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NAFTA: The Unfulfilled Promise of the FTA

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Abstract: *This paper argues that while the North American Free Trade Agreement (NAFTA) has been successful in fostering trade between the parties and in serving as a model for subsequent free trade agreements, it has not realised its potential. This results from the free trade format itself as well as the unwillingness of the parties to go beyond the free trade format and their refusal to deal with new trade and security issues within NAFTA.*

I Introduction

The North American Free Trade Agreement[1] (NAFTA) is one of the most significant and influential trade agreements in existence. It entered into force one year before the Agreement Establishing the World Trade Organization[2] (WTO) and was negotiated during the same period and had considerable influence on the General Agreement on Tariffs and Trade (GATT) Multilateral Trade Negotiations. It followed upon and was largely based upon the Canada–United States Free Trade Agreement (CUFTA) of 1988,[3] one of the first free trade agreements (FTAs) to include significant provisions on services and investments. As will be argued below, in many respects, NAFTA has set the pattern for many FTAs that have come after it. NAFTA is an FTA; it is not a customs union and avoids any hint of supranationality. This reflects the deliberate choice made by the three NAFTA parties, the USA, Canada and Mexico, each for its own political reasons.

Equally significant in the larger picture is the fact that NAFTA was concluded between two highly developed countries, the USA and Canada, and a third state that remains, in many respects, a developing country despite having an advanced petrochemical industry and a significant industrial sector in the North of the country and the capacity for rapid economic development. The dynamics of blending developed and developing economies of NAFTA reflects a very significant aspect of the process of globalisation that characterises much of the wider world economy in recent years.

This paper sets out to explain both the successes and the failures inherent in the NAFTA process. It will be shown that NAFTA has been marked by great success but

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[1] NAFTA, 17 December 1992, U.S.-Can-Mex., 32 I.L.M. 289 (chs. 1–9); 32 I.L.M. 605 (chs. 10–22) (1992) [NAFTA].

[2] Marrakesh Agreement Establishing the WTO, 15 April 1994, 33 I.L.M. 1144 (1994).

[3] CUFTA, 22–23 December 1987 and 2 January 1988, U.S.-Can., 27 I.L.M. 281 (1988).

that it could have achieved much more. It is argued that the reasons for the failure to achieve its full potential are inherent in the FTA model.

II The Achievements of NAFTA

A *Impressive Economic Performance*

Judged by the expansion of trade between Canada and the USA and between Mexico and the USA, the results of NAFTA have been impressive. In both cases there has been a threefold increase in the volumes of bilateral trade.[4] In the case of Canada, NAFTA was built upon an already high degree of economic integration, which began many years before the adoption of the CUFTA in 1988. Canada was already more highly integrated into the economy of the USA than many members of the EEC and was the major trading partner of 36 American states.[5] The existence of NAFTA further encouraged the growth of trade in absolute terms,[6] and at one point in time, no less than 86% of Canada's international trade has been directed towards the USA. Despite going through two recessions, Canada has continued to enjoy significant prosperity and economic growth.[7]

Mexico similarly has witnessed an impressive degree of growth in its trade in both goods and services with the USA[8] and on a smaller but in relative terms impressive scale with Canada.[9] Mexican entry into NAFTA consolidated the opening of Mexico to foreign investment. This took the form of the establishment of new productive capacity by major Canadian and American corporations seeking to take advantage of cheaper production costs and cheaper skilled labour in Mexico.

If one judges success strictly in terms of the increase of productive capacity and the volumes of trade, NAFTA has been a great success for both Canada and Mexico. Although it is harder to make the case, given the disparity in the relative size of the Canadian and Mexican markets to that of the USA, it can also be argued that NAFTA has also been very beneficial for the USA because trade flows have increased dramatically in both directions.[10] A further dimension of the advantages of NAFTA for the USA can be seen in the expansion of trade in services from the USA to the two partners.[11]

B *Access to the Markets*

NAFTA parties, each in its own way, had a vital interest in securing market access, and it would be unwise to neglect this key dimension in the analysis of the benefits of this

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[4] G. Hufbauer and J. Schott, *NAFTA Revisited* (Institute for International Economics, 2005), Table 1.2.

[5] T. Courchene, 'FTA at 15, NAFTA at 10: a Canadian Perspective on North American Integration', (2003) 14 *North American Journal of Economics and Finance* 263, Table 1. See also DFAIT State Trade Fact Sheets 2009 http://www.canadainternational.gc.ca/can-am/commerce_can/2009/index.aspx?lang=eng (accessed 17 February 2011).

[6] Hufbauer and Schott, *supra* n 4, 20.

[7] P. Cross (Statistics Canada), 'Year-End Review of 2009', (27 April 2010), available at: http://www.statcan.gc.ca/pub/11-010-x/2010004/part-partie3-eng.htm (accessed on 15 February 2011).

[8] Hufbauer and Schott, *supra* n 4, 20.

[9] G. Hufbauer and G. Vega-Cánovas, 'Whither NAFTA: A Common Frontier?' in P. Andreas and T. Biersteker (eds), *The Rebordering of North America* (Routledge, 2003), Table 7.1.

[10] Hufbauer and Schott, *supra* n 4.

[11] *Ibid*, Table 1.3.

or any other FTA. Canada had been deeply troubled by the impact of American trade remedy laws, and this was clearly one of the central explanations given for the negotiation of the 1988 CUFTA and the resulting Chapter 19 dealing with dispute settlement over dumping and subsidies disputes.[12] The removal of tariffs and the promise of no new tariffs were also a central objective. The concern expressed by the *Royal Commission on the Economic Union and Development Prospects for Canada* (known as the *Macdonald Commission*) in 1985[13] that the world was moving towards major trading blocks and that Canada had guaranteed access to none of them thus found an answer in NAFTA. For Mexico NAFTA also represented a significant guarantee of access to the American market for its goods and services. A whole, often socially controversial but economically successful, market was developed on the basis of the 'maquilladoras,' border zones where products could be imported for the purpose of manufacturing or inclusion in other products subsequently re-exported to the USA or Canada.

For the USA, the guarantees of access for American goods and services may ultimately have been less important than the guarantees of access to Canadian, and to a much lesser extent, to Mexican energy goods and other natural resources. The bad memories of old disputes over American access to Canadian natural resources and expropriations in Mexico were laid to rest by NAFTA Chapter 6, and the ground was laid for Canada to become the most important supplier of energy to the USA.

For all three states the adoption of the principle of national treatment as the default rule for trade in goods and for many services, as opposed to the most-favoured nation standard of the GATT/WTO multilateral system, has been a significant guarantee of open markets.

C First Major FTA

The adoption of NAFTA was a significant event for all three countries, which, with a few exceptions,[14] had few FTAs and, in the case of Canada and the USA, had been strong supporters of the GATT and multilateral approaches to trade negotiations. For Mexico it represented the final rejection of historic policies of import substitution and the consolidation of the deregulation and internationalisation of the Mexican economy, first begun with the entry of Mexico into the GATT in 1986.[15] Mexico had been the *demandeur* to the USA for NAFTA, and for this reason, the governing party of the time and the opposition party that took power some years later both supported NAFTA strongly and continue to do so.

In Canada the negotiation and adoption of NAFTA was even more controversial than in Mexico. The shift to a policy of continental free trade[16] represented the abandonment of the historic 'national policy' first adopted in the 19th century and left many

[12] W. Davey, *Pine & Swine: Canada-United States Trade Dispute Settlement: The FTA Experience and NAFTA Prospects* (Centre for Trade Policy and Law, 1996) 2.

[13] Royal Commission on the Economic Union and Development Prospects for Canada (Macdonald Commission Report) (Government of Canada, 1985).

[14] These exceptions include the Agreement on the Establishment of a Free Trade Area, U.S.-Israel, 22 April 1985, 24 I.L.M. 653 (1985); Agreement between the United States of America and the Hasemite Kingdom of Jordan on the Establishment of a Free Trade Area, 24 October 2000, 41 I.L.M. 63 (2002).

[15] J.C. Moreno-Brid, J. Santamaría and J.C. Rivas Valvidia, 'Industrialization and Economic Growth in Mexico after NAFTA: The Road Travelled', (2005) 36 *Development and Change* 1095, 1099.

[16] Macdonald Commission Report, *supra* n 13 at 60–61.

Canadian nationalists uneasy that a certain vision of the country had been abandoned. Thus, when Mexico approached the USA in 1990 to negotiate an FTA, the Conservative Government of Prime Minister Mulroney waited over six months before deciding that it could not allow the negotiation of a separate FTA with the USA to which it was not a party and asked to join in the negotiation.

Ironically, the adoption of NAFTA was a matter of more controversy in the USA than in Canada. The Bush administration, like the Reagan administration before it, was sympathetic to the objective and the adoption of the agreement in principle.[17] Whereas the CUFTA's adoption raised matters of domestic political concern but passed virtually unnoticed by the American public, NAFTA was quite different. While the idea of a further agreement including Canada raised few hackles, the idea of an agreement with Mexico, a major developing country, raised significant political concerns about the potential shift of production facilities out of the USA. Having won election in 1991, President Clinton sought to give effect to his promises to add protections for environmental and labour standards to NAFTA. In the face of the refusal of either Canada or Mexico to reopen the text of NAFTA, Clinton's negotiator Cantor proposed the negotiation of 'side agreements' on both subjects, which became the North American Agreement on Environmental Cooperation (NAAEC)[18] and the North American Agreement on Labor Cooperation (NAALC).[19] These formally separate treaties were adopted at the same time as NAFTA and were essential to its entry into force on 1 January 1993.[20]

It must be noted that all three governments were united in the negotiations in avoiding any commitment to supranational principles or institutions. They made a very deliberate choice of an FTA that left each one free to negotiate separate trade agreements with third states. This they have subsequently done, and NAFTA appears to have provided both a model and an incentive for the process of negotiation of FTAs by the three governments.

D Broad Commitment to Dispute Settlement

One of the distinguishing features of NAFTA is its commitment both to compulsory and to comprehensive dispute settlement. The explanation for this feature reflects the fact that the agreement was negotiated at the same time as the closing years of the Uruguay Round of Multilateral Trade Negotiations,[21] which focused very much on

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[17] M. Hart, *Decision at Midnight: Inside the Canada-US Free Trade Negotiations* (UBC Press, 1995) 367, 104.

[18] NAAEC, 14 September 1993, 32 I.L.M. 1480 (1993).

[19] NAALC, 14 September 1993, 32 I.L.M. 1499 (1993).

[20] It should be noted that Canada insisted on a federal-state clause (NAFTA, *supra* note 1, Article 105). Only Alberta, Quebec and Manitoba are bound by the NAAEC (NAAEC Canadian Office, 'Canadian Implementation', (2 December 2002), available at: http://www.naaec.gc.ca/eng/implementation/implementation_e.htm (accessed 15 February 2011)). Only four Alberta, Manitoba, Quebec and Prince Edward Island are bound by the NAALC; see D. Gantz, *Regional Trade Agreements: Law Policy and Practice* (Carolina Academic Press, 2009) 151.

[21] Uruguay Round of Multilateral Trade Negotiations (1987–1994), available at: http://www.wto.org/english/docs_e/legal_e/legal_e.htm (accessed on 5 February 2011). At that time GATT Contracting Parties had already committed themselves to a measure of compulsory dispute settlement through the 1989 'mid-term' agreement: Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures, 12 April 1989, BISD, 36th Supp. 61 (1989). This mid-term agreement was surpassed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding (DSU)), Annex 2 of the Agreement Establishing the WTO, *supra* n 2.

compulsory and comprehensive dispute settlement, to which the USA and Canada were very much committed. The second feature reflects a general objective of NAFTA, and many other regional trade agreements, to adopt trade rules and disciplines that go beyond those of the multilateral system. NAFTA thus contains a Chapter 20, which sets out the general default principle and procedure for compulsory dispute settlement. Chapter 20 was a ground-breaking document in that it committed both parties to a compulsory procedure. However, the NAFTA parties held back from adopting a totally binding procedure as to its result. The consequence has been that Chapter 20 was overtaken a year later by the fully compulsory procedure contained in the DSU adopted pursuant to the Agreement Establishing the WTO 1994.[22]

NAFTA also innovated in the establishment of several other forms of compulsory dispute settlement in the areas of financial services,[23] investment protection,[24] government procurement,[25] and anti-dumping and countervailing (ADCV) duties.[26] Chapter 14, dealing with financial services, follows the same procedure as Chapter 20 but requires that panellists be experts in financial matters. Chapter 11 adopted the US Model Bilateral Investment Treaty (BIT)[27] procedure involving investor–state arbitration. This was done largely at the behest of the USA, which felt that Mexico should be subject to greater discipline than the CUFTA, which lacked any special dispute settlement procedure, but the result was to submit two highly developed countries to the process—something that had seldom been done before.[28] The NAFTA parties also built on the earlier GATT agreement and the ongoing Uruguay Round negotiations to set up a specialised form of review of government procurement bidding processes in Chapter 10. Perhaps the most innovative of all the NAFTA dispute settlement procedures is found in Chapter 19. This procedure was taken largely from CUFTA Chapter 19, which had been negotiated in 1987 in order to deal with the demand from Canada that American trade remedy laws be subject to greater discipline, and the refusal of the USA to abolish ADCV duties in trade with Canada. The result was a special form of dispute settlement that subjected domestic ADCV duty decisions to the jurisdiction of 'bi-national panels' made up of five trade experts, who were given binding jurisdiction to review and override the decisions of the domestic administrative tribunals. Finally, NAFTA also recognises the legitimacy of recourse to GATT/WTO dispute settlement procedures.[29] It also seeks to set out choice of forum rules governing the consequences of the selection made by the parties to the procedure in question.

The subsequent experience of working of these various forms of dispute settlement is interesting in itself and instructive as to the working of many other trade agreements.

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[22] *Ibid*.
[23] NAFTA, *supra* n 1, Chapter 14.
[24] *Ibid*, Chapter 11.
[25] *Ibid*, Chapter 10.
[26] *Ibid*, at Chapter 19.
[27] C. Brower and L. Steven, 'Who Then Should Judge? Developing the International Rule of Law under NAFTA Chapter 11', (2001) 2 *Chicago Journal of International Law* 193, 194.
[28] *Ibid*. One example was the US–Italy Trade Agreement, which was the basis of the jurisdiction of the International Court of Justice in the Case Concerning Elettronica Sicula S.p.A. (*United States of America v Italy*) (Judgment of 20 July 1989).
[29] NAFTA, *supra* n 1, Article 2005 (Chapter 20).

The multiplicity of procedures has been a mixed blessing.[30] This was surely a creative experiment, but the results have not all been positive. Chapter 20, in part due to its failure to be truly binding as to the result, has only been used three times[31] and at least one decision, *Cross Border Trucking Services*, has not been respected by the USA, which has frustrated the demand for a panel on buses from Mexico by refusing to establish a panel. The other reason for the relative failure of Chapter 20 is that all NAFTA parties have turned to the binding and compulsory process of the WTO DSU, which has come to overshadow Chapter 20 and many other similar general dispute settlement procedures in other trade agreements. The claim to supremacy over all other trade agreements inherent in the WTO Mexico *HFCS*[32] and the *Brazil Retreaded Tire*[33] decisions has substantially weakened the force of comprehensive dispute settlement provisions in regional and bilateral trade agreements. Chapter 10 has provided useful discipline in the area of government procurement, partly because the parallel WTO agreement is not binding on all WTO members.[34]

Chapter 11 has proven to be no burden on Mexico, which has lost several major cases, but in Canada and the USA, investor–state arbitration, which bypasses the domestic courts, has proven to be a considerable embarrassment to both governments. Both countries, being highly litigious, have seen frequent recourse to the Chapter 11 remedy by foreign investors who have been disappointed in various ways. This has been criticised as granting foreign investors a privilege not available to others, while the arbitral process has been criticised as biased towards corporate interests and secretive. The USA has never lost a case, but Canada has lost or conceded several,[35] and there has been considerable public complaint.[36] Chapter 19 has been extensively used by parties in all three countries. Early cases in Mexico revealed the insufficiencies of the laws existing at the time as well as difficulties posed by the

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[30] A. de Mestral, 'NAFTA Dispute Settlement: Creative Experiment or Confusion?' in L. Bartels and F. Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006) 359, 381. See also Brower and Steven, *supra* n 45; J. De Pencier, 'Investment, Environment and Dispute Settlement: Arbitration under NAFTA Chapter Eleven', (1999–2000) 23 *Hastings International & Comparative Law Review* 409; D. Gantz, 'Dispute Settlement under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties', (1998) 14 *American University International Law Review* 1025.

[31] NAFTA Secretariat, 'Decisions and Reports', (6 February 2011), available at: http://www.nafta-sec-alena.org/en/DecisionsAndReports.aspx?x=312 (accessed 6 February 2011).

[32] Mexico-Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States (WTO Dispute Settlement, Dispute DS132).

[33] Brazil-Measures Affecting Imports of Retreaded Tyres (WTO Dispute Settlement, Dispute DS332).

[34] WTO Agreement on Government Procurement (15 April 1994), Annex 4 to the Marrakesh Agreement, *supra* n 2. Canada and the USA are parties, but Mexico is not: WTO Secretariat, 'Parties and Observers to the GPA', available at: http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties (accessed 6 February 2011).

[35] Some of the disputes lost by Canada include *AbitibiBowater Inc. v Canada*, Consent Award (15 December 2010), available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/AbitibiBowater_archive.aspx?lang=en; *S.D. Myers Inc. v Government of Canada*, Final Award (30 December 2002), available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/SDM_archives.aspx?lang=en (accessed 5 February 2011); *Methanex Corp. v United States of America*, Final Award (9 August 2005), available at: http://www.state.gov/s/l/c5818.htm (accessed 5 February 2011).

[36] H. Mann, *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights* (International Institute for Sustainable Development and the World Wildlife Fund, 2001), available at http://www.iisd.org/pdf/trade_citizensguide.pdf (accessed 6 February 2011).

constitutionally based *amparo* remedy.[37] In Canada and the USA, the epic battle over trade in softwood lumber has been the object of a large number of Chapter 19 proceedings,[38] including one request for consolidation.[39] On balance, this special procedure, which has not been replicated in any other trade agreement, has given rise to considerable criticism and disappointment because of the capacity of litigious parties to prolong the process unduly. The other disappointment has been due to the fact that both parties felt able to recast their disputes and take them to the WTO DSU.[40] Finally, it should be noted that when Canada and the USA signed the Softwood Lumber Agreement[41] (SLA) in 2006 putting an end to the latest of a series of disputes, they incorporated a new procedure for disputes arising under the SLA, namely arbitration under the rules of the London Court of International Arbitration (LCIA).[42] One reason for the recourse to arbitration was the confidentiality and relative non-politicisation of the LCIA. There have been two awards under the SLA, and a third arbitral procedure was announced in 2011.[43]

E Side Agreements—A Creative Experiment

NAFTA had been presented by its negotiators as the most comprehensive and forward-looking FTA of its time.[44] They pointed out that NAFTA contained provisions on services, investments, intellectual property protection, temporary movement of persons and competition law.[45] It was also argued that the text of NAFTA, which contains such articles such as 1114 on the avoidance of lower standards to attract investment, was more sensitive to the trade and environment nexus than any other FTA.[46] This was done in an effort to respond to the criticisms of environmentalists that international trade law at the time was insufficiently sensitive to the need to respect non-trade

[37] See, eg, Flat Coated Steel (AD) (*Mexico v USA*), 1994-1904-01, available at: http://www.nafta-sec-alena.org/en/DecisionsAndReports.aspx?x=312 (accessed 16 February 2011). A. Vazquez, 'The Law of Amparo: A Critical Analysis of the Function and Uses of the Amparo Process in the International Trade Law Matters', (1998) 6 *United States-Mexico Law Journal* 51; J. Smith, 'Confronting Differences in the United States and Mexican Legal Systems in the Era of NAFTA', (1993) 1 *United States-Mexico Law Journal* 85.

[38] Refer to list, see: NAFTA Secretariat, 'Decisions and Reports', available at: http://www.nafta-sec-alena.org/en/DecisionsAndReports.aspx?x=312 (accessed 6 February 2011).

[39] US Department of State, 'Softwood Lumber Consolidated Proceeding', available online: http://www.state.gov/s/l/c14432.htm (accessed 6 February 2011).

[40] J. Dunoff, 'The Many Dimensions of Softwood Lumber', (2007) 45 *Alberta Law Review* 319; Gantz 2009, *supra* n 38 at 55.

[41] SLA between the Government of Canada and the Government of the United States of America (12 September 2006), available online: http://www.international.gc.ca/controls-controles/assets/pdfs/softwood/SLA-en.pdf (accessed 6 February 2011).

[42] Art XIV(6), SLA, *ibid*.

[43] See documents under 'Dispute Settlement' at Foreign Affairs and International Trade Canada, 'Softwood Lumber', (3 February 2011), available online: http://www.international.gc.ca/controls-controles/softwood-bois_oeuvre/other-autres/agreement-accord.aspx?lang=eng#legal (accessed 6 February 2011).

[44] Bill Clinton, 'Remarks on the Signing of NAFTA', (8 December 1993), available at: http://millercenter.org/scripps/archive/speeches/detail/3927 (accessed on 18 February 2011).

[45] See, respectively, Chapters 12, 13, 14, 11, 17, 16, 15 of NAFTA, *supra* n 1.

[46] 'Statement of Implementation', (*Canada Gazette Part I*, 1 January 1994) 77; 'Statement of Administrative Action' (submitted to Congress on 3 November 1993), 103d Congress, 1st Session, Document 103–159; Bill Clinton, *supra* n 62.

values.[47] However, candidate Clinton, during the 1992 presidential election campaign, promised not to promote ratification unless additional provisions could be negotiated on the protection of environmental and labour standards. The result was the negotiation of two separate agreements,[48] both of which committed the three parties to maintaining high standards of protection and which allowed for a process of citizen complaint against any party that was alleged not to respect and apply existing environmental and labour laws; the side agreements set up an international Secretariat in the case of the NAAEC and national labour offices in the case of the NAALC. The environmental complaints process has functioned relatively well in that reports have been prepared on a number of significant environmental complaints.[49] The principal criticism of environmentalists has been that all three governments have been hostile and defensive in response to complaints and to the work of the commission. Sufficient resources have not been assured over the years, and governments have seldom taken sufficient action in the face of factual records. The results of the NAALC have been even more disappointing in that a pattern of hostility of governments developed in the face of the complaints process and measures were seldom taken following a complaint. In 2010 it was announced that the national offices would be partially disbanded, leaving much doubt as to the future of the process. In both cases governments had created an independent complaints procedure but had not subjected themselves to any duty to give effect to the results of the complaints. Both side agreements contain extensive dispute settlement procedures that come into play after the first complaints process has been completed. These procedures are extremely complex and have never been invoked. It is fair to say that both the environmental and the labour movements are disappointed with the results.

The record of both side agreements is certainly disappointing; however, given the very deliberate rejection of any form of supranational institutions or rules in the establishment of NAFTA and the adoption of the FTA model, this failure may not be surprising. In retrospect it would have been preferable to strengthen the duty to protect environmental and labour standards in the text of NAFTA itself rather than to choose separate agreements.

F A Model for Many Subsequent FTAs

Apart from its undoubted success in promoting trade liberalisation between Canada, the USA and Mexico, the other great success of NAFTA has been as a model for other trade negotiations—multilateral, regional and bilateral. This can be seen in its impact

[47] The most notorious example being the GATT Panel Decisions in the Tuna Dolphin cases: GATT Panel Report on U.S. Restrictions on Imports of Tuna, 20 May 1994, 33 I.L.M. 839 (1994); GATT Panel Report on U.S. Restrictions on Imports of Tuna, 16 August 1991, 30 I.L.M. 1594 (1991).

[48] NAACE, *supra* n 18; NAALC, *supra* n 19.

[49] Commission for Environmental Cooperation of North America, available online: http://www.cec.org/Page.asp?PageID=1115&AA_SiteLanguageID=1 (accessed 6 February 2011). Examples of factual records include Montreal Technoparc (SEM-03-005), available at: http://www.cec.org/Page.asp?PageID=2001&ContentID=2384&SiteNodeID=543&BL_ExpandID= (accessed 6 February 2011); Migratory Birds (SEM-99-002), available at: http://www.cec.org/Page.asp?PageID=2001&ContentID=2370&SiteNodeID=543&BL_ExpandID= (accessed 6 February 2011); BC Mining (SEM-98-004), available at: http://www.cec.org/Page.asp?PageID=2001&ContentID=2355&SiteNodeID=543&BL_ExpandID= (accessed 6 February 2011). See also C. Kukucha, 'From Kyoto to the WTO: Evaluating the Constitutional Legitimacy of the Provinces in Canadian Foreign Trade and Environmental Policy', (2005) 38 *Canadian Journal of Political Science* 129, 132.

on the contemporaneous Uruguay Round of Multilateral Trade negotiations, leading to the establishment of the WTO, as well as in its impact on the host of FTAs that have followed. In this regard one can look not only at the number of agreements but also at their drafting and their content.

In the first place, it must be remembered that NAFTA was negotiated at the same time as the Uruguay Round Negotiations and that in many cases, the Canadian, Mexican and American negotiators were the same. The effect was that NAFTA's deep structure is clearly that of the GATT/WTO. The logic, the terminology used and the legal relationship of NAFTA to the GATT/WTO is very close. This was achieved quite deliberately by using and formally asserting the primacy of GATT concepts and terminology in the text of each chapter as well as in the definitions and the Annexes.[50] A second very significant feature is the comprehensive coverage of NAFTA, which very deliberately went beyond trade in goods to full coverage of investments (including investor–state arbitration) and various services, intellectual property, government procurement, temporary movement of service providers and competition law, as well as the various forms of dispute settlement outlined earlier. In doing this NAFTA both acted as a precursor to the results of the Uruguay Round and served as a model for many trade agreements that have been adopted around the world by many other states.[51] As WTO members have proceeded to negotiate over 200 new regional and bilateral trade agreements since 1994, NAFTA has served as an implicit and often an explicit model.

III What Is Wrong?

A So Much More Could Have Been Done

NAFTA has certainly delivered on its promise of liberalised conditions of trade between the three parties, and in all probability, it has been a stimulus to increased foreign investment, particularly in Mexico. Since 1994 NAFTA has provided a set of rules governing trade in goods and services which has been largely respected and which, except in the opinion of certain nationalist groups,[52] has been beneficial to all three countries. However, if one compares the experience of the EU and, to a lesser extent,

[50] For example, provisions on services are similar to those in the GATT and 'a large number of terms in the NAFTA appear to be based on definitions which has been developed by GATT "jurisprudence"' (B. Appleton, *Navigating NAFTA* (Carswell, 1994)). Moreover, Chapter 3 Article 301 on national treatment states that 'each Party shall accord national treatment to the goods of another Party in accordance with Article III of the GATT, including its interpretative notes' (NAFTA, *supra* n 1).

[51] For example, Mexico-EC Free Trade Agreement, 3 August 2000, WT/REG109/1, available at: http://ptas.mcgill.ca/Agreements%20pdfs/EC-Mexico.pdf (accessed on 16 February 2011); New Zealand–China Free Trade Agreement, entered into force 1 October 2008, available at: http://chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/index.php (accessed 15 February 2011); EC-CARIFORUM Economic Partnership Agreement, 30 October 2008 (L 289/I/3), available at: http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf (accessed 6 February 2011); Foreign Affairs and International Trade Canada, 'Canada-European Union: Comprehensive Economic and Trade Agreement (CETA) Negotiations', (2011), available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu.aspx (accessed on 6 February 2011).

[52] Council of Canadians, 'Trade', (2006), available at: http://www.canadians.org/trade/index.html (accessed 6 February 2011); Centre for Policy Alternatives, 'NAFTA Chapter 11 an increasing threat to the public good', (4 November 2010), available at: http://www.policyalternatives.ca/newsroom/updates/nafta-chapter-11-increasing-threat-public-good (accessed 6 February 2011).

the ASEAN,[53] the European Economic Area[54] (EEA) or MERCOSUR,[55] there is a curious sameness of NAFTA in 2011 compared with NAFTA in 1994. In a sense NAFTA has remained frozen in time, and little has been done to ensure that it develops and expands to deal with new challenges. One answer to this critique is that NAFTA is not and was never intended to be a customs union. This is true. But even taken on its own terms, one is struck at how little has been done to work within NAFTA and still less to build upon the existing framework in order to enhance and deepen the economic relationship between the three countries. In many cases, as will be shown later, NAFTA has been ignored or avoided when new measures had to be taken. In a variety of other contexts, NAFTA has not been used in situations where it could perfectly well have served as the basis for the resolution of economic and political problems related to trade, and one is left wondering whether the FTA formula is itself unable to provide such a long-term framework. In many respects the FTA framework appears to be a one-time arrangement that can only be altered by a deliberate decision of the three governments, each time having to devote the effort and political capital needed to alter the treaty.

It may be unfair to criticise the three parties for their failure to develop towards a customs union despite the very high degree of economic advantage that this holds for all three. There have been calls for a closer economic union such as a customs union.[56] But political realities in all three countries have silenced any debate on the issue. It has often been said that a customs union between Canada and the USA would be possible but that the USA could not turn its back on Mexico.[57]

Even if one admits that the failure to move towards a customs union is an unfair criticism, what can be said is that the promise of incremental growth through intergovernmental cooperation has not materialised. When NAFTA was first adopted, it was announced that there were at least 30 different standing and *ad hoc* intergovernmental and interdepartmental committees that existed or were to be established.[58] Some committees did in fact issue reports in the early years[59]; common rules of origin for customs purposes were implemented,[60] and a *Code of Transportation of Hazardous Products* was adopted by the three parties. But gradually these standing committees have faded away, not to be replaced by more permanent and effective bodies. If one looks simply at the working of NAFTA, it is also clear that many promises have not

[53] Association of Southeast Asian Nations, 'Overview', (2009), available at: http://www.aseansec.org/64.htm (accessed 6 February 2011).

[54] EEA, 'Home', (2011), available at: http://www.efta.int/eea.aspx (accessed 6 February 2011).

[55] MERCOSUR, 'Portal Oficial', (2011), available at: http://www.mercosur.int/msweb/Portal%20Intermediario/ (accessed 6 February 2011).

[56] D. Goldfarb, *The Road to a Canada-U.S. Customs Union: Step-by-Step or in a Single Bound?* (CD Howe Institute, June 2003).

[57] W. Dobson, *Shaping the Future of the North American Economic Space* (CD Howe Institute, 2002), 6.

[58] Department of Foreign Affairs and International Trade Canada, *The NAFTA at Five Years: A Partnership at Work* (Government of Canada, 1999), available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/nafta5-en.pdf, 23 (accessed on 13 February 2011).

[59] See, eg, the reports listed here: Foreign Affairs and International Trade Canada, 'Reports to the NAFTA Free Trade Commission', (8 April 2008), available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/reports-rapports.aspx?lang=en (accessed on 13 February 2011).

[60] Department of Foreign and International Trade Canada, 'Report of the NAFTA Working Group on Investment and Services: NAFTA Rules of Origin, Technical Rectifications', (15 January 2008), available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/report3.aspx?lang=en (accessed on 13 February 2011).

been fulfilled. Trade remedy laws have no place between three such closely integrated countries. Michael Wilson, the Canadian ambassador to Washington and previously the minister responsible for NAFTA, made this point frequently.[61] Little effort was made to expand government procurement markets, especially at the state and provincial levels, until the 2008 Buy American provisions forced the Canadian government to seek some protection for them and in turn to give some broader access to Canadian procurement markets to the USA. More serious still, the commitment in 1994 to open state and provincial service markets within two years was abandoned in 1996[62] in part because of the reluctance of American states to make the necessary effort and the reluctance of Washington to force the issue.

B Major Issues Dealt with Outside NAFTA

Most serious of all has been the process of thickening the border of the USA since the '9/11' tragedy. Rather than using NAFTA as the framework for taking measures that would have a direct effect on trade, as will be shown later, the USA has insisted in negotiating or imposing a series of measures that greatly complicate the maintenance of normal trading patterns within and between firms across the northern and southern borders, and the administration of these rules has been vested in government departments whose sole focus is security and which have insufficient concern for trade.[63]

The strengthened security measures taken along the Canadian and Mexican borders in the wake of 9/11 have taken their toll upon NAFTA. This has been further complicated by the massive illegal immigration across the Mexican border, to the point that it is reported that there are more than 10 million illegal immigrants in the USA today. As a direct result of 9/11 and of the problems posed by illegal immigration, a series of measures have been taken, primarily by the USA but also in concert with Canada and Mexico, which make it more difficult for persons, goods and services to cross the two borders. Along the Mexican border, a fence has been erected stretching many hundreds of miles[64]; all persons entering the USA, including American citizens, are required to show their passports at airports and road travellers must, as a minimum, show an enhanced security drivers licence.[65] The Canada–USA border sees the daily crossing of some 400,000 people and goods and services worth some $CAD 1.6 billion

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[61] D. Goold, 'Michael Wilson: Canada's ambassador to the US', (2006) 61 *International Journal* 468, 478.

[62] NAFTA Working Group on Investment and Services, 'Report of the NAFTA Working Group on Investment and Services', (18 March 1997), available at: http://www.sice.oas.org/tpd/nafta/Commission/reports/inves_e.asp (accessed on 6 February 2011).

[63] M. Hart, 'A Matter of Trust: Expanding the Preclearance of Commerce between Canada and the United States', (CD Howe Institute Borders Paper no. 309, September 2010).

[64] R. Archibold, 'Homeland Security Stands by Its Fence', (*New York Times*, 21 May 2008), available at: http://www.nytimes.com/2008/05/21/washington/21fence.html?_r=1&ref=borderfenceusmexico (accessed on 13 February 2011).

[65] For rules for US citizens, see U.S. Customs & Border Protection, 'Traveling Outside the U.S. Documents Needed for U.S. Citizens', (2011), available at: https://help.cbp.gov/app/answers/detail/a_id/74 (accessed on 13 February 2011). For rules for non-US nationals, see U.S. Customs & Border Protection, 'Admission into the United States', (17 December 2010), available at: http://www.cbp.gov/xp/cgov/travel/id_visa/legally_admitted_to_the_u_s.xml (accessed on 13 February 2011).

passing each way.[66] Despite calls for much enhanced systems of pre-clearance of merchandise, an adequate system has yet to be put in place.[67]

Pre-clearance of travellers from Montréal, Toronto, Calgary and Vancouver airports by US officials stationed in Canada has been instituted, and much has been done to ensure common supervision of all goods entering Canada's principal container ports en route to the USA. But what is striking in this context is that virtually no new measures have been taken in the context of NAFTA. On the contrary, a series of measures has been announced that seems to exist quite apart from NAFTA despite having serious effects upon the movement of persons, goods and services. Thus, the following measures have been announced in recent years:

1995 Shared Border Accord
1997 Citizenship and Immigration Canada—US Border Vision
1997 Canada—US Border Crime Forum
2000 Canada—US Border Partnership Action Plan
2001 Smart Border Declaration
2005 Security and Prosperity Partnership[68]
(2011 A new agreement is under negotiation)

The net result of these measures has been an appreciable reduction in trade and personal travel between the three countries.[69]

Some relief from this approach was announced at a summit meeting of President Obama and Prime Minister Harper held in Washington on 4 February 2011. For the first time the two leaders agreed to negotiate—between Canada and the USA only—a border 'perimeter' treaty.[70] The announcement heralded the negotiation of an

[66] For the number of crossings, see C. Sands, 'Towards a New Frontier: Improving the U.S.-Canadian Border' (Metropolitan Policy Program at Brookings/Canadian International Council, 2009), available at: http://www.brookings.edu/~/media/Files/rc/reports/2009/0713_canada_sands/0713_canada_report.pdf, 2 (accessed on 13 February 2011). For the value of crossings, see Foreign Affairs and International Trade Canada, 'International Trade: Fast Facts on Canada-U.S. Commercial Relations', (January 2011), available at: http://www.international.gc.ca/commerce/facts-infos/usa-2009-eu.aspx (accessed on 13 February 2011).

[67] Hart, *supra* n 91.

[68] D. Waller Meyers, 'Does "Smarter" Lead to Safer? An Assessment of the US Border Accords with Canada and Mexico', (2003) 41 *International Migration* 5, 8; Minister of Public Works and Government Services Canada, 'Canada-United States Accord on Our Shared Border', (2000), available at: http://ottawa.usembassy.gov/content/can_usa/pdfs/us_can_border_accord.pdf (accessed on 14 February 2011); Public Safety Canada, 'Canada–US Border Crime Forum' (10 November 2011), available at: http://www.publicsafety.gc.ca/prg/le/oc/cbc-eng.aspx (accessed on 13 February 2011); Public Safety Canada, 'Canada–US Border Partnership Action Plan for Critical Infrastructure' (13 July 2010), available at: http://www.publicsafety.gc.ca/prg/em/ci/cnus-ct-pln-eng.aspx (accessed 15 February 2011); Public Safety Canada, 'Smart Border Declaration and Action Plan' (5 March 2003), available at: http://www.publicsafety.gc.ca/prg/le/bs/sbdap-eng.aspx (accessed on 13 February 2011); Government of Canada, 'Security and Prosperity Partnership' (2011), available at: http://www.spp.-psp.gc.ca/eic/site/spp.-psp.nsf/eng/home (accessed on 13 February 2011).

[69] Minister of Public Works and Government Services Canada, 'NAFTA @ 10: A Preliminary Report', (2003) (Report E2/487/2003), available at: http://www.international.gc.ca/economist-economiste/analysis-analyse/research-recherche/10_pre.aspx (accessed on 16 February 2011).

[70] Prime Minister's Office, 'PM and U.S. President Obama Announce Shared Vision for Perimeter Security and Economic Competitiveness between Canada and the United States', (4 February 2011), available at: http://pm.gc.ca/eng/media.asp?category=1&id=3931&featureId=6&pageId=26 (accessed on 17 February 2011); J. Ibbitson, 'Integrated Border Won't Sacrifice Canada's Sovereignty, Harper Says', (Globe and

agreement designed to facilitate the movement of goods and services, but not necessarily people, across the Canada–USA border by securing the outer perimeter of both countries. It is envisaged that ports and airports—particularly those in Canada—would be secured in a manner meeting American security standards, thus guaranteeing easier access to the USA of goods and services in Canada. The announcement also envisages the negotiation of common product production and safety standards with the same objective. This has yet to be realised, but it is welcome news to Canadian and American producers. It must be noted that, once again, a major negotiation affecting trade will be conducted outside the formal scope of NAFTA, although its objective must be to ensure the better functioning of the trade agreement between Canada and the USA. Mexico is not likely to be invited to participate in this negotiation.

C Weaknesses of the Dispute Settlement Provisions

The various dispute settlement chapters of NAFTA were heralded as one of the strongest points of the agreement.[71] This is undoubtedly true and provided evidence that a regional trade agreement allowed parties considerable flexibility to experiment with different approaches to dispute settlement. Yet curiously, the many dispute settlement chapters of NAFTA have not all had the success that was originally claimed for them; each in its own way has demonstrated legal or political weaknesses.

Chapter 20 constituted an advance on most Regional Trade Agreements (RTAs), with the obvious exception of the EEC/EU. It demonstrated a commitment to compulsory dispute settlement which was important for NAFTA and which strengthened the move towards more binding procedures in the Uruguay Round negotiations, which were concluded a year later. Chapter 20 raised the standard, but unfortunately, it had a fatal flaw in that it did not require the parties to respect the final decision. The result for the three decisions that were rendered is that there was debate over their enforcement, and the last decision relating to *Cross Border Trucking Services* has never been implemented by the USA despite the fact that the USA clearly lost the case and was required to admit trucking services from Mexico in accordance with the terms of NAFTA. Even less impressive is the fate of the Mexican complaint in *Bus Services*.[72] In this instance the USA has frustrated the process by refusing to name panellists to hear the case. Finally, there is the issue of the long-standing Mexican complaint concerning the export of Mexican sugar to the USA. Mexico, rightly or wrongly, alleges that the USA made verbal commitments to increase the quota of sugar that might be imported from Mexico.[73] A further and possibly even more serious problem for Chapter 20 is constituted by the WTO DSU, which, in all practical purposes, has overtaken NAFTA in this respect. The DSU is binding both as to

Mail, 4 February 2011), available at: http://www.theglobeandmail.com/news/politics/integrated-border-wont-sacrifice-canadas-sovereignty-harper-says/article1895211/ (accessed on 17 February 2011).

[71] G. Hufbauer and J. Schott, *NAFTA: An Assessment* (Institute for International Economics, 1993) 2.

[72] For a discussion of this complaint, see D. Gantz, 'Government-to-Government Dispute Resolutions under NAFTA's Chapter 20: A Commentary on the Process', (2000) 11 *American Review of International Arbitration* 481, 519.

[73] Discussed in A. Vacek-Aranda, 'Sugar Wars: Dispute Settlement under NAFTA and the WTO as Seen through the Lens of the HFCS Case and its Effects on U.S.-Mexican Relations' 12 *Texas Hispanic Journal of Law & Policy* 121, 143; Gantz 2000, *ibid.*

process and as to the result. It is backed by the legal and moral force of the whole WTO. From this perspective it can be seen as a stronger and more reliable procedure than Chapter 20, and, in fact, all three NAFTA parties have taken a number of cases to the WTO that might otherwise have been heard under the NAFTA process. Among these cases can be cited the many Softwood Lumber[74] decisions, *Canada—Wheat Exports and Imports*[75] and the *HFCS* case.[76] In this respect the multilateral process has proven to be much more attractive than Chapter 20.

Chapter 19 is undoubtedly a highly original procedure designed to prove to NAFTA citizens involved in ADCV disputes that they can in fact be protected from unfairness and bias at the hands of another NAFTA government. Bi-national panels have frequently ruled that administrators of a party have overstepped the mark and have not ruled fairly as their own law required. In this sense the process has worked. However, Chapter 19 has not proven equal to the challenges posed by trade groups able and willing to prolong old challenges and to take up new complaints as soon as the old have been terminated. In several instances, Canada has had recourse to the WTO to assert claims that had already been won before Chapter 19 bi-national panels.[77] The result of all this is that the verdict on Chapter 19 must be a very mixed one, and it is significant that no other government has seen fit to adopt a similar approach to ADCV disputes in the many FTAs negotiated subsequent to NAFTA. On top of this, both Canada and the USA appeared to back away from Chapter 19 when they signed the SLA in 2006, when the two parties chose arbitration under the Rules of the London Court of International Arbitration.

Chapter 11, on its face, has functioned well in terms of opening investment markets and maintaining a stable investment climate. The investor–state arbitration system has been the only source of complaint.[78] Adopted at the behest of the USA to deal with a perceived problem in Mexico, both the Canadian and the American governments were surprised to be the objects of demands for arbitration. This should not have been a surprise: when a new legal remedy is created in a litigious society, it will be used. But both the Canadian and the American governments have responded with some displeasure at being sued and on finding that they had no way to avoid the criticism from nationalist groups that have argued that this kind of dispute settlement is illegitimate in a democratic society.[79] The fact that the reach of Chapter 11 arbitration is infinitely shorter than the jurisdiction of the European Court of Justice or that investor state claims are much less demanding than such claims as *Francovitch*[80] or *Brasserie du Pêcheur*[81] is not a relevant comparison for Canadian and American critics. The fact that

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[74] Softwood Lumber Decisions, See documents under 'Dispute Settlement' at Foreign Affairs and International Trade Canada, 'Softwood Lumber', (3 February 2011), available online: http://www.international.gc.ca/controls-controles/softwood-bois_oeuvre/other-autres/agreement-accord.aspx?lang=eng#legal (accessed 6 February 2011).

[75] Canada-Wheat Exports and Grain Imports, Appellate Body Report, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004: VI, 2739.

[76] HFCS, *supra* n 32.

[77] J. Dunoff, 'The Many Dimensions of Softwood Lumber', (2007) 45.

[78] Hufbauer and Schott, *supra* n 4 at 204. See http://www.naftaclaims.com for a complete record of the cases.

[79] H. Mann, *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights* (International Institute for Sustainable Development and the World Wildlife Fund, 2001), available at http://www.iisd.org/pdf/trade_citizensguide.pdf (accessed 6 February 2011).

[80] Case C-6/90, Francovitch and Bonifaci v Italy [1991] ECR I-5537.

[81] Case 46/93 and 48/93 Brasserie du Pêcheur/Factortame III [1996] ECR I-1029.

Canada has lost[82] or conceded several cases[83] has been the object of considerable criticism and embarrassment to the government.

D Failure to Deliver on the Promise of the Side Agreements

The performance of the two side agreements has been the source of disappointment and criticism from the labour and environmental movements. Given that the existence of the side agreements was politically essential for the adoption of NAFTA, this is a serious matter, but it is not one that the three governments have sought to remedy. Indeed, the disappointment with the side agreements stems at least in part from the hostility that government departments—with the possible exception of the United States Environmental Protection Agency—have displayed in the face of public critics of their policies who have attempted to use the complaints processes of both side agreements. Resources allocated to the operation of the Commission on Environmental Cooperation (CEC) Secretariat have been kept to a minimum and scarcely increased over time. The response of governments to the request for the preparation of factual reports by private complainants has been to restrict the scope of the inquiry if it is allowed at all[84]; very few of the impressive factual records prepared by the CEC Secretariat have been welcomed by governments or have given rise to new governmental policies. The very narrow potential for supranational scrutiny inherent in the NAAEC article 14 complaints process has been greeted as a threat to national governments rather than an opportunity to enunciate common North American policies.

The record of the NAALC has been even less impressive. After using the complaints process before 'National Administrative Offices' in Mexico,[85] the USA[86] and Canada[87] with little effect, the labour movement appears to have given up recourse to the process and the three governments have apparently scaled down the Secretariat and the national offices. NAFTA's claim to being the first genuinely environmentally and labour-friendly trade agreement now rings somewhat hollow.

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[82] See. *S.D. Myers Inc. v Government of Canada*, Final Award (30 December 2002), available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/SDM_archives.aspx?lang=en (accessed 5 February 2011); *Methanex Corp. v United States of America*, Final Award (9 August 2005), available at: http://www.state.gov/s/l/c5818.htm (accessed 5 February 2011).

[83] *AbitibiBowater Inc. v Canada*, Consent Award (15 December 2010), available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/AbitibiBowater_archive.aspx?lang=en (accessed February 5, 2011).

[84] Commission for Environmental Cooperation, 'Home', (2010), available at: http://www.ic.gc.ca/eic/site/ic1.nsf/eng/04535.html. See for example the most recent complaint, 'PCB Treatment in Grandes-Piles Quebec' (SEM-11-001, filed on 11 January 2011), available at: http://www.ic.gc.ca/eic/site/ic1.nsf/eng/04535.html (accessed on 12 February 2011).

[85] For Mexico's office, see Secretaria del Trabajo y Prevision Social, 'Home', (2011), available at http://www.stps.gob.mx/ENGLISH/index.htm (accessed 11 February 2011). See A. de Mestral, 'The Significance of the NAFTA Side Agreements on Environmental and Labor Cooperation', (1998) 5 *Arizona Journal of International & Comparative Law* 169, 180.

[86] For the US office, see United States Department of Labor, 'Division of Trade Agreement Administration and Technical Cooperation', (2011), available at: http://www.dol.gov/ilab/programs/nao/ (accessed on 12 February 2011).

[87] For Canada's office, Department of Labour, 'Cooperative Activities under the NAALC', (16 November 2005), available at: http://www.hrsdc.gc.ca/eng/lp/spila/ialc/04Cooperative_Activities.shtml (accessed on 13 February 2011).

E Failure to Develop a Genuine Concept of a Single North American Market

One very clear objective of NAFTA was to expand the size of the North American market so that investors and manufacturers could have the advantage of an expanded scale of production.[88] This has certainly been done through the elimination of tariffs on virtually all but agricultural goods and through the grant of national treatment for a wide range of services and investments from the three countries. The expression 'single market' inspired by the EU has occasionally been used to describe the result.[89] However, the three governments have remained jealously in control of their separate economies, and there has been scant effort made to adopt concerted economic policies in the form of common regulatory policies or common environmental, labour, or health standards. Governments have only acted in a few cases, such as those dealing with common customs procedures and the definition of NAFTA goods,[90] and have not responded positively to proposals from economic advisers and think tanks[91] that further steps should be taken towards the further integration of North American markets and the elimination of other existing trade barriers. There have been exceptions, such as the joint efforts made by the Canadian and US governments to save the US automobile industry in 2008–2010.[92] A further example of the need to accommodate policy to the integration of markets occurred when the Canadian and American governments worked together to avoid the worst effects of applying a Buy American policy across the board to the operation of the US stimulus legislation in 2009[93] by eliminating its application to potential Canadian bidders and by partially opening Canadian provincial procurements.[94]

In a sense the general public in Canada and Mexico have continued to fear American economic dominance, and politicians have often pandered to such sentiments rather than leading public opinion in other directions. In the USA the impact of American economic policy on Canada and Mexico is not a public issue except with respect to perceived problems such as immigration or the threat of terrorism. The result has been that since 1994, politicians, including legislators, have failed to develop any sense of the North American economy and the common economic and regulatory space that might be expanded and clarified to the advantage of all three countries. Whatever opportunity that NAFTA provides to build and expand upon a sense of North American common space has been wasted or simply ignored. At a time when European leaders have been working, often against opposition, to build a sense of common human, economic and regulatory space in the EU, North American politicians have made scant efforts in that

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[88] 'Statement of Implementation (Canada)', *supra* n 64.

[89] See, eg, Government of Canada, 'Ambassador Wilson's Address to the Board of Directors of the Western Growers Association', (14 May 2008), available at: http://www.canadainternational.gc.ca/washington/offices-bureaux/amb/080514.aspx?lang=eng (accessed 14 February 2011).

[90] Gantz 2009, *supra* n 38, 109.

[91] See, eg, Goldfarb, *supra* n 84.

[92] See, eg, Industry Canada, 'The Governments of Canada and Ontario Rejects Automakers' Restructuring Plans', (30 March 2009), available at: http://www.ic.gc.ca/eic/site/ic1.nsf/eng/04535.html (accessed 12 February 2011).

[93] American Recovery and Reinvestment Act of 2009, Public Law 111-5-17 February 2009 (123 STAT.115).

[94] Foreign Affairs and International Trade Canada, 'Canada-U.S. Agreement on Buy American Came into Force', (16 February 2010), available at: http://www.international.gc.ca/commerce/Can_US_procurement_agreement-accord_marche_public_Can_EU.aspx (accessed 12 February 2011).

direction. The efforts of Asian,[95] Latin American[96] and African leaders have been making further efforts at economic integration. North America has chosen to rest on the somewhat faded laurels won in 1993.

F Little Capacity for Substantive and Institutional Development

The capacity for incremental and interstitial growth has been one of the most impressive features of the EEC/EU. Most commentators suggest that this is a function of the institutions which were initially created in 1957 and which have continued to serve the EU well over the years. It is interesting to note that other regional trade arrangements that appear to be growing and deepening their reach appear to need to develop common institutions. This appears to be true for agreements such as the MERCOSUR, which began as a self-professed customs union but which has had difficulty remaining true to the model, or the ASEAN, which began as a security and modest FTA but which is attempting to move in the direction of a full-fledged customs union.

NAFTA does have institutions, albeit very modest in scale. The regular meeting of the trade ministers of the three parties who compose the commission could have developed into something more than a biannual gathering, but it has not. The NAFTA Secretariat could also have developed but has not. The explanation is partially political as there was no political will to deepen NAFTA in the sense revealed over the years in Europe. However, the reason is also structural. The institutions were never given the capacity for incremental growth. Each change has to reflect new political will, and such determination to change institutions is not easy to muster at any time, still less to maintain over a space of years. For common institutions to succeed, there has to be political support, but they also have to have the capacity to sustain themselves and to move forward on their own. This has been notably lacking under NAFTA.

The failure of NAFTA institution building is nowhere more marked than in the gradual disappearance of the 30 standing and *ad hoc* joint committees that were announced to exist at the entry into force of NAFTA. Commentators and negotiators at the time heralded the importance of these committees, but they are virtually all gone and NAFTA structures had no independent capacity to develop and sustain them. There is a message here. As a general rule, without strong political will behind them, FTAs do not contain the seeds of their own expansion. As a general rule they are fated to remain in a form of suspended animation, growing gradually less relevant to economic policy unless deliberate efforts are made to use them to develop new policies.

G Failure of the NAFTA Concept as a Basis for an FTA of the Americas

A further example of the failure of NAFTA to develop and inspire institutional change has been the fate of the Free Trade Agreement of the Americas (FTAA). The FTAA negotiations were launched with great fanfare at a meeting of heads of state of all the Americas and the Caribbean. The model was to be an FTA based on NAFTA but including a number of new areas of economic policy and suitably adjusted to accommodate the needs of the less developed states of the hemispheres. The negotiations have

[95] ASEAN, *supra* n 81.

[96] MERCOSUR (website), *supra* n 83; Andean Community, available at: http://www.comunidadandina.org/endex.htm; UNASUR, 'Sitio Oficial', (2011), available at: http://www.pptunasur.com/ (accessed on 6 February 2011).

been sustained by a multinational secretariat that organised regular negotiating sessions of the parties. From the inception, some major Latin American states, such as Brazil, were hostile to the enterprise, seeing it as an extension of American economic dominance. It has also become clear that NAFTA is a demanding model and that while many Latin American states are willing to enter into a NAFTA-type agreement on a bilateral basis with the USA and Canada, there is no enthusiasm for a generalised NAFTA applicable throughout the two hemispheres.

IV Conclusions—NAFTA as the Paradigm of the Limits of the FTA Model

One can be very critical of the NAFTA experience, but the balance sheet for the three parties is anything but negative. Virtually all customs barriers have been abolished; services and investments have been liberalised far beyond that required under the WTO. Areas such as trade in energy have been subjected to disciplines only talked about in the WTO. The objective of the parties was to submit themselves to trade disciplines which could not be achieved in the Uruguay Round negotiations, and in this they were highly successful. In short, NAFTA has done much good and, despite the criticisms, little demonstrable harm.

Where NAFTA is most open to criticism is with respect to what it has not done or where its potential has not been realised. NAFTA, despite its wide coverage and demonstrated economic effects, has not shown a capacity for incremental growth. The FTA model simply does not provide the institutions necessary to carry an agreement forward. To change, an FTA must be renegotiated and recreated each time—something that is extremely difficult, if not politically impossible, over time. The central lesson of NAFTA is therefore to serve as a warning that the FTA model, although dynamic on a one-time basis, does not contain the seeds of its own future success. FTAs are a little like butterflies, wonderful short-lived creatures that must be recreated each time in order to live again.

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