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THE DIMENSIONS OF SOVEREIGNTY – A CANADIAN APPROACH

*Jonathan Fried**

Permit me to set the stage by offering two possible definitions of sovereignty. One working hypothesis provided to us by the majority opinion in the Austrian-German Customs Union case before the Permanent Court of International Justice¹ is that sovereignty exists where a government has the sole right of decision. Another view was offered by the minority, namely, that sovereignty exists where a government has autonomy to exercise its own judgment, including to accept restrictions on freedom of action, if the acceptance is freely given.

Under either definition in today's world, "sole source" decision-making is impossible as a matter of global economic reality. To take an obvious example, no country acting alone can decide interest rates. Governments continue to freely enter into binding treaty commitments to restrict their freedom of action in their own self-interest. Thus, the question is not whether governments have lost their ability to make decisions alone, or to be left alone, but rather the extent to which states retain the legal power of decision, the freedom to make their own judgments, and the freedom to "opt in" or "opt out" from international rules that might be said to be imposed. I concluded in a presentation here four years ago that sovereignty is, on this basis, alive and well in today's world.² But, something more fundamental may be happening.

Four years older and four years wiser, Henry King asked me to reflect further on my earlier sanguine assessment of sovereignty. And indeed, as one surveys today's landscape, one is tempted to adopt Joseph Heller's work and

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¹ Customs Regime Between Germany and Austria, 1931 P.C.I.J. (ser. A/B) No. 41.

² See Jonathan Fried, *Two Paradigms for the Rule of International Trade Law*, 20 CAN.-U.S. L. J. 39.

say *Something Happened*,³ to some, Ray Bradbury's *Something Wicked This Way Comes*⁴ may be more apt.

In the trade field, with border issues largely addressed, the agenda is moving increasingly inland. Today, in addition to tariff and related customs issues, the trade agenda concerns such issues as standards, licensing and approval procedures, product and professional certifications, and, more broadly, the regulatory framework. To take two examples, the TRIPs Agreement⁵ sets out a comprehensive code for domestic law governing the grant, administration, and enforcement of intellectual property rights; and the WTO Agreement on Basic Telecommunications⁶ includes a "reference paper" on regulatory principles to ensure that market access is not undermined by less than competitive domestic regulation.

Our work in the Canadian and U.S. governments with the International Monetary Fund (IMF) and countries affected by the current currency turmoil in Asia carries a similar message. It is generally agreed that the free flow of capital is not the cause of the problem. Rather, the problem is the fact that adequate supervisory or regulatory frameworks may not have been in place to oversee these flows. In some countries, the problem has been exacerbated by less-than-transparent procedures for products and business approval.

As a result, our publics have begun to ask whether we have struck the right balance. To some, it appears that the trade agenda is designed to free up trade in goods and services and to ensure the free flow of capital at all costs. Consumer and health groups ask whether the Sanitary/Phytosanitary (SPS) Agreement⁷ has struck the right balance between avoiding unwarranted trade restrictions, on the one hand, and maintaining the right to take precautionary measures to ensure food safety on the other.

More fundamentally, political scientists would suggest that underlying these concerns is a preoccupation about accountability, or what some have termed a "democratic deficit." Arguments about loss of sovereignty may reflect anxiety about the transparency and accountability of those in the position of making decisions in areas where domestic governance directly impacts international trade and investment.

³ JOSEPH HELLER, *SOMETHING HAPPENED* (Alfred A. Knopf, 1974).

⁴ RAY BRADBURY, *SOMETHING WICKED THIS WAY COMES* (Bantam Books, 1963).

⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), 33 I.L.M. 1223. One hundred and nineteen countries and territories are WTO Members and are, therefore, Parties to TRIPs.

⁶ Agreement on Telecommunication Services (Fourth Protocol to the General Agreement on Trade in Services), Feb. 15, 1997, 36 I.L.M. 354 (1997).

⁷ Agreement on the Application of Sanitary and Phytosanitary Measures <<http://www.wto.org/goods/spsagr.htm>> (visited June 11, 1998).

The internationalization and universalization of human rights is extensively documented. Without dwelling on an area so well reviewed by others, and put most simply, it is just not credible for any government today to say that basic treatment of citizens is solely a matter of domestic jurisdiction and not of international concern. While as a formal matter, states may be free to “opt into” international human rights instruments, as China has recently done by signing the International Covenant on Civil and Political Rights,⁸ as a practical matter, no state has the freedom to say that it chooses not to be bound by basic human rights norms.

More broadly, the evolution of U.N. and regional peacekeeping and peacebuilding activities, whether in Southeast Asia, the Balkans, sub-Saharan Africa, or the Caribbean, may point to the overriding importance of collective security. Some commentators would conclude that neither humanitarian intervention nor peacekeeping is any longer dependent on the consent of the receiving state.

In yet another field, sovereignty and a nation-state’s freedom to decide seems to have become something of an anachronism. Climate change or global warming, degradation of our oceans and atmosphere, and the risk of nuclear accidents or spread of toxic chemicals are all manifestations of potentially global environmental forces. From the *Trail Smelter* arbitration,⁹ to Stockholm’s Principle 21,¹⁰ to the emerging global commons, the sovereign nation-state may no longer be free to decide to “opt out.”

Some would go even further. In a seminal article in *Foreign Affairs, Power Shift*,¹¹ Jessica Matthews describes the rise of a global civil society, the decline of states, and the rise of non-state actors, including the rapid growth and influence of transnational non-governmental organization (NGO) networks, the globalization and “de-nationalization” of business actors, on the one hand, and the expansion of supranational institutions and authority, on the other hand. She asks “. . . whether there are new geographic or functional entities that might grow up alongside the state, taking over some of its powers and emotional resonance.”¹²

In a cogent reposte, Anne-Marie Slaughter argues in her article that, “[t]he state is not disaggregating into its separate, functionally distinct parts.

⁸ International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368 (1967).

⁹ *United States v. Canada*, Arbitral Tribunal, Montreal, Apr. 16, 1938 and Mar. 11, 1941; U.N. REP. OF INT’L. ARBITRAL AWARDS 3 (1947) 1905.

¹⁰ Principle 21 of the Stockholm Declaration of the United Nations Conference on the Human Environment, June 16, 1972, document 1.12, in GURUSWAMY ET AL., SUPPLEMENT OF BASIC DOCUMENTS TO INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER.

¹¹ Jessica Matthews, *Power Shift*, FOREIGN AFF. 50 (Jan./Feb. 1997).

¹² *Id.*

These parts – courts, regulatory agencies, executives, and even legislatures – are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order.”¹³ For her, this reality has some benefits since, for example, judges are increasingly able to build a global community of law. Regulators, through Basel, the International Organization of Securities Commissions (IOSCOS), or the International Association of Insurance Supervisors, can more effectively ensure prudential supervision of global capital flows. More generally, “individuals and groups in nondemocratic countries may also ‘borrow’ government institutions of democratic states to achieve a measure of justice they cannot obtain in their own countries.”¹⁴ But, she cautions, “the prospect of transnational government by judges and bureaucrats looks more like technocracy than democracy . . . government institutions engaged in policy coordination with their foreign counterparts will be barely visible, much less accountable, to voters still largely tied to national territory.”¹⁵ Worse still, Slaughter’s scenario suggests a fragmentation of international decision-making so extensive that there is no avenue for articulating a community interest, national or international.

Yet, reports of the demise of the nation-state are exaggerated. My assessment is different. In my view, the nation-state is still the central organizing vehicle for the voicing of claims and rights, the reconciliation and resolution of competing claims through the legal process of rule-making, administration, and enforcement, and for the articulation of such interests. It is significant to note that an extensive discussion of the democratic process of balancing interests unfolded in the Organization for Economic Cooperation and Development (OECD) in the context of addressing trade and environment disputes. Governments concluded that, in developing their national approaches to trade and environmental disputes, they “. . . should recognize the importance of taking into account, as appropriate, environmental, trade, scientific, and other relevant expertise. Governments which have made third-party interventions in trade disputes with environmental dimensions have developed their positions through consultations among trade, environmental, and other government officials and with interested NGOs. OECD governments which have been involved in such disputes have consulted a broad range of expertise, including NGOs, in developing their national approaches

¹³ Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF. 183 (Sept/Oct. 1997).

¹⁴ *Id.*

¹⁵ *Id.*

and have taken steps to improve the ability of non-governmental actors to obtain information on these disputes.”¹⁶

Thus, in each of the fields I have reviewed, trade, human rights, peace and security, the environment, and even specialized regulation, it is still primarily the nation-state government, today’s sovereign, if you will, that, having resolved competing interests domestically, is the spokesperson for such interests at the international or transnational level. The nation-state judges how its now-aggregated national interest is best reconciled with those of others, determines appropriate forms of regulation, and much more often than not, implements and enforces any such regulations or norms agreed upon internationally. In fact, putting aside matters of international peace and security, in virtually all other areas I have identified, namely, trade, environment, and human rights, we see nation-states voluntarily coming together to formulate internationally anchored norms, but leaving to the national level the responsibility for both implementation and enforcement.

There are some current challenges. I do not mean to create a construct that artificially describes a perfectly functioning international system of civil societies acting internationally through the medium of nation-state cooperation to create supranational norms that in turn are implemented and enforced through national legal systems. Indeed, challenges abound.

First among these challenges is the articulation and the enforcement of claimed community interests, or of interests perceived as so fundamental as to require the development and the enforcement of norms in defense or fulfillment of these interests.

In the human rights field, many have welcomed the increasing reference by national legislatures and courts to international norms. The *Filartiga* case in the United States,¹⁷ in which a U.S. court assumed jurisdiction over a crime committed by one foreigner against another outside the United States, could be said to stand for the proposition that domestic courts can and should identify and apply widely recognized treaty-based or customary international human rights norms, in effect as agents for the international community, despite the fact that under normal tests of jurisdiction, the authority exercised by the court is extraterritorial in nature.

At the other extreme is the Helms-Burton law,¹⁸ which defenders explain as merely giving U.S. authorities, in this case the Foreign Claims Commission, authority to interpret and apply well-recognized international standards requiring prompt, adequate, and effective compensation for expropriations in

¹⁶ Report on Trade and Environment to the OECD Council at Ministerial Level, Doc. OECD/GD (95) 63 at 34, OECD, Paris, 1995.

¹⁷ *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980).

¹⁸ 22 U.S.C.A. §§ 6031-6046 (1996).

violation of international law. It is seen by most, including Canada, as imposing a unilateral U.S. standard on the rest of the world in improper extra-territorial fashion.

Accepting my premise that we do, and should continue to, rely on the intermediation of the nation-state to put into practical effect agreed-upon values, where should the line be drawn between domestic, legislative, regulatory, or judicial acts that do reflect international consensus and such acts that, although ostensibly reflecting community values, are in reality the unilateral extrapolation of purely domestic values onto others?

The second challenge is a corollary of the first. Assuming that a nation-state chooses to promulgate what might be considered to be a unilateral standard, is there a distinction to be drawn between the conduct sought to be regulated and the tools used as sanctions or remedies in respect of that conduct? For example, in the late 1980s, Toshiba Corporation was found to have permitted the re-export of a "silent propeller" from Japan through Norway to a country that posed a security risk. Under U.S. law, Toshiba was not fined or compelled to submit to U.S. jurisdiction. Instead, they were told that they would no longer enjoy the privilege of being authorized to participate in U.S. defense procurement. Is there anything wrong with a government deciding for itself how it intends to conduct its internal purchasing within its own territory, subject, of course, to applicable international rules, such as the WTO Government Procurement Agreement?¹⁹ Or is there something that seems to partake of the same odious unilateral imposition of standards abroad that Helms-Burton represents? Is the difference one between directing primary conduct, particularly in a manner that undermines the law and policy of the place where the conduct occurs, and the remedy, in this case limited wholly to U.S. territory?²⁰

Allow me to offer some humble guidance. Thus far, I have identified certain dimensions of the current sovereignty debate, and some challenges. Are there any prescriptions? Permit me to offer only a few observations, and possibly some guidance for other speakers and panels. I have suggested elsewhere²¹ that it is, arguably, the lack of consensus on the substantive rules, rather than on institutional and dispute settlement mechanisms, that may account for the seemingly widespread resistance to a supranational authority as a threat to "sovereignty," particularly in the trade field.

¹⁹ Agreement on Government Procurement Measures <<http://www.wto.org/govt/agree.htm>> (visited June 11, 1998).

²⁰ In the *Bank of Nova Scotia* case, *In re Grand Jury Proceedings*, Bank of Nova Scotia, 740 F.2d 817(11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985), Canada objected strongly to the Hobson's choice presented to the Bank of being free to choose to do business in the Caribbean or the United States.

²¹ See *supra* notes 13-15 and accompanying text.

Many disputes in North America concern areas unregulated by international trade rules or governed by rules too general and rudimentary in scope to provide effective discipline (such as agricultural trade), or areas where in the absence of internationally agreed upon rules, one or another country (usually the United States) has sought to legislate, adjudicate, and enforce domestically acts abroad that either have “effects” within the territory or affect “vital” national interests.

It seems that, in areas unregulated or modestly regulated by international norms, a greater degree of “sovereignty” or “independence” in decision-making remains. In these circumstances, however, in the absence of international agreement on the substantive norms to be applied, disputes center instead on the propriety of unilateral enforcement. Put more simply, the question becomes whether access to the U.S. market is, or should be, a reward for “good” behavior, as determined by the United States. For example, the current debate regarding most-favored nation (MFN) treatment for China in the light of human rights violations involves the question of withholding non-GATT-bound preferences. In the area of export controls, the 1988 Omnibus Trade Bill’s sanctions for export control violations are limited to access to the U.S. defense procurement market,²² an area largely outside the coverage of the GATT Procurement Agreement.²³ And the Thai copyright and Brazilian pharmaceuticals investigations, conducted under the auspices of Section 301 of the Trade Act of 1974,²⁴ each involved areas where the “target” government had, in the exercise of its sovereign authority, chosen not to sign on to certain international standards.

Conversely, the best way to avoid the perils of unilateralism is to reach agreement on the substantive rules. If, for example, we as a society believe that corruption abroad is to be deterred, is legislation like the Foreign Corrupt Practices Act²⁵ the most efficient way to achieve this objective, or will it lead to difficult litigation surrounding extraterritorial jurisdiction, as occurred in the *Kilpatrick v. Environmental Tectonics*²⁶ case that went to the U.S. Supreme Court?

²² Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

²³ See *supra* note 19.

²⁴ Trade Act of 1974, Pub. L. No. 93-618, §§301-09, 88 Stat. 1978, 2041 (1975), amended by Omnibus Trade and Competitive Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1164 (codified as amended at 19 U.S.C. §§ 2411-19 (1988)).

²⁵ Foreign Corrupt Practices Act of 1977, 18 U.S.C. §§ 1961 *et seq.*

²⁶ *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1980).

Is not our track record in achieving consensus both in the OECD²⁷ and in the Organization of American States²⁸ on international conventions to combat bribery and corruption, again implemented and enforced through national laws,²⁹ both more effective and more guaranteed to avoid problems of extra-territorial jurisdiction?

Accordingly, the real question is how best to allocate the norm-creating and enforcement responsibility among international, national, and sub-national levels. Internationally agreed upon rules, enforced domestically, still allow for a balanced relationship between international and national levels. Not to belabor the point, but in an interdependent world, the nation-state can properly be viewed as the executor of shared values. In the WTO TRIPS Agreement, for example, members set out a reasonably comprehensive code of intellectual property protection, and the remedies are authorized and agreed upon. Implicitly, therefore, questions of institutional competence, both national and international, are properly addressed.

The E.U. "subsidiarity" principle may provide a lesson of more general application, one that encourages the development of international or supra-national principles, while permitting national tailoring, subject to international oversight. In fact, this principle is being applied in the international trade regime as well, as under the SPS Agreement and Agreement on Technical Barriers to Trade (TBT), where national licensing and other administrative authorities are expected to adhere to domestic procedures that conform to, and implement, international rules.

A further lesson is that, where differences arise internationally, they should be resolved at the international level. In the WTO, an elaborate but effective international dispute settlement regime is available for settling disputes about the internationally agreed upon norms. Disputes between individuals arising under these norms are settled through national courts and agencies.

A third lesson would appear to be that, if the nation-state is and should properly remain a central organizing principle, we should also recognize some obligation on governments to ensure democratic decision-making and processes for the reconciliation of interests domestically before they are articulated by the state internationally.

²⁷ Organization for Economic Cooperation and Development: Council Revised Recommendation c(97) 123/final on Combatting Bribery in International Business Transactions, May 23, 1997, 36 I.L.M. 1016 (1997).

²⁸ Organization of American States: Inter-American Convention Against Corruption, March 29, 1996, I.E.L.-VI-Z.

²⁹ Foreign Corrupt Practices Act, *supra* note 21; Offences Against the Administration of Law and Justice, R.S.C. 1985, c. C-46, §§ 119-130.

Taking the current trade agenda as an example, its focus on non-tariff barriers, services, competition, investment, sound regulatory frameworks, and transparency means that the new agenda is more about strengthening markets and less about opening markets. The focus becomes the horizontal, domestic agenda of regulatory reform, the promotion of non-corrupt governments working to create a stable, predictable, transparent supervisory structure (i.e., financial services regulation) that ultimately creates a stable environment for investment. This agenda also has connections to other areas of domestic regulation. Sound labor policies ensure stability. Sound environmental policies avoid deforestation. Accordingly, this agenda necessarily goes beyond the WTO and affects our thinking about the World Bank, the United Nations Conference on Trade and Development, and the United Nations Development Program, as well as the International Labor Organization and various fora where environmental agreements are being pursued.

This agenda also has a significant development dimension, as we seek ways to ensure the greater integration of developing economies into the global trading system, as well as to provide support for Africa and the poorest countries committed to poverty reduction, economic reform, and good governance.

Some would take this agenda one step further. White House adviser Mack McLarty, in a recent speech, underlined the fact that “open markets support open contemporary democracies” in calling for a second generation of reforms addressing such matters as drugs, corruption, and other aspects of the social infrastructure. I do not purport to offer as extensive a list of substantive reforms. More modestly, I am suggesting that basic legal process values of transparency, due process, administrative and judicial review, and freedoms essential to a functioning democracy are a necessary *domestic* element of today's *international* system.

Both Dicean parliamentary democracy and Thomas Paine's republican models are more than adequate to the task. I will, however, leave you with one final question. If my sense of the evolution of norm-creation at the international level is correct, and if indeed in due course we will find an increasing number of international decisions, whether via dispute settlement or by treaty, in an increasing number of fields, we will need to address how our two legal systems can absorb supranational decisions. This is a challenge with which various European legal systems have had to come to grips in the course of building the European Union, putting it against various constitutional democracies on the foundation of accountability. But, neither Canada or the United States has really yet had to ask how sovereign parliaments,

sovereign legislatures, and independent judiciaries can reconcile themselves to the international system.³⁰

³⁰ See Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39 (1994); Jeffrey L. Friesen, *The Distribution of Treaty-Implementing Powers in Constitutional Federations: Thoughts on the American and Canadian Models*, 94 COLUM. L. REV. 1415 (1994).