
Globalization and Canadian Federalism: Implications of the NAFTA's Investment Rules

Mark A. Luz and C. Marc Miller

Globalization is a theory blind to federalism. In this Note, the authors consider the implications of globalization for Canadian federalism by exploring the implications of the investment protection provisions of Chapter 11 of the *North American Free Trade Agreement* ("NAFTA").

After exploring the theoretical foundations of globalization, three indicators of globalization are identified: the increase in regulatory treaties, the legalization of dispute resolution, and the individualization of remedy. All three indicators are exemplified by the NAFTA investment protections.

The authors then address three potential consequences of NAFTA Chapter 11 for the constitutional division of powers in Canada. First, they foresee that international law will be brought to bear on the most local levels of Canadian society, with an unprecedented effect on provincial powers. Second, the territorial limitation on provincial powers will be challenged by the non-territorial aspects of globalization. Third, the authors predict an expansion of federal power through the trade and commerce power and the peace, order, and good government power.

The authors conclude that a judicial balancing solution is preferable to granting the federal government a treaty-making power. This balance may be assisted by employing the national concern doctrine.

La théorie du fédéralisme échappe à la mondialisation. Dans cette Note, les auteurs examinent les implications de la mondialisation pour le fédéralisme canadien en explorant les implications des directives de protection d'investissement du Chapitre 11 de l'*Accord de libre-échange nord-américain* («ALENA»).

Après un examen des fondements théoriques de la mondialisation, trois indicateurs de la mondialisation sont identifiés, soit la croissance des traités régulateurs, la légalisation des résolutions de différends et l'individualisation du remède. Ces trois indicateurs sont illustrés par les directives de protection d'investissements de l'ALÉNA.

Les auteurs examinent ensuite les implications du Chapitre 11 de l'ALÉNA pour la division des pouvoirs en Canada. Premièrement, ils prévoient que le droit international sera appliqué aux échelons locaux de la société canadienne entraînant ainsi un effet sans précédent sur les pouvoirs provinciaux. Deuxièmement, les limitations territoriales des pouvoirs provinciaux seront mises au défi par les aspects non territoriaux de la mondialisation. Troisièmement, les auteurs envisagent un élargissement du pouvoir fédéral à travers les pouvoirs du trafic et du commerce et du pouvoir de paix, d'ordre et de bon gouvernement.

En conclusion, les auteurs reconnaissent qu'une solution d'équilibre judiciaire est préférable au pouvoir fédéral de conclure des traités. La doctrine de l'intérêt national peut aider à atteindre cet équilibre.

* Mark A. Luz, Associate, White & Case LLP (Moscow), B.A., M.A., LL.B., B.C.L.; C. Marc Miller, Associate, Paul, Weiss, Rifkind, Wharton & Garrison LLP (New York), B.A., M.Sc., LL.B., B.C.L. The authors would like to thank Professor Stephen Toope for his great support and guidance on this note, as well as the editors of the *McGill Law Journal* for their diligent editing and helpful comments.

Introduction

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Introduction

While there has been substantial discussion about the implications of the *North American Free Trade Agreement* (“NAFTA”)¹ for the Canadian economy, sovereignty, and democracy, few studies have sought to put the NAFTA into the broader context of globalization and examine what impact it will have on Canadian federalism. Indeed, globalization is a theory blind to federalism. If globalization represents the decay of national borders, how can internal borders in federal states remain unaffected? The NAFTA, as a particular expression of globalization, is similarly blind to the basic tenets of federalism. If we are to reconcile globalization with the principles of federalism that have sustained Canada since Confederation, the traditional tests of balancing federal and provincial powers need to be rethought.

We argue that a treaty like the NAFTA, particularly the investment protection provisions contained in Chapter 11, will accelerate significantly the entrenchment of international legal standards at the provincial level by virtue of the threat of credible international arbitration and the direct enforcement of arbitral awards by domestic courts. Historically, there have been few international investment claims against Canada (on its own behalf or because of an alleged wrongful action taken by a province) because Canada has rarely entered into agreements that either gave individuals procedural remedies against it or covered provincial actions within the scope of the agreement. Recently, treaties like the NAFTA, the *Canada-Chile Free Trade Agreement*,² and Canada’s newest versions of foreign investment protection agreements (“FIPAs”),³ expose the country to potential international investment claims unprecedented in Canadian history. In particular, NAFTA Chapter 11 outlines specific standards of treatment of investors and their investments, directly incorporates customary international law as a source of interpretation, and provides for a direct right of action by an investor against a NAFTA government for transgressions of the treaty by federal and provincial entities. With the federal and provincial governments having recently

¹ *North American Free Trade Agreement between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 & 605 (entered into force 1 January 1994).

² 5 December 1996, Can. T.S. 1997 No. 50, 36 I.L.M. 1067 (entered into force 2 June 1997).

³ See e.g. *Canada-Venezuela Agreement for the Protection and Promotion of Investments*, 1 July 1996, Can. T.S. 1998 No. 20 (entered into force 28 January 1998), online: DFAIT <<http://www.dfait-maeci.gc.ca/tna-nac/FIPA/VENEZUELA-E.PDF>> (date accessed: 18 October 2002). See generally the Department of Foreign Affairs and International Trade’s list of FIPAs online: DFAIT <http://www.dfait-maeci.gc.ca/tna-nac/fipa_list-e.asp> (date accessed: 18 October 2002).

adopted legislation on the recognition and enforcement of foreign arbitral awards,⁴ individual and corporate investors have more power against governments than ever before. Whether this is a positive or negative development is a topic for another study, but it is clear that conflicts centred on the status of treaties and customary international law will likely arise in Canada in the near future.

In Part I we discuss globalization from a theoretical perspective and identify globalization for the purposes of this paper as a process that is transforming traditional structures of society, in particular the state. In Part II we identify three indicators of globalization: the increase in regulatory treaties, the legalization of dispute resolution, and the individualization of remedy. Part III outlines how the three indicators operate by demonstrating how certain provisions in a regulatory treaty such as the NAFTA (particularly those contained in Chapter 11) are symptomatic of globalization. Finally, in Part IV we address the potential impact of NAFTA's Chapter 11 provisions on Canada's federal structure and suggest that these provisions will present an increasing challenge to the traditional distribution of powers between the federal and provincial governments.

I. The Theory of Globalization

The modern use of the term "globalization" can be traced back at least to the 1960s. In 1962, Marshall McLuhan observed that the "new electronic interdependence" was recreating the world in the image of a global village and that this new electronic age was merging humanity into a single global tribe.⁵ McLuhan pointed to technological development as having created a situation in which change itself had become the "archetypal norm of social life."⁶ The growing discussion of "the global", for which McLuhan's work was in part responsible, builds on the great technological developments of the twentieth century. Indeed, the common theme running through most accounts of globalization emphasizes the massive technological leap that has occurred in the past century and its effects on humanity through the provision of instant access to information in vast quantities and through allowing individuals to interact with each other more quickly, more often, and more economically than before. The

⁴ See e.g. *Commercial Arbitration Act*, R.S.C. 1985 (2d Supp.), c. 17; *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233; *United Nations Foreign Arbitral Awards Convention Act*, R.S.C. 1985 (2d Supp.), c. 16; *Foreign Arbitral Awards Act*, R.S.B.C. 1996, c. 154.

⁵ M. McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man* (Toronto: University of Toronto Press, 1962) at 8, 31.

⁶ *Ibid.* at 155.

globalization debate, however, is much more than the observation of technological transformation.

Globalization is not an entirely new phenomenon. Indeed, if one is to believe McLuhan, global change started with Gutenberg's printing press. If globalization is to be identified with converging societies and a process of integration, then Emile Durkheim, Claude-Henri de Saint-Simon, Karl Marx, and Max Weber, among others, have already addressed this phenomenon.⁷ Durkheim argued that industrialization was erasing national borders and Saint-Simon identified the emergence of a pan-European state. Weber saw the Protestant ethic as a rationalization process that would modernize the Western world, while Marx argued that the capitalist method of production led to the expansion of the bourgeois class, which would eventually allow a worldwide proletariat to triumph.⁸ These writers focused not only on economic development but also on the shaping of ideas and the transformation of societies.

From a historical perspective, it can be argued that the current form of globalization is the result of a drawn-out process. Roland Robertson identifies five phases of globalization.⁹ The fifth phase, from 1965 onward, is marked by the vast increase in global consciousness due largely to the increase in means of communication and information transfers. It is, according to Robertson, characterized by the spread of de-

⁷ E. Durkheim, *The Division of Labor in Society*, trans. by G. Simpson (New York: Free Press, 1933); G. Ionescu, ed., *The Political Thought of Saint-Simon* (London: Oxford University Press, 1976); M. Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. by S. Kalberg (Los Angeles: Roxbury, 2002); K. Marx, *Capital: A Critique of Political Economy*, ed. by F. Engels, 3 vols. (New York: International, 1967).

⁸ M. Waters, *Globalization* (London: Routledge, 1995) at 5-7.

⁹ R. Robertson, *Globalization: Social Theory and Global Culture* (London: Sage, 1992) at 58-59. The first phase, from 1400 to 1750, was characterized principally by the formation of national communities, the recognition of the heliocentric theory, the propagation of the Gregorian calendar, and the expansion of the Catholic Church. This phase was followed by the "nascent" period from 1750 to 1870 in which the key benchmarks included the solidification of the homogeneous nation-state, the formation of international relations, as well as the increased presence of non-European states. The third phase, termed the "take-off" phase, ranged from 1870 to 1925 and was capped by the First World War. Robinson considers the take-off phase to be a period in which the inclusion in international relations of non-European societies started to take place, as well as a significant increase in means of communication. This phase was also characterized by more global forms of competition and recognition such as the Olympics and the Nobel Prize. The fourth phase, or the "struggle for hegemony" phase, lasted between 1925 and 1965. According to Robertson, this period's benchmarks were the League of Nations, the Second World War, and the United Nations. It was marked by different conceptions of modernity, as exemplified by the opposing ideological forces characteristic of the Second World War and the Cold War. The increased awareness of the world and humanity writ large, notoriously through the harnessing of atomic energy, was also a key benchmark.

mocracy and human rights as a global norm of governance, and coincides roughly with what Samuel Huntington has called the third wave of democratization.¹⁰ This model, though summary, illustrates the historical progress that forms the basis for globalization theory.¹¹

Anthony Giddens argues that a dislocation has occurred in modern history such that forms of organization like the nation-state can only be properly understood in reference to modernity, a social process that began with industrialization. Giddens claims that "originating in the West but becoming more and more global in their impact [are] a series of changes of extraordinary magnitude."¹² Giddens further argues that globalization is a process involving a dialectic between the global and the local.¹³ Understood as an increasing compression of time and space, globalization implies that no one can opt out of the transformations caused by modernity as typified by the risks of an ecological disaster or nuclear war.¹⁴ Globalization thus cannot be understood solely as an overwhelming "top-down" process. It is also reflexive—meaning that it is structured in reference to itself. Indeed, events and activities that one might think of as being strictly local phenomena may well be the result of global forces.

This idea was developed earlier by Karl Polanyi, who argued that although "haute finance" had contributed internationally to the maintenance of peace, particularly in the so-called Hundred Years Peace, it was not sufficient for government simply to follow simplistic principles of auto-regulation and utopian liberalism.¹⁵ Polanyi argued that modern society at that time was governed by a dual movement: a constant expansion of the market met by a countermovement of social forces limiting its expansion.¹⁶ The idea of this dual movement, although seemingly antagonistic in Polanyi's analysis, underscores the dynamic interaction later identified by Giddens as the global-local dialectic: the process by which new social structures emerge and transform old structures.

¹⁰ S.P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman, Ok.: University of Oklahoma Press, 1991).

¹¹ This theory has been described by other eminent writers such as F. Braudel, *Civilization and Capitalism 15th-18th Century: The Perspective of the World*, vol. 3, trans. by S. Reynolds (London: Collins, 1984); I. Wallerstein, *The Modern World-System: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (New York: Academic Press, 1974).

¹² A. Giddens, *The Nation-State and Violence*, vol. 2 of *A Contemporary Critique of Historical Materialism* (Berkeley: University of California Press, 1987) at 33.

¹³ A. Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Cambridge: Polity Press, 1991) at 22.

¹⁴ *Ibid.*

¹⁵ K. Polanyi, *The Great Transformation* (New York: Rinehart, 1957) at 17-18, 29-30.

¹⁶ *Ibid.* at 130.

Given this theoretical and historical background, globalization is most aptly conceptualized by five general conclusions.¹⁷ First, it is a set of potentially competing processes and not a single condition. Second, globalization, through its intense and far-reaching web of interconnected international and transnational relationships, is contributing to an emerging structure that both enables and constrains communities, states, and social forces. Third, very few areas of social life escape this process, which affects life in different ways. Fourth, both socio-economic and political spaces are being subjected to a “deterritorialization” and “reterritorialization”. In many areas of social life, territoriality is becoming disembedded. Finally, and perhaps as a consequence of the foregoing, power relationships amongst local, national, and global actors are becoming increasingly affected and restructured by globalization.

If globalization is a “widening, deepening and speeding up of worldwide interconnectedness in all aspects of contemporary social life,”¹⁸ it is clearly a phenomenon of varying intensity and extent. In particular, there is a disturbing disjuncture between the developed and developing world in virtually all aspects of globalization. Also, this phenomenon is modifying or extinguishing traditional forms of organization. Thus, any discussion of globalization should focus on the transformation of the spatial organization of social relations and transactions as assessed in terms of their extent, intensity, velocity, and impact.¹⁹

The globalization debate has generated three identifiable theses: hyperglobalist, skeptical, and transformationalist.²⁰ The hyperglobalist school of thought defines globalization as a new point in human history and posits that traditional structures, such as the nation-state, are outdated and incapable of fully controlling modern life.²¹ This view usually points to an economic logic such as the emergence of the world market as a near-irresistible force that is replacing traditional units of social organiza-

¹⁷ D. Held *et al.*, *Global Transformations: Politics, Economics and Culture* (Stanford: Stanford University Press, 1999) at 27-28.

¹⁸ *Ibid.* at 2.

¹⁹ *Ibid.* at 16.

²⁰ *Ibid.* at 2. As Held *et al.* point out, none of these schools of thought replicate the classical schools of thought in the social sciences: Marxism, liberalism, and conservatism.

²¹ See *e.g.* K. Ohmae, *The End of the Nation-State: The Rise of Regional Economies* (New York: Free Press, 1995); W.B. Wriston, *The Twilight of Sovereignty: How the Information Revolution Is Transforming Our World* (New York: Charles Scribner's Sons, 1992); S. Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: Cambridge University Press, 1996).

tion with new ones. In the hyperglobalist logic, the perceived consequences of this new and powerful force can be radically divergent.²²

The skeptical school of thought argues that the levels of economic interdependence are overstated and not unprecedented. This school further emphasizes the increasing need for and salience of national governments in this process of internationalization.²³ Accordingly, there is no clear evidence of perfectly integrated world markets and at best, the current evidence indicates further world fragmentation and regionalization.²⁴ Moreover, the argument according to which nation-states are becoming increasingly irrelevant is one that is categorically rejected by this school.²⁵ If anything, states themselves have been the authors of any perceived increase in internationalization. As Robert Gilpin argues, the role of the state and the role of the market are fundamentally different: "[T]he logic of the market is to locate economic activities where they are most productive and profitable; the logic of the state is to capture and control the process of economic growth and capital accumulation."²⁶ Furthermore, increased economic activity is not being globalized, but is restricted to Northern countries, and the rift with the "Third World" is becoming increasingly wide.²⁷

²² Neo-Marxist arguments underscore the increase of oppressive global capitalism tied to American hegemony. See S. Gill & D. Law, "Global Hegemony and Structural Power of Capital" in S. Gill, ed., *Gramsci, Historical Materialism and International Relations* (Cambridge: Cambridge University Press, 1993) 93. See also B. Stern, "How to Regulate Globalization?" in M. Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000) 247; M. Koskenniemi, "Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations" in Byers (*ibid.*, 17). Meanwhile, a more neo-liberal account stresses the victory of individualism over state power. See Held *et al.*, *supra* note 17 at 3. See also T.M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford: Oxford University Press, 1999). Nevertheless, there is considerable agreement on the proposition that nation-states are increasingly unable to contain and regulate social and economic activities and respond to the demands of their citizens.

²³ P. Hirst & G. Thompson, *Globalization in Question: The International Economy and the Possibilities of Governance* (Cambridge: Polity Press, 1996) at 199-200.

²⁴ See R. Boyer & D. Drache, eds., *States against Markets: The Limits of Globalization* (London: Routledge, 1996). See also S.P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996).

²⁵ See A. Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999).

²⁶ R. Gilpin with J.M. Gilpin, *The Political Economy of International Relations* (Princeton: Princeton University Press, 1987) at 11.

²⁷ Robertson, *supra* note 9; Held *et al.*, *supra* note 17 at 6-7.

The transformationalist school argues that societies are being transformed by an unprecedented and distinct historical process rife with contradictions.²⁸ Accordingly, the current phase of globalization is forcing governments and societies to adapt to a world where there is no longer a sharp distinction between international and domestic or internal and external.²⁹ For example, James Rosenau argues that since the Second World War, a technological revolution has occurred creating a significant degree of turbulence in world politics, thus creating a bifurcated system where there is increased parity between the global, the national, and the subnational.³⁰ This account identifies globalization as a process that is significantly transforming states, societies, and individuals, without necessarily tending towards a global market or a global civilization. The state is thus under increased pressure to seek coherent strategies for dealing with a globalized world and consequently there is no clearly defined set of rules to address this powerful force of change.³¹

We adopt the transformationalist school of thought primarily because we accept the notion that nation-states face difficulties in regulating and controlling global forces. We also take the state as our focal point of analysis and as the primary actor in international politics, since it is in part responsible for the creation and unleashing of these forces. One of the ramifications is that states are compelled to adapt and reform one of the fundamental means by which they manage legal relations amongst themselves: treaties.³² Whereas historically treaties were strictly meant to govern international relationships between sovereign states, they now deal with issues in areas once considered to be solely within the domestic sphere of nations. As such, local issues have become matters of concern for other states. Furthermore, treaties have historically only offered general and vague rules, without the means to resolve disputes over

²⁸ Held *et al.*, *ibid.* at 7.

²⁹ *Ibid.* See also A. Giddens, *The Consequences of Modernity* (Stanford: Stanford University Press, 1990); J.N. Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* (Princeton: Princeton University Press, 1990); J.G. Ruggie, "Territoriality and Beyond: Problematising Modernity in International Relations" (1993) 47 *International Organization* 139.

³⁰ Rosenau, *ibid.* at 100-01.

³¹ Held *et al.*, *supra* note 17 at 9.

³² Customary international law is obviously of critical importance as well. Unlike treaties, however, which are negotiated as instruments of international law, customary rules are created by substantial state practice and by states considering that the rule in question is legally binding upon them (*opinio juris*). See *Statute of the International Court of Justice*, s. 38(1)(b), online: UN <<http://www.un.org/Overview/Statute/contents.html>> (date accessed: 18 October 2002); *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, [1969] I.C.J. Rep. 4; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits), [1986] I.C.J. Rep. 14.

interpretation and application other than through diplomatic negotiations. Today, many treaties are complex regulatory instruments with highly institutionalized oversight bodies and binding dispute resolution mechanisms. Finally, whereas states are still the primary subjects of international law and as a rule the only entities that can make such agreements, treaties are increasingly granting substantive and procedural rights to non-state actors.

The theoretical outcome of this analysis is that globalization is increasingly challenging the traditional conception of the nation-state, and will therefore force a change in the traditional means by which states govern relations between themselves. Globalization theories put into question the viability of the state as an actor capable of making effective decisions. Both "pressure from above" and "pressure from below" challenge states in their institutional procedures. Stephen Gill argues that states are active participants in the creation of a "new constitutionalism", which involves the imposition of "binding constraints" on key aspects of economic life, ensured through the creation of supra-national institutional mechanisms like the World Trade Organization ("WTO"), the European Union, and the NAFTA.³³ The result of this process is that state institutions are constrained in their powers to interfere with, for example, property rights, such that holders of mobile capital are provided secured "entry and exit options."³⁴ Where power is divided federally in a state, the effect of these "constraints" is felt even more acutely. We argue that globalization disembeds the traditional legal order such that the division of powers typical of federal systems is under attack.

Globalization theory usually focuses on two sets of actors: the nation-state, as if it were an undivided sovereign entity, and non-state actors such as corporations, non-governmental organizations, and individuals. The *internal* political structure of a state and its relevance for that society, however, is rarely discussed in a globalization context. Here we argue that federalism, as a particularly valuable internal political and social structure, should receive much more attention in globalization debates, precisely because it conceives of the state as other than an undivided sovereign entity. If we consider some of the aforementioned conclusions about globalization in the context of federalism, it becomes apparent that significant and perhaps damaging consequences await federal states like Canada as a result of globalization. While we examine only the Canadian situation from an international legal and Canadian constitutional division of powers perspective and focus on the particular issue of investment, we also

³³ S. Gill, "Globalisation, Market Civilisation, and Disciplinary Neoliberalism" (1995) 24 *Millennium: Journal of International Studies* 399 at 412.

³⁴ *Ibid.* at 413.

attempt to add to the broader debate on how subnational entities like the Canadian provinces will adapt to globalization.

II. Legal Indicators of Globalization

From a legal perspective, three indicators are particularly valuable illustrations of how globalization has permeated and transformed international law: the increase in treaties of a regulatory nature, the legalization of dispute resolution, and the individualization of remedies. While the strength of these indicators varies by treaty and issue-area, matters that were once the exclusive domain of diplomatic “high politics” and off limits to any person or entity other than a sovereign state are becoming more transparent and accessible to non-state actors.

A. Increase in the Number and Scope of Regulatory Treaties

Since the inception of the United Nations (“UN”) system, and arguably earlier, there has been a trend towards the legalization of international interactions. The sheer number of international treaties is telling; the *United Nations Treaty Series* now contains more than 40,000 treaties and currently publishes more than 100 volumes per year.³⁵ While many of these treaties remain exclusively relevant to state-state interactions, international law is taking up an increasingly important role in domestic legal spheres.

Koh describes this trend as “an epochal transformation in international law.”³⁶ He argues that this particular transformation “has been characterized by the marked decline of national sovereignty; the concomitant proliferation of international regimes, institutions, and nonstate actors; the collapse of the public-private distinction; the rapid development of customary and treaty-based rules; and the increasing interpenetration of domestic and international systems.”³⁷ Chayes and Chayes point to a similar

³⁵ UN, *United Nations Treaty Collection—Overview*, online: UN <<http://untreaty.un.org/English/overview.asp>> (date accessed: 18 October 2002).

³⁶ H.H. Koh, “Review Essay: Why Do Nations Obey International Law?” (1997) 106 *Yale L.J.* 2599 at 2604.

³⁷ *Ibid.* [footnote omitted]. Koh traces this radical transformation of international law and divides it into six phases of evolution: (1) ancient and primitive international law, (2) traditional international law, (3) the dualistic era, (4) the era of institutions, (5) interdependence and transnationalism, and (6) the new world order. See *ibid.* at 2604–34. Dealing with the period immediately after the Second World War, which he calls the “era of institutions”, he characterizes this phase as one of international institutions that are governed by multilateral treaties and that organize “proactive assaults on all manner of global problems.” *Ibid.* at 2614. He describes the system as global constitutions seeking “both

trend, noting that the focus of treaty practice in recent decades has shifted from the recording of bilateral political settlements and arrangements to multilateral agreements concerning complex economic, political, and social problems that require cooperative action among states.³⁸ Although treaties are not the sole source of state obligation, they indicate an increased legalization of international relations. An example from the domain of high politics—the prohibition of chemical weapons—illustrates this trend.

In 1925, the *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*³⁹ was signed in Geneva. It prohibited the use of chemical and bacteriological weapons when it entered into force on 8 February 1928. Nevertheless, many reservations were made to the protocol, most of which limited compliance to first use. It lacked substantive detail and was essentially an agreement in principle. It contained no verification mechanism and was limited solely to the use in war of asphyxiating, poisonous, or other gases. Moreover, it was unspecific as to what constituted a prohibited substance. Not until almost fifty years later, in 1972, with the signing of the *Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*⁴⁰—did the processes leading up to the potential use of such weapons become prohibited. Once again, however, this treaty spanned only fifteen short articles (although it was more extensive than the 1925 treaty). Indeed, it contained no verification mechanism and its level of specificity was low. Even at the height of the Cold War, this treaty was seen as insufficiently detailed, but its signature and ratification were nevertheless considered to be necessary, in part to maintain the momentum in the field of arms control.⁴¹ Work towards a more detailed treaty and a viable verification mechanism carried on, focusing specifically on chemical weapons. In 1993, the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*

to allocate institutional responsibility and to declare particular rules of international law." *Ibid.* This phase was followed by a period of interdependence, followed by what Koh calls the new world order—marred by considerable uncertainty but distinct in that international law is becoming increasingly transnational, permeating deeper into domestic legal orders. *Ibid.* at 2630-33.

³⁸ A. Chayes & A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass.: Harvard University Press, 1995) at 1.

³⁹ 17 June 1925, T.I.A.S. 8061, Can T.S. 1930 No. 3 (entered into force 8 February 1928, ratified by Canada on 6 May 1930).

⁴⁰ 10 April 1972, 1015 U.N.T.S. 163, T.I.A.S. 8062, 11 I.L.M. 310, Can. T.S. 1975 No. 12 (entered into force 26 March 1975).

⁴¹ J.C. Kessler, *Verifying Non-Proliferation Treaties: Obligation, Process, and Sovereignty* (Washington, D.C.: National Defence University Press, 1995) at 52-53.

("CWC")⁴² was signed, and it entered into force in 1997. Although this treaty deals solely with chemical weapons and certain toxins, it can accurately be described as regulatory in nature. The CWC is a highly detailed document that creates a central authority, the Organization for the Prohibition of Chemical Weapons, to ensure compliance with the treaty. Furthermore, it lists prohibited chemicals and requires reporting when they are used for civilian purposes. The transparency mechanism is reinforced by an inspection mechanism that requires states parties to allow an international inspectorate to examine sensitive facilities situated within the state. Arguably, this new mechanism is groundbreaking in the field of high politics and it exemplifies the transformation of international law as described by Koh. The CWC thus bears little resemblance to its 1925 predecessor, whether in intensity, specificity, or delegation.

The past six decades have been characterized by significant increases in depth and scope of treaties in arms control, security and defense, economics and trade, criminal matters, the environment and natural resources, transportation and communication, education and culture, and human rights. This tendency points to a more generalized pattern of compliance, particularly as embodied by the UN system. As noted by Oscar Schachter, this increased concern for compliance at the world level was brought most notably to the fore by pressure on governments to respect human rights.⁴³ More generally, Schachter notes that globalization and the spread of the UN system have fostered this process.⁴⁴ This in turn has resulted in increased institutionalism and legalized patterns of transaction.⁴⁵

This elaboration of what constitutes "legalization"—although highly positivistic—essentially reproduces the argument made regarding the more general concept of globalization: it makes membership to the international structure more intense and more complex. The conceptual framework falls neatly within the context of globalization and the growing importance of treaty law; globalization is entrenching this trend towards legalized relationships, which in turn, is penetrating issue-areas that were traditionally territorially bound.⁴⁶ As Chayes and Chayes emphasize, although

⁴² 13 January 1993, 32 I.L.M. 800 (entered into force 29 April 1997, ratified by Canada 26 September 1995).

⁴³ O. Schachter, "United Nations Law" (1994) 88 A.J.I.L. 1.

⁴⁴ *Ibid.* at 19, n. 62.

⁴⁵ A.-M. Slaughter, A.S. Tulumello & S. Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship" (1998) 92 A.J.I.L. 367. The trend towards legalization of international interactions has recently been discussed in a special issue of *International Organization*. See (2000) 54:3 *International Organization*.

⁴⁶ Chayes & Chayes, *supra* note 38 at 284-85.

regulatory treaties, formally, are cast as obligations of a state to do or not do something, their object also is to regulate the activities of private entities and individuals.⁴⁷

B. Legalization of Dispute Resolution

Legalization is a form of institutionalization of international rules and norms characterized by obligation, precision, and delegation.⁴⁸ The degree of obligation can vary from expressly non-legal norms to binding legal rules and is evaluated by the extent to which an actor is bound by its commitments. The degree of precision can range from a vague principle to a precise and highly-elaborated rule. This dimension involves clearly and unambiguously defining what is expected of the actors in question.⁴⁹ The third dimension, the level of delegation, can shift from simple diplomacy to international or domestic court remedies.⁵⁰ It refers to the extent to which states and other actors delegate authority to third parties in order to implement and enforce agreements.⁵¹

As states enter into more substantively complex, regulatory, and intrusive treaties than ever before, the mechanisms by which disputes are resolved have also become more complex and intrusive. The delegation of broad authority to a neutral entity charged with ensuring that implementation, interpretation, dispute settlement, and rule-making are taking place bolsters the institutional nature of these treaties and, ultimately, the level of compliance.⁵²

⁴⁷ *Ibid.* at 14.

⁴⁸ K.W. Abbott *et al.*, "The Concept of Legalization" (2000) 54 *International Organization* 401.

⁴⁹ *Ibid.* at 412.

⁵⁰ *Ibid.* at 404.

⁵¹ *Ibid.* at 415.

⁵² J.L. Goldstein *et al.*, "Introduction: Legalization and World Politics" (2000) 54 *International Organization* 385 at 388-91. Specifically focusing on dispute resolution in trade treaties, James McCall Smith argues, "The more legalistic the dispute settlement mechanism ... the higher the likely level of compliance." J. McCall Smith, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts" (2000) 54 *International Organization* 137 at 144. By "legalistic", McCall Smith refers to five features of institutional design: an automatic right to third-party review; a standing tribunal of judges; access to the dispute resolution mechanism by states, individuals and treaty organs; the ruling is a binding obligation in law; and the enforcement of the ruling has direct effect in domestic law (*ibid.* at 139-43). The progressive institutionalization of the world trading system is one example of this process.

The unprecedented increase in world trade,⁵³ for example, has been fostered by institutional efforts to remove tariff barriers and to promote competition in the global trading system. The 1944 Bretton Woods agreement represented a conscious attempt to purge the protectionism of the 1930s by laying the foundations for a multilateral trading order.⁵⁴ Although the 1947 *Havana Charter* provided for the creation of the International Trading Organization to oversee the international trading system, it was opposed in the U.S. Congress, leaving the *General Agreement on Tariffs and Trade* (“GATT”)⁵⁵ as little more than a trade agreement with a small secretariat setting the rules for global trade. It was not until 1995 that the WTO cemented the GATT into a more powerful institution.⁵⁶

The GATT’s transition from a system of soft law to a more hard-law system illustrates the global shift toward legalization and the emergence of supranational law-based governance mechanisms in the area of trade law. The GATT was drafted in relatively general terms and its delegation of authority to a dispute settlement body was unwieldy and insufficient.⁵⁷ While it was a major step forward at the time it was negotiated, over time it became anemic and incapable of addressing more sophisticated forms of protectionism such as the so-called second and third generation trade barriers: non-tariff governmental measures like quotas, export subsidies, anti-dumping measures, and voluntary restraints. Internal governmental regulatory measures not directly targeting trade also presented difficulties, such as services, regulatory measures,

⁵³ Although the emergence of the world trading system can be traced back to the sixteenth century, it was not until the period ranging from 1870 to 1939 that markets for key goods started to acquire a global dimension which resulted in country specialization where national patterns of production were increasingly influenced by global competition. The post-World War II period up until 1973 saw trade volumes increase at 5.8 percent annually, while world trade output grew at a rate of 3.9 percent annually. This was followed by, from 1973 to 1996, increased trade volumes of 4.1 percent and world output volume increases of 3.3 percent annually. Held *et al.*, *supra* note 17 at 163-65. See also Braudel, *supra* note 11; A.K. Smith, *Creating a World Economy: Merchant Capital, Colonialism, and World Trade, 1400-1825* (Boulder, Colo.: Westview Press, 1991); M. Kitson & J. Michie, “Trade and Growth: A Historical Perspective” in J. Michie & J.G. Smith, eds., *Managing the Global Economy* (Oxford: Oxford University Press, 1995) 3.

⁵⁴ Held *et al.*, *ibid.* at 164.

⁵⁵ 30 October 1947, 55 U.N.T.S. 187, Can. T.S. 1947 No. 27 (entered into force 1 January 1948).

⁵⁶ *Agreement Establishing the Multilateral Trade Organization [World Trade Organization]*, 15 April 1994, 33 I.L.M. 15.

⁵⁷ F.M. Abbott, “NAFTA and the Legalization of World Politics: A Case Study” (2000) 54 *International Organization* 519 at 520.

intellectual property norms, and competition policies.⁵⁸ It took five decades to address the insufficiencies of the original GATT agreement.⁵⁹

The GATT dispute resolution process was radically transformed by the creation of the WTO. The GATT panel and appellate body decisions became legally binding, thus giving these bodies the power to rule that a government was in breach of international trade laws and to impose sanctions.⁶⁰ According to Shell, this move constituted a dramatic departure from prior trade practice:

[T]he new WTO system represents a stunning victory for international trade "legalists" in their running debate with trade "pragmatists" over how international trade dispute resolution should be structured. Pragmatists have supported formally nonbinding methods of dispute resolution based on their belief that such systems provide the best means of coping with power relationships between countries. ... For their part, legalists have advocated the creation of rule-based trade tribunals that can move world trade toward a governance system based on "the rule of law."⁶¹

This increased delegation to an independent dispute resolution mechanism was seen as necessary to reinforce the trading system further and to give teeth to the GATT/WTO adjudicative process.⁶² Ultimately, the trend towards legalization of dispute resolution is attractive because it leads to greater compliance.⁶³

C. Individualization of Remedy

The third legal indicator of globalization is the individualization of remedy. An increasing number of treaties confer not only substantive legal rights on non-state actors but also the procedural rights necessary for their enforcement. Given the intensity and frequency of international transactions, states are finding it necessary to give individuals greater procedural rights to encourage those exchanges and to resolve dis-

⁵⁸ *Ibid.* at 520, n. 5.

⁵⁹ F.M. Abbott "The Intersection of Law and Trade in the WTO System: Economics and the Transition to a Hard Law System" in D. Orden & D. Roberts, eds., *Understanding Technical Barriers to Agricultural Trade* (Minneapolis, Minn.: International Agricultural Trade Research Consortium, 1997) 33.

⁶⁰ G.R. Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization" (1995) 44 *Duke L.J.* 829.

⁶¹ *Ibid.* at 833-34 [footnote omitted].

⁶² See generally J.H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (London: Royal Institute of International Affairs, 1998).

⁶³ See R.O. Keohane, A. Moravcsik & A.-M. Slaughter, "Legalized Dispute Resolution: Interstate and Transnational" (2000) 54 *International Organization* 457.

putes efficiently when they arise. As globalization transforms traditional power relationships, states, for various reasons, find it in their interests to open up international legal space for non-state actors.⁶⁴

The real issue is not whether an individual is a subject of international law and is the bearer of rights but rather whether the individual has the procedural capacity to pursue and enforce those rights.⁶⁵ States do have the capacity to confer both substantive and procedural rights on individuals, although “it cannot be presumed that States intend to treat what normally are mere objects of international law as subjects within the realm of the law of nations.”⁶⁶ In the *Danzig Railway Officials* case, the Permanent Court of International Justice (“PCIJ”) noted that “it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts.”⁶⁷

At the beginning of the twentieth century individuals slowly began to acquire independent recognition under international law.⁶⁸ For example, while the mixed arbitral

⁶⁴ Of course, it might be stated with equal credibility that states have no choice but to allow non-state actors to have procedural rights if they wish to exercise any modicum of control over international interactions.

⁶⁵ D.P. O’Connell, *International Law*, vol. 1 (London: Stevens & Sons, 1965) at 109-11. Brownlie also criticizes this tendency to focus on the theoretical question of whether an individual is an object or subject of international law. See I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Oxford University Press, 1998) at 584-85.

⁶⁶ G. Schwarzenberger, *International Law*, vol. 1 (London: Stevens & Sons, 1945) at 66-67 [footnote omitted].

⁶⁷ (1928), P.C.I.J. (Ser. B) No. 15 at 17-18.

⁶⁸ This process, however, was without much success prior to World War II. An early example was the International Prize Court, which was supposed to have been established pursuant to Hague Convention XII, 18 October 1907, but never was. See J.B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907* (New York: Oxford University Press, 1915) 188. The International Prize Court was to have allowed individuals a claim against a foreign state before the court, although the individual’s home state retained the right to disallow. Indeed, the individual could be forbidden by his or her own state to initiate a proceeding and the home state could choose to initiate the claim itself. See Schwarzenberger, *supra* note 66 at 118-20. The ill-fated Central American Court of Justice, established in 1908, similarly did not contribute a great deal to substantive international law, but the fact that it existed until 1918 is evidence of states’ willingness to recognize the individual as the bearer of substantive rights and the procedural rights by which to enforce them. It heard five cases brought by individuals against the five Central American Republics signatory to the *Convention for the Establishment of a Central American Court of Justice*, 20 December 1907, 206 C.T.S. 78, which established the Court. The convention provided that individuals could “raise [questions] against any of the other Contracting Governments, because of the violation of Treaties or Conventions, and other cases

tribunals established after World War I⁶⁹ are of historical interest because they heard several cases brought by citizens of the victor countries against the defeated states seeking compensation for injury to their property during the war, they enjoyed unusual coercive powers in support of their decisions and state governments still maintained an important role in the claims process.⁷⁰ These institutions all laid the groundwork for the establishment of modern claims tribunals where individuals have the procedural capacity to bring claims rather than having to rely on their home state's discretion to enforce the claim on their behalf.⁷¹ The entrenchment of the individual as a subject of international law with procedural capacity to enforce substantive rights came about after the Second World War.

Non-state actors have also made significant inroads in the realm of foreign direct investment ("FDI"). Transnational corporations (and small-scale investors with foreign investments) have gained substantial procedural rights in international law for the protection of their FDI, especially in the past ten years. Whereas foreign investors used to be required by treaty and custom to rely exclusively on their home state to espouse their claims,⁷² there are now many bilateral and multilateral investment treaties that allow for direct investor-state arbitration to resolve disputes.⁷³

of an international character; no matter whether their own Government supports said claim or not; and provided that the remedies which the laws of the respective country provide against such violation shall have been exhausted or that denial of justice shall have been shown." Four of the five cases were dismissed and the Court ruled against the claimant in the fifth case. See Brownlie, *supra* note 65 at 587-88.

⁶⁹ Articles 296, 297, 304, 305 of the *Treaty of Versailles*, 28 June 1919, 225 C.T.S. 188, established these tribunals.

⁷⁰ Brownlie, *supra* note 65 at 588-89. Other mixed arbitral tribunals have been set up giving individuals procedural rights. For example, see Agreement of 10 August 1922 between U.S. and Germany (cited in *ibid.* at 589).

⁷¹ These include the U.S.-Iran Claims Tribunal, established by the *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran*, 19 January 1981, 20 I.L.M. 230, art. 2 (part of the Algiers Accords).

⁷² The two most prominent examples are *Case Concerning the Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, [1970] I.C.J. Rep. 4; *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, [1989] I.C.J. Rep. 15.

⁷³ According to the United Nations Conference on Trade and Development ("UNCTAD"), the number of investment treaties concluded in the 1990s quintupled, driven particularly by the growth of bilateral investment treaties signed between developing countries, as well as between Central and Eastern European countries. See *Bilateral Investment Treaties: 1959-1999*, UNCTAD/ITE/IIA/2 (New York & Geneva: United Nations, 2000) at iii, online: UNCTAD <<http://www.unctad.org/en/docs/>

The 1965 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*⁷⁴ was a particularly important step in this process. The treaty created the International Centre for Settlement of Investment Disputes (“ICSID”) and gave investors direct access to this dispute resolution body. The ICSID uses a set of arbitral rules contained in the *ICSID Convention* and, if appropriate, applies international law.⁷⁵ In 1978, the “Additional Facility” of ICSID⁷⁶ was created for the purposes of arbitrating disputes outside its jurisdiction because either the respondent state or the home state of the applicant investor was not a party to the *ICSID Convention*. The exponential growth in bilateral investment treaties (“BITs”) that include an investor-state dispute resolution provision is also a significant development.⁷⁷

poiteiid2.en.pdf> (date accessed: 18 October 2002); G. Sacerdoti, “Bilateral Treaties and Multilateral Instruments on Investment Protection” (1997) 269 *Rec. des Cours* 251.

⁷⁴ 18 March 1965, 575 U.N.T.S. 160 (entered into force 14 October 1966) [hereinafter *ICSID Convention*].

⁷⁵ In order for the ICSID to have jurisdiction over an investment dispute, three conditions must be fulfilled: (a) there must be a legal dispute arising out of an investment, (b) the dispute must have arisen between a contracting state and a national of another contracting state, and (c) the parties must have consented to submit their dispute to the ICSID. See *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1 (award of 21 February 1997), 36 LL.M. 1531. See generally A. Broches, “The Convention on the Settlement of Investment Disputes between States and Nationals of Other States” (1972) 136 *Rec. des Cours* 331.

⁷⁶ *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (Additional Facility Rules)*, online: ICSID Additional Facility <<http://www.worldbank.org/icsid/facility/facility-en.htm>> (date accessed: 18 October 2002) [hereinafter Additional Facility Rules]. See A. Broches, “The ‘Additional Facility’ of the International Centre for Settlement of Investment Disputes (ICSID)” (1979) 4 *Y.B. Comm. Arb.* 373. Following the fundamental tenet of international commercial arbitration that the parties to a dispute must consent to arbitration, both the *ICSID Convention* and the Additional Facility Rules require that both the investor and the state involved consent to submit their investment dispute to arbitration. Article 25(1) of the *ICSID Convention*, *supra* note 74, requires that “the parties to the dispute consent in writing to submit [it] to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.” Article 4 of the Additional Facility Rules (*ibid.*) requires that there be an agreement providing for conciliation or arbitration proceedings under the Additional Facility in respect of existing or future disputes in order for the Secretary General to approve the institution of proceedings.

⁷⁷ See generally M. Somarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 1994); R. Dolzer & M. Stevens, *Bilateral Investment Treaties* (The Hague: Martinus Nijhoff Publishers, 1995); A.R. Parra, “Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment” (1997) 12 *ICSID Review-F.I.L.J.* 287; Sacerdoti, *supra* note 73. These treaties typically include provisions on the scope and definition of foreign investment; admission of foreign investment; national and most-favoured-nation treatment; fair and equitable treatment; guarantees and compensation

Many of the recently negotiated BITs include an "offer" to arbitrate on behalf of the contracting states that an investor may choose to accept should it wish to pursue arbitration rather than seek remedies in a domestic court.⁷⁸ As private foreign investment is now seen as a critical means of economic development,⁷⁹ BITs are negotiated not only to provide incentives to bring in foreign investment but also in order to give enhanced protection for foreign investment beyond that which exists in customary international law.

Indeed, a clear indicator of Canada's entry into the global marketplace is epitomized by the negotiation of FIPAs starting in 1989.⁸⁰ Canada's negotiation of such treaties (which has been common practice for the United States and Western European countries for some time) is concomitant to the increasing stock of Canadian FDI abroad, which has more than tripled from \$74 billion in 1987 to \$257 billion in 1999.⁸¹ Canadian efforts to negotiate foreign investment protection treaties, both bilaterally and multilaterally,⁸² signify the growing importance of FDI and Canada's

for expropriation and nationalization, as well as for damages caused by war and civil disturbances; guarantees of free transfer of funds and repatriation of capital and profits; subrogation on insurance claims and dispute settlement covering investor-state disputes as well as disputes as between the two contracting parties. In recent years, some of the treaties have become even more complex and deal with a broader array of subjects, including transparency of national laws, performance requirements, entry and sojourn of foreign personnel, and the extension of national and most-favoured-nation treatment to the entry and establishment of investments.

⁷⁸ See generally Sacerdoti, *ibid.* The first case brought by an investor under a bilateral treaty was *Asian Agricultural Products Ltd. v. Republic of Sri Lanka* (1990), Case No. ARB/87/3 (ICSID Tribunal), 30 I.L.M. 577.

⁷⁹ See generally UNCTAD, *World Investment Report 2000: Cross-border Mergers and Acquisitions and Development* (New York: United Nations, 2000).

⁸⁰ See R.K. Paterson, "Canadian Investment Promotion and Protection Treaties" (1991) 29 Can. Y.B. Int'l L. 373. On FIPAs, see text accompanying note 3 above.

⁸¹ See Canada, Department of Foreign Affairs and International Trade, *Opening Doors to the World: Canada's International Market Access Priorities, 2001* (Ottawa: Department of Foreign Affairs and International Trade, 2001) at 35-38, online: DFAIT <<http://www.dfait-maeci.gc.ca/tna-nac/2001/3-e.asp>> (date accessed: 18 October 2002). Since 1987, FDI in Canada has doubled, from \$106 billion to \$240 billion. Moreover, as is pointed out on the Department of Foreign Affairs and International Trade's website, "[s]ince 1996, the stock of Canadian direct investment abroad has surpassed the stock of FDI in Canada."

⁸² The inclusion of an investor-state mechanism in the Free Trade Agreement of the Americas similar to that of NAFTA will undoubtedly be very controversial. See Canada, Department of Foreign Affairs and International Trade, "Free Trade of the Americas (FTAA): Background—December 2000", online: DFAIT <http://www.dfait-maeci.gc.ca/tna-nac/ftaa_background2-e.asp> (date accessed: 18 October 2002). Canada was also, for a while, a leading proponent of the Multilateral Agreement on Investment. See OECD, Directorate for Financial, Fiscal and Enterprise Affairs, *The Multilateral Agreement*

growing role in that global market. Canada has historically been a net importer of capital and had therefore never been compelled to conclude such treaties with foreign countries. In the past, Canadian investors who suffered damage as the result of actions of another state had to rely primarily on the Department of Foreign Affairs and International Trade to espouse their claims, as few other remedies were available.⁸³ In support of the Canadian companies that have begun to venture out into the world in recent years, however, Canada's FIPAs now provide for a potentially effective mechanism for investor-state dispute resolution by enshrining consent to arbitration in the treaty itself.⁸⁴

States often find it inefficient and politically dangerous to rely on the old model of espousing claims on behalf of their nationals; individuals find the old model costly, cumbersome, and dependent not solely on the merits of their claim but also on broader diplomatic considerations.⁸⁵ By offering individualized remedies, particularly ones similar to those contained in investment treaties, states not only increase individuals' confidence in the obligations agreed to in the treaties, thereby promoting investment by reducing risks to those investments, but also more greatly bind themselves to their treaty commitments because of the high cost of ignoring them.⁸⁶

on *Investment: Draft Consolidated Text*, Doc. No. DAF/MAI(98)7/REV1 (OECD, 1998), online: OECD <<http://www1.oecd.org/daf/mai/htm/2.htm>> (date accessed: 18 October 2002).

⁸³ See C.V. Cole, "A Generation of Canadian Experience with International Claims" (1965-66) 41 *Brit. Y.B. Int'l L.* 368.

⁸⁴ This was not always the case—Canada's old model FIPAs contained very vague provisions on investment protection and did not provide for compulsory arbitration in case of a dispute unless the parties specifically agreed to submit it to arbitration after the dispute arose. See e.g. *Agreement between the Government of Canada and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments*, 20 November 1989, Can. T.S. 1991 No. 31 (entered into force 27 June 1991), online: DFAIT <<http://www.dfait-maeci.gc.ca/tna-nac/FIPA/USSR-E.PDF>> (date accessed: 18 October 2002). An example of a more powerful FIPA that contains advance consent to arbitration by the host state is the Canada-Venezuela treaty, *supra* note 3, art. 12(5).

⁸⁵ As Chayes & Chayes write, "[I]n a world increasingly dependent on the reliable performance of international regimes, states and their citizens may also be less willing to rest content with either negotiation or the hope that some ad hoc arrangement to umpire a dispute will be set up in the event of an impasse." *Supra* note 38 at 216.

⁸⁶ McCall Smith writes: "Trading states realize that agreements are valuable only if compliance with their terms is high. Cheating, in the form of *ex post* protectionism, undermines the expected benefits of free trade accords. One way to discourage defection is to craft dispute settlement mechanisms that monitor and enforce compliance. The more legalistic the mechanism—in other words, the more effectively and impartially it identifies violations and enforces third-party rulings—the higher the likely level of government compliance." *Supra* note 52 at 146.

III. Case Study: NAFTA Chapter 11

Globalization has compelled states to negotiate and conclude treaties in a significantly different manner in order to accommodate the increased number of transnational interactions and transnational actors. We have identified three legal indicators of this trend: the increased complexity of regulatory treaties, the legalization of treaties, and the individualization of remedies contained in many of these treaties. NAFTA Chapter 11, which covers investment, encapsulates all three indicators.

The opening of foreign markets and the integration of national economies into a global marketplace have driven the need for trade liberalization. While it is by no means assured that the current global economic framework will succeed in achieving all of its promises, there is now a growing awareness that national economies cannot “afford to remain outside the international network of products, customers, suppliers, financing, and technology embodied in the activities of [transnational corporations].”⁸⁷ This is particularly true in the realm of FDI. There has been a massive increase in global FDI since the early 1980s, driven not only by the increased privatization of state-owned economies and national deregulation but also by the growing importance of transnational services.⁸⁸

FDI is particularly worth studying through the lens of globalization because it encompasses many of the factors outlined above. FDI both enables and constrains states, corporations, and local communities. It raises sensitive issues of sovereignty, democracy, and national control over domestic economies.⁸⁹ It involves not only states and multinational corporations, but also NGOs, labour unions, and other social groups. Finally, FDI exemplifies the reconceptualization of territory. On the one hand, it means a greater and longer-term link to the domestic economy of the host state than in the case of portfolio investment, while on the other hand, foreign investors also have “supranational” rights safeguarded by customary international law and treaties, thereby mitigating the exclusive application of national law.

⁸⁷ D. Schwanen, “Investment and the Global Economy: Key Issues in Rulemaking” in P. Sauvé & D. Schwanen, eds., *Investment Rules for the Global Economy: Enhancing Access to Markets* (Toronto: C.D. Howe Institute, 1996) 1 at 4.

⁸⁸ M. Wolf, “Will the Nation-State Survive Globalization?” (2001) 80:1 *Foreign Affairs* 178. Whereas antipathy towards FDI characterized much of the postwar era, there are virtually no governments left that espouse pure protectionism as a path to economic growth.

⁸⁹ Sornarajah, *supra* note 77 at 4 [footnote omitted], defines foreign direct investment as involving “the transfer of tangible or intangible assets from one country into another for the purpose of use in that country to generate wealth under the total or partial control of the owner of the assets.”

The NAFTA, as a whole, is designed to promote trade and investment between Canada, the United States, and Mexico by eliminating tariffs and reducing non-tariff barriers, as well as by establishing rules for the conduct of business in the free trade area, including regulations of investment, services, intellectual property, competition, and the temporary entry of business persons. The NAFTA not only commits governments to remove barriers to trade and investment amongst Canada, the United States, and Mexico, but it affords individuals a primary role in ensuring the NAFTA's consolidation. For example, Chapter 19 provides for a system of binational panel reviews in place of judicial review of domestic decisions regarding anti-dumping and countervailing duty matters.

Of even greater significance are the investor-state dispute resolution provisions contained in Chapter 11.⁹⁰ The standards of treatment that each of the NAFTA governments are committed to afford to investors and investments include national treatment, most-favoured-nation treatment, treatment in accordance with international law, prohibitions against certain performance requirements, permissive transfers relating to an investment of an investor, and a prohibition against expropriation of an investment except in accordance with the international legal standards stipulated in the treaty.⁹¹ If a NAFTA government breaches one of its commitments, an investor has the option of demanding that the dispute be submitted to an arbitral tribunal pursuant to the provisions of Chapter 11 and either the ICSID Rules, the Additional Facility Rules, or the UNCITRAL Arbitration Rules.⁹² An offer and consent to such arbitration is given in advance within the treaty itself, as long as the dispute is arbitrable under the treaty.⁹³ If the arbitral tribunal finds that the respondent government has in fact breached its commitments under the treaty, monetary damages can be awarded and are legally enforceable in domestic courts.⁹⁴ Since the NAFTA came into force on 1 January 1994, there have been numer-

⁹⁰ See generally J.A. VanDuzer, "Investor-State Dispute Settlement under NAFTA Chapter 11: The Shape of Things to Come?" (1997) 35 Can. Y.B. Int'l L. 263; J.C. Thomas, "Investor-State Arbitration under NAFTA Chapter 11" (1999) 37 Can. Y.B. Int'l L. 99.

⁹¹ NAFTA, *supra* note 1, arts. 1102-10.

⁹² ICSID Convention, *supra* note 74; Additional Facility Rules, *supra* note 76; UNCITRAL Arbitration Rules, UN GAOR, 31st Sess., Supp. No. 17, U.N. Doc. A/31/17 (1976) 46.

⁹³ NAFTA, *supra* note 1, art. 1122(1) (Consent to Arbitration) states: "Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement." Art. 1122(2) explicitly states that this consent satisfies the requirements for agreement to arbitrate as defined in the ICSID Convention, *ibid.*, the Additional Facility Rules, *ibid.*, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 U.N.T.S. 38 (entered into force 7 June 1959) [hereinafter *New York Convention*], and the Inter-American Convention on International Commercial Arbitration, 30 January 1975, OR/OEA/Ser.A/20/Doc.42 (1975).

ous interim and final awards by arbitral tribunals constituted under Chapter 11,⁹⁵ with numerous cases pending.⁹⁶

Notwithstanding that there is no permanent judicial authority to interpret and apply the NAFTA's rules, Chapter 11 specifically remains legalistic given that consent to arbitration is enshrined in the treaty and that the initiation of the arbitration is left to the discretion of the investor.⁹⁷ The ruling of the arbitral tribunal is legally binding on

⁹⁴ The losing government is bound by art. 1136(2) to "abide by and comply with an award without delay," and by art. 1136(4), which states: "Each Party shall provide for the enforcement of an award in its territory." International arbitration awards are enforceable in Canada pursuant to federal and provincial legislation implementing the *New York Convention*, *ibid*. See *supra* note 4. See also J.G. Castel *et al.*, *The Canadian Law and Practice of International Trade with Particular Emphasis on Export and Import of Goods and Services*, 2d ed. (Toronto: Emond Montgomery, 1997) at 745-50. If the respondent NAFTA government fails to comply with a final award, art. 1136(5) allows for the investor's home state to initiate a state-to-state dispute settlement panel pursuant to NAFTA Chapter 20.

⁹⁵ *Ethyl Corporation v. Canada* (Notice of Arbitration), 14 April 1997, online: DFAIT <<http://www.dfait-maeci.gc.ca/tna-nac/ethyl-e.asp>> (date accessed: 18 October 2002), was settled before any award was made. See J. Urquhart, "Canada Removes Its Ban on Ethyl's Additive; U.S. Firm to Terminate Its Legal Fight" *The Wall Street Journal* (21 July 1998) A4. See also *Azinian v. United Mexican States* (Award), 1 November 1999, online: DFAIT <<http://www.dfait-maeci.gc.ca/tna-nac/azinian-e.asp>> (date accessed: 18 October 2002) [hereinafter *Azinian*]; *Waste Management, Inc. v. United Mexican States* (Notice of Arbitration, 29 September 1998), online: DFAIT <http://www.dfait-maeci.gc.ca/tna-nac/waste_manage-e.asp> (date accessed: 18 October 2002); *S.D. Myers Inc. v. Canada* (Partial Award), 13 November 2000, online: DFAIT <<http://www.dfait-maeci.gc.ca/tna-nac/SDM-e.asp>> (date accessed: 18 October 2002); *Pope & Talbot Inc. v. Canada* (Award on the Merits of Phase 2), 10 April 2001, online: DFAIT <<http://www.dfait-maeci.gc.ca/tna-nac/pope-e.asp>> (date accessed: 18 October 2002) [hereinafter *Pope & Talbot*]; *Metalclad Corporation v. United Mexican States* (2000), Case No. ARB(AF)/97/1 (ICSID Additional Facility), online: DFAIT <<http://www.dfait-maeci.gc.ca/tna-nac/metalcladCorp-e.asp>> (date accessed: 18 October 2000) [hereinafter *Metalclad*]. For an example of judicial review, see *United Mexican States v. Metalclad Corp.* (2001), 89 B.C.L.R. (3d) 359, 2001 BCSC 664.

⁹⁶ *United Parcel Service of America, Inc. v. Canada* (Notice of Arbitration), 19 April 2000, online: DFAIT <<http://www.dfait-maeci.gc.ca/tna-nac/parcel-e.asp>> (date accessed: 18 October 2002); *Methanex Corporation v. United States* (Notice of Arbitration), 3 December 1999, online: U.S. Department of State <<http://www.state.gov/s/l/c5819.htm>> (date accessed: 18 October 2002); *ADF Group Inc. v. United States* (Notice of Arbitration), 19 July 2000, online: U.S. Department of State <<http://www.state.gov/s/l/c3754.htm>> (date accessed: 18 October 2002). Methanex Corporation of Vancouver has launched a \$970 million U.S. suit seeking damages from the American government in compensation for a ban by California of its methanol gasoline additive MRBE. See P. Morton, "\$1B Methanol Battle Fires up this Week—Methanex Corp. in Face-off with US Government: Canadian Firm Claims California Violated NAFTA When It Banned Fuel Additive" *National Post* (5 September 2000) C1.

⁹⁷ NAFTA, *supra* note 1, art. 1122.

the parties to the dispute and can be enforced directly in domestic courts by virtue of domestic legislation.⁹⁸

Put in a broader context, Chapter 11 is not only about investment—it implicates employment, the environment, social welfare, and democracy.⁹⁹ It also attempts to regulate and stimulate relationships between foreign capital and local economies. This constrains and enables states. Though states are restricted in their policy-making discretion, people are empowered by the freedom to pursue their economic goals. While territory remains important because FDI means a more entrenched economic relationship with the host state, NAFTA investors have extraterritorial rights and remedies. Furthermore, the only borders that truly matter to FDI are external ones: once allowed entry into a national market, the rules apply throughout. Finally, Chapter 11 has already begun to redefine the traditional power relationships between foreign corporations, citizens, and government. Given the aforementioned realities, it is only a matter of time before it provokes a rethinking of the federal-provincial relationship.

IV. Effects on Canadian Federalism

If globalization necessitates de-territorializing and altering traditional structures of power, Canada will have to adapt its internal legal structure to the realities of globalization, such as our three legal indicators. Globalization will have an effect on Canadian federalism, but identifying and responding to these effects is a confusing process if some indicators of globalization are not identified. In describing three legal indicators of globalization as manifested in international treaties (regulatorization, legalization of dispute resolution, and individualization of remedies), we hope to contribute to the debate on how Canada may adapt its internal legal structure to these new realities. To do so, however, will have serious consequences for Canada's traditional federal structure and could impose significant costs on the constitutional powers of the provinces.

The principle of federalism¹⁰⁰ is not simply a function of dividing powers between a national government and territorially-defined subunits. In the Canadian context, federalism is aimed particularly at maintaining and developing the diversity of the component parts of the country, as well as giving provinces the necessary and desirable

⁹⁸ *Ibid.*, art. 1136.

⁹⁹ For environmental issues, see J.A. Soloway, "Environmental Regulation as Expropriation: The Case of NAFTA's Chapter 11" (2000) 33 Can. Bus. L.J. 92.

¹⁰⁰ K.C. Wheare defines federalism as "the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent." K.C. Wheare, *Federal Government*, 4th ed. (New York: Oxford University Press, 1964) at 10.

autonomy to develop their regional identities within their respective spheres of jurisdiction. In *Reference Re Secession of Quebec*, the Supreme Court of Canada held that “[f]ederalism was the political mechanism by which diversity could be reconciled with unity.”¹⁰¹ Furthermore, the Court recognized that a federal structure also facilitates democratic participation by distributing power to the government that is the most suited to achieving the “particular societal objective having regard to this diversity.”¹⁰² These are important values, recognized by the Supreme Court to be on an equal footing with Canada’s other foundational principles: democracy, constitutionalism and the rule of law, and the protection of minorities.

We argue that the regulatorization, legalization of dispute resolution, and individualization of remedies found in treaties like the NAFTA will have at least three effects on the Canadian federal structure. First, it will bring international law to the most local levels of Canadian society and have an unprecedented effect on the exercise of provincial powers. Second, because provincial powers are territorially limited, the unterritorial nature of global interactions identified earlier will increasingly be put beyond provincial legislative competence. This is particularly true of FDI, an area where provinces have traditionally exercised significant control. As a result of the latter, the third implication will likely be a concomitant expansion in federal power at the expense of the provinces. The federal general trade and commerce power¹⁰³ and the peace, order, and good government power¹⁰⁴ are the primary vehicles through which this expansion is likely to occur.

Localizing globalization means that local economic structures and conditions must be reformed to conform to transnational rules and practice. Territorially-based provincial powers are subject to erosion from both bottom and top—individuals are becoming the driving force behind the process of localizing globalization while the realities of global investment require the introduction and creation of complex regulating treaties outlining supranational sets of enforceable rules that penetrate deep into local aspects of the economy. The Supreme Court of Canada will have to chart a path through which it can apply judicial interpretations to a new global society where borders, both external and internal, lose significance.

¹⁰¹ [1998] 2 S.C.R. 217 at para. 43, 161 D.L.R. (4th) 385.

¹⁰² *Ibid.* at para. 58.

¹⁰³ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(2), reprinted in R.S.C. 1985, App. II, No. 5.

¹⁰⁴ *Ibid.*, s. 91.

A. International Law in Canada

The process of regional economic integration and the entrenchment of international legal standards into Canada's legal system will be greatly accelerated through investors' exercise of their treaty rights. Individual corporations are subject to fewer diplomatic restraints than national governments and we have seen their growing willingness to use the procedural remedies of NAFTA Chapter 11.¹⁰⁵ As lawyers and investors become more experienced with Chapter 11 and more cases interpret and apply its provisions, it will be used even more often. This will have particularly significant implications for the Canadian provinces. With globalization bringing international legal norms down to the most local levels of the economy, policy decisions that were once strictly intraprovincial now have to take international law into account if provinces do not wish to put Canada in breach of its international obligations. Provinces have always been "subject" to international law,¹⁰⁶ but with the individualization of remedy, foreign investors now have the procedural capacity to hold provinces accountable to international legal standards.

This is a significant development given the treatment of international law in the Canadian legal system. Canada has largely retained the legal principles of status and implementation of international law into domestic law that it derived from the United Kingdom: the Crown holds the royal prerogative to conduct foreign affairs and to enter into treaties, but Parliament must enact any necessary legislation to implement a treaty into domestic law.¹⁰⁷ Unlike the United Kingdom, however, Canadian treaty law has to deal with the special issue of the division of powers. The uneasy relationship between Canada's international treaties and their domestic implementation in spheres of provincial jurisdiction was outlined in *Labour Conventions*.¹⁰⁸ In that case, Lord

¹⁰⁵ NAFTA, *supra* note 1, arts. 1115-38.

¹⁰⁶ See *Reference Re the Powers of the Corporation of the City of Ottawa and the Corporation of the Village of Rockcliffe Park to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208, [1943] 2 D.L.R. 481 [hereinafter *Foreign Legations Reference* cited to S.C.R.].

¹⁰⁷ P.W. Hogg, *Constitutional Law of Canada*, looseleaf (Scarborough, Ont.: Carswell, 1997) at 11-5; R.St.J. Macdonald, "International Treaty Law and the Domestic Law of Canada" (1975) 2 Dal. L.J. 307. See *Re Arrow River & Tributaries Slide & Boom Co.*, [1932] S.C.R. 495, [1932] 2 D.L.R. 250. In the United Kingdom, it is the constitutional practice for the government to submit a treaty that is subject to ratification to Parliament for twenty-one days while Parliament is in session (the "Ponsonby Rule"). If legislation to implement the treaty is required, then it may take the form of an Act of Parliament that formally incorporates the treaty into the law of the United Kingdom or it may provide a framework by which secondary legislation may be adopted in the future. A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000) at 151.

¹⁰⁸ *Canada (A.G.) v. Ontario (A.G.) (Reference re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours of Work Act)*, [1937] A.C. 326, [1937] 1 D.L.R. 673

Atkin held that section 132 of the *Constitution Act, 1867* did not give the federal government the power to implement treaties outside its legislative competence.¹⁰⁹ It was held that the authority to implement treaties remained with the level of government having the appropriate jurisdiction under the constitution for the subject-matter covered in the treaty. Given that the case dealt with the implementation of three International Labour Organization conventions dealing with areas that clearly fell within provincial jurisdiction (employee working hours, weekly rest, and minimum wages), the Privy Council was concerned that a treaty implementation power equal to section 132 would effectively undermine the division of powers. Despite some past musings in the Supreme Court about the soundness of *Labour Conventions*,¹¹⁰ the notion that treaties do not have a direct effect in domestic law without implementing legislation remains the fundamental understanding of international treaty law in Canada.¹¹¹

The status of customary international law in Canada is somewhat amorphous. The basic rule is that customary international law is incorporated into Canadian law without enacting legislation unless the customary rule clearly conflicts with existing statutory law or with established principles of the common law. As Lord Atkin wrote in *Chung Chi Cheung v. The King*, "The Courts acknowledge the existence of a body of rules which nations accept amongst themselves [and the courts] ... will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."¹¹²

Federal and provincial legislation is usually interpreted in conformity with international law. There is a presumption of legislative interpretation at common law that

[hereinafter *Labour Conventions* cited to A.C.]. See generally W.H. McConnell, "A Half Century of Constitutional Turbulence" (1993) 57 Sask. L. Rev. 105.

¹⁰⁹ *Labour Conventions*, *ibid.* at 350. Section 132 of the *Constitution Act, 1867*, *supra* note 103, states: "The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries."

¹¹⁰ See *MacDonald v. Vapor Canada Ltd.* (1976), [1977] 2 S.C.R. 134 at 168, 66 D.L.R. (3d) 1 [hereinafter *Vapor Canada* cited to S.C.R.]; *Schneider v. R.*, [1982] 2 S.C.R. 112 at 134, 139 D.L.R. (3d) 417; *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 49 D.L.R. (4th) 161 [hereinafter *Crown Zellerbach* cited to S.C.R.].

¹¹¹ See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 69, 174 D.L.R. (4th) 193 [hereinafter *Baker*].

¹¹² [1939] A.C. 160 at 168. See also *Reference Re Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*, [1984] 1 S.C.R. 86, 55 D.L.R. (4th) 385 [hereinafter *Newfoundland Reference* cited to S.C.R.]; *R. v. The "North"* (1906), 37 S.C.R. 385 at 393-95, 26 C.L.T. 380 where Davies J. found that the Admiralty Court of Canada is bound to take notice of the law of nations regarding pursuit and arrest of ships into open seas beyond territorial limits for the commission of offenses in the territorial waters of Canada.

Parliament will not “legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law.”¹¹³ Similarly, Canadian courts will interpret provincial statutes so as to conform with international law as far as possible. In the *Foreign Legations Reference*, the Supreme Court opined that general legislation should not be construed as intending to violate international law.¹¹⁴

It is also well established in Anglo-Canadian law, however, that where a rule of international law, customary or otherwise, directly conflicts with established legislation or a rule of common law, the latter must prevail. As Justice L’Heureux-Dubé affirmed in *Thomson v. Thomson*, “A statute is not void or inoperative simply because it violates international custom or convention.”¹¹⁵ This rule is supported by section 52(1) of the *Constitution Act, 1982*.¹¹⁶ It is also supported by section 33 of the *Canadian Charter of Rights and Freedoms*¹¹⁷ (the “notwithstanding clause”) given that section

¹¹³ *Daniels v. White and The Queen*, [1968] S.C.R. 517 at 541, 2 D.L.R. (3d) 1 [hereinafter *Daniels* cited to S.C.R.]. See also *Salomon v. Commissioners of Customs and Excise*, [1966] 3 All E.R. 871 at 875, [1966] 3 W.L.R. 1223 (C.A.) where Diplock L.J. said, “[T]here is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations.” R. Sullivan, ed., *Driedger on the Construction of Statutes*, 3d ed. (Markham, Ont.: Butterworths, 1994) at 330.

¹¹⁴ *Supra* note 106.

¹¹⁵ [1994] 3 S.C.R. 551 at 618, 119 D.L.R. (4th) 253, citing P.-A. Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville, Qc.: Yvon Blais, 1991) at 308. See also *Daniels*, *supra* note 113: “[I]f a statute is unambiguous, its provisions must be followed even if they are contrary to international law ... [Where] the intent of Parliament was clear and unmistakable ..., the plain words of a statute [cannot] be disregarded in order to observe the comity of nations and the established rules of international law”; *R. v. Gordon* (1980), 19 B.C.L.R. 289 at 291-92, [1980] 5 W.W.R. 668 (S.C.), aff’d (1980), 22 B.C.L.R. 17, [1980] 6 W.W.R. 519 (C.A.): “[W]here Canada asserts jurisdiction over an area of the sea and purports to limit access thereto, from the standpoint of domestic law the access is in fact limited for a special purpose, and even if the law of Canada contravenes ‘customary international law’, if Parliament ... has acted unambiguously, the courts of this country are bound to apply the domestic law”; *R. v. Meikleham* (1905), 11 O.L.R. 366 at 373 (Div. Ct.), Meredith C.J.: “[W]here it is plain that the Legislature has intended to disregard or interfere with [international law], the Courts are bound to give effect to its enactments.”

¹¹⁶ Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

¹¹⁷ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

11(g) of the *Charter*, which incorporates international law and the "general principles of law recognized by the community of nations," can be constitutionally suspended.¹¹⁸

Canada's dualist approach to international law,¹¹⁹ combined with the federal system as interpreted in *Labour Conventions*, complicates Canada's compliance with international law. It is a well-established rule of international law that "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."¹²⁰ The NAFTA panel in *Metalclad* affirmed this rule and neither Mexico nor the United States disputed it. The tribunal's ruling restated a well-settled rule of international law: a state cannot plead a violation of, or deficiencies in, its internal law to absolve itself of responsibility for breach of an obligation under treaty.¹²¹ Thus, even if it is not illegal in Canadian law to breach a treaty or customary rule that is not otherwise enshrined in domestic legislation, Canada may still be held in violation of international law and be responsible for the ensuing consequences.

Canada had evaded this lacuna for many years, in part because of the lack of credible dispute resolution procedures that applied international law as a primary source of law. NAFTA Chapter 11, however, brings the issue to the fore and domestic laws and actions will be scrutinized through the lens of treaties and customary international law.

Seeking to avoid the bias of local courts and to provide investors from the three NAFTA countries with a common set of rules for investment, Chapter 11 directly imports standards of international law and affords no room for the application of na-

¹¹⁸ This seems to contradict the view of Professor La Forest (as he then was) that provinces are legally incompetent to legislate in violation of customary international law based on the argument that it would be an extra-territorial application of provincial law. See G.V. La Forest, "May the Provinces Legislate in Violation of International Law?" (1961) 39 Can. Bar Rev. 78.

¹¹⁹ "This approach reflects, on the one hand, the constitutional power of the executive generally to bind itself to a treaty without the prior consent of the legislature and, on the other hand, the supreme power of the legislature under the constitution to make laws." Aust, *supra* note 107 at 150-51.

¹²⁰ *Treatment of Polish Nationals in Danzig* (1932), Advisory Opinion, P.C.I.J. (Ser. B.) No. 44 at 44I. See also art. 46 of the *Vienna Convention on the Law of Treaties*, 22 May 1969, UN Doc. A/CONF. 39/27, 8 I.L.M. 679 (entered into force 27 January 1980); Brownlie, *supra* note 65 at 34-35.

¹²¹ *Metalclad*, *supra* note 95 at para. 73, the tribunal cited article 10 of the "Report of the Commission to the General Assembly" (1975) 2 Y.B. Int'l L. Comm'n 47 at 61: "The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the Governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to interval [*sic*] law or contravened instructions concerning its activity."

tional law. Article 1131 states: “A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.” Similarly, NAFTA article 1105 (Minimum Standard of Treatment) states: “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”¹²² Principles of good faith¹²³ and transparency¹²⁴ are elements of this notion of fair treatment and have already been cited in at least one NAFTA arbitration.¹²⁵

The notion of an international minimum standard including fair and equitable treatment and full protection and security is incorporated in NAFTA article 1110, the controversial expropriation of an investment provision. Expropriation, including nationalization, has been dealt with extensively over the past century by international tribunals and derives much of its content from customary international law.¹²⁶

¹²² The Free Trade Commission, made up of cabinet-level representatives of the NAFTA Parties (art. 2001(1)), issued an interpretation of art. 1105(1) as prescribing the customary international law minimum standard of treatment of aliens as the standard to be applied under art. 1105(1), and that the concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international legal standard. See e.g. NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, 31 July 2001, online: DFAIT <<http://www.dfait-macchi.gc.ca/tna-nac/NAFTA-Interpr-e.asp>> (date accessed: 18 October 2002). The status of this interpretation has caused great controversy in subsequent NAFTA arbitrations and in academic fora. Professor Sir Robert Jennings, former President of the International Court of Justice, referred to elements of the interpretation as “self-serving” and “preposterous” and that it sought to amend the treaty to curtail investor protection. See *Methanex Corp. v. United States (Opinion of Professor Sir Robert Jennings, Q.C.)*, 6 September 2001, online: NAFTA LAW <<http://www.international-economic-law.org/Methanex/Jennings%20Methanex%20Opinion.PDF>> (date accessed: 18 October 2002). The *Pope & Talbot* arbitration has been particularly concerned with the issue as the investor argued that article 1105 was not limited to customary international law and the tribunal itself found that it has the right to question whether the commission was merely “interpreting” article 1105 or seeking to amend it. See *Pope & Talbot, supra* note 95 (Award of Damages), 31 May 2001.

¹²³ See *Behring Fur Seal Arbitration (Great Britain v. United States)* (1893), 1 Moore’s Int. Arb. 755.

¹²⁴ *United States—Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by Malaysia)* (1998), WTO Doc. WT/DS58/AB/R at paras. 177-83 (Panel Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm> (date accessed: 18 October 2002).

¹²⁵ *Metalclad, supra* note 95 at paras. 70-71.

¹²⁶ American Law Institute, *Restatement of the Law (Third): The Foreign Relations Law of the United States*, vol. 2 (St. Paul, Minn.: American Law Institute Publishers, 1987), s. 712; R. Jennings & A. Watts, eds., *Oppenheim’s International Law*, 9th ed., vol. 2 (London: Longman Group UK, 1992) at 911-22; Brownlie, *supra* note 65 at 533-38. See also *Southern Pacific Properties (Middle East) Limited v. Egypt* (1992), I.C.S.I.D. Case No. ARB/84/3, 32 I.L.M. 933; *Starrett Housing Corp.*

NAFTA investors have legally enforceable rights based substantially in international law and, given the ability of arbitral awards to be enforced pursuant to the *New York Convention*, the practical exercise of those rights is no longer in the exclusive domain of government lawyers. The concepts of national treatment and most-favoured-nation treatment, for example, derive their status not only from the NAFTA but also from rulings of international courts and tribunals. Thus, a province that discriminates against a NAFTA investor will be judged not only on the terms of the treaty but also by international legal norms.¹²⁷

How Canada's federal and provincial governments will deal with Chapter 11's powerful presence in the federal framework remains to be seen. The federal government is clearly liable to pay damages to an investor for its breach of the NAFTA and/or international law because it has signed and ratified the treaty. Meanwhile, the provinces are not directly liable at international law.¹²⁸ It is clear, however, that in order for the investment provisions to function for the benefit of Canada as a whole and for

v. *Iran* (1983), 4 Iran-U.S. C.T.R. 122, 23 I.L.M. 1090 [hereinafter *Starrett Housing*]; *Amoco International Finance Corporation v. Iran* (1987), 15 Iran-U.S. C.T.R. 189, 27 I.L.M. 1314. The *Pope & Talbot* arbitration under Chapter 11, *supra* note 95 (Interim Award) at para. I04, recently found that the term "tantamount to" an expropriation, as used in article 1110(1), meant nothing more than "equivalent" (the term used in the equally authentic French and Spanish texts of article 1110) and that the NAFTA *does not* broaden the ordinary conception of expropriation under international law, as counsel for *Pope & Talbot* had argued. Accordingly, the tribunal found that although export quotas certainly interfered with *Pope & Talbot's* ability to export softwood lumber to the U.S., and even caused it financial harm, it was not enough to constitute an expropriation under international law. See also *Azinian*, *supra* note 95.

¹²⁷ Two GATT panels regarding gold coins and liquor are prime examples of local provincial legislation taking on an international status. *Canada—Measures Affecting the Sale of Gold Coins (Complaint by South Africa)* (1985), GATT Doc. L/5863, online: WorldTradeLaw.net <<http://www.worldtradelaw.net/reports/gattpanels/goldcoins.pdf>> (date accessed: 20 October 2002); *Canada—Panel on Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies* (1988), GATT Doc. L/6304, 35th Supp. B.I.S.D. (1998) 37, online: WorldTradeLaw.net <<http://www.worldtradelaw.net/reports/gattpanels/canadaalcdistribution.pdf>> (date accessed: 20 October 2002); *Canada—Import, Distribution, and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* (1992), GATT DS17/R, 39th Supp. B.I.S.D. (1992) 27, online: WorldTradeLaw.net <<http://www.worldtradelaw.net/reports/gattpanels/canadaalcdistribution11.pdf>> (date accessed: 20 October 2002).

¹²⁸ As the Supreme Court pointed out in *Reference Re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792 at 821, 65 D.L.R. (2d) 353 [hereinafter *Offshore Minerals Reference* cited to S.C.R.]: "[I]t is Canada, not the Province of British Columbia, that will have to answer the claims of other members of the international community for breach of the obligations and responsibilities imposed by the Convention." See also *Compañía de Aguas del Aconquija, S.A. v. Argentine Republic* (2001), ICSID Case No. ARB/97/3, 40 I.L.M. 426 at paras. 48-50.

the federal government to avoid liability for transgressions, the provinces must act in accordance with international legal standards. As such, globalization in the form of Canada's newest trade and investment treaties in effect "removes" individuals from exclusive provincial jurisdiction even when they would otherwise be jurisdictionally and territorially bounded by provincial borders.

Both Mexico and the United States have been respondents in arbitrations involving alleged breaches of the NAFTA. Mexico lost an arbitration against the Metalclad Corporation for violations of articles 1105 and 1110 by a municipality in the state of San Luis Potosi.¹²⁹ Of great interest is the ongoing Loewen arbitration, where the tribunal found that it has jurisdiction to hear the complaint of a Canadian funeral home company claiming that it suffered from an egregious damages award by a Mississippi jury out of a trial that violated basic standards of fairness.¹³⁰ A Canadian investor has also submitted a claim for alleged breaches of the NAFTA by Massachusetts courts.¹³¹

¹²⁹ *Metalclad*, *supra* note 95. The Metalclad Corporation was awarded close to \$16.7 million in compensation for unfair treatment and the expropriation of their investment in a hazardous waste landfill in the Mexican municipality of Guadalcazar in the state of San Luis Potosi. After having received the requisite federal construction permit, state land use permit, environmental regulatory approval, and apparent political support from the state government, the municipality ordered a halt to construction despite federal government assurances that there was no legal barrier to continuing the project (there was apparently no known administrative procedure for obtaining a municipal construction permit in Guadalcazar, which the local government argued was needed even though there was no evidence to show that it had ever been required for any other construction project in the municipality). Pressure from the municipal government forced Metalclad to stop construction on the landfill and prompted it to launch a suit pursuant to NAFTA Chapter 11. The tribunal found that the actions of the municipality of Guadalcazar were below the minimum standard of treatment owed to investors according to international law (art. 1105), not only because there were no established rules regarding the need or application process for a municipal construction permit (which Metalclad was pressured to obtain notwithstanding doubts as to whether the municipality could even legally regulate in this particular issue area), but because it relied to its detriment on the representations of government officials that it had fulfilled all legal and environmental requirements (*ibid.* at paras. 74-101).

¹³⁰ *Loewen Group, Inc. and Raymond L. Loewen v. United States* (Decision on Jurisdiction), 5 January 2001, ICSID Case No. ARB(AF)/98/3, online: U.S. Department of State <<http://www.state.gov/s/1/c3755.htm>> (date accessed: 18 October 2002).

¹³¹ *Mondev International*, a Canadian real estate development company, has initiated a NAFTA arbitration against the United States for alleged breaches of Chapter 11 by the City of Boston, the Commonwealth of Massachusetts, and the Supreme Judicial Court of Massachusetts. See *Mondev International v. United States* (Notice of Arbitration), 1 September 1999, online: U.S. Department of State <<http://www.state.gov/s/1/c3758.htm>> (date accessed: 18 October 2002). At the time of writing, there has been only one arbitration initiated against Canada for an alleged violation of the NAFTA by a province. Sun Belt Water, Inc., a California-based company, initiated arbitration against Canada in 1999

While the law does not prohibit provincial governments from violating international law if done so explicitly in legislation, the fact that doing so could incur significant monetary liability for the federal government will provide significant incentives for the provinces to act in accordance with the NAFTA and the standards of customary international law incorporated therein. As such, the federal government will seek to exercise its constitutional authority to regulate and police general provincial economic activity, and in certain circumstances it could act to correct specific transgressions of the NAFTA by a province.

B. Territoriality of Provincial Powers

The previous discussion highlights the inevitable problems that Canada will face as it enters into trade and investment treaties that intrude deeply into local parts of the economy. Individuals will be the driving force behind the implementation of NAFTA Chapter 11 and the embedding of rules of international law into provincial spheres via federal legislation where they were otherwise dormant. While the resurrection of the general trade and commerce power opens the door for the federal government to implement such treaties legally and impose standards of international law on the provinces, it would do so through the doctrine of federal paramountcy in certain cases. While this is nothing unique in Canada's federal system, this is only the beginning of localized globalism and the long-term entrenchment of federal authority in spheres of exclusive provincial jurisdiction.

Wolf points out that opening a local economy to the global market requires governments to loosen three forms of economic controls: capital flows, goods and services, and people.¹³² In Canada's federal structure, the provincial governments have much of the legal power to legislate in these areas under subsection 92(13) of the *Constitution Act, 1867*.¹³³ Thus, on the one hand they are key actors in the process of globalizing the Canadian economy, but on the other hand they stand to lose the most legal authority to act.¹³⁴

for an alleged breach of Chapter 11 by British Columbia in relation to a ban on bulk water exports, but there is no indication that this arbitration ever proceeded. Sun Belt's Notice of Claim and Demand for Arbitration can be found online: <<http://www.naftalaw.org>> (date accessed: 18 October 2002).

¹³² Wolf, *supra* note 88 at 184.

¹³³ *Supra* note 103.

¹³⁴ In *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437 at 441 (P.C.) [hereinafter *Maritime Bank*], Lord Watson described the object of the *Constitution Act, 1867* as "neither to weld the provinces into one, nor to subordinate provincial governments to a central authority." See also *Hodge v. The Queen* (1883), 9 A.C. 117 at 132 (P.C.); *Re The Initiative and Referendum Act*, [1919] A.C. 935 at 942, 48 D.L.R. 18 (P.C.). Lord Watson stated that

While the global economy is becoming less territorial, Canadian provinces maintain a primarily territorial economic regulatory power. Indeed, the power relating to “property and civil rights in the province” is necessarily territorially bound. In *Shannon v. Lower Mainland Dairy Products Board*,¹³⁵ the Privy Council confirmed the territorial confinement of provincial powers over property and civil rights as compared to the federal trade and commerce power. Unlike the power of Parliament,¹³⁶ provincial legislatures do not have the constitutional authority to legislate extraterritorially:¹³⁷ “[A]uthority is under every head expressly or impliedly restricted to the provincial territory.”¹³⁸ Once a provincial law can be classified as being inter-provincial or international in pith and substance, the law is *ultra vires* the province.¹³⁹ Notwithstanding the basic territorial limitation of provincial power, provincial legislation can have incidental effects outside its borders without being *ultra vires*, as long as the provincial law is in pith and substance related to a provincial head of power.¹⁴⁰

The premise that provinces are legislatively bound within their jurisdictions has important implications for their ability to deal with the realities of globalization. As typified by the NAFTA, subject matters that would have traditionally fallen into provincial power now take on an importance that transcends provincial boundaries. As outlined above, an investment or an investor covered by Chapter 11 can certainly be

“within the limits assigned by section 92 of the Act of 1867, these powers are exclusive and supreme” (*Maritime Bank*, *ibid.* at 443).

¹³⁵ [1938] A.C. 708 at 718-20, [1938] 4 D.L.R. 81 (P.C.).

¹³⁶ *Statue of Westminster, 1931* (U.K.), 22 Geo. V, c. 4, reprinted in R.S.C. 1985, App. II. Section 3 states that the Parliament of a Dominion “has full power to make laws having extra-territorial operation.” See *Croft v. Dunphy* (1932), [1933] A.C. 156, [1933] 1 D.L.R. 225 (P.C.).

¹³⁷ *Offshore Minerals Reference*, *supra* note 128; *Newfoundland Reference*, *supra* note 112 at 115-16.

¹³⁸ *Interprovincial Co-operatives Ltd. v. R.*, [1976] 1 S.C.R. 477 at 513, 53 D.L.R. (3d) 321 [hereinafter *Interprovincial Co-operatives* cited to S.C.R.]; *Royal Bank of Canada v. The King*, [1913] A.C. 283, 9 D.L.R. 337 (P.C.); *Reference Re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, 8 D.L.R. (4th) 1 [hereinafter *Upper Churchill Reference* cited to S.C.R.].

¹³⁹ *Manitoba (A.G.) v. Manitoba Egg and Poultry Association*, [1971] S.C.R. 689, 19 D.L.R. (3d) 169 [hereinafter *Manitoba Egg and Poultry*]; *Burns Foods Ltd. v. Manitoba (A.G.)* (1973), [1975] 1 S.C.R. 494, 40 D.L.R. (3d) 731; *Interprovincial Co-operatives*, *ibid.*; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1.

¹⁴⁰ *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494 at paras. 22-24, 185 D.L.R. (4th) 439 [hereinafter *Global Securities*]; *Upper Churchill Reference*, *supra* note 138 at 332; *Carnation Co. v. Quebec Agricultural Marketing Board*, [1968] S.C.R. 238, 67 D.L.R. (2d) 1 [hereinafter *Carnation Co.*]. However, “the impairment of extra-provincial rights ... may be validly accomplished by a provincial Legislature as an incidental effect of a statute that is in relation to a matter territorially within the province and within a head of provincial legislative power.” Hogg, *supra* note 107 at 13-8.

strictly intraprovincial. If Chapter 11 falls legitimately within the federal trade and commerce power, however, and incorporates principles of customary international law, investors in fact have civil rights that are “extra-provincial”; that is, they enjoy rights and privileges that exist by virtue of federal legislation and international law but operate in an intraprovincial context. The NAFTA has granted investors access to a new international mechanism of dispute resolution that is independent from the control of the respondent governments. This reality goes beyond their “foreign investor” status. However, for those investors who qualify under the terms of Chapter 11, their remedy is international, based on the NAFTA. The enforcement of any arbitral awards is based on international conventions (ICSID, *New York Convention*, *Inter-American Convention*), some of which have been directly adopted into domestic law. Thus, it can no longer be asserted that these are “local investors” in the sense that they are territorially bounded by provincial jurisdiction. The rules applicable to those individuals are in fact extraterritorial.

How and whether provinces will be able to legislate in violation of these investors’ rights when acting within their exclusive sphere of jurisdiction could prove to be a difficult legal question. In situations where a provincial law or action in pith and substance aims either to give a local investor preferential treatment or to distort the playing field in favor of a domestic investor, the pith and substance analysis could render it *ultra vires*. Further, where the province enacts legislation within its jurisdiction and only incidentally affects extraprovincial rights, that legislation may not necessarily be sacrosanct by virtue of the general trade and commerce power.

The realities of globalization and the territorial limitation of provincial legislative jurisdiction have been the subject of several Supreme Court cases in which economic integration was used as a justification for reinforcing federal power. *Morguard Investments v. De Savoye*¹⁴¹ and *Hunt v. T&N plc*¹⁴² fundamentally changed the status of conflict of laws and recognition of judgments of other provinces on the basis that Canada cannot function with such barriers existing between provincial borders.¹⁴³

In both cases, the finding that the provincial laws in question were *ultra vires* was largely justified on the premise that there was a greater need for economic coordination amongst the provinces who should no longer be seen as having sovereignty in the classic sense. The themes of globalization and economic integration were

¹⁴¹ [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256 [hereinafter *Morguard* cited to S.C.R.].

¹⁴² [1993] 4 S.C.R. 289, 109 D.L.R. (4th) 16 [hereinafter *Hunt* cited to S.C.R.].

¹⁴³ Both judgments were written by La Forest J. Elements of his argument in the *Canadian Bar Review*—that the provinces cannot legislate in violation of international law—are clearly present. See La Forest, *supra* note 118.

prominent in *Morguard*: “The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative.”¹⁴⁴ La Forest J. continued this same theme in *Hunt*: “Greater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe.”¹⁴⁵

In *Global Securities*, the Supreme Court recognized that technologies such as the Internet defy traditional conceptions of jurisdiction and territory and that regulators need to be able to “surmount borders where legally possible.”¹⁴⁶ In that case, provincial legislation relating to the ability of the British Columbia Securities Commission to order a registrant to produce records “to assist in the administration of the securities laws of another jurisdiction”¹⁴⁷ was upheld as in pith and substance relating to the provincial right to regulate securities.

The principle that valid legislation may have incidental extraterritorial effects is just as applicable to the provinces as it is to the federal government, but as the integration of economies demands greater regulation at the international level, the provinces will inevitably be confronted with international problems that section 92 restricts them from dealing with.

C. Implicated Federal Powers

This brings us to the question of how the NAFTA’s investment provisions are actually implemented by the federal government and to what extent the provinces are hindered in their capacity to legislate within their exclusive spheres of jurisdiction. The primary purpose of the next section is not to argue the constitutionality of the NAFTA per se. Rather, we seek to address two federal powers that are likely to be implicated in the broader context of globalization.

1. Trade and Commerce Power

Although Chapter 11 incorporates standards of international law and is applicable to the provinces, this does not in itself make the NAFTA’s investment provisions binding on the provinces. *Labour Conventions* still requires the treaty to be enacted

¹⁴⁴ *Morguard*, *supra* note 141 at 1098.

¹⁴⁵ *Hunt*, *supra* note 142 at 322, citing *Morguard* in part.

¹⁴⁶ *Global Securities*, *supra* note 140 at para. 28.

¹⁴⁷ *Ibid.* at para. 2.

into domestic legislation and to fall within a federal head of power.¹⁴⁸ Many important areas of investment policy fall within exclusive provincial jurisdiction and yet federally-enacted trade and investment treaties are becoming increasingly regulatory, complex, legally binding, and necessarily embedded in domestic legal systems.¹⁴⁹

Instead of overturning the rule established in *Labour Conventions*, it is likely that globalization will bring about an expansion of federal powers that could intrude deeply into areas of exclusive provincial jurisdiction. A prime candidate in this respect will be subsection 91(2) of the *Constitution Act, 1867*, and in particular, the general branch of the trade and commerce power. Indeed, the re-emergence of the second branch of the trade and commerce power after decades of neglect indicates the growing integration of Canada's economy with the global network of capital and investment.

Unlike the trade and commerce power in the United States, which has been interpreted expansively as a result of the lack of enumerated state powers in the tenth amendment,¹⁵⁰ subsection 91(2) has been treated with judicial caution given its potential to engulf realms of economic activity at the expense of the provincial power in relation to property and civil rights in the province. The Canadian federal trade and commerce power is made up of two branches covering "interprovincial and international trade and commerce" and the "general regulation of trade affecting the whole dominion."¹⁵¹ The Privy Council in *Citizens Insurance* did not establish what the boundaries of the federal authority were but rather stipulated that "its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a *particular* business or trade."¹⁵²

¹⁴⁸ *Supra* note 108. Section 5 of the *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44, states: "This Act is binding on Her Majesty in right of Canada." Section 9 of the act, however, reserves the right of the government of Canada to enact legislation to implement provisions of NAFTA or to fulfill any of its obligations under that agreement.

¹⁴⁹ See generally Chayes & Chayes, *supra* note 38.

¹⁵⁰ U.S. Const. amend. X.

¹⁵¹ *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 A.C. 96 at 113 (P.C.) [hereinafter *Citizens Insurance*]. See also *British Columbia (A.G.) v. Canada (A.G.)*, [1937] A.C. 377 at 386-87, [1937] 1 D.L.R. 691 (P.C.), Lord Atkin [hereinafter *Natural Products Marketing*]; *Reference Re Alberta Statutes*, [1938] S.C.R. 100 at 119-20, [1938] 2 D.L.R. 81, Duff C.J.C.

¹⁵² *Citizens Insurance*, *ibid.* at 113 [emphasis added]. See also *John Deere Plow Co. v. Wharton* (1914), [1915] A.C. 330 at 340, 18 D.L.R. 353 (P.C.) [hereinafter *John Deere Plow*]; *Canada (A.G.) v. Alberta (A.G.)*, [1916] 1 A.C. 588 at 596, 26 D.L.R. 288 (P.C.) [hereinafter *Insurance Reference* cited to A.C.] where Viscount Haldane wrote that "the authority to legislate for the regulation of trade

The development of the federal trade and commerce power was left to subsequent case law, which consistently revealed a concern for ensuring that provincial powers were not unduly infringed by an expansive reading of subsection 91(2). The Privy Council ruled in two early cases that there was no independent content in the federal trade and commerce power and that it could only be invoked as ancillary to other enumerated federal powers,¹⁵³ but this interpretation was eventually relaxed.¹⁵⁴ What was not compromised was the basic premise that the federal power cannot regulate specific industries within a province. As Dickson J. noted in *Canadian National Transportation*, “[t]he reason why the regulation of a single trade or business in the province cannot be a question of general interest throughout the Dominion, is that it lies at the very heart of the local autonomy envisaged in the *Constitution Act, 1867*.”¹⁵⁵

In respect of the first branch established by *Citizens Insurance*, the federal power to regulate international and interprovincial trade has not been directly interpreted to include a federal trade treaty implementation power.¹⁵⁶ Rather, the courts have adopted a pith and substance approach that allows for incidental effects on wholly intraprovincial transactions or businesses if the primary goal of the federal legislation is interprovincial or international trade. In *R. v. Klassen*,¹⁵⁷ the Manitoba Court of Appeal held that the *Canadian Wheat Board Act* could be validly applied to strictly intraprovincial transactions of wheat even when it was used only for local consumption. Similarly, in *Caloil Inc. v. Canada (A.G.)*,¹⁵⁸ the Supreme Court upheld a federal law that prohibited the transportation or sale of imported oil west of the Ottawa Valley. In

and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces.”

¹⁵³ *Re Board of Commerce Act* (1921), [1922] 1 A.C. 191, (*sub nom. Canada (A.G.) v. Alberta (A.G.)*) 60 D.L.R. 513 (P.C.); *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396 at 410, [1925] 2 D.L.R. 5 (P.C.) [hereinafter *Snider*].

¹⁵⁴ *Natural Products Marketing*, *supra* note 151; *Canadian Federation of Agriculture v. Quebec (A.G.)* (1950), [1951] A.C. 179, [1950] 4 D.L.R. 689 (P.C.).

¹⁵⁵ *Canada (A.G.) v. Canadian National Transportation*, [1983] 2 S.C.R. 206 at 267, 3 D.L.R. (4th) 16 [hereinafter *Canadian National Transportation* cited to S.C.R.].

¹⁵⁶ Those who argue that it does include R.E. Sullivan, “Jurisdiction to Negotiate and Implement Free Trade Agreements in Canada: Calling the Provincial Bluff” (1987) 24 U.W.O. L. Rev. 63; S.A. Scott, “NAFTA, the Canadian Constitution, and the Implementation of International Trade Arrangements” in A.R. Riggs & T. Velk, eds., *Beyond NAFTA: An Economic, Political and Sociological Perspective* (Vancouver: Fraser Institute, 1993) 238.

¹⁵⁷ (1959), 20 D.L.R. (2d) 406, 29 W.W.R. 369 (Man. C.A.). See also the earlier case of *Murphy v. Canadian Pacific Railway*, [1958] S.C.R. 626, 15 D.L.R. (2d) 145, which upheld the federal *Canadian Wheat Board Act*, R.S.C. 1952, c. 44 as a legitimate use of the federal trade and commerce power as applied to shipments of grain from one province to another.

¹⁵⁸ [1971] S.C.R. 543, 20 D.L.R. (3d) 472.

both cases, the regulation of local transactions was incidental to the primary purpose of, in the first case, regulating the wheat export market, and in the second case, regulating the importation of oil, and was therefore valid.¹⁵⁹

The flipside of this is that provincial legislation can, if it is aimed at an intraprovincial activity within a provincial head of power, incidentally affect transactions or entities that would otherwise fall under federal jurisdiction.¹⁶⁰ For example, legislation that fixed the price of raw milk in Quebec was upheld even though it imposed a price control on processed milk that was mostly exported from the province.¹⁶¹ Since the law was not aimed at the regulation of trade in matters of interprovincial concern, the Supreme Court found it to be valid. On the other hand, if provincial legislation is in pith and substance aimed at affecting interprovincial or international trade, it may be ruled invalid.¹⁶²

The second branch of the federal trade and commerce power lay dormant for decades after early Privy Council decisions nearly extinguished it as a separate branch of federal power.¹⁶³ Only in the 1976 case of *Vapor Canada*¹⁶⁴ did the general trade and commerce power start to gain judicial support at the Supreme Court level. Laskin C.J., in *obiter dicta*, suggested the possibility of upholding unfair competition provisions in the federal *Trade Marks Act*¹⁶⁵ had there been a regulatory agency overseeing the implementation of a general regulatory scheme concerned with trade as a whole rather than a particular industry.¹⁶⁶ This was taken up by Dickson J. (as he then was) seven

¹⁵⁹ See also *Reference Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257.

¹⁶⁰ See *Canadian Indemnity Co. v. British Columbia (A.G.)* (1976), [1977] 2 S.C.R. 504, 73 D.L.R. (3d) 111.

¹⁶¹ *Carnation Co.*, *supra* note 140.

¹⁶² As was Manitoba's egg marketing scheme to protect provincial producers, *Manitoba Egg and Poultry*, *supra* note 139, and Saskatchewan's potash export price control regulating scheme in *Central Canada Potash v. Saskatchewan*, [1979] 1 S.C.R. 42, 88 D.L.R. (3d) 609. See Sullivan, *supra* note 156 at 77.

¹⁶³ *Insurance Reference*, *supra* note 152; *Re Board of Commerce Act*, *supra* note 153; *Snider*, *supra* note 153; *R. v. Eastern Terminal Elevator*, [1925] S.C.R. 434, [1925] 3 D.L.R. 1; *Proprietary Articles Trade Association v. Canada (A.G.)*, [1931] A.C. 310, [1931] 2 D.L.R. 1 (P.C.); *Natural Products Marketing*, *supra* note 151. The only cases that found the general trade and commerce power to have independent content were *John Deere Plow*, *supra* note 152 and *Ontario (A.G.) v. Canada (A.G.)*, [1937] A.C. 405, [1937] 1 D.L.R. 702 (P.C.).

¹⁶⁴ *Supra* note 110.

¹⁶⁵ R.S.C. 1970, c. T-10.

¹⁶⁶ *Vapor Canada*, *supra* note 110 at 165-66.

years later in *Canadian National Transportation*.¹⁶⁷ In addition to the three factors suggested by Laskin C.J. in *Vapor Canada*, Dickson J. stated that if the legislation was of such a nature that the provinces, jointly or severally, would be incapable of enacting it and if the failure to include one or more provinces in the legislative scheme would jeopardize the successful operation of the scheme as a whole, then a federal law could be upheld under the general trade and commerce power.¹⁶⁸

The general trade and commerce power was brought back to life in *General Motors of Canada v. City National Leasing*,¹⁶⁹ which dealt with the validity of a provision in the *Combines Investigation Act*¹⁷⁰ that allowed for a civil right of action for unfair competitive practices. The provision for a civil remedy falls under property and civil rights in the province, and General Motors (accused of anti-competitive practices) and the intervening provincial attorneys general argued that it could not be characterized as ancillary to the exercise of federal power. The Supreme Court held that a federal regulatory scheme with such characteristics could justify an encroachment on a strictly local economic activity. The notion that when the legislation is general in nature and “aimed at the economy as a single integrated national unit rather than as a collection of separate local enterprises”¹⁷¹ is reflective of a newfound interest at the Supreme Court level for buttressing the internal Canadian market. *Hunt* and *Morguard* contained explicit references to this goal¹⁷² and the resurrection of the general trade and commerce power is another step in this direction.

What does this have to do with globalization? As supranational norms begin to play an even greater role at the most local levels of the economy and local actors gain rights based in international law and have the procedural mechanisms to enforce them, the tension between the federal trade and commerce power and provincial powers over property and civil rights will become aggravated by the territorial nature of provincial powers.

¹⁶⁷ *Supra* note 155.

¹⁶⁸ *Ibid.* at 267-68.

¹⁶⁹ [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255 [hereinafter *City National Leasing* cited to S.C.R.].

¹⁷⁰ R.S.C. 1970, c. C-23.

¹⁷¹ *Canadian National Transportation*, *supra* note 155 at 267. In *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 at 145-46, 65 D.L.R. (4th) 361 [hereinafter *Hall* cited to S.C.R.], the Court said: “The fact that a given aspect of federal banking legislation cannot operate without having an impact on property and civil rights in the provinces cannot ground a conclusion that that legislation is *ultra vires* as interfering with provincial law where the matter concerned constitutes an integral element of federal legislative competence.”

¹⁷² *Hunt*, *supra* note 142 at 130; *Morguard*, *supra* note 141 at 1099.

The tests that the Supreme Court has developed thus far may not be sufficient to deal with this reality. While it has been accepted that strictly intraprovincial transactions may be regulated by federal legislation if part of a broad regulatory scheme and ancillary to valid federal regulation of external and interprovincial trade, the realities of globalization and the new type of treaties described above may result in a serious impairment of provincial powers.

City National Leasing set out a test to balance federal and provincial rights. First, the court must determine if there was an intrusion into provincial powers. Second, the court must determine if the provision in question was part of a valid legislative scheme enacted under a federal head of power. Lastly, the court must determine if the impugned provision was "sufficiently integrated with the scheme that it can be upheld by virtue of that relationship."¹⁷³ Some authors find it unnecessary to question whether there is a significant intrusion into provincial powers, arguing that if the law is valid under a federal head of power or ancillary to a valid federal law then there is no encroachment of provincial powers.¹⁷⁴ Nevertheless, that Dickson C.J. included this test indicates that the Supreme Court had the foresight to think that there may be cases where the federal intrusion significantly impairs provincial powers. It remains to be seen whether this test will be able to cope adequately with the realities of modern trade treaties like the NAFTA.

Assuming that standards of treatment for foreign investors fall legitimately into the federal trade and commerce power because of their general nature¹⁷⁵ and that the federal government may stipulate standards of treatment for foreign investors as ancillary to its ability to regulate the entry of foreign investment,¹⁷⁶ the breadth of eco-

¹⁷³ *City National Leasing*, *supra* note 169 at 672; *Reference Re Goods and Services Tax*, [1992] 2 S.C.R. 445 at 470-71, 94 D.L.R. (4th) 51; *Global Securities*, *supra* note 140 at para. 19.

¹⁷⁴ N. Finkelstein, "Note: *General Motors of Canada Limited v. City National Leasing; Quebec Ready Mix Inc. v. Rocois Construction Inc.*" (1989) 68 Can. Bar Rev. 802 at 814-16.

¹⁷⁵ See M.A. Luz, "NAFTA, Investment and the Constitution of Canada: Will the Watertight Compartments Spring a Leak?" (2000-2001) 32 Ottawa L. Rev. 35. See also R. Howse, "The Labour Conventions Doctrine in an Era of Global Interdependence: Rethinking the Constitutional Dimensions of Canada's External Economic Relations" (1990) 16 Can. Bus. L.J. 160 at 182; H.S. Fairley, "Implementing the Canada-United States Free Trade Agreement" in D.M. McRae & D.P. Steger, eds., *Understanding the Free Trade Agreement* (Halifax: Institute for Research on Public Policy, 1988) 193 at 200.

¹⁷⁶ *Investment Canada Act*, R.S.C. 1985 (1st Supp.), c. 28. See J.B. Nixon & J.H. Burns, "An Examination of the Legality of the Use of the Foreign Investment Review Act by the Government of Canada to Control Intra- and Extraterritorial Commercial Activity by Aliens" (1984) 33 I.C.L.Q. 57.

conomic activity that the NAFTA's concept of investment covers¹⁷⁷ will certainly capture decisions that are absolutely within exclusive provincial jurisdiction and that otherwise have no extraprovincial effect.

This is tantamount to a permanent entrenchment of federal jurisdiction in areas previously reserved exclusively for the provinces. In cases where legitimate federal and provincial laws conflict, paramountcy of federal law will prevail.¹⁷⁸ While this certainly could help to create a common set of standards for the entire country for the treatment of foreign investment (which may be economically laudible), one can envisage scenarios whereby a province would be significantly hindered, or even prevented, from exercising its constitutional powers if the federal government decided to take pre-emptive action in anticipation of a provincial activity that could incur liability for the federal government under the NAFTA. In other words, strictly intraprovincial transactions suddenly take on national concern and implicate international rights that are "extraterritorial" to the province.

While the resurrection of the general trade and commerce power may open the door to greater federal regulation of the economy, it will also require a rethinking of the balance between the federal power to implement treaties and the ability of provinces to exercise their powers. While the Supreme Court may find a middle ground by standing by its position that a regulation under the federal trade and commerce power that intrudes too greatly into provincial jurisdiction cannot be justified under subsection 91(2), this may be insufficient. Such a position could leave Canada in the position of having to pay considerable damages to a foreign investor.¹⁷⁹

¹⁷⁷ NAFTA, *supra* note 1, art. 1139 (Definitions) stipulates that an "investment" means, among other things, an enterprise or share or interest therein, a loan to an enterprise, real estate, or other tangible or intangible property, commitment of capital or other resources, etc. This does not include claims for money arising solely from commercial contracts for the sale of goods or services, the extension of credit for financing (unless it qualifies as a loan), or other claims to money unless it qualifies under another category of investment in the definition.

¹⁷⁸ The doctrine of paramountcy applies when there is a federal law and a provincial law that are both valid but that are inconsistent with each other. When federal and provincial laws are found to be inconsistent, the doctrine of federal paramountcy will render the provincial law inoperative only to the extent of the inconsistency. Hogg, *supra* note 107 at 16-2 to 16-3. See also Hall, *supra* note 171.

¹⁷⁹ From a more theoretical perspective, it is interesting to note that the pressures exerted on Canada's federal structure by treaties such as the NAFTA will come from below through individual investors or corporate entities and from above through friction between states as well as the various levels of government, thus epitomizing what we described as "globalization". See Part I, above.

2. Peace, Order, and Good Government Power

A strong argument can be made for federal jurisdiction to implement international trade treaties under subsection 91(2) of the *Constitution Act, 1867*, but this would not apply to treaties generally given that subsection 91(2) simply addresses trade and commerce.¹⁸⁰ Attempting to implement every international treaty entered into by Canada on the basis of the peace, order, and good government power, however, could threaten provincial heads of power. Without provincial consent, the federal legislature could assume powers otherwise of a provincial nature by simply entering into international treaties. Any argument involving invocation of the peace, order, and good government power calls into question its very nature: is it simply a residual power to be used where there is a vacuum or a full-fledged head of federal competency? Because of its seemingly comprehensive nature, the Supreme Court has generally sought to restrict its scope.

In order to secure a power for Parliament to implement any kind of international treaty, it would have to be argued that the treaty was of national concern. The national concern dimension of the introductory paragraph to section 91 of the *Constitution Act, 1867* was first articulated by Lord Watson in *Ontario (A.G.) v. Canada (A.G.)*: “[G]reat caution must be observed in distinguishing between that which is local and provincial ... and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.”¹⁸¹ This note of caution radiated through the Privy Council’s subsequent jurisprudence, which restricted the exercise of the peace, order, and good government clause to emergency situations until 1946. In *Ontario (A.G.) v. Canada Temperance Federation*,¹⁸² the Privy Council maintained the existence of a peace, order, and good government power outside emergency situations. Viscount Simon emphasized that the true test to the exercise of this power must be found in the real subject matter of the legislation, and that if it were such as to go beyond the local or provincial concern or interest and were from its inherent nature to be the concern of the Dominion as a whole, it would fall within the competency of Parliament.¹⁸³ This definition would serve to entrench the existence of a national concern branch under the introductory clause of section 91 of the Constitution.

¹⁸⁰ J.S. Ziegel, “Treaty Making and Implementing Powers in Canada: The Continuing Dilemma” in B. Cheng & E.D. Brown, eds., *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger on his Eightieth Birthday* (London: Stevens & Sons, 1988) 333 at 348.

¹⁸¹ [1896] A.C. 348 at 361 (P.C.).

¹⁸² [1946] A.C. 193, [1946] 2 D.L.R. 1 (P.C.) [hereinafter cited to A.C.].

¹⁸³ *Ibid.* at 205.

In *Crown Zellerbach*, the Supreme Court articulated a test that considered the effect of the federal legislation when deciding whether an act came within the national concern doctrine. Le Dain J. for the majority drew the following conclusions regarding the national concern test:

1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power ...;
2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;
3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;
4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intraprovincial aspects of the matter.¹⁸⁴

The Supreme Court later held that the *Atomic Energy Control Act*¹⁸⁵ was a valid exercise of federal jurisdiction, in part under the national concern doctrine.¹⁸⁶ La Forest J. pointed to the production, use, and application of atomic energy as a matter of national concern because it was predominantly extraprovincial and international in its character and implication.¹⁸⁷

Arguing that globalization satisfies Le Dain J.'s criteria of singleness, distinctiveness, and indivisibility is not only highly suspect, but it would essentially overturn *Labour Conventions* by creating a federal treaty implementation power more or less identical to section 132 of the *Constitution Act, 1867*. The same would seem to apply to Le Dain J.'s fourth criterion. Indeed, it would be difficult to make the argument that the effects on extraprovincial interests, created by Parliament upon signature and ratification, would cloak the federal government with the power to deal with the subject matter over which it would otherwise have no jurisdiction under the division of pow-

¹⁸⁴ *Crown Zellerbach*, *supra* note 110 at 431-32.

¹⁸⁵ R.S.C. 1985, c. A-16.

¹⁸⁶ *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, 107 D.L.R. (4th) 457 [hereinafter cited to S.C.R.].

¹⁸⁷ *Ibid.* at 379.

ers.¹⁸⁸ Simply creating a power based on the federal government's failure to consult the provinces where an issue of international importance has provincial repercussions offends the architecture of the Constitution.

Nonetheless, the Supreme Court might consider whether the importance of FDI in Canada and the need for Canadian foreign investors to enjoy reciprocal treatment in other countries brings certain international legal standards of treatment of foreign investment (including "national treatment" and "fair and equitable treatment") under the rubric of the peace, order, and good government power.

Effective implementation of treaty obligations is a highly desirable goal. *Labour Conventions* weighs heavily when assessing the federal government's ability to enter into extensive rule-based treaties. Given the presence of the indicators outlined above, however, which are requiring new structures to be set in place in Canada, it would not be surprising if in the near future the trade and commerce power and the peace, order, and good government power are re-evaluated. Furthermore, the Supreme Court, perhaps unfairly, will find itself in the centre of tensions brought on by a new generation of treaties that will severely challenge the federal structure. The simple solution to this problem may be that provinces will be asked to implement Canadian treaties on an individual basis.

Conclusion

Much of the controversy over NAFTA Chapter 11 has glossed over the effect it will have on the federal-provincial balance, perhaps in part because the provinces are only indirectly liable for violations. We argue, however, that the nature of the NAFTA investment provisions will inevitably erode the traditional boundaries between federal and provincial jurisdiction because of the unique ability of investors to invoke binding arbitration against Canada for alleged violations of Chapter 11. Over time, provincial policy decisions and actions will become the subject of NAFTA arbitrations (as have those of several U.S. and Mexican states), and the courts might be dragged into a dispute between the federal government and a province responsible for a NAFTA violation, especially if the federal government wants the province to back down from the policy decision in question or wishes to be compensated by the province for a NAFTA arbitral award.

¹⁸⁸ For example, supposing a province decides to allow NAFTA investors to invest in its health care system, does this require all the other provinces to accord like treatment? If so, could it be argued that the extraprovincial effects of such an action were so grave as to create national concern and therefore to give Parliament the authority to step in despite the fact that it had set the framework for this possibility?

We argue that a judicial balancing solution is preferable to overturning *Labour Conventions* to give the federal government a treaty-making power. Furthermore, an orthodox application of paramountcy in an era of globalization may be more of a threat to provincial autonomy than when supranational rules were virtually irrelevant in Canadian domestic law. While federal measures will certainly be employed to ensure that provinces “toe the NAFTA line”, there may be instances where “a federal measure would severely disrupt the equilibrium of Canadian federalism to a degree unwarranted by the national interest.”¹⁸⁹ While we have argued that globalization is a theory blind to federalism, this does not mean that the basic tenets of Canadian federalism should be cast aside. As La Forest J. put it in *Crown Zellerbach*, “[t]he challenge for the courts ... will be to allow the federal Parliament sufficient scope to acquit itself of its duties to deal with national and international problems while respecting the scheme of federalism provided by the Constitution.”¹⁹⁰

The courts should look to the federal trade and commerce power or to the peace, order, and good government power, or both, in order to justify the establishment of basic standards of treatment for foreign investors in NAFTA Chapter 11. The courts may further develop the notion of national concern elucidated by Le Dain J. in *Crown Zellerbach* as a means of balancing the federal ability to regulate the treatment of foreign investment in Canada with the right of a province to legislate in spheres of exclusive jurisdiction without fundamental impairment of its objectives.¹⁹¹ Some authors suggest a reliance on the federal government’s peace, order, and good government power where treaty matters “have an identity and unity that is quite limited and particular in its extent,”¹⁹² and this has received some judicial support.¹⁹³ In so doing, the provinces will still be able to exercise their section 92 powers, but will be as constrained by the international legal norms embodied in Chapter 11 as is the federal government.

¹⁸⁹ D. Gibson, “The Free Trade Agreement and the Provinces: A Counter for the Sale of Constitutional Wares?” in M. Gold & D. Leyton-Brown, eds., *Trade-Offs on Free Trade: The Canada-U.S. Free Trade Agreement* (Toronto: Carswell, 1988) 117 at 124.

¹⁹⁰ *Supra* note 110 at 448.

¹⁹¹ For example, provincial incapacity was particularly important in both *Crown Zellerbach*, *ibid.* and *City National Leasing*, *supra* note 169 and that could be a key criterion in defining a “national concern” when it comes to treaty implementation.

¹⁹² W.R. Lederman, “Legislative Power to Implement Treaty Obligations in Canada” in W.R. Lederman, *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada* (Toronto: Butterworths, 1981) 350.

¹⁹³ *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373 at 451-52, 68 D.L.R. (3d) 452, Beetz J.