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THE US, THE FTAA, AND THE PARAMETERS OF GLOBAL GOVERNANCE

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"The U.S. has the world's most diverse and efficient capital markets, which reward, and even celebrate, risk-taking. Anyone with an invention and a garage can hope to raise millions overnight (...) It has multiple economies, with a single currency, on a single continent that looks to both the Pacific and the Atlantic. And most important, its big multinational companies and little entrepreneurs think globally and excel in almost everything that is post-industrial : software, computing, package delivery, consulting, fast-food, amusement parks, advertizing, media, entertainment, hotels, financials services, environmental industries and telecommunications. Globalization is us." Thomas L. Friedman, New York Times, February, 9th 1997.

To understand the process of economic integration in the Americas since the Miami Summit of 1994, when negotiations toward the setting up of a Free Trade Area of the Americas (FTAA) were launched, I will start off with the issue of hemispheric economic integration as it stood fifty years ago, and compare this to what is now recognized as a global order.¹ To set up this comparison, I will establish a clear-cut distinction between a world view and a global view, between the « *mondial* » and the « *global* » as we say in French. Subsequently, I will explain why, in order to understand the implication of the FTAA project, it is important to focus on the features of the North American Free Trade Agreement (NAFTA) : these features will reveal that the project of free trade is not so much about trade, but about governance. This approach supports the argument that the FTAA plays a central role in setting up a new global order, the spirit of which is so aptly expressed in the introductory quotation by T. L. Friedman.

¹ The author wishes to thank Ms Marina Greciano for her help with the translation of this article.

FEATURES OF A WORLDVIEW

The United States played a major role in the setting up of the post World War II order. In fact, never had a nation come out of a war in such a dominant position relative to the rest of the world. We have a confirmation of this in the overall architecture of the new economic and political order that was gradually set up between 1944 and 1947, from Bretton Woods to San Francisco to Geneva.² To further their nation's aims and ambitions, American negotiators will be active at both the international and the regional levels and at the same time, they will be deeply involved in each and every forum, and in each instance, they will argue and negotiate with great consistency. The net result of this involvement and of this consistency is that the post WW II order is endowed with a coherence and a complementarity never seen in the past.

In his seminal book published in 1944, *The Great Decision*, James T. Shotwell stated that the time had come to think the building of world peace as a whole, and that the international order would be incomplete and unbalanced if one did not have in mind the underlying connections between problems and issues.³ To solve these problems and tackle these issues, this world order should perform a set of basic functions, economic, political, social and legal, and carry out three mutually dependent objectives : security, justice and prosperity, which were inscribed in the Charter of the United Nations (UN).⁴ In this regard, the UN Charter sets up a new world order which was supposed to bring peoples, through their respective governments, to intervene directly in international affairs on all three objectives. To attain these objectives, the Charter resorts to a different technique in each case : in matters of security, it resorts to police action and the use of force; in matters of justice, to international law and procedure; and, finally, in matters of welfare, it sets up an original mechanism of cooperation, the Economic and Social Council (ECOSOC).

American dominance on the post WW II world view is both undisputed and undisputable, and it is confirmed by a host of facts, ranging from the so-called

² As a case in point, let us recall that it was Secretary of State Cordell Hull, also known as the « father of the UN » who was credited with « the formation of the new world organization in which the United States would participate after the war. To accomplish this aim, in 1941 Hull formed the Advisory Committee on Postwar Foreign Policy. (...) Hull argued for an international structure rather than a system of regional groups, a plan that eventually prevailed. By August, 1943, the State Department drafted a document titled Charter of the United Nations, which became the basis for proposals submitted by the United States at the 1944 Dumbarton Oaks Conference. » From the « Biography of Cordell Hull » at : (www.payson.tulane.edu/cordellhull).

³ James T.. Shotwell, *The Great Decision*, Macmillan, New York, 1944, page 275.

⁴ The first steps in this direction were made the previous year, at the Dumbarton Oaks conference held in October of 1944, with the extension of the international organization's competences to economic and social problems, which count as its distinctive feature compared to those of the *Société des Nations* (SDN).

compromise reached at Bretton Woods, according to which the American dollar would henceforth serve as a world currency, to the results of the trade negotiations convened at the US' request in Geneva in 1947, which would bind the 23 countries present to a General Agreement on Tariffs and Trade (GATT).

This being said, the actual implementation of a world order seen as a whole did not prevail, as our last example shows all too well. We can see this, at a most trivial level, in the dwindling number of partners involved: there were 44 countries present in Bretton Woods, 54 in San Francisco, but only 23 in Geneva, and if a maximum of 55 is reached the following year in La Havana, the conference was a failure because the International Commerce Organization (ICO) was never set up, which is why commercial negotiations were held under the auspices of the GATT up until the creation of the World Trade Organization (WTO) in 1994. In fact, all through the years following WW II, American negotiators find themselves face to face with two constraints at each and every level, and in each and every conference as well: protectionism under all its guises on the one hand, regionalism on the other. Protectionism could take many forms, ranging from tariff to non-tariff barriers, to state intervention and state monopoly, but regionalism, and the breaking down of regional ties, was the harder issue of the two, because it meant challenging imperial preferences and the maintenance of colonies on the one hand, addressing the formation of new economic blocks and, most obviously, the expansion of the Soviet block, on the other.

But, needless to say, if this is how things looked from a theoretical or abstract point of view, in practical terms, they were far from being so simple, first and foremost because the regional option, or block formation as it was then known, had been quite prevalent during the war years, and this is especially true in the case of US relations with their partners in the Americas. In fact, up until the attack on Pearl Harbor on Dec. 7, 1941, the prospect of a total Nazi victory over Europe had gained such likelihood that the idea of setting up a hemispheric economic block within the Americas was seriously contemplated on a number of occasions by US authorities and economists, as well as by Latin Americans. If subsequent events propelled the US onto world affairs, they did not make this option obsolete, far from it, since it was further debated at meetings of the Ministers of Foreign Affairs of the Americas held at the time, and within the US government, as the following quotation shows:

« the Office of Inter-American Affairs had been established in July of 1941, in the Office for Emergency Management, as the successor to the Office for Coordination of Commercial and Cultural Relations Between the American Republics (...) Its purpose, as stated in the Executive order was to "provide for the development of commercial and cultural relations between the American Republics" and thereby to increase the solidarity of the Western Hemisphere and further "the spirit of cooperations between the Americas in the interest of Hemisphere defense (...)».⁵

Interestingly, even though the internationalist and holistic perspective alluded to earlier did not prevail at a world level in the end, owing, among other factors, to the intensification of the Cold War, this did not prevent the transposition and

⁵ Nelson A. Rockefeller is credited with the initiative and he will be named its coordinator by President Roosevelt; (www.rockefeller.edu/archive.ctr).

adaptation of complementarity and interdependence between economic, political and social objectives at the regional level, as the following excerpts from the *Declaration of objectives of the Economic Charter of the Americas* of 1945 will show :

«The American republics collaborating in the war effort, fully aware of their traditionally close relations and of their position and responsibility as an integral part of the world community, declare their firm purpose to collaborate in a program for the attainment of :

(...)

(3) A constructive basis for the sound economic development of the Americas through the development of natural resources; increased industrialization; improvement of transportation; modernization of agriculture; development of power facilities and public works; the encouragement of private investment of capital, of managerial capacity and technical skills; and the improvement of labor standards and working conditions, including collective bargaining, all leading to a rising level of living and increased consumption ».

And even more to the point, to attain these ends, the American republics set forth ten « guiding principles », ⁶ of which two make explicit references to four existing international organizations, the IMF, the BIRD, the FAO and the ILO :

« (7) Endorsement of financial and agricultural proposals: As positive steps in international collaboration for the stabilization of currencies and to facilitate the development of productive resources, to seek early action by their Governments with a view to bringing into operation the International Monetary Fund, the International Bank for Reconstruction and Development, and the Food and Agriculture Organization of the United Nations.

(...)

(10) Labor : To take appropriate steps to assure of progressive economic development, the realization of the objectives set forth in the Declaration of Philadelphia, adopted by the International Labor Conference ».

We see here a strong parallel between the objectives which were then pursued at the international level, and the ones framed in the *Economic Charter of the Americas*, a parallel which confirms my own initial comment about the role of complementarity and interdependence in the establishment of a world view. This being said, such a broad based agreement on principles and objectives should not hide the fact that the Americans, on one side, and the Latin Americans, on the other, were at cross purposes as to what the ultimate goal of the Inter-American Conference on Problems of War and Peace should be. There was at the time an important debate on the strategic aspect of the issue : from the US perspective, economic integration of the Americas should serve the hemisphere as a whole, whereas, for many in Latin America, economic integration should first and foremost serve the objectives and the needs of the Latin American themselves, which meant that they should integrate

⁶ The eight other guiding principles are : (1) rising levels of living; (2) equality of access; (3) reduction of trade barriers; (4) private agreements which restrict international trade; (5) elimination of economic nationalism; (6) just and equitable treatment for foreign enterprise and capital.; (8) private enterprise and government operations; and (9) International action to facilitate distribution of production surpluses.

first, before they should seek to negotiate a hemispheric economic integration with the US.⁷

⁷ For a presentation of these debates from both perspectives, American and Latin American, see Javier Marquez, *Bloques Economicos y Excedentes de Exportacion*, Mexico, Informaciones economicas del Banco de Mexico, S.A., 1943. Further on, Javier Marquez raises concern over the issue of economic security and, specifically, on the eventuality that, should they feel insecure after the war in this regard, the US could « force the countries of Latin America to enter into block formation in order to gain access to essential raw materials without difficulty » (page 54. My translation, DB).

FEATURES OF A GLOBAL VIEW

There is no consensus as to the exact meaning of the word « global »,⁸ and I do not propose to add yet another definition to the ones already existing simply because I do not believe that the search for a substantive definition is a determining factor at this time. However, to justify my own understanding and treatment of the notion, I will explain what I believe to be the *negative* features of a global view. A world view, as we have seen, rests on a number of principles and objectives which are tied together in a given way; these principles and objectives are entrusted to various institutions at the international or regional, and at the national levels. Accordingly, a world view promotes homology and complementarity of principles, objectives and levels of intervention. In turn, homology and complementarity are dependent on the establishment and on the maintenance of two fundamental divisions and differentiations: The first, between the international or the regional on the one hand, the national, on the other; the second, between a public sphere and a private sphere. These divisions and differentiations allow for the establishment of a state which is separated, and distinct from, a civil society, and for the recognition of both collective rights on the one hand, individual rights on the other.

A global perspective is neither holistic nor universal, neither international nor national, rather, it tends to be highly selective in its objectives and encompassing in its means. One of its peculiarities, is that it calls for the removal of all normative and regulatory obstacles it encounters on its path, and especially of those obstacles that prevent predatory practices against common or collective goods. In this sense, it has a profound effect on the redefinition of the relation between state and civil society, as well as on the relation between collective and individual rights. I will explore these issues in more practical terms when we come to the analysis of NAFTA, but before I do, I want to spell out how the FTAA came to be.

The triple origin of the Miami Summit

The decision to convene the first summit of the heads of states and governments of the Americas in Miami in December of 1994 can be traced to a triple origin. The distant origin goes back to the Monroe Doctrine of 1823, and more specifically, to the convocation of the first International Conference of the Americas held in Washington in October of 1889,⁹ which eventually lead to the creation of the Organization of American States (OAS) in 1948, and subsequently, to the reunions

⁸ A recent overview can be found in: David Held and Anthony McGrew, « The Great Globalization Debate: An Introduction », in D. Held and A. McGrew, editors, *The Global Transformations Reader. An Introduction to the Globalization Debate*, Oxford, Polity Press, 2000, pp.1-45.

⁹ A first hand account of these, and subsequent events can be found in: Orestes Ferrara, *L'Amérique et l'Europe. Le panaméricanisme et l'opinion européenne*, Paris, Les Œuvres représentatives, 1930. Ferrara was Cuban ambassador to the US and delegate at the SDN.

and meetings held under the aegis of the OAS, as well as under other regional organizations through the years. This historic origin, at some point during and after the war, incorporates the events I presented in the first section above.

A more recent origin is the *Enterprise for the Americas Initiative*, announced by President George Bush on June 27th 1990, which was intended to :

« create incentives to reinforce Latin America's growing recognition that free-market reform is the key to sustained growth and political stability. The three pillars of our new initiative are trade, investment, and debt. To expand trade, I propose that we begin the process of creating a hemisphere-wide free trade zone; to increase investment, that we adopt measures to create a new flow of capital into the region; and to further ease the burden of debt, a new approach to debt in the region with important benefits for our environment».¹⁰

This initiative is interesting, coming as it did both before the completion of what was then thought to be the final months of the Uruguay round of world trade talks, and right after the announcement of the opening of trade liberalization negotiations with Mexico. But nothing concrete ever came out of the Bush project, and no negotiations in view of setting up a hemispheric trade zone were opened at the time.

Finally, the immediate origin for the convocation of the Miami Summit comes from a memorandum issued by the National Security Council (NSC), dated November 29, 1993, sent by National security advisor, Anthony Lake, to President Clinton. The object of the memo is : « Proposed Hemispheric Summit », and its purpose, the following : « To seek your approval for a summit meeting of Western Hemisphere heads of state in Washington in May 1994 to build on the NAFTA victory to generate a broad hemispheric consensus behind our key policy objectives (...) ». The memo's « background » unfolds the argument in the following manner :

The moment is ripe for an historic initiative—of the weight of the Good Neighbor policy and the Alliance for Progress—to establish the themes for inter-American relations for the rest of the decade and beyond :

The NAFTA is the foundation for the gradual expansion of hemispheric free trade (...)

Hemispheric institutions, including the OAS and Inter-American Development Bank and now the NAFTA institutions, can be forged into the vital mechanisms of hemispheric governance.

The organizing concept could be a hemispheric « Community of Democracies » increasingly integrated by economic exchange and shared political values. Whatever the slogan, your vision of an integrated Western Hemisphere could be a model for international relations in general and for North-South relations more specifically. (...) ».¹¹

¹⁰ The text of the press release can be found at (www.bushlibrary.tamu.edu/papers/1990). Further down, the press release states: « The successful completion of the Uruguay round remains the most effective way of promoting long-term trade growth in Latin America and the increased integration of Latin nations into the overall global trading system ».

¹¹ National Security Council, *Memorandum for the President*, November 29, 1993. Declassified 3/8/96.

This is the event that was eventually held in Miami in December, but since much of the rationale of the memo rests on NAFTA as « victory », as « foundation » and as « governance », I propose to explore these properties further. In doing so, I will proceed in reverse order, and start with the idea of NAFTA as governance, before tackling the notion of foundation. From there, I will come to the last item, and ask the question about NAFTA being a victory for whom and against what?

Governance under NAFTA

To understand how the FTAA could set up an « hemispheric governance », and what type of governance that would be, one must start by understanding the connection between free trade and governance as it exists in North America. In order to make this connection clear, I will bring some light to the activities of NAFTA which is a most original commercial treaty. NAFTA covers much more ground than any other similar document, it is more ambitious in its aims and, most of all, it is quite innovative in the means at its disposal to fulfill these aims. NAFTA establishes the broadest liberalization of trade in goods and products, services and investment. It also calls for the opening of public markets and for the protection of intellectual property. But, for all intents and purposes, the originality of NAFTA rests on two sets of innovations : the first set is found in chapter 11 on investments, and the second, in chapter 20, on institutions. These two sets of innovations at first appear only remotely related, but on closer examination they do reveal an underlying logic that sets up a new form of governance. I will now explain this briefly.

Chapter 11 establishes a dispute resolution mechanism, not between Parties to the agreement, as was customary up until then in such accords, but between a Party and an investor of another Party. In other words, the provisions of articles 1115 extend the recourse to the dispute resolution mechanisms under NAFTA to private investors and firms.¹² Because the NAFTA provisions should apply to all levels of government, federal, state, provincial, municipal, and even school boards which gives investors and private firms a most useful and effective tool to bring down any regulatory measure adopted at any time by these public authorities, measures which, in their view, have a detrimental effect on the conduct of their business and/or on their earnings.¹³ The idea behind this approach being that, once NAFTA is implemented, no law or regulation from any government or public entity, should set up *new* obstacles to business and commercial undertakings.

As to chapter 20, it sets up a NAFTA Commission and a number of working groups with the mandate to extend trade liberalization to the sectors and domains excluded from the negotiating process at time of signature.¹⁴ In this sense, NAFTA

¹² There is a precedent to this, provided by a treaty signed between the US and Panama, in 1982.

¹³ The literature on NAFTA chapter 11 is quite abundant. See Rémi Bachand, « *Les poursuites intentées en vertu du chapitre 11 de l'ALENA: Quelles leçons en tirer?* » (www.unites.uqam.ca/gric).

¹⁴ There is an incidental originality here since, in order to do this, NAFTA resorts to what is called the « negative list » approach, as opposed to the traditional « positive list » approach. A positive list

sets up a new protocol binding together government and business negotiators. An excerpt of the Joint Statement issued in Paris following the 5th Meeting of the NAFTA Commission on April 29, 1998, explains the aims and objectives of these further negotiations :

« As evidence of the opportunities that NAFTA has promoted, and on the basis of the recommendation of our private sector, we have agreed on a package covering hundreds of tariff lines that will be subject to accelerated tariff elimination, further opening opportunities to our private sectors and benefiting close to one billion U.S. dollars in NAFTA trade. We acknowledged that the necessary modifications of our tariff schedules will be implemented by August 1, 1998, following the completion of domestic legal procedures in each country. We acknowledged that the tariff acceleration negotiations have brought about a very positive process of consultations and communication among the private sectors of the NAFTA countries. Governments will continue to encourage industry initiatives in this area in the future. »¹⁵

According to this statement, the NAFTA Commission is basically engaged in tariff reduction with the private sector and, in this sense, the overall impression is that the parties to these negotiations are dealing with technical matters. But this interpretation would be misleading, for two reasons : first, because NAFTA is just as much about non-tariff barriers as it is about tariff barriers, and second, because the Commission's mandate goes beyond these objectives and extends deep into the field of the harmonization and the implementation of rules and norms. In order to do this, NAFTA sets up a « dual approach » to the implementation and harmonization of rules and norms throughout the North American territory. This « dual approach » complements the traditional « top to bottom » one with a new « bottom to top » approach. The traditional « top to bottom » procedure « involves drafting of treaties or model laws by committees of experts from each of the participating countries », ¹⁶ This method has been used since time immemorial in international law, and once the Parties have agreed to the terms of a legal instrument, it is their responsibility to implement the provisions of this instrument within their own domestic legal system. But the « bottom to the top » procedure, on the other hand, is something quite different : it has nothing to do with the negotiation of treaties within a public sphere, it has to do with the negotiation of business practices and law. To do so, this approach,

« requires that the disparities in business practices and application of the law be clearly and exhaustively identified and thereafter removed by standardization of documentation, and/or by harmonization or unification of law and practice. Each aspect of every business and legal practice, no matter how seemingly detailed or insignificant, must be part of the description of disparities. The reason for "exhaustiveness" is that often a seemingly unimportant detail such as the location of

enumerates the items which the Parties have agreed should be covered by the terms of the agreement; a negative list itemizes the excluded ones. Whereas a positive list approach is selective by definition, the negative list approach is all encompassing, save in a given number of areas. This is the approach that allows for the establishment of further negotiations, while the positive approach cannot obviously serve this purpose.

¹⁵ The Joint Statement can be found on the OAS web site (www.oas.org).

¹⁶ Boris Kozolchyk, *NAFTA in the Grand and Small Scheme of Things*, National Law Center for Inter-American Free Trade, May 3rd, 1994; (www.natlaw.com/pubs).

the endorsement by a bank of first deposit in a check sent for collection to a drawee bank in another NAFTA nation, or the exclusive possession of a truck bill of lading by a trucker can be a serious obstacle when standardizing practice or harmonizing law. Only after these obstacles have been identified, it is possible to determine which obstacles can be removed by unofficial trade association agreements and which require governmental treaties, statutes or administrative regulations ».¹⁷

There are two important innovations here, one that is explicit, and one that is inferred. The former one concerns the removal of obstacles through « unofficial trade association agreements » and the latter one, implicit in the methodology of the dual approach, is given in the criteria used to « determine which obstacles » are removed by unofficial, as opposed to official means. This is a very political issue indeed which, instead of it being dealt with at the political level, where it should be, is left to the appreciation of unofficial agents and negociators. In this sense, the so-called « dual approach » methodology is quite unbalanced in that it entrusts unofficial agents with the interpretation of what is political and what is technical and, in doing so, it sets up a new interface between public and private norms. Within this kind of logic, it becomes economically rational to exercise the greatest restraint in the resort to official means of addressing the harmonization and standardization issues, with the result that the methodology in question is liable to become an important tool to defuse politically sensitive issues in the field of environment, human and aboriginal rights, etc.

I will use the example of the Committee on Standards-Related Measures, provided for in article 913 of NAFTA, to illustrate this point. This Committee is empowered to set up four other sub-committees : a Land Transportation Standards Subcommittee, a Telecommunications Standards Subcommittee, an Automotive Standards Council, and a Subcommittee on Labelling of Textile and Apparel Goods. In addition it may set up « such other subcommittees or working groups as it considers appropriate to address any topic », including the fourteen following :

- « (i) identification and nomenclature for goods subject to standards related measures,
- (ii) quality and identity standards and technical regulations,
- (iii) packaging, labelling and presentation of consumer information, including languages, measurement systems, ingredients, sizes, terminology, symbols and related matters,
- (iv) product approval and post-market surveillance programs,
- (v) principles for the accreditation and recognition of conformity assessment bodies, procedures and systems,

¹⁷ The author explains the rationale behind the dual approach in these terms : « The top to the bottom approach, by itself, cannot bridge the extensive business and legal cultural gap between Canada and the United States on one side and Mexico on the other, especially when the expected large increases in the volume and speed of transactions require the highest possible level of standardization of business practice and uniformity of law. Such uniformity can only be attained when the top to the bottom norm becomes part of everyday usage and vice-versa when everyday practice is reflected in the text of the top to the bottom norm ». See Kozolchik, *Idem*.

- (vi) development and implementation of a uniform chemical hazard classification and communication system,
- (vii) enforcement programs, including training and inspections by regulatory, analytical and enforcement personnel,
- (viii) promotion and implementation of good laboratory practices,
- (ix) promotion and implementation of good manufacturing practices,
- (x) criteria for assessment of potential environmental hazards of goods,
- (xi) methodologies for assessment of risk,
- (xii) guidelines for testing of chemicals, including industrial and agricultural chemicals, pharmaceuticals and biologicals,
- (xiii) methods by which consumer protection, including matters relating to consumer redress, can be facilitated, and
- (xiv) extension of the application of this Chapter to other services. »¹⁸

This list is quite extensive and confirms the point I wish to make concerning the breadth and liberality of the mandates given to these non-official entities. I am not suggesting that every topic in this list is politically sensitive, far from it, rather that some of these points are sufficiently sensitive to warrant an open political debate of some kind. The problem is that nothing of the sort is provided, and even the NAFTA Commission relinquishes a great deal of its own administrative control over the whole process by giving similar open-ended mandates to its own sub-committees.

If we take the word « governance » generally and generically, to mean the « sum of the many ways individuals and institutions, public and private, manage their common affairs », ¹⁹ we have here an illustration of the particular type of governance set up by NAFTA. The particularity of this type of governance is the pursuit of economic integration divided between public and business interests to the exclusion of everyone else. Contrary to what many analysts contend, who see this new governance as an indicator of the decline of the state, ²⁰ political actors are far from being passive, since they play a conspicuous role in these protocols and arrangements. It is precisely this active position on the part of political actors and governments regarding the « common good » that gives credence to the idea that NAFTA sets up an original interface between public and private spheres, an interface of such significance that a full recourse to NAFTA requires major legal adaptations on the part of two of the three countries involved.

In the following section, I will show that the mechanics and protocols of the negotiations of trade liberalization under NAFTA have such far reaching consequences that they have had direct and profound effects on the constitutions of Canada and Mexico.

¹⁸ NAFTA, ch 9, art. 913, para. 5, sub-para. (b).

¹⁹ See the Report of the Commission on Global Governance, *Our Global Neighborhood*, Oxford University Press, 1995, p. 2.

²⁰ For a most stimulating interpretation of this so-called decline, see : Susan Strange, *The Retreat of the State, The Diffusion of Power in the World Economy*, Cambridge, Cambridge University Press, 1996.

NAFTA AS FOUNDATION

It would be a mistake to interpret as mere metaphor the idea of «NAFTA (being) the foundation for the gradual expansion of hemispheric free trade » (described in the NSC memo quoted earlier) for two reasons : first, because NAFTA has become a model agreement for both Canada and Mexico, and second because NAFTA has had an important impact on both the Canadian and on the Mexican constitutions, which have, as a result, been brought closer in line with the Constitution of the USA.

NAFTA has indeed become a « model agreement », but not for the US, since the White House did not obtain its *Trade Promotion Authority* from Congress before August of 2002.²¹ In the meantime, the expansion of the NAFTA model was not so much the result of hemispheric trade negotiations, but rather the result of bilateral trade negotiations concluded by Canada and Mexico, each in their own separate way. In this sense, NAFTA is truly a foundation on which subsequent accords have been negotiated, in the Americas and elsewhere as well, as the episode surrounding the negotiation of a Multilateral Agreement on Investment (MAI) shows all too well.²²

Second, NAFTA is truly a foundation in the legal sense or, better still, *foundational*, for the partners of the US, in the sense that its provisions and institutions lead to the displacement of existing constitutional rules and norms. In other words, because of its repercussions and effects on the prevailing constitutional principles, and on the operating of the constitutional machinery, NAFTA calls for either *ex ante* or *ex post* major constitutional reforms. In the case of Canada, amendments were made at the time of patriation in May 1982, three years before the opening of bilateral trade negotiations with the Reagan administration.²³ In the Mexican case, the repeal of article 27 of the Constitution was made on February 27

²¹ Canada has signed NAFTA-type agreements with Chile and Costa Rica; Mexico has done the same notably with Costa Rica, Nicaragua, Bolivia and Chile. Furthermore, both countries have exported the model outside the Americas; in the case of Canada, to Singapore. This being said, now that the White House has regained its TPA, its own NAFTA-type bilateral commercial agreements with Chile, Singapour and others should come before Congress in the near future.

²² The Organization for Economic Cooperation and Development (OECD) had acted in the late nineties as host of the MAI negotiations between its member states. The MAI was both a replica and an extension, of NAFTA's chapter 11 on investments. The leak of a draft of the MAI in the Spring of 1998, led to widespread opposition and to street demonstrations in the US, Canada, as well as in the European Union, against the proposed agreement. After a huge demonstration at the théâtre de l'Odéon attended by a roster of actors , actresses and intellectuals, the French socialist government of Lionel Jospin subsequently chose to pull out its negociators in September of 1998, and the MAI was buried. The MAI was then picked up by the WTO and it formed part of the « Millennium Round » to be inaugurated in Seattle in December of 1999. But once more, street demonstrations and discord among member states caused the MAI to be set aside a second time.

²³ This was done through the entrenchment of a *Canadian Charter of Rights and Freedoms* in the Canadian Constitution of 1982. At a systemic level, in doing so, Canadian authorities were bringing the constitutional regime in line with the American one.

1992, one year after trade negotiations with the US and Canada had begun.²⁴ In each instance, the spirit of the amendment is the same : they each aim at a further extending the liberalization process. In the Canadian case, the entrenchment of a *Canadian Charter of Rights and Freedoms* in the Constitution served initially to restrain parliamentary supremacy and to challenge collective rights and, in particular, the so-called linguistic rights of the French majority in the province of Québec, an issue apparently far removed from free trade. But, subsequently, in the Fall of the same year, the federal government set up a Royal Commission on Economic Union and the Development Prospects for Canada with the mandate to study and make recommendations on the consequences and effects of the Charter on the country's « economic union ». This is the commission that recommended the opening of bilateral trade negotiations with the US, as the overall solution to the so-called « balkanization » of the Canadian economic space, a dislocation it attributed to excessive government intervention.²⁵ In the Mexican case, the logic behind the repeal of article 27 is quite transparent : what was at stake, was basically the issue of free access to ownership of land for foreigners and corporations, at the expense of collective aboriginal rights which had been granted protection in the Constitution of 1917, following the peasant struggles during the Revolution of 1910.

NAFTA : a victory for whom?

First, as I have shown, in extending the process of liberalization as it had never been extended before, NAFTA is a victory for the forces bent on thorough liberalization in all three countries over those adverse forces bent on protecting or sheltering collective rights and the public domain. Second, NAFTA is a victory of one interpretation of the public good over another, in the sense that the setting up of a bottom to top negotiating process, operating through the protocols described earlier, has profound effects on the political institutions of the other two partners involved, because they must adapt their own institutions to their counterpart, the US model. Thirdly, NAFTA is a victory on the part of the US over their two partners in North America, basically because it allows the US to export their economic and political values, their model of negotiation between public and private actors, and their own protocol to achieve these aims.

To sum up, NAFTA does not so much establish a « community of democracies », understood as the coming together of three different democratic regimes within

²⁴ Article 27 extended protection to indigenous communal land. Its repeal permitted both foreigners and corporations to buy land in Mexico. It is interesting to recall that this was precisely the pretext used by the *Ejercito Zapatista de Liberacion Nacional* (EZLN) to take arms against the government of Mexico, January 1st 1994, the date NAFTA came into force. In the case of Mexico, at least, other constitutional modifications are still in store, concerning the recourse to hearings on the part of the Mexican government, for instance. Furthermore, because of the prevailing high levels of decentralization within the US and Canadian systems, the Mexicans are finding virtue in this, and could well follow suite and interpret their own constitution accordingly, instead of clinging to their historically highly centralized approach.

²⁵ See D. Brunelle, *Droit et exclusion. Critique de l'ordre libéral*, Paris et Montréal, L'Harmattan 1997; especially, chapters 3, 4 and 6.

North America, but rather the diffusion of the US model of republicanism to its other two partners.

From NAFTA to the FTAA

Inasmuch as the FTAA is nothing short of an extension of the NAFTA to the hemisphere, everything that was said pertaining to the latter applies to the former and, consequently, both the issues of governance and foundation would apply to the FTAA partners. Therefore, what I will now attempt to establish are the similarities and differences between the two agreements. Fortunately, a draft of the FTAA, released on July 3rd 2001, a few weeks after the third Summit of the Americas held in Québec city in April, makes this possible. On first perusal, the draft appears unintelligible. Under each heading, there follows the respective and unidentified positions of the negotiating teams, (these are all in brackets) with the result that it would seem premature to draw any kind of conclusion as to the issue of the negotiating process in each and every instance. But, at second glance, things are not that complicated, because there emerge two opposing views from the various positions: one that favours extreme liberalization, that is to say a liberalization that would extend to all fields and domains, and another one, which favours a more balanced view, incorporating, at times, specific protections for some sectors. I will not go into the technical aspects of these negotiations, nor will I try to pinpoint who defends what. My main point is that, in its present state, the draft does resort to a negative list, and does set up a FTAA Commission empowered to pursue the bottom to top approach, even though, for the time being, its scope is limited. Furthermore, as negotiations are far from being over, I am aware that things are liable to evolve in either direction, especially if the volatile economic and political situation in Latin America should deteriorate further in the coming months.

For the time being, the strategy of conducting the FTAA negotiations behind closed doors has served governments well. Over the past years, over 900 negotiators have worked on the FTAA. The top-secret, closed-door nature of the FTAA discussions has meant that neither ordinary people nor their elected representatives have been informed of the negotiations. Moreover, representatives of the business community have set up an Americas Business Forum (ABF), that has gained official status. The ABF's role is a crucial one since "many of the recommendations proposed by participants at the San Jose ministerial [Costa Rica] are reflected in the mandate of FTAA negotiating groups and in the *Plan of action* that came out of the second Summit of the Americas »²⁶ held in Santiago in 1998.

Council of Canadians chairperson, Maud Barlow, summed up the range of the FTAA negotiations in these terms :

(...) reports from the negotiators themselves have inadvertently found their way into the public domain. An October 7, 1999 confidential report from the

²⁶ ABF-Canada, *Information Document*, Fifth Americas Business Forum, Toronto, November 1st 1999. The *Plan of action* adopted following the second Summit of the Americas, stated that governments agreed to "facilitate private sector participation in local and transnational infrastructure projects, that can serve as a basis for bilateral and multilateral agreements."

Negotiating Group on Services was recently leaked; it contains detailed plans for the services provisions of the FTAA. Sherry M. Stephenson, Deputy Director for Trade with the Organization of American States, prepared a paper for a March, 2000 trade conference in Dallas, Texas, in which she reported on the mandate and progress of the nine Working Groups by sector. FTAA Web sites and Canadian government documents contain important information as well. Put together, these reports expose a plan to create the most far-reaching trade agreement ever negotiated. The combination of a whole new services agreement in the FTAA combined with the existing (and perhaps even extended) NAFTA investment provisions represent a whole new threat to every aspect of life for Canadians. This powerful combination will give transnational corporations of the hemisphere important new rights, even in the supposedly protected areas of health care, social security, education, environmental protection services, water delivery, culture, natural resource protection and all government services - federal, provincial and municipal.²⁷

²⁷ The complete text of M. Barlow's article «The FTAA and the Threat to Social Programs, Environmental Sustainability and Social Justice in Canada and in the Americas» can be found on : www.indymedia/org/

CONCLUSION

FTAA is far from inevitable, and there are many hurdles in its way, among them, a growing social opposition to the project in many countries of the Americas, that could have a negative impact at least on some governments.²⁸ There is also a political opposition of considerable weight, particularly in Brazil; things could change quickly if the Partido dos Trabalhadores (PT) won the elections there in October of 2002 since the PT is opposed to the whole FTAA process. On the other hand, pressure within the US, and within the White House in particular, in favour of FTAA is gaining momentum, essentially because the Presidency has taken so long to secure the TPA, and many feel that the US is being left behind : « (...) some 250 preferential trade agreements exists in the world today. The US is a party to only three of these 150, considerably short of the EU's 31 or even Mexico's 10 ».²⁹

At times, the rationale behind the whole project seems shallow, as when the economist Jagdish Bhagwati, a staunch defender of free trade, says the US need to pursue the FTAA because the present bilateral approach to negotiating economic integration has left the partners of a hemispheric free trade with a « spaghetti bowl »³⁰ of agreements that should now be unravelled. True, « the proliferation of bilateral and regional deals today sometimes makes import-export administration so complex that few entities, public or private, can manage it effectively ».³¹ Nevertheless, the usefulness of a FTAA seems at times spent, compared to the efficiency, as seen from a US perspective at least, of the « Washington consensus »³² which has taken the relay in terms of economic reforms, and this last is bound to come under severe criticism now that the economic prospects are deteriorating all over Latin America.

Finally, the White House's success in obtaining TPA, instead of putting the whole issue of a FTAA back on track, could well be clouded by the spill over effect of problems at home with a string of scandals coming out of kleptocrat CEO's. In such a context, the idea of implementing a model of extreme liberalization seems less

²⁸ Two Peoples Summit of the Americas, the first in Santiago in April of 1998, and the second in Québec city in April of 2001, as well as the first Encuentro de lucha contra el Alca en La Havana in October of 2001, all testify to this growing opposition.

²⁹ Deputy treasury secretary, Kenneth W. Dam, in his remarks to the Trilateral Commission entitled : *Globalism and Regionalism in the Post-Doha Multilateral Trading System*, delivered on April 7th, 2002

³⁰ Quoted by K. W. Dam, *Idem*.

³¹ *Idem*.

³² The expression was coined by John Williamson. See his : « The Washington Consensus Revisited ». in Louis Emmerij, editor, *Economic and Social Development into the XXI Century*, Washington D.C., Inter-American Development Bank, 1997, pp.48-59. According to Williamson, this « consensus » refers to a list of « ten policy reforms that I believed « Washington » would agree were needed in Latin America » (page 48). The « Washington » in question designates the White House, Congress, the IMF and the World Bank.

appealing somehow. But the stakes are high and pressure in favour of a successful completion of the FTAA negotiations are bound to mount in the coming months.