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## CHAPTER 11 OF NAFTA AND THE PROVINCES – WILL THE CONSTITUTIONAL QUESTION BE ASKED?

Rajeeve Thakur<sup>\*</sup>

### I. INTRODUCTION

Canada's unique version of federalism has resulted in an uncertain division of powers between federal and provincial governments. International trade law is among the areas of law that have been significantly impacted by such uncertainty. An important question that remains unanswered today is whether the federal government has the constitutional authority to implement international trade treaties, such as the North American Free Trade Agreement ("NAFTA"), into domestic law so that the treaties will have force against the whole of Canada (including the provinces). The *Labour Conventions Case* provides some guidance on this question; but considering its vintage and the facts on which it was based, the answer remains uncertain.<sup>1</sup>

The recent expropriation of the assets of AbitibiBowater by the Government of Newfoundland and Labrador lead AbitibiBowater to launch a dispute under Chapter 11 of NAFTA.<sup>2</sup> The Government of Newfoundland and Labrador did not make any attempt to settle the dispute under the dispute resolution process outlined in Chapter 11. Instead, the federal government paid out a settlement. With the federal government having to pick up the tab in a NAFTA dispute arising out of purely provincial act, the hand of the federal government may finally have been forced to take legislative action.

A straightforward approach would be the promulgation of legislation implementing NAFTA into domestic law. To help ensure the provinces will be held accountable if they violate Chapter 11, the federal government could also enact a provision, as part of the implementing legislation, stipulating that provinces will be held liable for such violations. Legislation that implements NAFTA and imposes liability on provinces for violations thereof, however, will likely be met with challenges by the provinces. As a result, the Supreme Court of Canada may have to revisit the *Labour Conventions Case* and opine

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<sup>1</sup> See *Att'y Gen. Can. v. Att'y Gen. Ont. (Labour Conventions)*, [1937] 1 D.L.R. 673 (P.C.).

<sup>2</sup> North American Free Trade Agreement, U.S.-Can.-Mex., ch. 11, Dec. 17, 1992, Can T.S. 1994 No. 2, 32 I.L.M. 289 (1993) [hereinafter *NAFTA*].

on whether the federal government has the power to implement international trade treaties into domestic law.

## II. BACKGROUND

### A. Chapter 11 of NAFTA

Chapter 11 of NAFTA deals specifically with investment disputes.<sup>3</sup> It has three primary objectives:

- (1) establish a secure investment environment through the elaboration of clear rules of fair treatment of foreign investment and investors;
- (2) remove barriers to investment by eliminating or liberalizing existing restrictions; and
- (3) provide an effective means for the resolution of disputes between an investor and the host government.<sup>4</sup>

Structurally, Section A of the chapter provides substantive rules and principles, while Section B establishes a dispute settlement mechanism.<sup>5</sup> Section A draws on some of the most common principles of international trade law, including the principles of "National Treatment"<sup>6</sup> and "Most-Favored-Nation Treatment."<sup>7</sup> Two of the most important rules established in Section A are the rules on "fair and equitable treatment"<sup>8</sup> and "expropriation."<sup>9</sup>

Article 1105(1) states "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment..."<sup>10</sup> Due to the lack of detail regarding what constitutes fair and equitable treatment under Article 1105, a large number of Chapter 11 claims have been brought, leading to varied interpretation.<sup>11</sup>

Unlike Article 1105, Article 1110 provides significant detail on expropriation and compensation. It prohibits NAFTA Parties from expropriating

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at ch. 11; see also Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L LAW. 727 (1993).

<sup>5</sup> *NAFTA*, *supra* note 2.

<sup>6</sup> *Id.* at art. 1102.

<sup>7</sup> *Id.* at art. 1103.

<sup>8</sup> *Id.* at art. 1105.

<sup>9</sup> *Id.* at art. 1110.

<sup>10</sup> *Id.* at art. 1105(1).

<sup>11</sup> See Ian A. Laird, *Betrayal, Shock and Outrage – Recent Developments in NAFTA Article 1105*, 3 ASPER REV. INT'L BUS. & TRADE L. 185, 185-214 (2003).

the investments of an investor of another NAFTA Party and other measures tantamount to expropriation.<sup>12</sup> It does, however, offer an exemption from the prohibition if the expropriation is “(a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of the law and Article 1105(1); and (d) on payment of compensation[.]”<sup>13</sup> In paragraphs 2 through 6 of the article, the details of what exactly constitute just compensation are spelled out.<sup>14</sup> Paragraphs 2 through 6 state the following:

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.
3. Compensation shall be paid without delay and be fully realizable.
4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.
5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.
6. On payment, compensation shall be freely transferable as provided in Article 1109.<sup>15</sup>

Thus, a NAFTA Party may expropriate the investments of an investor of another NAFTA Party, as long as it is a proper expropriation under Article 1110(1) and just compensation, as set out in Paragraphs 2 through 6, is paid.

Under Section B, the mechanism for the settlement of investment disputes between an investor of a NAFTA Party and another NAFTA Party is interna-

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<sup>12</sup> *NAFTA*, *supra* note 2, at art. 1110.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

tional arbitration.<sup>16</sup> As part of the agreement, each Party has pre-authorized the submission of disputes to arbitration.<sup>17</sup> Chapter 11 provides the following three avenues for submission of claims: (1) the International Centre for Settlement of Investment Disputes ("ICSID") Convention, (2) the Additional Facility Rules of ICSID, or (3) the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules.<sup>18</sup>

One of the key characteristics of Chapter 11 is that it gives private investors the right to bring a claim against a national government of one of the State Parties to the treaty.<sup>19</sup> Under its predecessor, the Free-Trade Agreement, a dispute settlement regime for private investors was not available.<sup>20</sup> The private cause of action afforded to disgruntled investors under Chapter 11 has also made it one of the most controversial chapters of the agreement. Given the controversy surrounding this particular part of NAFTA, it may come as a surprise that both Canada and the United States were intent on NAFTA providing this type of formal dispute settlement mechanism.<sup>21</sup> At the heart of this controversy is the issue of sovereignty. Many have argued that bestowing such rights on private parties erodes the sovereignty of state parties.<sup>22</sup>

Although the Chapter 11 investment regime is quite comprehensive, it does permit reservations and exceptions under Article 1108. Article 1108 provides an exemption for provincial governments from having to comply with Articles 1102, 1103, 1106 and 1107, as long as these governments listed their non-conforming measures within two years of NAFTA's entry into force.<sup>23</sup> As mentioned above, Article 1102, National Treatment, and Article

<sup>16</sup> *Id.* at sec. B.

<sup>17</sup> *Id.* at art. 1122(1).

<sup>18</sup> *Id.* at art. 1120. For NAFTA Chapter 11 disputes, claims may be submitted to arbitration under the UNCITRAL Arbitration Rules. A claim may be submitted to arbitration under the ICSID Convention if both the disputing Party and the Party the investor's Party are parties to the Convention. To date, only the United States is a party to the ICSID Convention; Canada has signed and ratified but has not deposited. ELIZABETH KURUVILA, LIBRARY OF PARLIAMENT, BILL C-9 SETTLEMENT OF INTERNATIONAL INVESTMENT DISPUTES ACT (2007). Mexico has not signed the convention; see CHRISTOPHER H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 222 (1st ed. 2001). If one of the Parties is a party to the Convention, the claim may be submitted under the Additional Facility Rules of ICSID. NAFTA, *supra* note 2, at art. 1120(b).

<sup>19</sup> NAFTA, *supra* note 2, at art. 1116.

<sup>20</sup> Free-Trade Agreement, U.S.-Can., Jan. 2, 1988, 27 I.L.M. 281.

<sup>21</sup> See Lawrence L. Herman, *Sovereignty Revisited*, 24 CAN.-U.S. L.J. 121 (1998); see also Joseph Cumming & Robert Froehlich, *NAFTA Chapter XI and Canada's Environmental Sovereignty*, 65 U. TORONTO FAC. L. REV. 107, ¶ 9 (2007) (stating "Canada and Mexico also supported the inclusion of [investment] provisions").

<sup>22</sup> Ray C. Jones, *NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?* 2002 BYU L. REV. 527, 542-46 (2002).

<sup>23</sup> NAFTA, *supra* note 2, at art. 1108(2).

1103, Most-Favored-Nation Treatment are two of the bedrock principles of international trade law,<sup>24</sup> so allowing the provinces to exempt some of their laws from these principles is significant. None of the provinces formally provided a list of their non-conforming measures.<sup>25</sup> On March 29<sup>th</sup>, 1996, in a letter from the Canadian Minister for International Trade to his NAFTA counterparts, the Canadian Minister provided a general reservation.<sup>26</sup>

## B. Treaty Making in Canada

Part of the controversy that surrounded, and continues to surround, Chapter 11 relates to the general treaty-making process in Canada. Treaty-making is not specifically addressed in Canada's written constitution.<sup>27</sup> Under the *Constitution Act, 1867*, however, the British Crown was given the power to represent Canada on the international plane; today, the prerogative of the Crown is exercised by the executive branch of the Canadian federal government.<sup>28</sup> The treaty-making power lies with the executive: the executive negotiates, signs, and ratifies international treaties.<sup>29</sup> After ratification, states are subject to the international legal obligation to implement the treaty.<sup>30</sup>

<sup>24</sup> See *id.*

<sup>25</sup> An explanation for the governments of some of the provinces deciding not to provide a list of their non-conforming laws is that they thought that producing such a list would be seen as a sign of implicit assent to NAFTA on their part.

<sup>26</sup> See Timothy Ross Wilson, *Trade Rules: Ethyl Corporation v. Canada (NAFTA Chapter 11) Part II: Are Fears Founded?*, 6 NAFTA L. & BUS. REV. AMERICAS. 205, 209 (2000). In the Trade Rules article Wilson provides the following reproduction of the reservation that was attached as a schedule in the Minister of International Trade's letter:

Sector: All Sectors Type of Reservation: National Treatment (1102, 1202),  
Most-Favored-Nation Treatment (1103, 1203),  
Local Presence (1205),  
Performance Requirements (1106),  
Senior Management and Boards of Directors (1107),  
Level of Government: Provincial Measures: All existing non-conforming  
measures of all provinces and territories.  
Phase-out: None.

<sup>27</sup> Joanna Harrington, *Redressing the Democratic Deficit in Treaty Law Making*, 50 MCGILL L.J. 465 (2005).

<sup>28</sup> See Letters Patent Constituting the Office of the Governor General of Canada, 1947, c. 2, reproduced in R.S.C. 1985, app. II, no. 31 (Can.) (stating the formal delegation of the King's powers to the Governor General).

<sup>29</sup> Constitution Act, 1867, 30 & 31 Vict., s. 132 (U.K.), reprinted in R.S.C. 1985, app. II, no. 5 (CAN); see also PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA, 11-5, 11.4(a) (Thompson Reuters Can. Ltd., 5th ed. Supp. vol. 1, 2007); see also LAURA BARNETT, LIBRARY OF PARLIAMENT, CANADA'S APPROACH TO THE TREATY-MAKING PROCESS 5 (2008), available at <http://www.parl.gc.ca/Content/LOP/researchpublications/prb0845-e.htm> (discussing the power to make treaties generally). Parliament, however, was involved with the ratification process in the past; see also Harrington *supra* note 27, at 476. Recently, the parliamentary role in ratification has somewhat reemerged; see also *Policy on Tabling of Treaties in Parlia-*

In Canada, for a treaty that alters domestic law to be enforceable at the national level, it must be incorporated through domestic law.<sup>31</sup> This is distinct from self-executing or monist regimes where an international treaty gains national effect by virtue of ratification. Canada's two-step or dualist treaty implementation regime requires both ratification and domestic implementation through legislation.<sup>32</sup>

The level of government—provincial or federal—that must promulgate the treaty implementing legislation turns on the subject matter of the treaty itself.<sup>33</sup> The *Constitution Act, 1867* divides the power to legislate between the federal government and the governments of the provinces. In the *Constitution Act, 1867*, section 91 enumerates particular powers that are the responsibility of the federal government, and section 92 enumerates particular powers which are the responsibility of the governments of the provinces. However, because of significant overlap and omissions, the division of powers between the national and sub-national governments is not always clear.

Unlike the United States Constitution, the Canadian Constitution bestows the federal legislature with the power to preempt the laws of subnational governments. Article VI, clause 2 (the "Supremacy Clause") of the United States Constitution states "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."<sup>34</sup> The Supremacy Clause has been interpreted by the Supreme Court of the United States to mean that state laws that conflict with federal law are "without effect."<sup>35</sup> The absence of a federal preemption power in Canada has resulted in considerable frustration in the international treaty-making context, in addition to a variety of other contexts.

The seminal case dealing with the issue of whether the federal government has the power to enact legislation that implements a treaty is the *Labour Conventions Case*.<sup>36</sup> The *Labour Conventions Case* involved a dispute between Canada and the provinces over the Canadian government's ability to promulgate federal legislation that would implement international labour

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ment, GOV'T OF CAN., <http://www.treaty-accord.gc.ca/procedures.aspx> (last modified Mar. 3, 2011).

<sup>30</sup> HOGG, *supra* note 29.

<sup>31</sup> See *Baker v. Canada (Minister of Citizenship & Immigr.)*, [1999] 2 S.C.R. 817, ¶ 79 (Can.); see also BARNETT, *supra* note 29, at 5. Some international treaties are consistent with domestic legislation, and thereby, do not require legislation to be passed. *Id.*

<sup>32</sup> BARNETT, *supra* note 29.

<sup>33</sup> Harrington, *supra* note 27, at 483.

<sup>34</sup> U.S. CONST. art. VI, cl. 2.

<sup>35</sup> *Maryland v. Louisiana*, 451 U. S. 725, 746 (1981).

<sup>36</sup> *Att'y Gen. Can. v. Att'y Gen. Ont. (Labour Conventions)*, [1937] 1 D.L.R. 673 (P.C.).

conventions that the Canadian government had ratified.<sup>37</sup> The Canadian government argued that section 132 of the *Constitution Act, 1867* gave it the necessary power to promulgate such legislation.<sup>38</sup> According to section 132, “[t]he Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof...towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.”<sup>39</sup> Section 132, on its face, seems to provide the government with necessary powers to implement treaties.

The case was argued before the Supreme Court, resulting in a split decision. It was then appealed to the Privy Council which held that the Federal Government’s section 132 treaty power does not give it any enhanced subject matter jurisdiction over and above the jurisdiction it has absent this power.<sup>40</sup> Essentially, section 132 has no bearing on the domestic implementation of international treaties. Much like in domestic matters, the level of government that has the power to implement a specific treaty depends on whether the subject matter of the treaty is within the province of the national or sub-national government. Determining what level of government has the power to implement a treaty is difficult in the trade context because the subject matter of international treaties often falls within the domain of both the federal and provincial governments. This situation can have far reaching implications. It could require the legislative approval of up to fourteen governments<sup>41</sup> to implement a treaty, thus making treaty implementation a formidable task.

In the case of NAFTA, the task of treaty implementation was not achieved by Parliament’s promulgation of the *North American Free Trade Agreement Implementation Act*.<sup>42</sup> In *Canadians v. Canada*,<sup>43</sup> the Ontario Court of Appeal addressed the issue of whether NAFTA had been “incorporated into domestic law” by the *NAFTA Implementation Act*. The Court held that because section 10 of the *NAFTA Implementation Act* only states “[t]he Agreement is Hereby Approved,” it does not incorporate the treaty into domestic law.<sup>44</sup> Moreover, no sub-national government in Canada has implemented NAFTA through legislation.<sup>45</sup> This regulatory void has resulted in a

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* ¶ 15.

<sup>39</sup> *Constitution Act*, *supra* note 29.

<sup>40</sup> *See Labour Conventions*, 1 D.L.R. ¶16.

<sup>41</sup> Ten provinces, three territories, and the federal government.

<sup>42</sup> *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44 (Can.).

<sup>43</sup> *Council of Canadians v. Canada*, (2006) 277 D.L.R. (4th) 527 (Can. Ont.).

<sup>44</sup> *Id.* ¶ 25. For a fuller analysis of this decision see HOGG, *supra* note 29, at 11-7 and 11.4(a).

<sup>45</sup> Lawrence L. Herman, C.D. Howe Institute, *Trend Spotting: NAFTA Disputes After Fifteen Years*, BACKGROUNDER, July 2010, available at



variety of issues, including whether Canadian sub-national governments are bound to the provisions of NAFTA. If they are not, who then is liable if an action is brought against Canada, as a Party to NAFTA, for a sub-national government's breach of a provision of Chapter 11? Though many commentators foresaw these issues,<sup>46</sup> the AbitibiBowater settlement has brought them to the forefront of the Canadian trade law debate.

### C. The AbitibiBowater Settlement

AbitibiBowater is one of the largest pulp and paper companies in the world.<sup>47</sup> Through its Canadian subsidiaries and their predecessors, AbitibiBowater has operated in Canada for more than a century.<sup>48</sup> Of its operations in Canada, some of its most significant operations were based in Newfoundland and Labrador. On December 16<sup>th</sup>, 2008, the Newfoundland and Labrador House of Assembly enacted Bill 75 (the "*Abitibi-Consolidated Rights and Assets Act*").<sup>49</sup> The *Abitibi-Consolidated Rights and Assets Act* expropriated certain timber rights, land rights, water use rights, and physical assets from AbitibiBowater.<sup>50</sup> Furthermore, the *Abitibi-Consolidated Rights and Assets Act* denied AbitibiBowater any form of compensation.<sup>51</sup>

Although AbitibiBowater's head office is in Montreal, it is incorporated in Delaware. Its United States corporate status allowed it to utilize the Chapter 11 investor dispute settlement process. AbitibiBowater was able to bring an action against the Canadian government because of its status as an Ameri-

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[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1706256](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1706256).

<sup>46</sup> S.A. Scott, *NAFTA, the Canadian Constitution, and the Implementation of International Trade Agreements*, in BEYOND NAFTA: AN ECONOMIC, POLITICAL AND SOCIOLOGICAL PERSPECTIVE 238, 239-42 (A.R. Riggs and T. Velk, eds., 1993). The treaty implementation issues associated with NAFTA were foreseen by the Federal government even before the treaty came into force; see DANIEL DUPRAS, LAW AND GOVERNMENT DIVISION, NAFTA: IMPLEMENTATION AND THE PARTICIPATION OF THE PROVINCES (1993) (Can.), available at <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/bp324-e.htm>.

<sup>47</sup> See *AbitibiBowater files for bankruptcy protection*, CBC NEWS (Apr. 16, 2009), <http://www.cbc.ca/canada/montreal/story/2009/04/16/mtl-abitibi-0416.html>.

<sup>48</sup> Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement AbitibiBowater Inc. v. Government of Canada (Apr. 23, 2009), ¶ 14 [hereinafter AbitibiBowater NOI].

<sup>49</sup> An Act to Return to the Crown Certain Rights Relating to Timber and Water Use Vested in Abitibi-Consolidated and to Expropriate Assets and Lands Associated with the Generation of Electricity Enabled by Those Water Use Rights, S.N.L. 2008, b. 75 (Can.) [hereinafter *Abitibi-Consolidated Rights and Assets Act*].

<sup>50</sup> *Id.* at ss. 3-8.

<sup>51</sup> The Act only left open the possibility of compensation for hydro assets. *Id.* at s. 10(1), (2). The province also attempted to shield itself from any action resulting from the Act by inserting a no liability clause within the Act itself. *Id.* at s. 11.

can investor.<sup>52</sup> Before submitting a claim to arbitration under Chapter 11 of NAFTA, Article 1118 requires parties to “first attempt to settle a claim through consultation or negotiation.”<sup>53</sup> Given the abruptness of the actions of the government of Newfoundland and Labrador,<sup>54</sup> it came as no surprise that the province was not willing to negotiate. After the six-month waiting period,<sup>55</sup> AbitibiBowater was free to submit a claim to arbitration. AbitibiBowater’s counsel submitted a Notice of Intent to Submit a Claim to an Arbitrator on April 23, 2009,<sup>56</sup> and a Notice of Arbitration and Statement of Claim on February 25, 2010.<sup>57</sup>

In its Notice of Arbitration and Statement of Claim, AbitibiBowater raised a number of claims under Chapter 11. AbitibiBowater argued that the province directly and unlawfully expropriated its assets, rights, licenses, and other interests, as none of the criteria for lawful expropriation under Article 1110 were met.<sup>58</sup> Moreover, no compensation was provided. AbitibiBowater argued that it also did not receive fair and equitable treatment pursuant to Article 1105 because the expropriation “was arbitrary, irrational and discriminatory, in violation of AbitibiBowater’s legitimate expectations of a stable business and legal environment and of equal treatment vis-à-vis other investors.”<sup>59</sup> Finally, it argued that Canada was in breach of the principles of National Treatment and Most-Favored-Nation Treatment, because by explicitly targeting AbitibiBowater, the province directly discriminated against it.<sup>60</sup> The corporation claimed monetary damages of \$500 million CAD.<sup>61</sup>

As some had predicted,<sup>62</sup> Canada ended up footing the bill for the actions of the government of Newfoundland and Labrador.<sup>63</sup> The federal govern-

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<sup>52</sup> *NAFTA*, *supra* note 2, at art. 1101.

<sup>53</sup> *Id.* at art. 1118.

<sup>54</sup> The *Abitibi-Consolidated Rights and Assets Act* was passed in one day, shortly following AbitibiBowater’s announcement of the closure of the Grand Falls Mill facility in Newfoundland and Labrador. See AbitibiBowater NOI, *supra* note 48, ¶42.

<sup>55</sup> Article 1120 of Chapter 11 only permits a claim to be submitted to arbitration six months after the events given rise to the claim have taken place. *NAFTA*, *supra* note 2, at art. 1120.

<sup>56</sup> AbitibiBowater NOI, *supra* note 48.

<sup>57</sup> Notice of Arbitration and Statement of Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement AbitibiBowater Inc. v. Government of Canada (Feb. 25, 2010) [hereinafter AbitibiBowater NOA].

<sup>58</sup> *Id.* ¶ 88.

<sup>59</sup> *Id.* ¶ 95.

<sup>60</sup> *Id.* ¶ 97.

<sup>61</sup> *Id.* ¶ 100(a).

<sup>62</sup> See J. Michael Robinson, *Danny’s NAFTA Mess*, *FP Comment*, FIN. POST (Jan. 6, 2009), <http://network.nationalpost.com/np/blogs/fpcomment/archive/2009/01/06/danny-s-nafta-mess.aspx>; see also Herman, *supra* note 45, at 6.

<sup>63</sup> See Bertrand Marotte, *Ottawa Pays AbitibiBowater \$130-million for Expropriation*,

ment reached a settlement with AbitibiBowater, whereby it paid out \$130 million CAD. The significance of the outcome of the AbitibiBowater expropriation is that the federal government had to pay one-hundred percent of the damages associated with the acts of a province in a NAFTA Chapter 11 dispute. Hopefully, this will push Canada to address some of the lingering issues that remain unresolved, over a decade and a half since NAFTA came into force. After the settlement was reached Prime Minister Stephen Harper made the following remarks:

I do not intend to get back the monies expended in this case from the government of Newfoundland and Labrador. But I have indicated that in future, should provincial actions cause significant legal obligations for the government of Canada, the government of Canada will create a mechanism so that it can reclaim monies lost through international trade processes.<sup>64</sup>

The question is -- how will the Prime Minister make good on this promise?

### III. LEGISLATIVE ACTION AND SUPREME COURT REVIEW

Prime Minister Harper's strong tone signals that Canadian provinces will soon be held accountable for violations of Chapter 11 of NAFTA. A mechanism for reclaiming federal funds lost through the Chapter 11 dispute resolution process could be created legislatively. As discussed above, the *NAFTA Implementation Act* does not appear to bind the provinces to the provisions of NAFTA. In order to address this issue, Parliament could promulgate legislation that explicitly implements NAFTA into domestic law. Among the provisions in the implementing statute, Parliament would be well advised to include a provision that specifically addresses Chapter 11 disputes that arise out of the conduct of a provincial government. Such a provision should clearly indicate that any liability resulting to Canada from a Chapter 11 dispute—arising out of the actions of a province—is the responsibility of the provincial government.

Surely such a provision and the act as a whole would almost certainly be met with a challenge by the provincial governments. The provincial governments would argue that by enacting such legislation, the federal govern-

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GLOBE & MAIL (Aug. 25, 2010), <http://www.theglobeandmail.com/report-on-business/ottawa-pays-abitibibowater-130-million-for-expropriation/article1683906/>.

<sup>64</sup> See Bertrand Marotte & John Ibbitson, *Provinces on the Hook in Future Trade Disputes: Harper*, GLOBE & MAIL (Aug. 26, 2010), <http://www.theglobeandmail.com/report-on-business/provinces-on-hook-in-future-trade-disputes-harper/article1686431/>.

ment has acted beyond its constitutional authority. The Supreme Court of Canada would then have to decide on the validity of the legislation and likely revisit the *Labour Conventions Case*.

The analysis provided below begins with a look at whether legislation implementing NAFTA as a whole against both the provincial and federal governments would be upheld by the Supreme Court. Although a variety of avenues for upholding such legislation may exist, the analysis is limited to overturning the *Labour Conventions Case*, as well as distinguishing the *Labour Conventions Case*, the General Trade and Commerce Power of section 91(2), and the Parliament's power to make laws for "peace, order, and good government."<sup>65</sup> Following this analysis, an evaluation of the likelihood of the Supreme Court upholding a subsidiary provision extending liability to the provincial governments in Chapter 11 disputes is provided. Finally, the prospect of the federal and provincial governments reaching an understanding is considered.

## A. Implementing NAFTA

### (1) Overturning the Labour Conventions Case

Any challenge of legislation implementing NAFTA would require the Supreme Court to revisit the issues addressed in the *Labour Conventions Case*. It is difficult to overlook that at the time this case was decided, Canada was a very different place. Having a single voice to speak to the rest of the world on international treaties is more important today than ever. It is also hard to ignore the Supreme Court *dicta* indicating that the outcome of the case, if decided today, might be different.<sup>66</sup> That being said, it is possible that the Supreme Court will decide, even today, that the federal government does not have plenary power to implement international treaties.

### (2) Distinguishing the Labour Conventions Case

Even if the Labour Conventions doctrine remains intact, the case could be distinguished on its facts from a challenge to federal legislation implementing a trade agreement. Arguably, the labour context is different than the

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<sup>65</sup> See generally CLEMENT MACINTYRE & JOHN WILLIAMS, PEACE, ORDER, AND GOOD GOVERNMENT (2003) (providing a general overview of how the ideals of peace, order, and good government drive Canadian policy).

<sup>66</sup> See, e.g., *Johannesson v. West St. Paul* [1952] S.C.R. 292, 303 (Can.); *Frances v. The Queen* [1956] S.C.R. 618, 621 (Can.); *Re Offshore Mineral Rights of B.C.* [1967] S.C.R. 792, 815-17 (Can.); *MacDonald v. Vapor Canada Ltd.* [1977] 2 S.C.R. 134, 167-72 (Can.); *Schneider v. The Queen* [1982] 2 S.C.R. 112, 134-35 (Can.); see also HOGG, *supra* note 29.

trade context which could result in a different outcome. The legislation at the center of the dispute in the *Labour Conventions Case* dealt with the implementation of international conventions dealing with labour standards.<sup>67</sup> The Privy Council stated that the "validity of the legislation can only depend upon sections 91 and 92 ... [and] this legislation came within the classes of subjects by section 92 assigned exclusively to the Legislatures of the provinces, viz., property and civil rights in the province."<sup>68</sup> A determining factor in the Privy Council's decision, therefore, was that the legislation in dispute dealt with a matter clearly within the jurisdiction of the provincial governments, under section 92 of the *Constitution Act, 1867*. The importance of this factor is made explicit by their reference to their decision in the *Reference re Regulation and Control of Radio Communication in Canada* ["Radio Case"].<sup>69</sup>

In the *Radio Case*, the Dominion government's power to implement a treaty regarding radio was upheld.<sup>70</sup> The Privy Council distinguished their decision in the *Radio Case* on the grounds that the subject matter was the regulation of radio, which did not fall squarely within one of the enumerated classes of subjects in section 92 (or section 91).<sup>71</sup> Rather, the regulation of radio could be seen as crossing into both federal and provincial jurisdiction.

Arguably, the case for the regulation of trade, including implementation of NAFTA, falling within the federal sphere of powers is even stronger than the regulation of radio. This is because section 91(2) clearly states "Regulation of Trade and Commerce" is within the federal government's exclusive authority.<sup>72</sup> The provincial governments, on the other hand, would argue that the subject matter of NAFTA invades the provincial domain of "property and civil rights," under section 92(13) of the *Constitution Act, 1867*. The ques-

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<sup>67</sup> Att'y Gen. Can. v. Att'y Gen. Ont. (*Labour Conventions*), [1937] 1 D.L.R. 673, ¶ 12 (P.C.).

<sup>68</sup> *Id.* ¶ 16.

<sup>69</sup> Reference re Regulation and Control of Radio Communication in Canada (*Radio Case*), [1932] AC 304 (Can.).

<sup>70</sup> *See id.*

<sup>71</sup> The Dominion government made a reference asking whether it had the right to regulate radio. *Id.*; see *Labour Conventions*, 1 D.L.R. ¶ 16.

<sup>72</sup> Constitution Act, *supra* note 29. An issue that may arise is that the section 92(1) trade and commerce power only contemplated domestic trade and commerce, not international trade and commerce, which was part of the Royal Prerogative at the time. Convincingly, it could be argued that the federal government's power over trade and commerce has been extended to international trade and commerce because the federal government now exercises the Crown Prerogative; see Harrington *supra* note 27. Significantly, the Supreme Court has recognized the section 92(1) "the federal trade and commerce power [as] not correspond to the literal meaning of the words 'regulation of trade and commerce' ... [and including] arrangements with regard to international and interprovincial trade[.]" Canada Attorney General v. Canadian National Transportation Ltd. (*Canadian National Transportation Case*), [1983] 2 S.C.R. 206, ¶ 33.

tion of whether the federal government's implementation of NAFTA is held to be *ultra vires* may depend, to some extent, on how the subject matter of the agreement is characterized.

### (3) The General Trade and Commerce Power

Under the Labour Conventions doctrine, determining whether federal legislation implementing NAFTA would be upheld may also depend on the breadth of Parliament's section 91 trade and commerce power. In *Citizens Insurance Co. of Canada v. Parsons*, the Judicial Committee of the Privy Council distinguished two branches of federal power under s. 91(2): (1) the power over international and interprovincial trade and commerce, and (2) the power over general trade and commerce affecting Canada as a whole ("General Trade and Commerce").<sup>73</sup> The first branch of the commerce and trade power has been subjected to intense constitutional challenge,<sup>74</sup> and is likely too narrow to be successfully applied to legislation implementing NAFTA. The second branch, on the other hand, may be sufficiently broad.

To assist in determining if a particular piece of legislation should be upheld under the General Trade and Commerce Power, the following five-factor test (the "General Trade and Commerce Power Test") was developed by the Supreme Court in *Vapor* and *Canadian National Transport*:

- (i) the impugned legislation must be part of a regulatory scheme;
- (ii) the scheme must be monitored by the continuing oversight of a regulatory agency;
- (iii) the legislation must be concerned with trade as a whole rather than with a particular industry;
- (iv) the legislation should be of a nature that provinces jointly or severally would be constitutionally incapable of enacting; and
- (iv) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.<sup>75</sup>

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<sup>73</sup> *Kirkbi AG v. Ritvik Holdings Inc. (Kirkbi Case)*, [2005] 3 S.C.R. 302, ¶ 15 (Can.) (citing *Citizens Insurance Co. of Canada v. Parsons* [1881] 7 App. Cas. 96 (P.C.)); see also *General Motors of Canada Ltd. v. City National Leasing Ltd. (General Motors Case)*, [1989] 1 S.C.R. 641, ¶ 23 (Can.).

<sup>74</sup> *General Motors Case*, 1 S.C.R. ¶ 23; see also *Labatt Brewing Co. v. Canada* [1980] 1 S.C.R. 914, ¶ 16 (Can.).

<sup>75</sup> *General Motors Case*, 1 S.C.R. at 662-63; see *MacDonald v. Vapor Canada Ltd.* [1977] 2 S.C.R. 134, ¶ 31-32 (Can.). The Supreme Court of Canada began to construct a test to determine whether legislation enacted under the general trade and commerce power is valid. The Vapor Court set out the first three factors of the test. The final two were established in 1983;

This list of factors is not exhaustive and the presence of any or all of the factors is not decisive, but merely persuasive in determining whether the legislation falls within the General Trade and Commerce Power.<sup>76</sup> A case-by-case analysis is necessary.<sup>77</sup> In the past, the Supreme Court has used the General Trade and Commerce Power to uphold federal legislation against provincial challenge in areas, such as competition<sup>78</sup> and intellectual property.<sup>79</sup>

Evaluating legislation that would implement NAFTA into domestic law under the General Trade and Commerce Power Test set out above would be difficult as the legislation itself would likely contain little substance of its own (as its purpose would be to implement NAFTA into domestic law). In order to perform a meaningful analysis under this test, NAFTA, rather than the implementing act, must be examined. It is important to note that the General Trade and Commerce Power Test has not been applied in this way by the Supreme Court in the past. Performing an analysis of the implementing legislation based on NAFTA, however, would still be faithful to the General Trade and Commerce Power Test because the implementing legislation functions to implement the treaty into domestic law.<sup>80</sup> By becoming part of the domestic law, it is the regime created by the treaty that must be evaluated. Provided below is an analysis of NAFTA and Chapter 11 under the General Trade and Commerce Power Test.<sup>81</sup>

#### (i) Regulatory scheme

In the *General Motors Case*,<sup>82</sup> the Supreme Court considered whether the *Combines Investigation Act*<sup>83</sup> was valid under the second branch of the Trade and Commerce Power.<sup>84</sup> In its examination of whether it contained a regulatory scheme, the Supreme Court focused on how the *Combines Investigation Act* consisted of a comprehensive regime geared towards achieving the objective of eliminating activities that reduce competition in the market-place.<sup>85</sup> NAFTA can easily be analogized to the *Combines Investigation Act*. Its pri-

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see *Canadian National Transportation Case*, 2 S.C.R. ¶34.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See generally *General Motors Case*, 1 S.C.R. at 662-63.

<sup>79</sup> See generally *Kirkbi Case*, 3 S.C.R. at 641.

<sup>80</sup> See NAFTA, *supra* note 2, at Part II.B (explaining treaty implementation generally).

<sup>81</sup> See Mark A. Luz, *NAFTA, Investment and the Constitution of Canada: Will the Water-tight Compartments Spring a Leak?* 32 OTTAWA L. REV. 35, ¶59-69 (2000-2001).

<sup>82</sup> *General Motors Case*, 1 S.C.R. at 662-63.

<sup>83</sup> R.S.C. 1952 c. 314. This act was replaced by the *Competition Act* (R.S.C. 1985, c. C-34).

<sup>84</sup> *General Motors Case*, 1 S.C.R. ¶¶ 50, 55.

<sup>85</sup> See *id.* ¶ 54.

mary objectives are to eliminate barriers to trade, promote fair competition, increase investment, and protect and enforce intellectual property rights.<sup>86</sup> NAFTA is divided into eight parts, providing detailed and comprehensive coverage of a variety of areas of trade, including goods, services, government procurement, investment, intellectual property, labor, and the environment.<sup>87</sup>

As discussed above, Chapter 11 of NAFTA sets out the “rules of the game” in Section A and the dispute resolution mechanism in Section B.<sup>88</sup> Chapter 11 on its own would likely be considered to encompass a regulatory regime specifically dealing with the regulation of private investment among NAFTA countries.

## (ii) Regulatory oversight

Turning again to *General Motors Case*, the Supreme Court found that the Director of Investigations and Research and the Restrictive Trade Practices Commission provided sufficient oversight over the regulatory scheme.<sup>89</sup> The Director has the authority to inquire into suspected anti-competitive conduct and the Commission holds proceedings.<sup>90</sup> Each of the three parties to NAFTA is involved in its oversight. The Free Trade Commission consists of cabinet-level representatives from the three member countries,<sup>91</sup> and is tasked with overseeing the implementation and elaboration of the agreement.<sup>92</sup> The NAFTA Co-ordinators are responsible for implementation in a broader sense.<sup>93</sup> In addition, each NAFTA Party has a domestic trade body dedicated to oversight of trade. In Canada, the Department of Foreign Affairs and International Trade performs this function. Given the multiple avenues of oversight, it is likely that this factor is met. The oversight provided by these bodies extends to all parts of NAFTA, including investment.

## (iii) Not focused on a single industry

This factor clearly weighs in favor of NAFTA because the agreement does not focus on a single industry or sector of the economy. Rather, it seeks

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<sup>86</sup> See *NAFTA*, *supra* note 2, at art. 102.

<sup>87</sup> See generally *NAFTA*, *supra* note 2.

<sup>88</sup> See *NAFTA*, *supra* note 2, at Part II.A (providing more information on the structure of Chapter 11 of NAFTA).

<sup>89</sup> *General Motors Case*, 1 S.C.R. ¶ 57.

<sup>90</sup> *Id.*

<sup>91</sup> See *Institutions of NAFTA*, FOREIGN AFFAIRS & INT’L TRADE CAN., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/inst.aspx?lang=en&view=d> (last visited Feb. 28, 2012).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*



to establish a free trade area.<sup>94</sup> Similarly, Chapter 11 focuses on investment generally and not investment in a specific industry.

(iv) Parliament must promulgate legislation

Although the question of what level of government has the power to implement a specific treaty turns on the subject matter of the treaty, the power to negotiate, sign, and ratify international treaties is within the powers of the federal executive.<sup>95</sup> In effect, this would make it constitutionally impossible for the provinces, jointly or severally, to enact NAFTA or Chapter 11 on their own.

(v) Need for national application

If a single province were not included in NAFTA, it would be extremely difficult to negotiate such an agreement. It is doubtful that the national governments of the United States or Mexico would be willing to enter into a trade agreement with only some of the Canadian provinces. Even if such an agreement could be reached, the bargaining power of the provinces that decided to participate would be significantly reduced. In the case of international trade, the nation must speak with one voice.

As mentioned above, all five factors do not have to be resolved in favor of the legislation for the Supreme Court to uphold it under the General Trade and Commerce Power.<sup>96</sup> But finding that all five factors do support a valid exercise of the General Trade and Commerce Power will be highly persuasive. Assuming the validity and acceptance by the Court of the analysis above, a statute implementing NAFTA into domestic law would likely come within the federal government's General Trade and Commerce Power. Again, it is important to note that to date, the Supreme Court has not extended this analysis to an international agreement.<sup>97</sup>

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<sup>94</sup> See *NAFTA*, *supra* note 2, at art. 101.

<sup>95</sup> See *BARNETT*, *supra* note 28; see also *Harrington*, *supra* note 27, at 476.

<sup>96</sup> See *NAFTA*, *supra* note 2, at Part III.A(3).

<sup>97</sup> See Jeffrey Macintosh, *The Houdini Gambit*, *FINANCIAL POST* (Nov. 23, 2010) <http://www.financialpost.com/Houdini+gambit/3869790/story.html> (analyzing the General Trade and Commerce Power Test in the Securities Regulation context). See also Memorandum from Ogilvy Renault, to Michael Phelps, Chair, Wise Persons' Committee (Nov. 10, 2003) (on file with author), available at <http://www.wise-averties.ca/reports/WPC%20Research%20Studies.pdf>.

#### (4) Peace, Order, and Good Government

Under the residual powers of section 91, Parliament may “make Laws for the Peace, Order, and Good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this *Act* assigned exclusively to the Legislatures of the Provinces[.]”<sup>98</sup> The relevant branch to assess the federal government’s enactment of legislation that implements NAFTA domestically is the national concern branch of POGG.<sup>99</sup> Justice Le Dain set out the following test for the national concern doctrine:

- (1) the national concern doctrine is separate and distinct from the national emergency doctrine...
- (2) it applies to new matters which did not exist at confederation and matters which since became matters of national concern;
- (3) it must have a singleness, distinctiveness, and indivisibility that distinguishes it from local matters and its impact on provincial jurisdiction is reconcilable with the distribution of constitutional power; and
- (4) in determining 3, what would the effect of provincial failure to effectively deal with the regulation of the matter on extra provincial interests.<sup>100</sup>

There is also a national emergency branch of POGG. This branch is not relevant in this context as it is unlikely that the implementation of a trade agreement would be considered necessary temporary legislation, so the first prong of the test is irrelevant. Arguably, the second prong of the test would also be satisfied. Trade agreements, such as NAFTA, did not exist with the Dominion at Confederation and are matters of national concern. In *Canadian Generic Pharmaceutical Assn. v. Canada (Minister of Health)*, the Federal Court stated in *dicta* that NAFTA would satisfy this prong.<sup>101</sup>

Under the third prong, the test for singleness, distinctiveness and indivisibility has been described as demanding because of the risk that the notion of national concern poses to the constitutional division of provincial and federal powers.<sup>102</sup> The analysis under the third prong is informed by the fourth prong. The effect on extra-provincial interests of a provincial failure to deal

<sup>98</sup> Constitution Act, *supra* note 29, § 91.

<sup>99</sup> See *R. v. Crown Zellerbach Canada Ltd.* [1988] 1 S.C.R. 401, 402-03 (Can.); *R v. Hydro-Quebec* [1997] 3 S.C.R. 213 ¶ 64-65 (Can.).

<sup>100</sup> *Id.*

<sup>101</sup> *Can. Generic Pharm. Ass’n v. Can. Minister of Health* [2009] F.C.J. No. 938 (Can.).

<sup>102</sup> *R v. Hydro-Quebec*, 3 S.C.R. ¶ 67.

effectively with the control or regulation of the intra-provincial aspects of trade could be significant, as roughly half of provincial exports are to markets within Canada.<sup>103</sup> Regulation of trade among the provinces and the regulation of trade among the provinces and other countries may be divisible, leaving the former within the authority of the provinces and the latter within the authority of the federal government.

Turning solely to international trade, there would still be some encroachment on the section 92(13) provincial powers if the regulation of international trade agreements was left to Parliament. The indivisible nature of international trade, however, would make it difficult to argue that both the federal and provincial governments could regulate such trade. The actions of one province can impact the whole nation. For example, if the federal government did not pay AbitibiBowater for the actions of the government of Newfoundland and Labrador, the impact would have been felt across Canada. Not paying out any compensation for such a blatant and large-scale expropriation would result in a negative impact on foreign investment in Canada. Notwithstanding this analysis, the limited precedent on what qualifies under the national concern branch of the POGG makes it difficult to determine whether federal legislation that implements NAFTA would be upheld under this branch.

Though it is unlikely that the Supreme Court will overturn the Labour Conventions doctrine, it may determine that international trade is outside the reach of the doctrine. As explained above, the national concern branch of the POGG may also be an avenue for upholding federal regulation implementing NAFTA. The General Trade and Commerce Power, however, would likely be the strongest grounds for finding such legislation is valid, provided the Supreme Court finds the General Trade and Commerce Test to be applicable in this context. Analyzing the factors, it appears that they weigh in favor of NAFTA and Chapter 11. Unfortunately, even if a Supreme Court decision finds that the provinces are bound to the provisions of NAFTA, it may not solve the problem that arose in the AbitibiBowater dispute. This is because Chapter 11 is silent on the issue of provincial liability under Articles 1105 and 1110. For this reason, a more direct approach may be necessary.

## B. A Provincial Liability Provision

A provision that holds a provincial government responsible for liability resulting from Chapter 11 disputes that arise out of its conduct is necessary. Even if an act implementing NAFTA was found to be *intra vires*, the provincial governments may challenge a particular provision of the act. Again, the

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<sup>103</sup> STATISTICS CAN., GOVT. OF CAN., DEPOSITORY SERVICE PROGRAM, INTERPROVINCIAL AND INTERNATIONAL TRADE IN CANADA 1992-1998 (2000).

strongest argument that Parliament has the authority to enact such a provision is that it falls within the General Trade and Commerce Power. The test for determining whether a provision within an act, rather than the act as a whole, is valid was articulated in the *General Motors Case*;<sup>104</sup> the steps of the test are as follows:

- (1)[T]he court must determine whether the impugned provision can be viewed as intruding on provincial powers, and if so to what extent[.]
- (2)[T]he court must establish whether the act (or a severable part of it) is valid[.]
- (3)If so, the court must then determine whether the impugned provision is sufficiently integrated with the scheme that it can be upheld by virtue of that relationship.<sup>105</sup>

At the first stage of the analysis, the reviewing court examines the provision individually, without regard to the Act of which it is part.<sup>106</sup> On its own, a provincial liability provision is sure to be seen as intruding on provincial powers. Take the AbitibiBowater settlement, for instance; the government of Newfoundland and Labrador promulgated provincial legislation that expropriated the property of a private company. Given that the matter was civil in nature and all the property was located within the province, the enactment of Bill 75 seems to fall within section 92(13). Federal legislation requiring the provincial government to make payment to AbitibiBowater as a result of such action seems to intrude on the provinces authority. A reviewing court's finding that the provision invades the provincial legislative domain, however, would not necessarily result in the provision being invalidated.<sup>107</sup>

The second stage requires the court to determine whether the act, or a severable part of it, is valid.<sup>108</sup> When examining the validity of a provision under the General Trade and Commerce Power, an analysis of the factors in the General Trade and Commerce Power Test is necessary.<sup>109</sup> As discussed above, if the five factors are applied to NAFTA, or Chapter 11 on its own, they will likely all weigh in its favor.<sup>110</sup>

Finally, the provision must be sufficiently linked to the legislation.<sup>111</sup> In the *Vapor Case*, Chief Justice Laskin indicated that including an invalid pro-

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<sup>104</sup> See *General Motors Case*, 1 S.C.R. ¶ 47.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* ¶ 41.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* ¶ 42.

<sup>109</sup> *Id.* ¶ 47.

<sup>110</sup> See *NAFTA*, *supra* note 2, at Part III.A.(3).

<sup>111</sup> See *General Motors Case*, 1 S.C.R. ¶ 44.

vision in a valid act does not make the provision valid.<sup>112</sup> At this stage in the analysis, the degree to which the provision encroaches on the provincial power is relevant.<sup>113</sup> A sliding scale approach is taken. The more intrusive the legislation is on the provincial power the stronger the connection between it and the act must be.<sup>114</sup> In the case of legislation that holds the provinces liable if their actions result in liability under Chapter 11, the strength of the connection between the provision and Chapter 11 of NAFTA is unquestionable. Without a mechanism to hold the provincial governments liable for violating Chapter 11, the entire Chapter 11 framework is at risk. As in the AbitibiBowater scenario, provincial governments could contravene the provisions of the Chapter and the federal government would be liable for their actions. This could circumvent the objectives of the Chapter—establishment of a secure investment environment, removal of investment barriers, and effective dispute resolution throughout the country.<sup>115</sup> The analysis of a provincial liability provision under the *General Motors* framework shows that a reviewing court would likely find such a provision valid.

### C. An Understanding

As an alternative to legislative action, the federal and provincial governments could negotiate an agreement. Given that maintaining a stable trade relationship with the United States and Mexico is in the best interests of Canada as a whole, an understanding with the federal government may be a viable option. It would also allow both levels of government to avoid a major constitutional issue. Since the *Labour Conventions Case* was decided, and perhaps even before then, the provincial and federal governments have, at least in some cases, co-operated in making treaties. The AbitibiBowater settlement is significant because the federal government paid one-hundred percent of the proceeds of a Chapter 11 settlement that stemmed from acts that were exclusively provincial. As prominent trade law practitioner Lawrence Herman points out: "consideration should be given to a federal-provincial understanding or protocol settling responsibility for payment of NAFTA awards that concern provincial measures."<sup>116</sup> Given what is at stake and Canadian history, this may be a realistic possibility.

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<sup>112</sup> *Id.* ¶ 34.

<sup>113</sup> *Id.* ¶44.

<sup>114</sup> *Id.*

<sup>115</sup> See *NAFTA*, *supra* note 2, at ch. 11.

<sup>116</sup> Herman, *supra* note 45, at 6.

#### IV. CONCLUSION

Parliament's promulgation of an act implementing NAFTA into Canadian domestic law and insertion of a provision that apportions liability for Chapter 11 disputes could prevent the reoccurrence of the AbitibiBowater problem. This, of course, is not the only way the federal government could remedy the problem. Any legislative solution that implements NAFTA domestically, however, will likely be subjected to the scrutiny of the Supreme Court upon provincial objections. In an effort to temper its actions, prior to promulgating such legislation, Parliament could pose the question of whether it has the authority to enact such legislation to the Supreme Court by submitting a reference. Whether by a reference or a provincial *ultra vires* challenge to legislation, the Supreme Court of Canada would have to decide on the constitutional validity of the legislation.

Though it is difficult to predict how the Supreme Court would approach this constitutional question, the General Trade and Commerce Power likely provides the strongest basis for domestically implementing NAFTA and a related provincial liability provision. Such a decision would require the Supreme Court to widen the scope of the General Trade and Commerce Test to include legislation that implements an international agreement, and look to the agreement to satisfy the factors of the test. This is the only way to perform a meaningful analysis. Given the importance and timeliness of this issue,<sup>117</sup> it is likely that Prime Minister Harper will fulfill his promise and the Supreme Court may soon be confronted with this question.

As discussed above, a constitutional challenge may be avoided if a federal-provincial understanding is reached. In any case, implementing NAFTA against all of Canada and enacting a provision that clearly establishes provincial liability or by negotiating an understanding that has essentially the same effect will insure that the federal government does not have to pay for provincial acts that violate Chapter 11. As result of a resolution on this issue, the provinces would be motivated to get involved in the entire Chapter 11

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<sup>117</sup> More cases involving the actions of provinces that contravene Canada's obligations under international trade treaties are making their way through the pipeline. *See eg.*, Notice of Arbitration Under the UNCITRAL Arbitration Rules and the North American Free Trade Agreement, Dow Agrosciences LLC, Investor v. Gov't of Can. (Mar. 31, 2009), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/DowAgroSciencesLLC-2.pdf> (involving losses to Dow Agrosciences allegedly caused by a Québec ban on sale of law pesticides). *See also* Canada – Certain Measures Affecting the Renewable Energy Generation Sector WT/DS412 (Panel composed on Oct. 6, 2011), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds412\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds412_e.htm) (involving a challenge by Japan later joined by the EU and the U.S., alleging the made-in-Ontario requirements of its feed-in-tariff program violates Canadian obligations under the GATT because, among other violation, they act as a subsidy).

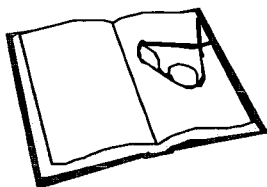
dispute settlement process for conflicts that originate out of provincial measures. This motivation would stem from the fear of resulting liability for an award against Canada. This is important because currently Canada is not only "on the hook" for payment of awards and settlements, it also must expend resources on the arbitration process. If a Chapter 11 dispute arises from the acts of a province, the province will likely be better situated to defend such actions. Moreover, the provinces and territories may think twice before enacting measures that would violate the provisions of Chapter 11 if they could no longer rely on the federal government to "pick up the check." This would help contribute to a stable investment environment and repair any damage done to Canada's reputation as a safe place for foreign investment.

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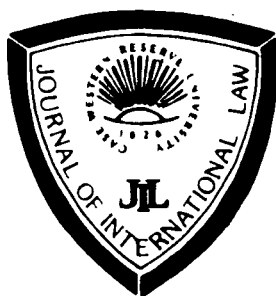
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## EDITOR-IN-CHIEF'S NOTE

Volume Thirty-Seven, Number Two of the *Canada-United States Law Journal* contains articles written by academics, professionals, and students regarding the Beyond the Border Initiative proposed by U.S. President Barack Obama and Canadian Prime Minister Stephen Harper on February 4, 2011. The *Journal's* umbrella organization, the *Canada-United States Law Institute*, held its annual conference on this initiative on March 22-23, 2012. The articles featured in this issue reflect the varying ideologies presented at the conference and related to this important endeavor. This issue showcases some of the brightest and influential minds in the field. The *Journal* extends a sincere thank you to the contributing authors for their insightful and exceptional scholarship and for their essential voice in this discourse.

This volume could not have been accomplished without the guidance and leadership exhibited by its faculty advisors. First, the *Journal* extends a warm thank you to its Case Western-based faculty advisor, David Kocan. David has been very supportive of the *Journal* and the new direction it has taken. His open-door policy and assistance throughout the process was key to this issue's successful publication. The *Journal* also wishes to thank Chios Carmody, whom albeit on sabbatical, provided continued support and enthusiasm to the University of Western Ontario Faculty of Law editorial staff.

We must also thank our editorial staff members for their hard work. The Executive and Associate Editors have worked diligently for months editing, finding strong supporting authorities, and footnoting. These are time-consuming, often frustrating, tasks and each editor has performed admirably. The *Journal* could not be published without the tireless work of these staff members.

Special thanks are also due to the Articles Editor, Kelsey Marand, and the Publication Editor, Stuart Sparker. Each went well beyond their "call of duty" and their help, humor, and contribution to this issue must be noted. Likewise, Scott Robinson, the Canadian Managing Editor, was invaluable at Western Ontario and successfully expanded the Western staff's involvement in the *Journal's* publications. Without Scott's hard work and dedication to the *Journal*, I doubt its bi-national nature could have continued.

Additionally, the *Journal* would like to acknowledge our research librarian, Andrew Dorchak. He is truly a research genius and our staff would be lost without him.

Lastly, and with my biggest thank you of all, I would like to recognize the Managing Editor, Tyler Talbert. Tyler has provided continued support throughout this entire process. His willingness to assume added duties despite his many other non-*Journal* related responsibilities is much appreciated. Tyler, thank you for not just being an awesome Managing Editor, but a great friend.

The *Journal* staff would also like to thank our family and friends for their support and patience during the publication process. We cannot imagine completing this issue without their encouragement and understanding.

On behalf of the entire *Canada-United States Law Journal*, we appreciate your continued support and readership. Thank you.

Jessica E. Rubin  
*Editor-in-Chief*