

# Achieving United States-Canadian Reciprocity in Sub-National Government Procurement: Federalism and the Canada-United States Free Trade Agreement

## I. INTRODUCTION

The Canada-United States Free Trade Agreement (FTA)<sup>1</sup> went into effect on January 1, 1989.<sup>2</sup> The United States and Canada entered the agreement for the purpose of increasing the economic activity between them and promoting an atmosphere of fair competition.<sup>3</sup> In contrast to this purpose, many states have enacted buy-American legislation which requires state government entities to restrict their procurement of foreign goods. These state restrictions on foreign products appear to cut against the federal government's policy of loosening the trade barriers with Canada. One federal appellate court held that the state restrictions did not conflict with the legislative intent when Congress ratified the treaty with Canada.<sup>4</sup> The conflict between the FTA and the buy-American statutes goes to the heart of the forces pulling at United States economic development in the international economic system.

This Note will address the conflict between buy-American statutes and the FTA. The attitude reflected by the federal government in the

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1. Free Trade Agreement, Jan. 2, 1988, Canada-United States, 27 I.L.M. 281. The I.L.M. outlined the background stating:

In March, 1985, President Reagan and prime Minister Mulroney asked their trade officials to explore ways to eliminate barriers to trade and investment between the United States and Canada. Under congressionally granted "fast track" authority, negotiations began in Ottawa, May 21-22, 1986. The United States and Canada reached agreement on the framework of a free trade area on October 3, 1987. The final text of the agreement was signed as indicated above. This agreement creates the world's largest free trade area, affecting trade of about \$125 billion. The agreement is expected to strengthen and stimulate the economies of both Canada and the United States, providing benefits for consumers and businesses.

*Id.* at 281.

2. *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903, 906 (3d Cir. 1990) *cert. denied*, 111 S.Ct. 2814 (1991).

3. Free Trade Agreement, *supra* note 1, at 293.

4. 916 F.2d at 903.

FTA is one of opening a free market system with a major trading partner. The attitude reflected by the states in their buy-American statutes is one of protectionism. There are two relevant questions raised by these conflicting concerns. First, how do we balance the concerns of the federal government and the concerns of the individual states in the area of international trade? Second, how narrowly or broadly should the courts interpret trade agreements entered by the United States? This discussion leads to constitutional issues on the supremacy of the foreign commerce clause and the foreign affairs power over the laws of the states. Moreover, in order for the United States government to effectively negotiate in the area of sub-national government procurement policy, it is imperative to understand the power the federal government of Canada has in enforcing international economic agreements over the Provinces.

## II. BUY-AMERICAN STATUTES

The question whether the Canada-United States Free Trade Agreement preempts the Pennsylvania Steel Act was addressed by the United States Court of Appeals for the Third Circuit in *Trojan Technologies, Inc. and Kappe Associates, Inc. v. Commonwealth of Pennsylvania*.<sup>5</sup> The court looked at the Pennsylvania Steel Products Procurement Act ("Pennsylvania Steel Act").<sup>6</sup> This Act is an example of how the states attempt to set up guidelines to protect American or local interests or businesses through laws or regulations. Generally, these laws require that suppliers contracting with the local government for public works projects provide products which have been American-made. The Pennsylvania Steel Act provides:

Every public agency shall require that every contract document for the construction, reconstruction, alteration, repair, improvement or maintenance of public works contain a provision that, if any steel products are to be used or supplied in the performance of the contract, only steel products as herein defined shall be used or supplied in the performance of the contract.<sup>7</sup>

The Pennsylvania Steel Act continues:

This section shall not apply in any case where the head of the public agency, in writing, determines that steel products

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5. *Id.*

6. PA. STAT. ANN. tit. 73, §§ 1881-1887 (Supp. 1992).

7. *Id.* at § 1884.

as herein defined are not produced in the United States in sufficient quantities to meet the requirements of the contract.<sup>8</sup>

The *Trojan* case is the only case in which a federal court has addressed the question of whether buy-American statutes are unconstitutional. The Pennsylvania Steel Act is challenged on several grounds: 1) whether the Act is preempted by various federal statutes and executive agreements regulating foreign commerce, 2) whether the Act unconstitutionally burdens foreign commerce, 3) whether the Act interferes with the federal government's exercise of the foreign relations power, 4) whether the Act is unconstitutionally vague, and 5) whether the Act violates the equal protection clause.<sup>9</sup> This Note will examine the first three issues and then turn to a comparison with Canadian law on these issues.

Several states have similar statutes to control the purchasing practices of their public agencies.<sup>10</sup> Since much has already been written on this subject in other law review articles and notes, only a brief survey of the history and types of the statutes involved is needed.<sup>11</sup> The United States Congress enacted the Buy American Act in 1933.<sup>12</sup> This Act requires federal agencies to purchase American-made materials. Also, any contractors working on federal public works projects are required to use American-made materials. However, the Act makes exception for "impracticability" of acquiring American-made material, an unreasonable increase in cost, or where the product is not made in

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8. *Id.*

9. 916 F.2d at 904.

10. See, e.g., ALA. CODE § 39-3-4 (1987 Supp.); ILL. REV. STAT. ch. 48, para. 1801 (1986); IND. CODE ANN. § 5-16-8-2 (West 1984); MASS. GEN. LAWS ANN. ch. 7, § 22 (West 1969); MD. STATE FIN. & PROC. CODE ANN. § 12-401 (1985); N.Y. STATE FIN. LAW § 146 (1988); W. VA. CODE § 5-19-1 (1987); R.I. GEN. LAWS § 37-2.1 (1984); OHIO REV. CODE ANN. § 153.011 (Anderson 1987); and N.J. STAT. ANN. § 40A:11-18 (West 1973).

11. Several law review articles have already discussed and analyzed the history and background of these statutes. See Robert Fraser Miller, *Buy-American Statutes - An Assessment of Validity Under Present Law and a Recommendation for Preemption*, 23 RUTGERS L.J. 137 (1991); James D. Southwick, *Binding the States: A Survey of State Law Conformance With the Standards of the GATT Procurement Code*, 13 U. PA. J. INT'L BUS. L. 57 (1992); James C. Olson, *Federal Limitations on State "Buy American" Laws*, 21 COLUM. J. TRANSNAT'L L. 177 (1982); James L. Kenworthy, *The Constitutionality of State Buy-American Laws*, 50 UMKC L. REV. 1 (1981); Notes, *State Buy-American Laws - Invalidity of State Attempts to Favor American Producers*, 64 MINN. L. REV. 389 (1980).

12. 41 U.S.C.A. §§ 10a-10d (West Supp. 1993) (amended in 1988 with a "sunset provision" providing that the Act shall cease to be effective on April 30, 1996, unless Congress extends that date).

sufficient and reasonable quantities in the United States.<sup>13</sup> The pertinent parts of the Act state:

Notwithstanding any other provision of law, and unless the head of the Federal agency concerned shall determine it to be inconsistent with the public interest, or the cost unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States, shall be acquired for public use. This section shall not apply with respect to articles . . . for the use outside of the United States, or if articles . . . of the class or kind to be used or the articles . . . are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.<sup>14</sup>

This federal statute was first enacted in 1933 at the height of the Great Depression. The Congressional concern is noted in the legislative history of the statute: "With 12,000,000 men walking the streets of this country, this work, which will be paid for by American taxpayers, should be awarded to an American manufacturer, who in turn will employ American labor."<sup>15</sup> Indeed, the statute was an attempt by Congress to alleviate the pressures on American industries during the Great Depression.<sup>16</sup>

The federal Buy American Act is much broader than the Pennsylvania Steel Act because it covers all American-made products and is not limited to steel. However, several states have modeled their statutes on the federal Buy American Act. These states have some of the same economic and protectionistic concerns as the federal statute.<sup>17</sup>

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13. *Id.* § 10a-b.

14. *Id.* § 10a.

15. Miller, *supra* note 11, at 138 (quoting 76 CONG. REC. 1892, 1896).

16. See Denis Lemieux, *Legal Issues Arising From Protectionist Government Procurement Policies in Canada and the United States*, 29 LES CAHIERS DE DROIT 367, 379 (1988).

17. See, e.g., N.J. Stat. Ann. § 52:32-1 (West 1986); MINN. STAT. § 16B.101 (1991); OKLA. STAT. tit. 61, § 51 (1991). See also Miller, *supra* note 11, at 142; and Lemieux, *supra* note 16, at 379-80.

The distinction between the federal-type Act and the Pennsylvania-type Act has been labelled by some commentators as comprehensive and product-specific.<sup>18</sup> A comprehensive statute is one that requires only domestic materials be used in the public works. By contrast, the product-specific statute, exemplified by the Pennsylvania Steel Act, specifies that domestic materials, such as steel, must be used in local public works projects.<sup>19</sup>

In addition to the categories of product-specific and comprehensive statutes, the statutes have been categorized as absolute and flexible.<sup>20</sup> An absolute statute is one that does not allow state officials to use discretion when carrying out the provisions of the statute which require the use of American-made products. That is, state officials must carry out the provisions of the statute without exception.<sup>21</sup> A flexible statute is one that contains discretionary language (like the federal statute),<sup>22</sup> or that relies on specific percentages between the domestic and foreign bids to determine unreasonable costs.<sup>23</sup>

18. See Miller, *supra* note 11, at 140-41.

19. See *id.* at 141.

20. *Id.*

21. *Id.* at 144. See, e.g., CAL. GOV'T CODE §§ 4300-4305 (West 1980); But see *Bethlehem Steel Corp. v. Los Angeles*, 276 Cal. App. 2d 221 (1969) (holding this statute unconstitutional).

22. Miller, *supra* note 11, at 142. See, e.g., N.J. Stat. Ann. § 52:33-2. This statute provides:

Notwithstanding any inconsistent provision of any law, and unless the head of the department, or other public officer charged with the duty by law, shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only domestic materials shall be acquired or used for any public work.

This section shall not apply with respect to domestic materials to be used for any public work, if domestic materials of the class or kind to be used are not mined, produced or manufactured, as the case may be, in the United States in commercial quantities and of a satisfactory quality.

23. Miller, *supra* note 11, at 142-43. See, e.g., Md. State Fin. & Proc. Code Ann. §§ 17-303 to -304 (1988). This statute provides in pertinent part:

(a) IN GENERAL. - Except as otherwise provided in this subtitle, a public body shall require a contractor or subcontractor to use or supply only American steel products in the performance of a contract for:

- (1) constructing or maintaining a public work; or
- (2) buying or manufacturing machinery or equipment that
  - (i) is composed of at least 10,000 pounds of steel products; and
  - (ii) is to be installed at a public work site.

(b) EXCEPTIONS. - This section does not apply if the head of a public body

Also, these statutes can be divided into the categories of buy-American preference and buy-state preference.<sup>24</sup> Buy-American statutes grant a preference to American-made products.<sup>25</sup> Buy-state statutes grant a preference to in-state manufactured products and businesses.<sup>26</sup> These categories are not mutually exclusive; so there can be a flexible, product-specific, buy-American statute like the Pennsylvania Steel Act.<sup>27</sup>

### III. CANADA-UNITED STATES FREE TRADE AGREEMENT

The *Trojan* court first looked at the preemption challenge to the Steel Act under the Canada-United States FTA and the Agreement on Government Procurement, which was entered into in 1979 pursuant to the Tokyo Round of GATT negotiations.<sup>28</sup> The appellant, Trojan Technologies, Inc., was a Canadian corporation.<sup>29</sup> Trojan Technologies, Inc. contended that the Pennsylvania Steel Act "runs counter to the Agreement's stated purpose of liberalizing government procurement policies and thus is preempted."<sup>30</sup> The *Trojan* court held that the Canada-United States FTA did not preempt the Pennsylvania Steel Act because it cannot be inferred that "the executive and legislative branches intended to require the unilateral elimination of state trade

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determines that:

(1) the price of American steel products is not reasonable, as provided in § 17-304 of this subtitle;

(2) American steel products are not produced in sufficient quantity to meet the requirements of the contract; or

(3) the purchase of American steel products would be inconsistent with the public interest.

(c) NOTICE. - The public body shall give notice of the requirement for American steel products in the invitation for bids or request for proposals.

The statute continues:

[A]n American steel product shall be considered reasonable if it does not exceed the sum of the bid or offered price of a similar steel product of foreign origin, including duty, plus:

(1) 20% of that bid or offered price; or

(2) 30% of that bid or offered price if the steel product is produced in a "substantial labor surplus area" as defined by the United States Department of Labor.

24. Miller, *supra* note 11, at 143.

25. *Id.*

26. *Id.*

27. It is arguable whether Pennsylvania's Steel Products Act is flexible or absolute. See Miller, *supra* note 11, at 144 note 54.

28. 916 F.2d at 906-08.

29. *Id.* at 905.

30. *Id.* at 906.

barriers," given Congress' concern "with achieving reciprocal trade barrier reduction" in the legislative history of the Congressional ratification of the FTA.<sup>31</sup>

The Government Procurement section of the Canada-United States FTA is found in chapter 13.<sup>32</sup> Its objective is outlined in article 1301:

In the interest of expanding mutually beneficial trade opportunities in government procurement based on the principles of non-discrimination and fair and open competition for the supply of goods and services, the Parties shall actively strive to achieve, as quickly as possible, the multilateral liberalization of international government procurement policies to provide balanced and equitable opportunities.<sup>33</sup>

Thus, the objective explicitly emphasizes that the liberalization of the government procurement policies between the two nations is "based on the principles of non-discrimination and fair and open competition."<sup>34</sup>

Coverage of the Canada-United States FTA is limited to "procurements specified in Code Annex I . . . ."<sup>35</sup> The Code Annex specifies thirty-two federal Canadian agencies<sup>36</sup> and fifty-four federal United States agencies.<sup>37</sup> The Code Annex does not include any state or provincial agencies in its list of applicable agencies.

However, the Canada-United States FTA has provided for further negotiations on government procurement in Article 1307.<sup>38</sup> This Article provides:

The Parties shall undertake bilateral negotiations with a view to improving and expanding the provisions of this chapter, not later than one year after the conclusion of the existing multilateral renegotiations pursuant to Article IX:6(b) of the Code, taking into account the results of these renegotiations.<sup>39</sup>

So, the Canada-United States FTA does not require the opening up of sub-national government procurement legislation.

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31. *Id.* at 907.

32. Free Trade Agreement, *supra* note 1, at 353-60.

33. *Id.* at 353.

34. *Id.*

35. *Id.* at 354.

36. *Id.* at 355-56.

37. *Id.* at 357-58.

38. *Id.* at 355.

39. *Id.*

As of September, 1992, the United States, Canada, and Mexico have proposed the text to a new agreement creating the North American Free Trade Agreement (NAFTA).<sup>40</sup> Article 102 of NAFTA outlines the objectives of the proposed agreement, and states that its principles and rules include national treatment, most-favored-nation treatment, and transparency.<sup>41</sup> Article 1003 puts government procurement between Canada, Mexico and the United States within the non-discrimination principle of national treatment.<sup>42</sup> Article 1003 provides:

1. With respect to measures covered by this Chapter, each party shall accord to goods of another Party, to the suppliers of such goods and to service suppliers of another Party treatment no less favorable than the most favorable treatment than the Party accords to:

- (a) its own goods and suppliers; and
- (b) goods and suppliers of another Party.

2. With respect to measures covered by this Chapter, no Party may:

- (a) treat a locally established supplier less favorably than another locally established supplier on the basis of degree of foreign affiliation or ownership; or
- (b) discriminate against a locally established supplier on the basis that the goods or services offered by the supplier for the particular procurement are goods or services of another Party.

3. Paragraph 1 does not apply to measures respecting customs duties or other charges of any kind imposed on or in connection with importation, the method of levying such duties or charges or other import regulations, including restrictions and formalities.<sup>43</sup>

Unlike the Canada-United States FTA, which explicitly incorporates the GATT's Procurement Code, NAFTA outlines the principle of national treatment as it applies to the area of government procurement. In effect, however, NAFTA's language incorporates the language of the GATT's Procurement Code.

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40. North American Free Trade Agreement, *done* December 17, 1992, 32 I.L.M. 289 (1993)(comes into effect after all three countries complete the legal review of the document to ensure the Agreement's overall consistency and clarity).

41. *Id.* at 297.

42. *Id.* at 613-14.

43. *Id.*



However, the proposed NAFTA agreement shifts the scope of coverage found in the Canada-United States FTA:

ARTICLE 1001: SCOPE AND COVERAGE

1. This Chapter applies to measures adopted or maintained by a Party relating to procurement:

(a) by a federal government entity set out in Annex 1001.1a-1, a government enterprise set out in Annex 1001.1a-2 in accordance with Article 1024;

(b) of goods in accordance with Annex 1001.1b-1, services in accordance with Annex 1001.1b-2, or construction services in accordance with Annex 1001.1b-3; and

(c) where the value of the contract to be awarded is estimated to be equal to or greater than a threshold calculated and adjusted according to the U.S. inflation rate as set out in Annex 1001.1c,

(i) for federal government entities, US\$50,000 for contracts for goods, services or any combination thereof, and US\$6.5 million for contracts for construction services,

(ii) for government enterprises, US\$250,000 for contracts for goods, services or any combination thereof, and US\$80 million for contracts for construction services, and

(iii) for state and provincial government entities, the applicable threshold, as set out in Annex 1001.1a-3 in accordance with Article 1024.<sup>44</sup>

Annex 1001.1a-1, on federal government entities, lists one hundred Canadian federal agencies,<sup>45</sup> twenty-two Mexican federal agencies,<sup>46</sup> and fifty-six United States federal agencies.<sup>47</sup> Annex 1001.1a-2, on government enterprises, lists eleven Canadian federal projects,<sup>48</sup> thirty-six Mexican federal projects,<sup>49</sup> and seven United States federal projects.<sup>50</sup> In addition, NAFTA proposes to expand the scope and coverage of

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44. *Id.* at 613.

45. *Id.* at 622-23.

46. *Id.* at 623-24.

47. *Id.* at 624.

48. *Id.* at 624-25.

49. *Id.* at 625.

50. *Id.*

the Canada-United States FTA in the area of services for the entities listed in Annex 1001.1a-1 and Annex 1001.1a-2.<sup>51</sup>

Annex 1001.1a-3, on state and provincial government entities, provides:

Coverage under this Annex will be the subject of consultations with state and provincial governments in accordance with Article 1024.<sup>52</sup>

This Annex has not made any direct changes in the respective positions of the United States and Canadian governments on the sub-national government procurement strategies. It merely indicates that the federal government of each nation is willing to address this issue with their respective states or provinces.

Article 1024, on further negotiations, indicates that the parties intend to continue negotiations on the liberalization of the government procurement markets and agree to begin these negotiations no later than December 31, 1998.<sup>53</sup> Article 1024 further provides:

[T]he Parties will endeavor to consult with their state and provincial governments with a view to obtaining commitments, on a voluntary and reciprocal basis, to include within this Chapter procurement by state and provincial government entities and enterprises.<sup>54</sup>

In addition, Article 1024 provides that this Agreement is to comply immediately with any changes in the GATT Agreement on Government Procurement, if the GATT negotiations are completed prior to the further negotiations provided for in NAFTA.<sup>55</sup>

The General Agreements on Tariffs and Trade (GATT)<sup>56</sup> has a section that applies to government procurement which is called the Agreement on Government Procurement.<sup>57</sup> The Government Procurement Code is an attempt by the signatory governments "to provide transparency of laws, regulations, procedures and practices regarding

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51. *Id.* 626-29.

52. *Id.* at 625.

53. *Id.* at 621.

54. *Id.* at 622.

55. *Id.*

56. The General Agreement on Tariffs and Trade and Protocol and Provisional Application, Oct. 30, 1947, 55 U.N.T.S. 194, B.I.S.D. IV (1969).

57. Agreement on Government Procurement, April 12, 1979, GATT, 26 B.I.S.D. 33-55.

government procurement . . . ."<sup>58</sup> for what has been for many countries, unlike the United States, "ad hoc bidding and award procedures that are less than transparent."<sup>59</sup>

Article I provides for the scope and coverage of the Government Procurement Code. Article I limits the coverage of the Code to "entities under the direct or substantial control of parties . . . ."<sup>60</sup> Further, Article I limits the coverage to entities specified by the lists in Annex I.<sup>61</sup> Also, Article I specifies that local and regional governments of the signatory countries are not included, but the sub-national governments shall be informed of "overall benefits of liberalization of government procurement."<sup>62</sup>

Currently, the international agreements to which the United States government is a party do not affect sub-national government procurement practices. In fact, it is clear from the language of the agreements that the sub-national government procurement laws and regulations are not addressed by any of these agreements. Instead, the sub-national government procurement laws and regulations are merely open to further negotiations in all the agreements.

#### IV. FEDERALISM AND FAIR TRADE

Several commentators have suggested that the United States should extend its agreements to include state government procurement.<sup>63</sup> One commentator recommended that "[t]he next logical step for the United States is to negotiate and ratify a trade agreement which includes state government procurement."<sup>64</sup> This same commentator suggested that "the United States now stands poised to bring itself and its trading partners closer to achieving the benefits of international free trade."<sup>65</sup>

However, the *Trojan* court suggested, in a footnote, that "achieving United States-Canadian reciprocity in sub-national government procurement may require more than national legislation."<sup>66</sup> The *Trojan*

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58. See *id.* (Preamble).

59. Theodore W. Kassinger, *Introduction and Bibliography*, 1 Basic Documents of International Economic Law 165 (November 1989).

60. Agreement on Government Procurement, *supra* note 57, at art. I.

61. Lists in the Annex are available in the practical Guide to the GATT Agreement on Government Procurement which has been published by the GATT Secretariat. *Id.*

62. *Id.* at art. I, par. 2.

63. See, e.g., Miller, *supra* note 11, at 161; Southwick, *supra* note 11, at 57-58.

64. Miller, *supra* note 11, at 161.

65. *Id.* at 164.

66. 916 F.2d at 907 n.6.

court noted that Article 1301 of the Canada-United States FTA "speaks of achieving '*mutually* beneficial trade opportunities in government procurement based on the principles of non-discrimination and *fair* and open competition.'" <sup>67</sup> But the court noted that in the legislative history in which Congress adopted the Canada-United States FTA, there was concern "about the negative effect that provincial procurement barriers can have on the ability of U.S. exporters to compete for government procurement contracts in Canada." <sup>68</sup>

In a footnote, the *Trojan* court suggested that "on the United States' side, Congress would have authority to act preemptively in this area [sub-national government procurement] as an exercise of its power over foreign commerce . . . ." <sup>69</sup> However, the court continued, "it is not at all clear that the Canadian Parliament has cognate authority." <sup>70</sup> So, in order to take the "next logical step," it is important to understand the complicating factors of working with other legal and governmental systems.

Despite commonalities, working out an agreement between the United States and Canada on the sub-national government procurement practices of both nations may require more than a desire to reduce these barriers to trade. It may require greater understanding of the diverse nature of the two different legal and political systems under the constitutions of both nations. Even though both nations are governed by federal systems, each nation has developed its own unique brand of federalism. Hence, the question is not whether the United States should attempt to open up free trade with other nations in the area of government procurement. Instead, the question is a much more practical one: what is the most effective way to implement the move toward free and fair trade between nations in the area of sub-national government procurement?

## V. THE UNITED STATES CONSTITUTION AND FEDERALISM

The concern about federalism is among the oldest concerns in the history of United States constitutional law, dating back to the time of

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67. *Id.* at 907 (quoting Free Trade Agreement, *supra* note 1, at art. 1301).

68. *Id.* (quoting S. REP. NO. 100-509, 100th CONG., 2d SESS. at 65).

69. *Id.* at 907 n.6.

70. *Id.*

our founding fathers.<sup>71</sup> The tension in the United States Constitution revolves around the federal powers enumerated in Article I, § 8 of the Constitution for Congress<sup>72</sup> and the powers reserved for the states in the Tenth Amendment.<sup>73</sup>

#### A. Commerce Power

The Constitution is straightforward on the power granted to the federal government in the area of international trade. Article I, § 8 explicitly states that Congress has the power to "regulate Commerce with foreign Nations."<sup>74</sup> It is well-established that the foreign commerce power granted to Congress in the Constitution may act as a prohibition to state regulatory activity, absent preemptive federal legislation.<sup>75</sup> Through negative implication, the courts have often found that the foreign commerce clause proscribes state regulation of foreign commerce.<sup>76</sup>

The foreign commerce power, though broadly interpreted, has some limitations. The Supreme Court has recognized that when a state is acting as a market participant, and not functioning as a regulator of foreign or interstate trade, then the state is not subject to the constraints of the commerce clause.<sup>77</sup> In *South-Central Timber Development*,

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71. *New York v. United States*, 112 S.Ct. 2408, 120 L.Ed.2d 120, 133 (1992) (noting that the constitutional question of "discerning the proper division of authority between the Federal Government and the States" is as old as the constitution).

72. U.S. CONST. art. I, § 8.

73. U.S. CONST. amend. X.

74. U.S. CONST. art. I, § 8, cl. 3.

75. 916 F.2d at 909.

76. See *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851); *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948). See also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-21 at 468 (2d ed. 1988); JOHN E. NOWAK AND RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 4.2 (4th ed. 1991).

77. See, e.g., *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983); *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984); TRIBE, *supra* note 76, § 6-21 at 469. Tribe describes the limitation as follows:

A distinction must be drawn between state regulation of foreign commerce, and state participation in foreign commerce. The former activity is tightly proscribed by the negative implications of what might be called the foreign commerce clause. Thus, a state or local government that opposed the regime of apartheid in the Union of South Africa could not, absent congressional authorization, enact a measure denying South African companies the privilege of doing business within its jurisdiction; nor could a state or locality

*Inc. v. Wunnicke*,<sup>78</sup> an Alaskan timber purchaser and shipper brought an action challenging Alaska's requirement that timber taken from state lands be processed within the state prior to export. It should be noted that the Alaskan timber corporation that brought the suit was engaged in the business of purchasing, logging, and shipping timber into foreign countries (almost exclusively with Japan).<sup>79</sup> Often, the company sold unprocessed logs, since it did not operate a mill in Alaska.<sup>80</sup> The Supreme Court held that the state was not protected by the market-participant doctrine for three reasons.<sup>81</sup> First, the state was not "merely subsidizing local timber processing in an amount 'roughly equal to the difference between the price the timber would fetch in the absence of such a requirement and the amount the state actually receives.'" <sup>82</sup> Instead, the state was imposing "conditions downstream in the timber-processing market."<sup>83</sup> Second, the market-participant doctrine is not an unrestrained exception to the commerce power. Instead, the Court suggested that the doctrine might be limited by a more rigorous scrutiny "when a restraint on foreign commerce is alleged . . ."<sup>84</sup> Third, the Court suggested that the market-participant doctrine might be limited when the state is involved in the sale of natural resources (like timber) and not the sale of a product which was "the end product of a complex process whereby a costly physical plant and human labor act on raw materials . . ."<sup>85</sup> Thus, the Court limited the use of the market-participant exception in the areas of foreign commerce, natural resources, and when the state's regulation has a downstream effect.

The *Trojan* court looked at the Pennsylvania Steel Act in light of the foreign commerce power. The court held that the Steel Act did

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forbid its citizens and resident corporations from investing in or trading with multinational corporations which have affiliates or subsidiaries in South Africa. But under the Supreme Court's market participant exception to the commerce clause, a state would be free to pass laws forbidding investment of the state's pension funds in companies that do business with South Africa, or rules requiring that purchases of goods and services by and for the state government be made only from companies that have divested themselves of South African commercial involvement.

*Id.* at 469.

78. 467 U.S. 82 (1984).

79. *Id.* at 85-86 n.4.

80. *Id.* at 85-86.

81. *Id.* at 99.

82. *Id.* at 95 (quoting *Alexandria Scrap*, 426 U.S. at 794).

83. *Id.*

84. *Id.* at 96 (quoting *Reeves*, 447 U.S. at 438 n.9).

85. *Id.* (quoting *Reeves*, 447 U.S. at 443-444).

not violate the commerce clause because it fit within the market-participant doctrine. The court defined the market-participant doctrine as protecting states "when they are acting as parties to a commercial transaction rather than . . . [when] they are acting as market regulators."<sup>86</sup> The *Trojan* court bypassed the suggested limitation on foreign commerce under the market-participant doctrine by noting the Supreme Court's "rule that State restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny."<sup>87</sup> Then, the *Trojan* court held that the Pennsylvania statute survived "even the most searching review."<sup>88</sup>

The *Trojan* court gleaned from *Japan Line, Ltd. v. County of Los Angeles*<sup>89</sup> "two concerns that underlie the application of a more probing analysis to state statutes that affect foreign commerce."<sup>90</sup> The *Trojan* court listed these two concerns: 1) "the danger of multiple taxation," and 2) "state enactments may 'impair federal uniformity in an area where federal uniformity is essential.'"<sup>91</sup> The court concluded that the first concern was "not implicated by the Steel Act."<sup>92</sup> Also, the *Trojan* court concluded that the second concern about impairing federal uniformity was not a problem with state procurement practices since "reconciling conflicting policy among multiple national sovereigns" was not the kind of area where federal uniformity was essential.<sup>93</sup>

However, we need to look at the language used in *Japan Line* to describe the unanimity principle:

[A] state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential. Foreign commerce is preeminently a matter of national concern. 'In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power . . . ' Although the Constitution, Art. 1, § 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the

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86. 916 F.2d at 910.

87. *Id.* at 912 (quoting *Wunnicke*, 467 U.S. at 100).

88. *Id.*

89. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979).

90. 916 F.2d at 912.

91. *Id.*

92. *Id.*

93. *Id.*

scope of the foreign commerce power to be the greater. Cases of this Court, stressing the need for uniformity in treaties with other nations, echo this distinction. In approving state taxes on the instrumentalities of interstate commerce, the Court consistently has distinguished oceangoing traffic . . . [T]hese cases reflect an awareness that the taxation of foreign commerce may necessitate a uniform national rule . . . Finally, in discussing the Import-Export Clause, this court, in *Michelin Tire Corp. v. Wages* . . . spoke of the Framers' overriding concern that 'the Federal Government must speak with one voice when regulating commercial relations with foreign governments.' The need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to 'regulate Commerce with foreign nations' under the Commerce Clause.<sup>94</sup>

The *Japan Line* court suggested that the negative implications of the foreign commerce clause should be subjected to the unanimity principle, and that the states in the area of foreign commerce are limited if the state enactment "may impair federal uniformity in an area where federal uniformity is essential."<sup>95</sup> One commentator suggested that this principle would apply to buy-American statutes, and noted that this principle "raises an interesting question as to the effect of this essentially novel commerce clause principle in a possible constitutional test of state Buy-American statutes."<sup>96</sup>

However, the *Trojan* court reasoned that the unanimity principle did not apply to the Pennsylvania Steel Act because there are "no problems of reconciling conflicting policy among multiple national sovereigns."<sup>97</sup> Since the Supreme Court has not addressed the issue of whether the unanimity principle applies to state government procurement practices, it is not clear how the Court would rule. But it is clear that the federal government has the power to regulate foreign commerce and could preempt the state government procurement practices and statutes by passing legislation or making agreements explicitly proscribing state buy-American statutes.

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94. 441 U.S. at 448-49 (quoting *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933) and *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

95. *Id.*

96. Kenworthy, *supra* note 11, at 15-16.

97. 916 F.2d at 912.



### B. *Foreign Affairs Power*

Next, the *Trojan* court looked at the effect of the foreign affairs power on the Pennsylvania Steel Act.<sup>98</sup> A commentator noted:

Foreign relations are national relations. The language, the spirit and the history of the Constitution deny the States authority to participate in foreign affairs, and its construction by the courts has steadily reduced the ways in which the States can affect American foreign relations. And yet, despite many light, flat statements to the contrary, the foreign relations of the United States are not in fact wholly insulated from the States, are not conducted exactly as though the United States were a unitary state.<sup>99</sup>

The Constitution explicitly denies the states powers over foreign affairs in Article I, § 10. It provides:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded or in such imminent Danger as will not admit of delay.<sup>100</sup>

This constitutional list clearly restricts the states' involvement in the area of foreign affairs, including the making of treaties.<sup>101</sup>

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98. *Id.* at 912-13.

99. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 228 (1972).

100. U.S. CONST. art. I, § 10. *See also* HENKIN, *supra* note 99, at 228-34.

101. *See* U.S. CONST. art. II, § 2. This section provides that the president "shall

In addition to this constitutional list, the Supreme Court in *United States v. Pink*<sup>102</sup> held that the power over foreign affairs is vested in the federal government exclusively.<sup>103</sup> The *Pink* case dealt with the Litvinov Assignment, an executive agreement which arose out of the United States' diplomatic recognition of the Soviet Union.<sup>104</sup>

The Litvinov Assignment's main purpose was to settle outstanding American claims against the Soviet Union by assigning all Soviet interests in the assets of a Russian insurance company located in New York to the United States government. The state of New York refused to enforce the Litvinov Assignment because the Assignment was based on foreign law that ran counter to the public policy of the forum.<sup>105</sup> The Supreme Court held:

No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts. For such reasons, Mr. Justice Sutherland stated in *United States v. Belmont* . . . 'In respect of all international negotiations and compacts, and

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have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ." *Id.*; U.S. CONST. art. I, § 10. This section expressly prohibits the states from making treaties. It provides, "No State shall enter into any Treaty, Alliance, or Confederation . . . ." *Id.* Further, it provides, "No State shall, without the Consent of Congress, enter into any Agreement or Compact with . . . a foreign Power . . . ." *Id.*; U.S. CONST. art. VI, cl. 2. This clause provides for the scope of the treaty power as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.*

From this text, it is clear that treaties entered into by the United States are "supreme Law of the Land" and preempt contrary state law. *See also* *Missouri v. Holland*, 252 U.S. 416 (1920); *Reid v. Covert*, 354 U.S. 1 (1957).

102. *United States v. Pink*, 315 U.S. 203 (1941).

103. *Id.* at 233-34.

104. *Id.* at 211.

105. *Id.* at 231.

in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist.<sup>106</sup>

Thus, the foreign policy doctrine gives the power to make foreign policy to the federal government. This doctrine is not based on explicit words in the Constitution; rather, it is based on the structure of the federal system.

In *Zschernig v. Miller*,<sup>107</sup> the Supreme Court explicitly uses a structural analysis of the federal government to support its position that an Oregon probate statute was unconstitutional. The Oregon statute provided that a foreign heir's claims from an Oregon decedent for real or personal property would escheat unless the foreign claimant can carry his burden of proving three requirements: 1) there is a reciprocal right for United States heirs to take property from estates in the foreign country; 2) Americans are assured the right to receive payment from estates in the foreign country; and 3) the citizens of the foreign country have the right to receive the proceeds of the estate without confiscation.<sup>108</sup> The Court held that the Oregon statute was unconstitutional because "the history and operation of this Oregon statute make clear that . . . [the statute] is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."<sup>109</sup> Further, the Court stated that the statute "seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own."<sup>110</sup> The Court concluded: "The present Oregon law is not as gross an intrusion in the federal domain as . . . others might be. Yet . . . it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems."<sup>111</sup>

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106. *Id.* at 233-34 (quoting *United States v. Belmont*, 301 U.S. 324, 331 (1937)). See also NOWAK & ROTUNDA, *supra* note 76, § 6.9 at 217. Nowak and Rotunda stated: "Pink merely reaffirmed the president's ability to enter into agreements which would override state law, provided the agreement itself did not violate any provision of the Bill of Rights." *Id.*

107. *Zschernig v. Miller*, 389 U.S. 429 (1968).

108. *Id.* at 430-31.

109. *Id.* at 432. See Tribe, *supra* note 76, § 4-6 at 230. Tribe stated "It follows that all state action, whether or not consistent with current federal foreign policy, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void as an unconstitutional infringement upon an exclusively federal sphere of responsibility." *Id.*

110. *Zschernig*, 389 U.S. at 440.

111. *Id.* at 441. See Harold G. Maier, *Preemption of State Law: A Recommended*

Justice Stewart's concurrence clearly based the result of the case on the structure of the federal system of government.<sup>112</sup> Justice Stewart stated:

We deal here with the basic allocation of power between the States and the Nation. Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department. Today, we are told, Oregon's statute does not conflict with the national interest. Tomorrow it may. But, however that may be, the fact remains that the conduct of our foreign affairs is entrusted under the Constitution to the National Government not to the probate courts of the several States.<sup>113</sup>

The question is whether the states have any power in areas that have an effect on foreign affairs.<sup>114</sup> The *Zschemig* court indicated that the

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*Analysis, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 126 (Louis Henkin et al. eds, 1990). Maier commented on *Zschemig*:

In a murky opinion by Justice Douglas, the Court found the Oregon statute unconstitutional "as applied." Justice Douglas based his opinion on what careful analysis reveals to be three alternative grounds. He found that the statute had a "direct" adverse effect on foreign relations, that it had a general potential for creating diplomatic embarrassment for the national Government and that the reciprocity and benefit-and-use requirements made criticism of foreign governments by state courts unavoidable. No one of these conclusions is effectively supported by the facts in the *Zschemig* case. There was no showing of an adverse effect on relations with East Germany and no evidence of overt or implicit criticism of the East German Government by any of the Oregon courts; and the U.S. Department of State submitted a statement that such statutes did not interfere with the conduct of foreign policy. *Id.* at 230.

112. 389 U.S. at 441-43.

113. *Id.* at 443.

114. See Maier, *supra* note 111, at 131. Maier noted:

*Zschemig* is the last major pronouncement by the U.S. Supreme Court on federal preemption of state law in the foreign affairs field that is based on structural analysis. The case should not be taken, however, as a statement that all state laws or decisions that may have foreign affairs implications are necessarily unconstitutional. All the cases dealing with this issue recognize the continuing role of the concept of federalism in appropriately dividing governmental decision-making authority.

The principle of federalism echoes a fundamental principle of democracy: that governmental decisions made at the local level are more likely to reflect the will of the people most directly affected by them. As long as the United States continues to exist as a federal nation, decisions in cases involving

states' power is limited by the very nature of the federal structure of government. One commentator noted that "deciding whether a state action is preempted by the national power over foreign affairs requires determining whether the values of local self-government inherent in the federal structure are appropriately given effect in the circumstances of the case."<sup>115</sup>

The *Trojan* court held that the Pennsylvania Steel Act was not preempted by the foreign affairs power of the federal government. The *Trojan* court reasoned:

The Pennsylvania statute exhibits none of the dangers attendant on the statute reviewed in *Zschernig*, for Pennsylvania's statute provides no opportunity for state administrative officials or judges to comment on, let alone key their decisions to, the nature of foreign regimes. On its face the statute applies to steel from any foreign source, without respect to whether the source country might be considered friend or foe. Nor is there any indication from the record that the statute has been selectively applied according to the foreign policy attitudes of Commonwealth courts or the Commonwealth's Attorney General.<sup>116</sup>

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possible state intrusion into foreign affairs must continue to strike an appropriate balance between preservation of the values of local self-government and the need for national uniformity in matters of international affairs. *Id.*

See also HENKIN, *supra* note 99, at 241. Henkin suggested:

The *Zschernig* doctrine does not, of course, substitute the judgment of the federal courts for that of the federal political branches; it asserts only the authority of the courts to strike down state acts when the political branches have not acted. In the Commerce Clause cases . . . the Court recognized the right of Congress to permit burdens on commerce which would have been invalid had Congress not spoken. While in *Zschernig* the Court seemed to hold that a communication expressing State Department toleration of the Oregon law was not enough to validate it, it was perhaps resisting *ad hoc* direction to the courts in particular cases. It is difficult to believe that the Court would find constitutionally intolerable state intrusions on the conduct of foreign relations which the political branches formally approve or tolerate. Domestic considerations apart, there might be foreign relations reasons why the political branches might deem it desirable to leave some matters to the States rather than deal with them by formal federal action. *Id.*

115. Maier, *supra* note 111, at 131. Maier suggested that buy-American statutes are an area where national and local concerns compete.

116. 916 F.2d at 913.

Moreover, the *Trojan* court noted that Congress could preempt sub-national government procurement restrictions through federal legislation but has taken no steps to do so.<sup>117</sup>

It is clear that the national government has the exclusive power to deal with foreign affairs. However, there are instances where the states and the national government have overlapping authority. In these instances, the states are permitted to pass legislation that has an impact on foreign affairs, so long as the states are not having a "direct impact upon foreign relations" and the impact of the state legislation does not "adversely affect the power of the central government to deal with those problems."<sup>118</sup> Buy-American statutes do have a direct impact on the foreign relations of the United States. Also, buy-American statutes may have an adverse effect on the power of the central government to deal with problems that may arise in the area of free and fair trade. However, the states' power to regulate their own government procurement practices is a local concern that must be balanced against the national interest promoting free trade. Perhaps the national government has not preempted the states' buy-American legislation as a means to promote a fair and reciprocal agreement between nations in the area of sub-national government procurement. To preempt state legislation at this point may be counterproductive in the negotiating process of GATT and NAFTA.

## VI. THE CANADIAN CONSTITUTION AND FEDERALISM

Unlike the United States Constitution, the Canadian Constitution is not a single document. The Constitution of Canada is defined in the Constitution Act, 1982:

- 52.(2) The Constitution of Canada includes
- (a) the Canada Act 1982, including this Act;
  - (b) the Acts and orders referred to in the schedule; and
  - (c) any amendment to any Act or order referred to in paragraph (a) or (b).<sup>119</sup>

The supremacy clause of the Constitution of Canada provides as follows:

- 52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions

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117. *Id.* at 913-14.

118. *Zschernig*, 389 U.S. at 441.

119. CAN. CONST. (Constitution Act, 1982) pt. VII, (General), § 52(2)(describing the primacy of the Constitution of Canada).

of the Constitution is, to the extent of the inconsistency, of no force or effect.<sup>120</sup>

The supremacy of the Constitution of Canada is the foundation for their federal system of government, and "gives priority to the 'Constitution of Canada' where it is inconsistent with other laws."<sup>121</sup> The pertinent question for the analysis here is whether the provincial governments of Canada have power under their federal system over foreign trade and commerce, as well as in the areas of treaty-making or foreign affairs. If so, the question becomes whether the central government of Canada has the power to require the provincial governments to conform to agreements made between the Canadian government and the United States.

A. *Trade and Commerce Power and the Property and Civil Rights Power*<sup>122</sup>

Section 91(2) of the Constitution of Canada provides for the distribution of the federal legislative power of Parliament:

[I]t is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

2. The Regulation of Trade and Commerce.<sup>123</sup>

However, the federal power over trade and commerce comes into conflict with the express provincial legislative power:

92. In each province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of

120. *Id.* at § 52(1).

121. PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 96 (2d ed. 1985).

122. *Id.* at 455. Hogg noted that civil rights in the context of "property and civil rights"

does not bear the meaning which it has acquired in the United States, that is, as meaning the civil liberties which in that country are guaranteed by the Bill of Rights. Civil rights in the sense required by the Constitution Act, 1867 are juristically distinct from civil liberties. The civil rights referred to in the Constitution Act, 1867 comprise primarily proprietary, contractual or tortious rights; these rights exist when a legal rule stipulates that in certain circumstances one person is entitled to something from another. But civil liberties exist when there is an absence of legal rules: whatever is not forbidden is a civil liberty. *Id.* at 455.

123. CAN. CONST. (Constitution Act, 1867) pt. VI (Distribution of Legislative Power), § 91(2)(describing the legislative authority of parliament of Canada).

Subjects next hereinafter enumerated; that is to say,—

13. Property and Civil Rights in the Province.<sup>124</sup>

In *Citizens Insurance Co. v. Parsons*,<sup>125</sup> the Privy Council<sup>126</sup> discussed the relationship between the federal power over the regulation of trade and commerce and the provincial power over property and civil rights. The issue presented was whether a provincial statute was valid that prescribed conditions to be included in all fire insurance policies.<sup>127</sup> Specifically, the respondent was concerned with whether the provincial statute in question “had relation to matters coming within the class of subjects described in No. 13 of sect. 92, viz., ‘Property and civil rights in the province.’”<sup>128</sup>

The Privy Council held that the “Act in question is valid.”<sup>129</sup> The Privy Council reasoned that the words “regulation and trade”

would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion.<sup>130</sup>

The Privy Council continued:

It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over

124. *Id.* at § 92(13).

125. *Citizens' Ins. Co. v. Parsons*, [1881] 8 App. Cas. 406 (P.C. 1880)(appeal taken from Can.).

126. Hogg, *supra* note 121, at 4. Hogg described the Judicial Committee of the Privy Council in England as the final appellate authority for British North America. After Canada was granted independent national status, the framers were content to leave the appellate authority in the British hands of the Privy Council. Hogg noted, “When the Supreme Court of Canada was established in 1875, it was established by an ordinary federal statute, and the right of appeal to the Privy Council was retained; the abolition of Privy Council appeals did not occur finally until 1949.” *Id.* at 4.

127. *Parsons*, [1881] 8 App. Cas. at 422.

128. *Id.*

129. *Id.* at 432.

130. *Id.* at 426.



property and civil rights assigned to the legislature of Ontario . . . .<sup>131</sup>

Therefore, it has been generally held since the *Parsons* case that the provinces have power over intraprovincial trade and commerce under their constitutionally granted power over "property and civil rights."<sup>132</sup> The federal power over trade and commerce has been limited to the areas of international and interprovincial trade, and general regulation of trade "affecting the whole Dominion."<sup>133</sup>

In *Dominion Stores v. The Queen*,<sup>134</sup> the Supreme Court of Canada held that Part I of the federal Canada Agricultural Products Standards Act<sup>135</sup> was inapplicable to the completely intraprovincial events under which this case was brought.<sup>136</sup> The federal Act sought to establish grading plans for agricultural products. Part I outlined a plan that, "so far as it applies within a Province, is voluntary in the sense that the strictures of the statute do not apply unless and until the products in question are offered for sale under a grade name prescribed pursuant to the statute."<sup>137</sup> Part II was a compulsory plan for international and interprovincial trade requiring products in international and interprovincial trade to conform to the statute's grading standards.<sup>138</sup>

The voluntary provincial plan of the federal statute is complicated by the fact that Ontario had a statute that required grading of farm products that applied grade names to apples that were the same as the names used under the federal statute. So, the farmer, meeting the requirements of the Ontario statute, must conform to the standards of the federal statute. Thus, any of his products that were sold intraprovincially were subject to federal regulation under the trade and commerce power.<sup>139</sup>

The Court held that Part I of the federal statute was an invalid attempt of the federal government to regulate local trade under its power to regulate trade and commerce.<sup>140</sup> However, Part II of the

131. *Id.* at 426-27.

132. *See* CAN. CONST. (Constitution Act, 1867) pt. VI (Distribution of Legislative Powers), § 92(13)(describing the subjects of exclusive Provincial legislation).

133. *Parsons*, [1881] 8 App. Cas. at 426.

134. *Dominion Stores Limited v. The Queen*, 106 D.L.R.3d 581 (1979)(Can.).

135. Canada Agricultural Products Standards Act, R.S.C., ch. A-8 (1970)(Can.).

136. 106 D.L.R.3d at 598 (1979)(Can.).

137. *Id.* at 592.

138. *Id.* at 591.

139. *Id.* at 592.

140. *Id.* at 598-99.

federal statute was valid federal legislation of international and inter-provincial trade. The Supreme Court reasoned that Part I of the federal statute was the "regulation of local as well as interprovincial and international marketing . . . ." <sup>141</sup> The Court continued:

[t]he statute . . . requires provincial participation in order to make the application of the federal statute inevitable in local trade. The true nature, the pith and substance, of the federal programme is exposed by the circumstances and context in which it was enacted and now enforced. The presence of the provincial Act did not of itself invalidate the federal action, but it forms part of the surroundings to be scrutinized in discerning the substantive core of the federal legislation. <sup>142</sup>

Hence, the Court held that the provinces had power to control "purely intraprovincial transactions," even if the province's control over the intraprovincial transaction might have an impact on international or interprovincial transactions. <sup>143</sup> By contrast, the United States' commerce power gives the federal government the power to control any state activity or transaction that has an "affect" on interstate or international trade. The United States courts only need to inquire whether Congress' determination that an activity affects interstate commerce has a rational basis. <sup>144</sup>

Further, the analysis suggested by the court in the *Dominion Stores* case interpreted the trade and commerce power as only a federal power over international and interprovincial transactions. This interpretation suggested that "purely intraprovincial transactions" are not a matter with which the federal parliament may interfere. Thus, the division of federal and provincial power in the area of trade and commerce gives the federal government power if the transaction is interprovincial or international and is not related to "purely intraprovincial transactions."

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141. *Id.* at 595.

142. *Id.*

143. *Id.* at 598-99.

144. *See Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 277 (1980) (holding that when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational).

Justice Rehnquist concurred with the result in the case, but criticized the majority's statement of the test. He stated:

In my view, the Court misstates the test. As noted above, it has long been established that the commerce power does not reach activity which merely "affects" interstate commerce. There must instead be a showing that regulated activity has a *substantial effect* on that commerce. *Id.* at 312.

If a transaction is "purely intraprovincial," then the federal government cannot interfere with the transaction and the Provinces have the power to regulate the transaction despite the possibility of whether the transaction may have an impact on international or interprovincial transactions.

In addition, the *Trojan* court suggested that the "Canadian provinces may enjoy rights similar to those accorded states under the market participant . . . doctrine."<sup>145</sup> Section 92(5) of the Constitution Act of 1867 provides:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,-

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.<sup>146</sup>

An Ontario case, *Smylie v. The Queen*,<sup>147</sup> based its decision on section 92(5) of the British North American Act. In *Smylie*, a timber harvester had been granted a license to harvest from provincial lands. Then, the provincial legislature passed an Act that required any timber harvester taking timber from provincial land to process the timber in Canada before the timber could be exported.<sup>148</sup> The timber harvester argued that this condition on the exportation of timber interfered with the trade and commerce power of the federal legislature under section 91(2) of the British North American Act.<sup>149</sup> The *Smylie* court held that the timber harvester must comply with the exportation condition that the provincial legislature had imposed on licenses that it sold. The court rejected the timber harvester's argument on the grounds that the provincial legislature had the power to dictate how it disposed of its property under section 92(5) of the British North American Act.<sup>150</sup> The court reasoned that the

Provincial Legislature in passing this Act are dealing with property belonging to the Province, over which they have the fullest power of control. They are entitled to sell it or to refuse to sell it; and if they sell, they have the right, in my opinion,

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145. 916 F.2d at 907 n.6.

146. CAN. CONST. (Constitution Act, 1867) pt. VI (Distribution of Legislative Powers), § 92(5)(describing the subjects of exclusive Provincial legislation).

147. *Smylie v. The Queen*, 31 O.R. 202, 222-23 (1900)(Ontario).

148. *Id.* at 213.

149. *Id.* at 220.

150. *Id.* at 222-23.

to impose upon the purchaser such conditions as they deem proper with regard to the destination of the timber after it is cut, including the state in which it shall be exported, just as they have the right in selling cattle from the farm at their Agricultural College to stipulate that the purchaser shall not export them alive. The condition that the timber shall be sawn into lumber before exportation in the one case no doubt reduces the quantity of logs exported, just as the supposed stipulation in the other case reduces the quantity of live cattle exported, but in each case the matter is one purely of internal regulation and management by the Province of its own property, for the benefit of its own inhabitants.<sup>151</sup>

Thus, the *Smylie* decision gives the provincial legislature wide latitude when it is acting as the proprietor in disposing of its own property.<sup>152</sup>

### B. *Treaty Power*

Section 132 of the Constitution Act, 1867 provides for the treaty power of the Canadian government. It provides:

132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.<sup>153</sup>

The language of section 132 explicitly gives the federal Parliament the power to make legislation that would give force to treaties. However,

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151. *Id.* at 222.

152. See Hogg, *supra* note 121, at 570. Hogg noted:

Section 92(5) of the Constitution Act, 1867 confers the power to make laws in relation to "the management and sale of the public lands belonging to the province and of the timber and wood thereon". The general legislative power over "property and civil rights in the province," among its many functions, gives power over provincially-owned property which is not covered by s. 92(5), for example, personal property. These legislative powers over public property enable the provincial Legislature to act like a private proprietor in disposing of the province's own property. This means provincial Legislature may legislate terms as to the use or sale of provincial property which it could not legislate in other contexts, for example, a stipulation that timber be processed in Canada, or that no Chinese or Japanese labour be employed in cutting timber. *Id.*

153. CAN. CONST. (Constitution Act, 1867) pt. IX (Miscellaneous Provisions), § 132 (describing treaty obligations).

these treaties are to be made between the British Empire and other foreign countries.<sup>154</sup> This unusual constitutional provision is a result of the gradual evolution of Canada from a colony of the British Empire to a fully, independent nation.<sup>155</sup> As a result of this unusual provision and the unforeseen position of Canada in the international community, it is uncertain what powers the federal Parliament has in the area of treaty-making and enforcement. Also, it is uncertain what powers the provincial Parliaments have in these areas.

One Canadian commentator noted that once Canada attained "international personality independent of support from or subservience to Great Britain," section 132 became obsolete.<sup>156</sup> The question of what effect section 132 had in the foreign affairs of Canada was addressed in the *Labour Conventions* case.<sup>157</sup> In the *Labour Conventions* case, the federal government of Canada had adopted conventions as a member of the International Labour Organization of the League of Nations.<sup>158</sup> The conventions dealt with limiting working hours of employees in industrial activity, creating minimum wages, and requiring a weekly rest for employees.<sup>159</sup> Then, three statutes were passed by the federal Parliament to enforce the conventions.<sup>160</sup> The question that was presented to the Privy Council was whether the treaty entered by the federal government of Canada was properly enacted by the federal

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154. See Hogg, *supra* note 121, at 249. Hogg explained:

[I]n 1867 the conduct of international affairs for the entire Empire was still firmly vested in the British (imperial) government, and it was the British government which negotiated, signed and ratified all treaties which applied to the Empire or to any part of the Empire. The treaties were then submitted to the colonial governors for implementation in their colonies. The framers of the Constitution Act, 1867 assumed correctly that the international obligations of the new Dominion of Canada would also be created by the imperial government in Britain. Accordingly, the Constitution Act, 1867 was silent as to the power to make treaties, and contemplated the performance only of "Empire" treaties. *Id.*

155. See *id.* at 249-250.

156. ALBERT S. ABEL, *LASKIN'S CANADIAN CONSTITUTIONAL LAW* 218 (4th ed. 1973).

157. *A.-G. Can. v. A.-G. Ont.*, 1 D.L.R. 673 (1937)(Can.). See Hogg, *supra* note 121, at 250. Hogg stated: "Once Canada had obtained the power to conclude treaties on its own behalf, the question arose whether s. 132, with its reference to 'Empire' treaties, could be interpreted as conferring power to implement Canadian treaties." *Id.*

158. *Id.* at 673.

159. *Id.* at 677.

160. *Id.* at 678.

legislature or whether the obligations of the treaty were in the area exclusively assigned to the provincial legislature under section 92(13) of the Constitution, viz., Property and Civil Rights in the Province.<sup>161</sup>

The Privy Council held that the federal statutes were invalid. The Council reasoned:

For the purposes of ss. 91 and 92, i.e., the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects: and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. No one can doubt that this distribution is one of the most essential conditions probably the most essential condition, in the inter-provincial compact . . . .<sup>162</sup>

The Council continued:

It would be remarkable that while the Dominion could not initiate legislation however desirable which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by provincial parliaments need only agree with a foreign country to enact such legislation: and its Parliament would be forthwith clothed with authority to affect provincial rights to the full extent of such agreement. Such result would appear to undermine the constitutional safeguards of provincial constitutional autonomy.<sup>163</sup>

Hence, the Council held that the provincial parliament had the authority to enact legislation in the area of labor under its power within the class of subjects "property and civil rights in the province."<sup>164</sup>

Despite other options available for Canada to make international agreements,<sup>165</sup> "the *Labour Conventions* decision has impaired Canada's

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161. *Id.* at 674.

162. *Id.* at 681-82.

163. *Id.* at 682.

164. See HOGG, *supra* note 121, at 252. Hogg criticized the result. He suggested that even if section 132 is no longer literally applicable to modern treaties, it "shows by its very existence that treaty legislation is a distinct constitutional 'matter' or 'value' under the power-distributing provisions of the Constitution, and that it is no part of provincial legislative power." *Id.*

165. See *id.* at 253. Hogg suggested the following options:

The federal government can consult with the provinces before assuming treaty obligations which would require provincial implementation, and if

capacity to play a full role in international affairs . . . ."<sup>166</sup> Thus, the *Trojan* court's concern about the possibility of achieving reciprocal agreement between the United States and Canada in the area of sub-national government agreement is well-founded,<sup>167</sup> since the federal Canadian government may not have adequate power to enforce such an agreement without consent of the provincial Parliaments, and sub-national government procurement could fall within one of the enumerated classes of provincial power.<sup>168</sup>

## VII. CONCLUSION: RECIPROCITY AND THE "NEXT LOGICAL STEP" IN FAIR TRADE

Miller recommended that "[t]he United States should take the next logical step and enter into a trade agreement which includes state government procurement."<sup>169</sup> Further, he stated: "Such an agreement should be reciprocal, and offer benefits to United States industry commensurate with those given by free access to United States state procurement market."<sup>170</sup> Moreover, he noted: "If the United States negotiates an agreement which includes state procurement, it will preempt state buy-American legislation."<sup>171</sup> By contrast, the *Trojan* court observed that

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all provinces (or all affected provinces) agree to implement a particular treaty, then Canada can adhere to the treaty without reservation. Even where prior provincial consent has not been obtained, Canada may feel free to adhere to a treaty because it includes a "federal state Clause"; under such a clause a federal state undertakes to perform only those obligations which are within central executive or legislative competence, and undertakes merely to bring to the notice of the provinces (or states or cantons), "with favourable recommendation" for action, those obligations which are within regional competence. Another device which enables a federal state to adhere to a treaty upon a subject matter outside central legislative competence is a "reservation"; upon the ratification of the treaty, if it contains no federal state clause, and if provincial agreement has not been obtained, the federal state may add a reservation in respect of obligations within provincial competence, which will make clear that the federal state is not binding itself to those obligations. *Id.*

166. *Id.*

167. 916 F.2d at 907 n.6.

168. See CAN. CONST. (Constitution Act, 1867) pt. VI (Distribution of Legislative Powers), § 92 (describing subjects of exclusive Provincial legislation).

169. Miller, *supra* note 11, at 161.

170. *Id.* at 163.

171. *Id.* at 166.

achieving United States-Canadian reciprocity in sub-national government procurement may require more than national legislation. While it is clear that on the United States' side, Congress would have authority to act preemptively in this area as an exercise of its power over foreign commerce, it is not at all clear that the Canadian Parliament has cognate authority.<sup>172</sup>

Both Miller and the *Trojan* court recognized the need for reciprocity in order to develop fair trade between Canada and the United States in the area of sub-national government procurement.

However, the need for reciprocity may be a stumbling block to achieving free and fair trade in the area of sub-national government procurement. As the above discussion has suggested, the framework of the American brand of federalism under its Constitution gives agreements entered by the federal government supremacy over state statutes and regulations. The discussion of the Canadian brand of federalism under its Constitution has made it clear that the same relationship is not true between the federal government of Canada and the Provincial governments. Indeed, the Canadian brand of federalism gives the Provincial governments power over parts of international agreements that fall within the enumerated provincial power outlined in section 92 of the Canadian Constitution.

Promoting free trade within the international community may have many economic benefits. However, achieving fair trade requires an understanding of how other systems of government work. The United States and Canada are close trading partners and both have federal systems of government. Despite these similarities, there are differences that require thought and analysis before binding sub-national governments to international agreements.

The "next logical step" may be for the United States to enter into an agreement with Canada to open up sub-national government procurement between the two nations. However, this "next logical step" may become a stumbling block to the creation of free and fair trade between the two North American federations. Instead of calling for the opening up of sub-national government procurement at this time, government procurement at the federal level should be scrutinized and there should continue to be an expansion of the list of federal

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172. 916 F.2d at 907 n.6.



agencies and organizations which are included in international agreements.

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