitments under Article I do not require the convergence of domestic or foreign policies nor do they condone the extraterritorial application of laws. In fact, they do quite the opposite, since signatories are required under certain circumstances to help another party apply its own laws. As in the 2002 Canada-US "safe third-country" agreement on refugees, these commitments recognize the legitimacy of the applicable laws in other parties, including those covering the treatment of third-party nationals. Thus, they represent the principles of comity and mutual recognition, rather than the unnecessary convergence of standards.

C. Article II: Security

Article II spells out specific commitments the parties would undertake to fulfill the more general provisions of Article I. Paragraph 1 describes a modified version of a "North American Customs and Immigration Force," originally described by Pastor (2001, 121–22), the mandate of which would be to prevent the kinds of acts described in Article I. Implicitly, this would require members of the force collectively to understand and protect the integrity of the relevant laws of each country as they apply both domestically and toward third parties. Explicitly, although the force would be composed of three national sections for administrative purposes, its members would be expected to work together in all three countries as necessary, in an extension of the existing practice whereby Canada and the US place customs officers in each other's ports. This idea is compatible with existing Canadian government plans eventually to "jointly police North America's ports, airspace, border crossings and roads" (Chase 2004).

Building on the question of specific levels of security addressed in Article I, paragraph 4, paragraph 2 of Article II means that if a party decides

12. Serrano cites the 1941 Joint Defense Commission, NAFTA, and the 2002 Border Partnership Plan.

to introduce measures to ensure that its nationals are not carrying fraudulent documentation, it is entitled to demand that the nationals of other parties carry similarly secure identification as a condition of letting them cross its border. Paragraph 3 establishes a process through which legislators in each country could review formally other parties' changes in laws, border policies or relations with third countries that might affect how they are able to fulfill their obligations under Article I. This process is inspired by, among other examples, the requirements for environmental review of certain domestic legislation and public projects. On their request, legislators from other parties would be given standing in the review process. The process could be applied to items as diverse as Canada's planned decriminalization of possession of small amounts of marijuana, funding for border security or changes in visa policies.

In paragraph 4, the parties agree to submit their specific treaty commitments, as well as their security practices generally, to the periodic scrutiny of a tripartite committee of security auditors for an opinion on whether serious security threats are sufficiently addressed. The audit committee would identify potential breaches and recommend remedial action if necessary. A party that did not address the committee's concerns could find itself not in compliance with the treaty — and, implicitly, under paragraph 6, would be unable to partake in its benefits. The aim of such a measure is to create a truly North American understanding of security needs and measures, and ongoing monitoring of commitments in this area. Apart from the objective benefit of establishing a high level of security compatible with more open linkages, a security audit committee would also help to address any perception of laxness that risks damaging the North American relationship in areas other than security.

Under paragraph 5, however, if one of the countries perceives that another party will not or cannot prevent an immediately threatening event defined under Article I or that another party persistently fails to conform with Articles I and II, it may suspend privileges that enterprises and nationals of that other party enjoy under the treaty. Suspended privileges are to be restored once the threat has been removed, is no longer immediate or the other party complies with its obligations.

D. Article III: Fair and Open Commercial Relations

From the point of view of trade and commerce, Article III is the most dynamic part of the treaty. In a nutshell, the treaty affirms certain simple but powerful principles that the three countries already consider appropriate. The treaty then sets up a trilateral transborder commission (described under Article IV below) to consider how to extend those principles across borders and to apply them more consistently where they might be lacking in the multiplicity of cross-border exchanges that take place.

Article III begins conservatively by affirming, in paragraph 1, the continuation of NAFTA in its current form for the present. However, that

agreement, despite its name and its many pioneering elements, allows for a large number of derogations from free (and, some would say, fair) trade. Accordingly, with the wording "continue to strive," paragraph 2 casts NAFTA in its historical context and implicitly opens the door to broadening and establishing a more principled basis for the conduct of commercial relations in North America.

In paragraph 3, the parties make it clear that the more open commercial relations they seek should not contradict the rights and obligations of duly elected governments to act in the promotion of public policy objectives. In short, the commitment to facilitate commercial relations is not about changing the overall balance between private rights and public interest in any particular jurisdiction. The paragraph cites as examples important areas of legitimate government intervention that would probably garner support in all three countries.

It is important to note that the idea that governments ought not to be restricted in their ability to pursue legitimate public policy objectives does not contradict the spirit or, in the vast majority of cases, the letter and the practice of existing trade agreements. A clear, logical distinction can be made between the objectives a government pursues and the instruments it uses to pursue them. Trade agreements are concerned with limiting the use of specific instruments to block the entry of goods or services produced in other countries for no other reason than that they are produced there. Trade agreements are also concerned with providing a fair and transparent playing field once foreign goods, services, people and investment are allowed to enter. Naturally, therefore, trade agreements are also concerned with how governments deal with foreign entities more generally. At the same time, it is increasingly understood that the fulfillment of a legitimate government objective may require exceptions to otherwise applicable rules of international commerce. Many such exceptions are already spelled out in trade agreements – for example, GATT Article XX (General Exceptions) states that the agreement is not to be construed as preventing the adoption or enforcement of measures to protect health or the conservation of exhaustible natural resources. Thus, paragraph 3 of the draft treaty also mirrors a fundamental principle that WTO members have already agreed to include with respect to future liberalization of trade in services – namely, "members' right to regulate and to introduce new regulations on the supply of services in pursuit of national policy objectives" (World Trade Organization 2003, 37). In short, the draft treaty reaffirms the ability of governments to act fully in the public interest as barriers to fruitful economic linkages continue to fall within North America.

Given the many instruments governments have at their disposal to achieve policy objectives, they should be encouraged to use those that are the least restrictive to commerce if "fair and open trade" is also agreed to be a worthy goal. To that end, in paragraph 4, the signatories would agree not to discriminate – in their policies or rules governing commercial

or public-private sector transactions – based on the nationality of each other's enterprises. Such discrimination would be acceptable, however, if it was also allowed between a party's subfederal jurisdictions – that is, if it was not strictly a matter of crossing international borders but was considered acceptable between nationals of the country where the restriction was imposed (for example, franchise laws in US states requiring that automobiles be purchased through local dealers). Discrimination would also be allowed if no other reasonably available, feasible or significantly less discriminatory measure could achieve the policy objective.[13]

This general commitment to nondiscrimination by the parties is not meant, however, to override exceptions to existing commitments under NAFTA and the WTO. Rather, the immediate aim is to establish a reporting system for government measures that significantly discriminate between businesses on the basis of nationality. For example, the treaty would require the parties to list the many subfederal discriminatory measures that were grandfathered under NAFTA. The parties would then strive, on a voluntary basis, to bring those measures into conformity with the treaty, unless there were other grounds under the terms of the treaty that allowed them to continue indefinitely.

Article III then moves on to rules of competition. Paragraph 5 refers to NAFTA Chapter 15 (Competition Policy, Monopolies and State Enterprises) as the basis from which to contemplate broadening the rules of fair competition. That chapter stresses the importance of cooperation and coordination among the competition authorities of the three countries, given their increasingly integrated markets.

The paragraph begins by introducing a "fair trade" designation for industries that agree by *mutual consent* to refrain from launching antidumping actions against producers within the NAFTA zone. In order for an industry to gain such a designation, each country's competition authorities would have to declare that it meets their standards for fair competition. The designation would also have to be approved by producers representing a preponderance of output in each country, and could be changed only if the competition authorities – at the behest of an industry in one country, for example – revised their view of the compatibility of competition regimes.

The next subparagraph moves a step beyond the bilateral agreements the NAFTA partners, building partly on NAFTA Article 15, signed to facilitate cooperation among them on competition policy issues. These agreements already include commitments to co-operate, exchange information and allow a party to request that another's competition authority initiate enforcement measures when its own important interests are affected by a violation of competition law in that other country (see, for

13. This wording mostly follows Australia's proposal that the General Agreement on Trade in Services include a necessity test on domestic regulation "to ensure that qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services."

example, Canada 2001). Under NAFTA, a decision on that request is left to the discretion of the authority receiving it. In the draft treaty, however, the parties would commit their competition authorities to investigate, at the request of another party, practices that the other party considered were best handled by those authorities.

Beginning with paragraph 6, Article III addresses instances when the government-mandated structure of the market in one country prevents or limits access to providers of goods and services from another signatory country. The list in paragraph 6 covers a wide range of sensitive industries and practices, including state-imposed monopolies, ownership restrictions, large chunks of Canada's health care system, drug pricing, agricultural tariffs and environmental rules on mining and logging. Broadly speaking, these practices, when they differ among countries, create de facto barriers to people, products and firms in one country from operating in another, and they can also be seen as a source of unfair advantage. Most such differences are not illegitimate per se under the exceptions and other provisions of existing trade agreements, although some practices, such as state-owned monopolies, will be subject to certain disciplines. However, as Canadians have seen with respect to such issues as lumber, the Canadian Wheat Board, periodicals and crossborder purchases of relatively cheap Canadian pharmaceuticals, none of the practices inherent in different countries' systems is immune to frictions or challenges.

Paragraph 7 seeks to provide an impetus to continuing discussions on whether and how any of these impediments should be addressed. There is no presumption here that a particular structure — for example, one calling for state ownership — is inherently better than another. The parties would, however, commit to an ongoing dialogue about the broadly defined competition policy orwider public policy justification of such measures.

For example, does a government-mandated structure that prevents foreign presence in the marketplace contribute to lower prices for consumers or otherwise strengthen economic efficiency or reduce risk relative to a situation where foreign competitors are allowed in the marketplace? (This question might be applied, for example, to public automobile insurance or the Canadian Wheat Board.) Or is such a government-mandated structure necessary to achieve broader legitimate public policy objectives, such as universal and accessible health care, access to domestic cultural products and information or encouragement of small business? Do restrictions on marine cabotage and broadcast ownership still contribute to national security? Unless a party can offer a reasonable justification for keeping NAFTA nationals out of one of its markets, it would be required to offer some measure of openness to other parties involving some increased presence in that marketplace.

When an industry operates with heavy public subsidies and other industry specific forms of support, other parties may retaliate with offset-

ting duties or other measures, but paragraph 9 provides relief only to the extent that subsidies in the alleged offending country exceed those in the country of the industry seeking relief. Furthermore, under paragraph 10, the treaty commits all signatories to implement a code of conduct on subsidies affecting trade and investment flows among them.

Paragraph 11 calls for the elimination of existing duties among the countries. As these mostly concern agricultural products, negotiations on reducing tariffs are predicated on the establishment of the part of the proposed Cohesion Fund (Article VIII) devoted to rural adjustment.

Paragraph 12 does not reject a customs union out of hand — indeed, it and paragraph 13 encourage less paperwork at the border and increased tariff and nontariff harmonization, as Hart (2004) and others advocate. In fact, the three NAFTA governments are currently conducting consultations on tariff harmonization and the liberalization of NAFTA rules of origin. The treaty implicitly suggests, however, that a customs union would be a poor objective because it would not inherently address many issues, such as labour mobility, trade in services, regulatory interoperability and restrictions on investment, on which the benefits of integration also depend. In any event, talks on a simple customs union would begin with a serious political handicap regarding enforced trade policy convergence on agricultural products or vis-à-vis third parties. Other deep integration arrangements — such as that between Australia and New Zealand or between Switzerland and the EU — provide for close interaction on many aspects of integration without requiring the harmonization of all tariffs and quotas. Correspondingly, the treaty suggests an approach that is less neat than a customs union, but that leads to a broader and deeper approach.

E. Article IV: The North American Transborder Commission

Mindful of the constitutional difficulties and democratic deficit inherent in building new North American institutions "from the top," the draft treaty makes no attempt to give executive or legislative power to new trinational institutions or more power to NAFTA institutions to adjudicate disputes than they already possess. The treaty does, however, mandate a new "North American Transborder Commission," appointed by the three federal governments, that would perform a number of tasks, as listed in paragraph 1 of the article. If the commission deemed it necessary to uphold the obligations and principles the parties have agreed to in the treaty, it would be able to intervene in existing proceedings, such as those of NAFTA's Chapter 11 or the deliberations of each country's international trade tribunals. The commission would also play a key role, in conjunction with input from the public and legislators, in launching a dynamic process to determine steps toward further integration.

The commission this draft treaty envisages would be an official trilateral body, with a specific mandate to link with groups concerned with North American integration, similar to the "North American Commis-

sion" that Pastor (2001, 99–103) proposes but unlike Blank's (2002) less official but more inclusive "North American Alliance." But the North American Transborder Commission would differ from Pastor's scheme in several key ways. First, Pastor's commission would propose a plan for the "integration and development of North America," which the three countries' leaders would approve and then meet every six months to review. Here, the treaty would spell out the broad principles on which the new commission would devise its plan. Second, Pastor's commission, composed of distinguished individuals appointed by governments, would supervise NAFTA working groups or NAFTA commissions on labour and the environment. In contrast, the commission proposed in this draft treaty would be charged with facilitating the work of these highly specialized bodies, as needed, without acting in a supervisory capacity.

Pastor also proposes a "Permanent North American Court on Trade and Investment." However, attempts to create such a body might well run into serious constitutional challenges in all three countries. I believe it is more feasible to give the draft treaty's commission standing in existing proceedings, while leaving it to the various panels, agencies and courts to make final decisions on trade-related and other matters, as they do now. This approach is also consistent with the general principle underlying the treaty of using domestic legal principles in each country, as well as fostering greater comity between different systems, rather than creating a new, harmonized level of law.

In terms of its political feasibility, the commission I propose also seems to me to be consistent with — albeit an expansion of — an idea expressed by US Senator Max Baucus of Montana during the FTA negotiations, who said, concerning the resolution of contingent protection (anti-dumping and countervailing duty) disputes:

> In my judgment, Congress might be willing to go so far as to consider the establishment of a bilateral commission to examine disputes between the two countries. Such a commission might be modeled along the lines of the Boundary Waters Commission. However, it is extremely unlikely, in my judgment, that Congress would permit such a commission to make binding determinations, but it might endow a commission with recommendatory authority. (1987, 22–23)

In general, therefore, the commission I envisage would hold very little decision-making power, and certainly none over other existing bodies. Moreover, some of its interventions could be overridden by two out of the three governments that are represented in the NAFTA Free Trade Commission, by a twothirds' majority of the national legislature of any party or of the two otherwise advisory bodies envisaged under Article IV, paragraph 3, one representing North American civil society and the other representing North American legislators. Nevertheless, the treaty's wording of the commission's role — as a constant advocate for, and builder of future consensus around, the principles underlying the treaty

— is meant to be such that its work could not be ignored. In that sense, the commission is certainly meant to be effective.

The commission's membership would consist of individuals who are, at a minimum, knowledgeable in trade issues and law and are not in a conflict of interest with respect to the commission's mandate. Although it might seem reasonable for the commission to have an equal number of members from each of the three countries, I propose an alternative model that recognizes the economic and political weight of the US in giving that country a plurality of commissioners: four out of eight, with another presiding commissioner rotating among the three countries.

F. Article V: Economic Citizenship

Article V, on "economic citizenship," shies away from a notion of mobility rights that might evoke issues related to rights of permanent migration. Even the EU, while officially recognizing citizenship in the Union, applies the concept of mobility rights mostly to economically active persons — that is, wage earners and selfemployed professional and trades people. It does not confer a general right of residence or a right to public services and publicly financed benefits available to a state's own nationals, although the European Court of Justice has recently become more activist in extending those rights. In this draft treaty, however, which envisages no such court, and given the sensitive question of illegal migratory flows, I have tried to stay well shy of mobility rights as understood either in the EU or in national constitutions such as Canada's.[14] This is not to say that more ambitious arrangements cannot exist between sovereign countries — as in the "Trans-Tasman Travel Arrangement," which basically permits Australians and New Zealanders to "travel to and live and work in one another's country without restriction."[15]

In short, Article V focuses instead on the general aim of the draft treaty to facilitate productive cross-border linkages, and does not evoke other aspects of rights of citizenship that might more properly belong in the context of a more politically unified North America. To make that distinction even clearer, the article as worded does not apply to transactions between individuals and public entities (other than publicly owned commercial entities).

In Paragraph 1, signatories recognize the right of nationals of the parties not to be discriminated against in each other's countries when engaging in legitimate commercial transactions. Note that (as in the case of enterprises covered in Article III) this paragraph does not remove inter-

14. On mobility rights in the EU and Canada's federation, *See* de Mestral and Winter (2001).

15. Even this agreement, however, contains restrictions concerning people with a criminal record or who pose a "health concern," and was recently complemented by new social security arrangements between the two countries. *See* the New Zealand Ministry of Foreign Affairs and Trade web site, under "Australia Division," "Trans-Tasman Travel Arrangement": http://www.mft.govt.nz, retrieved December 11, 2003.

state or interprovincial restrictions that are tolerated under the laws of each country; rather, it says that such restrictions must not be more onerously applied to nationals of other parties.

Paragraph 2 aims to facilitate the provision of labour or other services or tasks across national borders provided that all applicable rules are followed in the territory where the work is being done. The signatories agree to "strive" to achieve the aims of paragraphs 1 and 2 — wording chosen because the specific measures to fulfill such commitments might take time to inventory and implement.

In the same vein, paragraph 3 aims at giving each country's nationals and legitimate permanent residents access to the employment market in that country. This general undertaking is accompanied by a more specific pledge concerning students and the immediate family members of NAFTA professionals, of those who have been transferred across the border by their employer, and of traders and investors to whom a party has granted temporary entry — whose employment opportunities on the territory of that party are currently restricted.

Again with the aim of smoothing fruitful cross-border exchanges, the signatories agree in paragraph 4 to generalize the practice of mutual recognition of professional and technical qualifications of individuals. Here, the specific example of the International Registry of Professional Engineers is proposed as a template because it is already a very advanced international project.

Paragraph 5 recognizes the need in North America for a guest worker program in some form. Such a program would require close vetting by both the sending and receiving countries of those who wish to migrate across national borders to work, but it would also make the lives of such workers easier. For example, it would allow them to work in substantially similar conditions as the local labour force, and it would make it easier for them to obtain official documents such as drivers' licences (an issue, for example, in the 2003 California gubernatorial campaign). Such a program would include some elements of Canada's current guest worker program, while essentially fulfilling the functions of the *matricula consular* issued by Mexican consulates in the United States — which are widely recognized as practical means of identification but which are also widely open to fraud.[16] The guest worker program would also address many US concerns with respect to illegal immigration, and allow law-enforcement resources to focus on what would then become a reduced flow of illegal migrants from third countries who use Mexico, in particular, as a transit point through which to enter the US. Even studies that are unenthusiastic about the prospects for a guest worker program between the US and Mexico acknowledge that it could be beneficial, assuming the close coop-

16. *See* "Half an Enchilada," *The Economist*, January 25, 2003, p. 37. The serious fraud problems that can surround the issuance of these documents were stressed by officials of the US Department of Homeland Security in response to a question by the author.

eration of the Mexican government and if complemented by more regional development in that country (Leiken 2002). Indeed, the proposal is very much in sync with President Bush's announcement granting guest worker status to illegal workers already in the US (Bumiller 2004).

As a tenet of economic citizenship, paragraph 6 gives the North American Transborder Commission, perhaps through an individual screener or ombudsman reporting to it, the ability to receive complaints from individuals as well as enterprises concerning whether the actions of a signatory run counter to its commitments under the terms of the treaty generally. However, the commission's ultimate role in such matters, while certainly public, would be solely to advise governments about possible ways to remedy a situation where it found the complaint to have merit.

Finally, paragraph 7 makes it clear that the undertakings agreed to in Article V do not require a party to change any of its laws governing permanent immigration nor, of course, does it prevent any step deemed necessary for security purposes.

G. Article VI: Direct Effect

Building on the previous article, Article VI introduces a potential new pillar of a community of North Americans by providing for more direct involvement by nationals in the application of NAFTA, the treaty itself and, possibly, any future agreement that would emerge under Article IX (Future Negotiations). Based on the work of de Mestral and Winter (2003), the article transposes into a North American context the European concept of "direct effect," whereby EU nationals can, in some cases, bring their own governments before EU courts if those governments are not acting in conformity with the agreements they have signed. (Direct effect would not apply, however, between citizens of one country and the government of another.)

Even in the EU, however, the applicability of the direct effect principle before the courts is limited to cases where governments have agreed to a clear obligation that does not require implementing legislation to become effective. Few, if any, parts of the draft treaty meet this test, but the concept would at least facilitate a discussion about the right of nationals to require their respective governments to comply with specific promises to behave in a certain way, when breaching those promises affects the way they deal with other North Americans.

Although the treaty would commit governments to examine the direct effect concept, applying it would require listing the specific dispositions of the agreements to which the concept would apply. To that end, the proposed North American Transborder Commission would be charged with submitting such a list to governments for their consideration and, of course, the direct effect principle could not apply unless the parties approved the list and secured the relevant legislative approval.

H. Article VII: Agency and Regulatory Cooperation

Article VII requires regulatory and other government agencies to conform to the principles of comity and neighbourliness that underlie the treaty or, if they cannot do so, to explain why.

The article does not aim directly at greater harmonization of specific rules, and it certainly does not intend to diminish the mandate that democratically elected governments give to domestic agencies and regulators to set standards applicable to their jurisdiction. Indeed, paragraph 1 recognizes that it is important to maintain this role, not only from the viewpoint of democratic accountability, but also because regulatory competition can contribute to better economic outcomes over time. Naturally, there will be pressures from Canadian-based firms to conform to US standards, such as those on accounting, which might imply a cost reduction for them, but this is an argument of a different order than saying that standards have to converge. Cost reductions in specific areas do not necessarily translate into more efficiency for the economy as a whole, although unnecessary differences in standards are inefficient and, increasingly, network efficiencies dictate some convergence of rules for those wishing to operate as part of a network (for example, in the electricity sector), whether or not it operates across borders.

Thus, paragraph 2 underlines that the goal is to remove hurdles to crossborder linkages as long as such action does not prevent domestic agencies playing their substantive roles. Paragraph 2 refers specifically to unnecessary discrimination in the treatment of nationals (or locals) and foreigners and, in general, to arbitrary treatment across jurisdictions. Paragraph 3 requires agencies under the signatories' jurisdiction to conform to the principles of fair and open commercial relations agreed to under Article III of the treaty. This, of course, begins to make the principles operational, but still primarily through the prism of how each individual agency and its government overseers perceive their roles. If some inconsistency with the principles of Article III emerges on the North American Transborder Commission's radar screen, the commission may begin a process, described in paragraph 4, that involves, first, a short report by the agency concerned on whether its needs and practices with respect to cooperative efforts with other jurisdictions fall within the ambit of Article III; and, second, a more important audit as to whether an agency's administrative practices do indeed conform with the principles of Article III, which might then give rise to recommendations to governments concerning such practices.

The treaty would not modify the power of domestic agencies but, under paragraph 5, the commission could intervene in specific cases to inform an agency's decision. For example, the commission might intervene at the US International Trade Administration if it had information on, say, the relevant market structure that might influence that agency's calculation of a dumping margin. The treaty would oblige the agency to respond

explicitly to the commission's intervention, though not to change its decision.

The general caution and flexibility toward regulatory issues that Article VII calls for reflects the fact that, in certain areas, it may be hard to improve on existing models of cross-border cooperation where issues are best dealt with in good faith at the level where the technical expertise lies and where ways to respond to problems are already established that are far from the sometimes messy political spotlight. Such areas might include electricity and agricultural or health issues (such as so-called mad cow disease). Agricultural issues, for example, are already subject to a detailed record of understanding between Canada and the US. In other areas, national forces are likely to remain very much at play with little regard for the well-being of the whole; it is in these areas that the need is greatest for a champion to intervene on behalf of greater deference to cross-border issues. While it is true that existing models of cooperation often result in the collusion of officials across borders — where they are often intimately aware of one another's files and protect one another's national turf against any convergence of standards that would be in the broader public good — these agency problems may be unavoidable. The commission would, however, have an important role to

Having said this, as a step toward the establishment of mutually recognized standards as the generally accepted practice and where lack of acceptance of one another's standards becomes the exception, paragraph 6 requires the commission to work with existing bodies concerned with norms and standards, and to focus on those bodies that operate in jurisdictions with substantially similar policy goals. But even straightforward mutual recognition would be difficult to achieve in the absence of an overall decision-making process such as exists in the EU because it would require recognizing the jurisdiction of a body operating outside the country. Accordingly, it is important that the commission have the ability to propose regulatory templates to reduce transactions costs across jurisdictions that share substantially similar policy goals. Indeed, it might be useful just to have an inventory of such templates and to discuss them with the appropriate regulatory agencies, not only across national borders but within countries as well.

Paragraph 7, which suggests that senior officials of regulatory agencies in the three countries swap positions on a reciprocal basis, is an idea based on a presentation by Gary Hufbauer (2002), in which he suggested that the US Federal Reserve Board could include in its deliberations nonvoting members from Canada and Mexico, with reciprocal arrangements extended to the US by the two countries. It may well be that, as presented here, the idea is carried further than Hufbauer intended.

I. Article VIII: The Cohesion Fund

Article VIII is based on the case, made prominently by Robert Pastor (2001, 135–40), for a North American Development Fund to promote re-

gional development in Mexico. More generally, it corresponds to the objective of encouraging all regions of North America to participate more fully in the benefits of an integrated continental economy.

Pastor's case is built, in part, on the recognition that increased trade between Mexico and the US will not, in itself, reverse the illegal migration flows across their mutual border until economic development in Mexico gets a boost. The Organisation for Economic Co-operation and Development also came to that conclusion in a 1998 study, which compares the case of Mexico to the experience of Greece and Spain in integrating their economies with those of the EU. The turnaround of Mexican emigration, it says, will be determined not by trade, but by economic development and catch-up in Mexico, the effectiveness of its public and financial institutions, the introduction of labour-force training and upskilling programmes, and a massive inflow of foreign direct investment (including from emigrants abroad) to sustain growth. (Garson 1998, 2)

The economics of Mexican migration is a vital question for an exercise as broad in scope as the one envisaged here. The draft treaty, under Article VI (Economic Citizenship), attempts to deal with the issue of improving the climate surrounding economic migration and maximizing its potential benefits. The fund envisaged in this article, while it would, one hopes, contribute to economic development in Mexico and thus affect migration flows, has a wider objective than reducing the need for Mexicans to migrate to the US. Accordingly, it would have a more comprehensive mandate than that envisaged by Pastor.

Pastor's development fund would concentrate mainly on investment in the transportation infrastructure of Mexico's south and centre, with part of it also devoted to establishing community colleges in poor regions. The proposed fund in this draft treaty, however, would be involved in five types of investment: transportation and communications infrastructure; environmental infrastructure; education, training and health; security; and a set-aside to help rural areas adjust to the effects of any future removal of subsidies, custom duties and quotas.

Furthermore, fund disbursements would not be limited to Mexico. Partly because of this wider mandate, partly to avoid confusion with the existing North American Development Bank and partly to underline that the fund is meant to complement the wider goal of enhancing beneficial North American linkages, I suggest the name "Cohesion Fund," from that already in use in Europe. As described in paragraph 1, the fund would aim explicitly at assisting projects to enhance the overall benefits from integration and improve access to those benefits among residents of the three countries. As stated in paragraph 2, the fund would assist projects that are discrete and structural — that is, projects that would not require ongoing payments from the fund — and the fund itself would have a sunset provision.

Paragraph 3 provides for project evaluation by committees, one for each of the five types of investment, composed of experts from agencies

already involved in similar projects in the Americas. These committees would certify that projects conform with the purpose of the fund under Article VIII, and no funds could be disbursed on a project without such certification.[17] As it stands, the text of the draft treaty does not specify the full set of agencies that would be represented on the committees, but one could think, for example, of organizations such as the Inter-American Development Bank as being involved in evaluating transportation and communications infrastructure projects. The text does, however, specifically give the existing North American Commission for Environmental Cooperation a veto on environmental projects, given the expertise it has developed in identifying North American environmental stress points. It could also have a veto on transportation projects, given the impact on the environment that congestion in transportation corridors as a result of more open trade can have. And the appropriate authorities in each country would essentially control the flow of security related projects in their respective countries.

Paragraph 4 further specifies some conditions applicable to all fund disbursements. One key condition (paragraph 4e) relates to matching financial contributions by state, provincial and local governments in the geographical area targeted by the project, stipulating that, although such local funds would be mandatory for a project to go ahead, the required contribution should be based on average incomes in the project area, on a scale to be determined. The idea is that poorer regions would have to contribute less to a project, while very rich regions might be shut out of the funding altogether, depending on the formula.

The reason for mandating matching contributions is that the fund would have a better chance of being accepted if beneficiary jurisdictions were seen to contribute to an extent roughly commensurate with some notional revenue-raising capacity (as Pastor noted at a 2003 conference; see Pastor 2003), as opposed to actual revenues raised, which, in Mexico's case, might not be optimal.

- The fund's other most important conditions include the following:
- Projects should be specifically targeted at alleviating environmental, health or security concerns raised by greater integration, or be the catalyst that allows a region to reap greater gains from integration.
- With respect to alleviating the impact on rural areas of any reduction of intra-North American subsidies, customs duties or quotas that might result from further moves toward fair and open trade, projects could include a buy-out of quotas or of the present value of subsidies. Under paragraph 5, however, such disbursements could not go ahead until these further moves were decided upon.
- Local authorities should approve the project.

17. Thus, the role these committees would play in certifying a project, as distinct from disbursing funds and managing the project, would be similar to that of the Mexico-US Border Environment Cooperation Commission in certifying projects financed by the North American Development Bank

- Disbursement of funds should be above board and procurement open to all equally competent North American bidders.[18]

There should be no discrimination in the subsequent operation of the project.

Under paragraph 5, each type of investment would receive approximately the same share of the total funding. Admittedly, there is no rationale for such an allocation, which assumes that each type of project is equally important at the margin, other than that it would ensure that no area is neglected. As for the financial resources that would be allocated to the Cohesion Fund, paragraph 6 suggests that they be set as a percentage of the sum of Official Development Assistance disbursed globally by all three parties. This percentage would increase if and when measures to facilitate further economic linkages among the three countries — which Article IX envisages would be put on the table at a future date — result in the adoption of a comprehensive package toward the goal of fair and open commercial relations. Each party's contribution would then be set proportionally to the revenue-raising capacity of its public sector, as measured by the average ratio of public sector revenues to gross domestic product in North America as a whole. Since Mexico's tax system is in need of major reform and thus would be a poor basis on which to set that country's contribution to the fund (a point also made by Pastor in Mexico City in 2003), Mexico would contribute a notional amount, rather than one related to its actual revenues.

A final point is that the North American Development Bank would be rolled into the new Cohesion Fund, since the fund's objectives essentially would duplicate the tasks that the bank was set up to accomplish. There would, however, be a guarantee of continued funding in real terms for the specific tasks and areas currently covered by bank funding.

J. ARTICLE IX: FUTURE NEGOTIATIONS

Article IX requires that the North American Transborder Commission provide a single negotiating text toward an enhanced community of North Americans, based on the principles agreed to in the treaty, no later than eight years after the treaty's entry into effect. It also commits governments to begin negotiations on improving the treaty, on the basis of the same principles, within twelve years of its adoption. The idea behind this provision is that, in the intervening time, three US presidential elections, two Mexican presidential ones and approximately three Canadian general elections will have occurred, during which fulsome discussions of the effects of both the treaty and the commission's work, and any further steps toward closer integration, will have had time to take place.

18. The rules applying to the fund's procurement practices, therefore, would be somewhat more open than those of NAFTA, which still allows many discriminatory practices.

K. Article X: Adoption, Amendments and Accession

In international law, the word "treaty" can refer to any number of international agreements. In US constitutional law, however, the word takes on a very specific meaning, and as such would need to be ratified with the approval of two-thirds of the Senate. That is, the Senate could seek to amend the treaty — it could not go into effect simply as a congressional-executive agreement passed under the trade promotion authority's "thumbs up or thumbs down" (fast track) provision. A key reason for pursuing that route is to highlight the fact that the treaty, by itself, would require no change to the actual rules of international commerce, although minor domestic legislative changes might be needed to implement some of its provisions. The treaty, if successful, should lead to changes in specific tariff and nontariff trade barriers, as well as subsidy policies, but these presumably would occur through the appropriate legislative process, as paragraph 4 anticipates. Ultimately, however, in the US, the best legislative route to take for a treaty such as this would be a decision of the executive branch. One important element of this project is the explicit expectation that states and provinces would sign on to the treaty. Indeed, the treaty's provisions that concern subfederal governments would apply only if a certain number of them in each country actually sign on. The bar is admittedly set very high — namely, what is needed in each country to pass constitutional amendments.

Furthermore, only those subfederal governments that sign the treaty would be bound by it. Here again, although the specific approval procedures could certainly be debated, the important point is that strengthening North American linkages would require the active involvement of subfederal governments, a reality to which the increasing number of agreements and exchanges taking place at that level within North America attest (Fry 2004).

Article IX envisages that the parties would begin negotiations within ten years of the agreement's coming into effect toward a comprehensive package of measures based on the principles agreed to in the treaty; accordingly, subfederal governments would also be given ten years in which to decide whether to adhere to the process. Thus, the extent of state and provincial interest in the process would be known before negotiations among the federal governments began.

V. A TREATY TO ENHANCE MUTUALLY BENEFICIAL LINKAGES AMONG CANADA, MEXICO AND THE UNITED STATES

(Note: In the text, the "parties" are the three federal governments, whereas "signatories" refers to all governments that sign the agreement, which will be open for signature by the states and provinces.)

A. PREAMBLE

Canada, Mexico and the United States of America, Desirous to foster a more prosperous and secure community of North Americans, to strengthen their bonds of neighbourliness on the basis of mutual support, openness and comity, to extend the benefits of their relationship to the greater number of their constituents, to expand upon the existing successful cooperation initiatives in place among them and to foster openness toward other regions of the world on the basis of these same principles.

Determined to preserve the integrity of their respective constitutions, to uphold the prerogatives of their legislative bodies, to recognize state and provincial governments as partners in this agreement as befits their respective constitutional roles and to expand the means at their citizens' disposal to express their values in full respect of any differences among them,

Agree as follows:

B. ARTICLE I (MUTUAL SUPPORT AND COOPERATION)

1. The signatories recognize that their neighbourly relationship is based on mutual support and cooperation in preventing the commission of violent illegal acts on the territory of any of the parties and in apprehending those intent on committing such acts.
2. The signatories also agree to perform due diligence in preventing, within their purview, the commission, through their territory, of acts on another party's territory that are illegal in that territory.
3. The parties further recognize that their neighbourly relationship is based on mutual support and cooperation in preventing the circumvention, through their territory, of: i) restrictive commercial measures that may apply between the territory of one of them and that of a third country, and ii) restrictions on movements that any one of them may apply to nationals of a third country.
4. Nothing in this article commits a party or compels its nationals to provide levels of security against acts directed at another party and described in paragraphs 1, 2 and 3 (henceforth, "security") that the latter is not willing to commit for itself and apply to its nationals.
5. Nothing in this article compels a party to take any measure or adopt any specific practice inconsistent with its domestic laws, in particular concerning the rights of persons on its territory against abusive search and seizure or other police measures, against cruel and unusual treatment and against intrusion of their privacy. In general, the privileges afforded to any enterprise or national of a party under this treaty are subject to their compliance with the domestic law of each party.

C. ARTICLE II (SECURITY)

1. The parties agree to commit the border, intelligence and police resources required to fulfill their security commitments under Article I. In particular, the parties agree to set up a continental cross-border crime prevention unit, made up of three separate domestic sections, each comprising border, intelligence and police personnel, that would be trained for the joint fulfillment of commitments under Article I. The parties agree that representatives of one of them operating in the territory of another will do so under the direction of the authorities of the latter party, except where a superseding agreement provides for joint command and operations.
2. A party may limit the privileges of enterprises and nationals of another party under this treaty to those who are able to present documentation that is at least as safe from counterfeiting, and obtained in circumstances at least as devoid of risks of fraud, as the documents it requires vis-à-vis its own nationals when they re-enter its territory.
3. The signatories commit to establish a public legislative review process of any change in their domestic law, border policies and relations with third parties that may affect their commitment under Article I, and to give standing to legislators of the other parties in that review process at their request.
4. An independent tripartite audit committee of security experts will be struck by the parties and will report periodically to their legislatures on the seriousness with which parties address potential threats to their own security and to the security of other parties. The audit committee will identify potential security breaches in general, and any inconsistency with this treaty in particular, and recommend areas for remedial action. A party must address the areas recommended for remedial action with respect to this treaty to be in compliance with this article.
5. Nothing prevents a party from taking action that suspends privileges afforded enterprises and nationals of another party under this treaty, when: i) that other party fails to take action against acts described in paragraphs 1, 2 and 3 of Article I and that pose an immediate threat to the security of the first party, and ii)that other party exhibits a persistent pattern of nonconformity with Articles I and with this article, provided that i) in the former case, privileges are restored to the extent that the threat has been removed or is no longer immediate, and ii) in the latter case, the suspension of privileges does not exceed what is reasonable to offset the effects of noncompliance by that other party. The parties will report any suspension of privileges under this paragraph to the North American Transborder Commission created under Article IV for advice on whether the suspension of privileges is reasonable under this paragraph.
6. Conformity with Article I and with this article entitles a party and its enterprises and nationals to all the privileges of this treaty.

D. ARTICLE III (FAIR AND OPEN COMMERCIAL RELATIONS)

1. The parties are satisfied that the North American Free Trade Agreement (NAFTA) has enhanced economically useful linkages among their three countries. Nothing in this treaty abolishes any part of NAFTA.
2. The signatories agree to continue to strive for fair and open commercial relations as an essential component of a vibrant and beneficial community of North Americans.
3. The signatories affirm that nothing in either NAFTA or this treaty should be construed as negating their rights and obligations effectively to pursue legitimate public objectives for the benefit of their nationals. Legitimate public objectives include, but are not limited to, the following areas: security; social equity and mobility; integrity of the global, North American and local environments; health and pensions; labour relations; consumer protection and information; privacy; promotion of domestic or foreign culture and of cultural and community activities; language, education and training; research and development; fiscal and monetary policies; regional development; land use; criminal and civil law; public morals; and the parties' relations with third countries.
4. The signatories agree that the principle of nondiscrimination toward enterprises of another party, meaning treating them no worse than they would treat enterprises of their own party under similar circumstances, is a cornerstone of fair and open commercial relations going forward. To that effect, they agree that:
   a. In adopting, maintaining or implementing measures toward a legitimate public objective, a party and its agencies may not discriminate between its enterprises and the enterprises of another party, unless this discrimination is reasonably needed to attain a legitimate public objective.
   b. In adopting, maintaining or implementing measures toward a legitimate public objective, a signatory state or province, a municipality contained within its borders or any of their agencies may not discriminate between enterprises established in their territory or owned locally and enterprises of another party, unless it similarly discriminates against enterprises from all signatory jurisdictions within its territory or the discrimination is reasonably needed to achieve a legitimate public objective.
   c. A discriminatory measure is considered to be reasonably needed to achieve a legitimate public objective if no other measure is reasonably available, taking into account technical and economic feasibility, that can achieve this legitimate public objective and is significantly less discriminatory.
   d. Nothing in subparagraphs (a) and (b) affects the benefits that signatories can expect, or the obligations they must comply with, under World Trade Organization (WTO) agreements and NAFTA. In particular, subparagraphs (a) and (b) do not, unless the parties to NAFTA subsequently

agree otherwise, apply to sectors and measures covered by the existing exceptions to NAFTA.

e. The signatories will periodically and publicly report significant measures that: i) but for NAFTA and the WTO agreements, do not conform with subparagraphs (a) or (b); and/or ii) conform with subparagraphs (a) and (b) only by virtue of their being needed to achieve a legitimate public objective; and/or iii) conform with subparagraph (b) only because the subfederal discriminatory measure toward enterprises of another party is also permitted toward enterprises of the same country; or iv) are reciprocal measures allowed under subparagraph (g) below. The reports will indicate for each measure the existing ground or grounds for including the measure in the report.

f. The signatories will strive, on a voluntary basis, to bring all those measures that, but for NAFTA and the WTO agreements, do not conform with subparagraphs (a) or (b) into conformity with those subparagraphs.

g. The signatories agree that they may, within the bounds of existing trade agreements, reciprocate against another signatory's discriminatory measure that causes injury to enterprises located in their jurisdictions, but that they shall not take such action unless they offer reciprocal removal of the discriminatory measure as a means of resolving the dispute.

5. The parties agree to build on the principles and practices established in Chapter 15 of NAFTA and in existing bilateral agreements between their respective competition authorities concerning issues of fair competition and anti-trust. In particular, they agree that:

a. When an industry located in two parties meets the competition policy standards in each, then cross-border sales in that industry that conform to NAFTA rules of origin and are otherwise in conformity with the laws, regulations and standards of both parties are presumed to be fair. This "fair trade" designation must be approved in each country both by the competition authorities and by producers representing a major portion of domestic production of like or directly competitive goods. Once this designation has been given, no such action may be launched between the two countries unless the competition authorities in one or another party revise their opinion.

b. Each party will direct its competition authorities to extend, upon request by a signatory or the competition authorities of another party, the protection of its competition laws to enterprises legally established in other parties and to nationals of other parties in their cross-border commercial dealings with businesses established on its own territory, with respect to rules dealing with cartels, abuse of dominant position, tied selling, price discrimination, refusal to deal and deceptive marketing practices. Reasonable costs incurred as a result of

such a request will be reimbursed by the signatory or authority making the request.

c. The parties agree that the pursuit by governments of legitimate public objectives referred to in paragraph 3 does not, *per se*, constitute unfair practices.

6. The following situations prevailing in an industry in one of the signatories shall, for the purpose of this treaty, constitute *prima facie* evidence that competition standards differ for that industry between the signatory's country and the other parties:
   - the presence of monopolies and monopsonies created by state fiat;
   - large portions of a domestic industry acting in the exercise of a single government authority;
   - the significant presence of state-owned or state-subsidized enterprises;
   - the prevalence of restrictions, discriminatory procurement or other practices and subsidies based on nationality of ownership;
   - an industry that is effectively exempted by government legislation from the ambit of domestic competition authorities;
   - the presence of government-mandated price controls or quotas;
   - ongoing significant differences in producer subsidies and other forms of industry-specific support (as measured by producer subsidy equivalents), such as nonenforcement of rules, waiving of taxes and other fees, payment holidays or the pricing of publicly owned renewable natural resources so as to generate a below-normal rate of return for their owners; and
   - the existence of large customs duties and quantitative border restrictions to trade between the parties.

7. Where their competition standards differ in an industry due to one of the first five headings of the list in paragraph 6, the signatories agree that the differing competition standards should not be upheld solely to create barriers to trade and investment among the parties, but should be demonstrably supportive of legitimate public objectives. To that effect, the signatories agree in principle that:

   a. Competitive situations characterized by any of the first five headings of the list in paragraph 6 should, in the long run, contribute to lower costs and/or reduced risk and/or greater variety in the provision of specific goods and services that contribute to the attainment of a legitimate public objective or otherwise make a net positive contribution to the attainment of a legitimate public objective, and should periodically meet a transparent test to that effect.

   b. When rules affecting an industry do not meet the test described in subparagraph (a), the signatory or signatories in which the industry operates shall propose, for discussion with the other signatories, and to the extent permitted by the parties' respective constitutions, ways of delivering goods

and services within the industry that involve more opencompetition within the industry.

c. An enterprise operating within a competitive situation characterized by any the first five headings under paragraph 6 but meeting the test described in subparagraph (a) shall not be inherently construed as having an unfair advantage in the provision of goods and services in freely competitive segments of that industry or a related industry.

8. Signatories that apply price controls and quotas in their jurisdiction agree to take measures within their purview to prevent disruptions of normal market conditions in the territory of other signatories or disruptions of the ability of other signatories or their agencies to pursue legitimate public objectives that would result from cross-border purchases of goods whose prices or quantities are being controlled.

9. Signatories preserve their existing rights to take offsetting measures against competitive situations in another signatory characterized by ongoing significant differences in producer subsidies and other forms of industry-specific support, but agree to take into account their own similar measures in determining the appropriate offsetting measure; they further agree to limit these forms of support on a reciprocal basis where international conditions are auspicious. In particular:

a. A signatory that maintains producer subsidies and industry-specific support shall only take action against another signatory's subsidies affecting the same industry to the extent that is required to equalize the competitive effects of the subsidies.

b. Claims for countervailing duties made by nationals of a party against nationals of another party, arising from a subsidy conferred in the latter's territory, should refer to the amount of benefit conferred by that subsidy, less any bounty (as calculated by producer subsidy equivalents) enjoyed in the importing country by local producers, and any relief granted by domestic agencies should refer to this net subsidy.

10. The signatories agree to establish and apply a code of conduct on incentives as a means of curbing mutually impoverishing subsidy competition and, in the long run, to curb producer subsidies and industry-specific support to no more than that provided by nonsignatory competitors for like or directly competitive products under like circumstances. With respect to agricultural subsidies, this code of conduct will become applicable only if and when the Cohesion Fund established under Article VIII is fully functional with respect to rural adjustment, buyout, training and infrastructure.

11. The parties further agree to aim, in the long run, at the elimination among them of customs duties and quantitative border restrictions, provided that the Cohesion Fund established under Article VIII is fully functional with respect to rural adjustment, buyout, training and infrastructure.

12. This treaty entails no obligation on the parties to harmonize their relations with third countries. The parties reaffirm the principle that only goods originating in one of the parties according to NAFTA rules of origin, or goods for which they have a common external duty or restrictions, may circulate freely between them. However, the parties will establish common external duties and remove other restrictions on the widest possible number of products where differences between them are currently minimal, and will aim at lessening the restrictiveness of NAFTA's rules of origin.

E. ARTICLE IV (NORTH AMERICAN TRANSBORDER COMMISSION)

1. The parties hereby establish a North American Transborder Commission (hereinafter "the Commission"), the role of which is:
   a. to monitor and issue annual reports to the signatories on the implementation of this treaty;
   b. to give advice, under Article II, paragraph 5, to the parties on the reasonableness, under the terms of this treaty, of any suspension of privileges for nonconformity of a party with Articles I (Mutual Support and Cooperation) and II (Security);
   c. to respond, under Article V, paragraph 6, to submissions of enterprises and nationals concerning the application of this treaty;
   d. to submit to governments a list of dispositions among them that might be suited for direct enforcement by the courts ("direct effect"), according to Article VI, paragraph 2;
   e. to intervene, under Article VII, paragraphs 4 and 5, with domestic agencies as well as NAFTA working groups in favour of the application of the principles of this treaty, and to promote, under Article VII, paragraph 6, greater cross-border interoperability between domestic agencies where commercial matters are concerned, to the extent this does not duplicate work already under way between agencies;
   f. to intervene, at its discretion, in NAFTA Chapter 20 panel proceedings, and as amicus curiae both in NAFTA Chapter 11 proceedings and in the domestic courts of the parties in favour of the respect of the principles enunciated in this treaty;
   g. to co-ordinate its actions with the Commission on Environmental Cooperation and the Commission for Labour Cooperation, when these bodies request its assistance in addressing matters under their purview;
   h. to assess and issue opinions on the compatibility of any cross-border agreements between subfederal entities with the broad objectives of this treaty, and;
   i. to prepare, under Article IX, paragraph 1, a single negotiating text for any future steps toward an enhanced community

of North Americans, including the future removal of commercial barriers along the principles enunciated in Article III.

2. The Commission will be composed of four US citizens, two each from Canada and Mexico and a ninth presiding member who will rotate among all three countries. Commissioners will be drawn from lists approved by all three countries and will possess qualifications to be agreed upon in detail by the parties, but including at a minimum professional knowledge of trade issues and law and no significant contemporary pecuniary links to entities that may benefit monetarily from government policies that run contrary to the principles enunciated in Articles III and V. Both Canada and Mexico will renew one of their commissioners every three years; the US will renew one of its commissioners every four years.
3. The Commission will be assisted in its work by two advisory committees: A North American Public Advisory Committee (NAPAC), composed of 30 members, 10 from each party, chosen by each party among its nationals according to procedures to be devised by each, but necessarily forming a mix of academics, business representatives, labour representatives, technical experts and broad civil society groups; and a North American Legislators' Advisory Committee (NALAC), also composed of 30 members, 10 from each party, drawn from federal, state and municipal legislators as well as representatives of aboriginal governments.
4. The main responsibility of both NAPAC and NALAC is to advise the Commission in its deliberations and in the planning and execution of its activities. The Commission must keep NAPAC and NALAC informed and consult with them prior to any action it intends to take pursuant to the fulfillment of its role as described in paragraph 1.
5. Pursuant to Article X, paragraph 6, the terms of accession of any new party to this treaty must be approved by a majority of the members of both NAPAC and NALAC.
6. Any intervention made by the Commission or any response or advice issued by it under paragraphs 1 (c) to 1 (f) will be withdrawn if it is formally disavowed by:
   a. a vote of two-thirds of the members of both NAPAC and NALAC;
   b. a vote of two-thirds of the legislature of a party; or
   c. a majority of the NAFTA Free Trade Commission.
7. Funding for the Commission will be apportioned equally among the parties.

F. Article V (Economic Citizenship)

1. The signatories will strive to treat nationals of the parties who seek to engage, on their own behalf or on behalf of an enterprise of a party, in legitimate market transactions within their jurisdiction no worse than they would treat nationals of their own country under similar circumstances.

2. The signatories will strive to remove obstacles to the ability of nationals and enterprises from each party to seek and give work across internation- al borders, provided these nationals and enterprises conform with applicable labour-related laws, standards and practices and all manner of regulations relevant to the specific work or task.
3. The signatories will strive to remove obstacles to the ability of nationals of the parties to seek and give work when temporarily and legitimately residing within their jurisdiction. In particular, the parties agree to allow students and the immediate family members of NAFTA professionals, of those who have been transferred across the border by their employer, and of traders and investors to whom a party has granted temporary entry access to employment opportunities on their territory.
4. The signatories agree to facilitate a generalized process of mutual recognition of professional and trades qualifications by establishing, in conjunction with the relevant trade and professional associations, international registries for all trades and professions, using as a template the International Registry of Professional Engineers. It is understood that mutual recognition does not, by itself, confer the right to practise a trade or profession in the signatories' jurisdictions.
5. The parties agree, where demand warrants, to establish joint programs to match prospective employers from one party with workers who are nationals of another party. Characteristics of applicants, such as educational achievement, citizenship status and lack of a criminal record, will be vouched for by the applicant's home country, but representatives of other parties shall have the ability to participate actively in the verification process. The cost of the service will be recovered through user fees on prospective employers, who will also vouch, with respect to their employees who are nationals of another party, to meet minimum labour-related standards in the jurisdiction in which they operate.
6. Enterprises and nationals of the parties will have access to a public complaint mechanism, to be administered by the Commission, under which they may request the Commission's opinion as to whether the actions of a signatory, a signatory's agency or a signatory-sanctioned body run counter to the signatory's undertakings in this treaty. In the affirmative, the Commission will publicly advise the appropriate body on possible remedies.
7. Nothing in this article prohibits a party from taking steps it deems necessary to its security or affects a party's laws governing the permanent migration of individuals. Nothing in this article affects the ability of a signatory to apply residency requirements where reasonably necessary to attain a legitimate objective or as a condition of eligibility for public programs and benefits.

G. ARTICLE VI (DIRECT EFFECT)

1. In order to ensure the broad application of the principles enshrined in NAFTA and in this treaty, the parties will consider means to empower the courts in their respective countries to enforce directly certain dispositions of NAFTA, this treaty and any further agreements among them pursuant to Article IX, as law applicable between nationals and their respective governments.
2. The Commission will submit to governments a list of dispositions of these agreements that might be suited for direct enforcement by the courts under paragraph 1, limiting itself to dispositions that:
   a. are clear and precise;
   b. are unconditional and not subject to discretionary reservations;
   c. reflect a clear negative or positive obligation; and
   d. do not require implementing legislation to become effective.
3. Direct effect as provided for in this article will be implemented only as and when the parties exchange a protocol signifying that proper legislative approval has been accorded in each country to give direct effect to specific dispositions of NAFTA and this treaty.

H. ARTICLE VII (AGENCY AND REGULATORY COOPERATION)

1. The signatories recognize that the regulatory role of governments is always evolving and that different regulatory regimes may exist side by side, whether because of differences in situations or objectives or because of different views on how to obtain the objective of the regulation. The ability of jurisdictions to tailor their regulatory regimes to the specific needs of their constituents and to compete with other regulatory regimes on that basis is desirable from the point of view of both democratic accountability and economic efficiency.
2. The signatories agree that more effective and harmonious relations among them require that they and their agencies minimize discriminatory hurdles and arbitrary treatment for enterprises and nationals of the parties that wish to engage in legitimate transactions across their jurisdictions, and that they minimize unnecessary duplication and arbitrarily small differences across jurisdictions in the conduct of regulatory activities, consistent with the pursuit of their legitimate public objectives.
3. In the spirit of paragraphs 1 and 2, the signatories agree to require the regulatory agencies under their respective jurisdictions to conform, in their administrative practices, with the principles contained in Articles III and V.
4. The Commission may request short reports from these regulatory agencies on the need and extent of their efforts, both within their jurisdiction and in cooperation with other jurisdictions, to conform with the principles contained in Articles III and V. The Commission may request an independent audit of whether a reg-

ulatory agency, by itself or with counterparts in other jurisdictions, is indeed making efforts to that effect, and to issue publicly recommendations to governments to bring administrative practicesin greater conformity with the principles of Articles III and V.

5. If the Commission considers, in a cross-border matter of a commercial nature in which an agency of one of the signatories is to render a significant decision, that the agency might be assisted by an opinion from it on how the matter at hand relates to this treaty, the Commission will publicly deliver this opinion, along with any supportive factual research, to the agency. The agency must refer to the Commission's opinion and research in its decision, including the weight it has given to the opinion and its reasons for agreeing or disagreeing with the opinion. The Commission may proactively support research efforts to that effect.
6. The Commission will seek to compile an inventory of, and then to complement, the existing work of various professional, educational, industrial, labour, civic or governmental bodies or commissions, including those established under NAFTA, toward a mutual recognition or, where appropriate, convergence of standards between jurisdictions that share basic policy objectives within a specific regulatory area. To that effect, the Commission may, from time to time, propose a single regulatory template or mutual recognition agreement covering an area of interest between such jurisdictions. It is understood that the ability of any entity to depart from a regulatory template to which it has subscribed is unaffected to the extent that its requirements diverge from those of other registrants, provided it clearly indicates the extent of and basis for the difference.
7. Where two signatories agree that there is significant interplay in the day-to-day activities of agencies concerned in whole or in part with cross-border commercial and economic issues between them, they may mandate that a senior executive position in each country's agency, dealing with such cross-border issues, be held from time to time by a national of the other country, on a reciprocal basis. Furthermore, they may mandate that a permanent observer from the agency of one country be attached to the decision-making bodies of the corresponding agency in the other, again on a reciprocal basis. This paragraph will apply immediately to the following agencies: (A list follows of agencies that would include, *inter alia*, the Canadian International Trade Tribunal, the Bank of Canada, the Canadian Competition Bureau, Health Canada, the National Energy Board and their US and Mexican equivalents.)

I. ARTICLE VIII (THE COHESION FUND)

1. The parties will establish a Cohesion Fund (hereinafter "the Fund"), the aim of which is to enhance the potential overall flow

of benefits arising from this treaty and to ensure wide access by North Americans to the opportunities it creates.

2. The Fund will provide capital funds, but not operating funds, to structural projects of only the following types:
   - transportation and communications infrastructure;
   - environmental infrastructure;
   - education, training and health;
   - security; and
   - rural adjustment buyout, training and infrastructure.
3. The parties will mandate existing regional organizations that together can muster the required analytical and technical capabilities to form a committee for each type of investment to evaluate and certify projects as conforming with the purpose of Article VIII. The parties hereby agree, however, that the Commission for Environmental Cooperation may veto environmental and transportation infrastructure projects and that the US Department of Homeland Security (USDHS), as well as its counterparts designated by the governments of Canada and Mexico, will have full discretion in their own countries with respect to security-related projects provided they fall within the objectives and satisfy the requirements of Article VIII.
4. Funds will be disbursed only if:
   a. the project's main beneficial impact occurs within one or more signatory subfederal jurisdiction;
   b. the project alleviates any negative environmental, employment, health or security concerns of more open borders, and/or allows one or more signatory subfederal jurisdiction to reap, through education, training or improved infrastructure, benefits from the provisions of NAFTA and this treaty that it could not otherwise capture, or the project consists of buying out the present value of subsidies or producer subsidy equivalents received by farmers in order to ensure the sustainable economic development of rural communities affected by progress among the parties to reduce trade barriers and subsidies under this treaty;
   c. the project has been democratically approved by all relevant local authorities;
   d. the project's funds are disbursed according to transparent criteria, their use is independently audited and bidding is open to all equally qualified North American bidders;
   e. the project receives matching funds from the relevant state, provincial and the local governments involved, with the required contribution to be a function of average income within the relevant jurisdiction; and
   f. to the extent that user fees are charged upon completion of the project, they are not charged discriminatorily between similarly situated users, and to the extent that the project provides free services, they are open to all residents of the relevant jurisdiction.
5. The Fund will divide its disbursements approximately equally among the five areas listed in paragraph 2, but disbursements

under "rural adjustment buyout, training and infrastructure" will be predicated on progress in reducing producer subsidies and other forms of industry-specific support defined in Article III, paragraph 6, and on agreement under Article III, paragraph 11, toward eliminating remaining customs duties and quantitative restrictions at the border.

6. The parties' total annual contribution to the Fund will be established initially as a set percentage of the sum of the Official Development Assistance disbursed by the parties to third countries in the parties' most recent respective fiscal years. This proportion will double upon adoption of a comprehensive package of measures to further improve linkages among the parties pursuant to Article IX, after which payments by the parties into the Fund will continue for another 20 years.
7. The parties will contribute to the Fund in proportion to the revenue-raising capacity of their respective public sectors, as determined by applying to their respective gross domestic product (GDP) the average of total North American public sector revenues as a share of total North American GDP. The North American Development Bank will be rolled into the Fund, but its existing commitments to specific tasks and regions will not be reduced in real terms as a result.

J. ARTICLE IX (FUTURE NEGOTIATIONS)

1. The Commission will submit to the parties, in the form of a single negotiating text, a comprehensive list of future measures that would, in its view, facilitate the application of the principles and the attainment of the objectives enunciated in this treaty. The Commission will submit this text no later than eight years after this treaty comes into effect.
2. The parties will begin, no later than 10 years after this treaty comes into effect, formal negotiations on the basis of the text submitted by the Commission under paragraph 1, and of any other measures that, in the view of any of the parties, would facilitate the application of the principles and the attainment of the objectives enunciated in this treaty. The parties will aim to recommend to their respective legislative bodies a comprehensive package of measures to that effect, no later than 12 years after this treaty comes into effect.

K. ARTICLE X (ADOPTION, AMENDMENTS AND ACCESSION)

1. The treaty will come into force and will bind the parties only when instruments of ratification have been exchanged by the parties.
2. The treaty will apply directly only to those subfederal governments that sign it and only when it has been approved: in Canada, by the legislatures of seven provinces, comprising at least 50 percent of Canada's population; in Mexico, by the majority of

the legislatures of the states; and, in the United States of America, by three-fourths of the legislatures of the states.

3. The treaty will be open for signature by subfederal governments for 10 years following its coming into effect.
4. Amendments to the treaty will come into force only upon satisfaction of the conditions stipulated in paragraphs 1 and 2 above.
5. An interpretive note pertaining to any provision of this treaty and approved under the conditions stipulated in paragraph 1 shall be deemed part of the treaty, but such an interpretive note shall not have retroactive effect.
6. The treaty will be open for accession by third countries, on terms defined by an accession protocol among all parties to the treaty and the government of the country seeking accession. Accession on those terms becomes effective when approved under the conditions stipulated in paragraph 1 and by a majority of members of both NAPAC and NALAC.
7. Signed at New Orleans, Louisiana. . .(a date and list of signatories follow).

VI. CONCLUSION

In this paper, I have presented a concrete proposal concerning north American relations by developing a draft treaty to enhance mutually beneficial linkages among Canada, the US and Mexico. Although the proposed treaty is far from a one-stop solution to the requirements of the relationship, one of its key objectives is the establishment of a tripartite process that, over time, would deepen and broaden the basis of interaction across national borders in North America. The treaty does not seek to impose an onerous new political superstructure on relationships that already work well, but instead embeds current successful modes of cooperation and ongoing initiatives.

Relative both to the status quo and to many other proposals, the proposed treaty has a number of distinctive features. It would set up a tripartite, independent commission whose role would be to champion certain aspects of the treaty, albeit within the bounds of existing agreements and without exercising new powers over the decisions of governments or existing agencies. Here, the treaty banks on a multilayered, multiyear exercise that would culminate in the commission's proposing a single negotiating text to the three governments a few years after the treaty went into effect. Although existing trade restrictions initially would not be modified, the idea is to make them less and less relevant in a context where rules governing crossborder commercial relations explicitly take into account fairness as well as access, just as such rules determine what is fair competition within nations.

The draft treaty also emphasizes, more than does NAFTA, engaging individuals and representative groups other than business and making more explicit their stake in better managing North American integration. The treaty would enhance the ability of nationals to seek work, have their

skills recognized and not be discriminated against when they are legitimately present in another country. It builds on current discussions of guest worker programs, and proposes a cohesion fund for improving transportation and communications infrastructure, addressing environmental, health and security concerns raised by more open borders and providing education and training needed to gain basic leverage in the wider market.

Legislators and various groups representing civil society would be represented in two North American committees, whose primary roles would be to advise the commission. And governments would begin looking at making it possible for an individual to seek, through the courts, to enforce specific obligations incurred by his or her government under the terms of the treaty or of NAFTA. The project is also notable in its requirement that state and provincial governments sign on to it in some significant way for it to be effective.

The draft treaty is meant to encourage reflection on how to create a more useful interface for the many facets of integration among the three North American countries. No doubt, the project is too ambitious in some respects and too timid in others, but this only highlights the need to find the proper balance among its components. At the very least, the draft treaty could inform the agenda for future discussions on how best to shape integration among Canada, the US and Mexico in light of their domestic priorities, unique North American circumstances and an increasingly open and competitive world.

Comment and Casenotes