NAFTA and the Changing Role of State Government in a Global Economy: Will the NAFTA Federal-State Consultation Process Preserve State Sovereignty?

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I. INTRODUCTION

Over the last several years, state and federal officials have become increasingly concerned about the security of state sovereignty in the face of the United States government's aggressive trade policy.[1] As barriers among countries diminish and the domestic and foreign spheres of government become more integrated, a state's ability to regulate and protect its interests and citizens appears to have become secondary to the federal government's objective of promoting free trade.[2] This conflict between free trade and state sovereignty has made it more difficult to define the role of individual American state governments in international trade policy[3] and has added to states'

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1. For example, the State of Texas brought together state government officials at a conference in November, 1995, to discuss the impact of trade agreements on state and provincial laws. *See generally* David Morel, Risk to Sub-national Laws From International Trade Agreements, Address Before the Lyndon B. Johnson School of Public Affairs Conference on The Impacts of Trade Agreements on State/Provincial Law, (Nov. 10, 1995) (transcript available in the Univ. of Texas at Austin Lyndon B. Johnson School of Public Affairs Library); *see also* Ben Jones, *Free Trade and State Sovereignty*, 67 THE J. S. GOV'T 37 (1994); Professor Robert W. Benson, *Free Trade as Extremist Ideology*, 17 S.U. L. REV. 555, 572 (1994).

2. *See generally* Morel, *supra* note 1; *see also* Mark Wolski, *State Legislators told to prepare for defense of their Environmental Laws*, BNA STATE ENVIRONMENT DAILY, July 24, 1995; Bickerstaff Heath & Smiley, L.L.P., *International Trade Agreements May Affect Environmental Laws in* 4 TEXAS ENVIRONMENTAL COMPLIANCE UPDATE 6-8 (1994).

3. *See, e.g.*, Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1442 (1994).

fears that the federal government will impermissibly compromise their interests.[4]

The rapid rate of globalization[5] is cited as one factor which aggravates this conflict.[6] International trade agreements[7] are an impetus for globalization and add to state sovereignty concerns because the agreements limit a state's ability to autonomously conduct trade and regulate its interests.[8] On the other hand, the federal government is obligated under trade agreements to institute uniform standards to facilitate the freer movement of goods, services, and people.[9] Thus, there is a growing imbalance within our current federalist system of government because the federal government's obligation to establish uniform standards under free trade agreements conflicts with state governments' interests in protecting citizens and industries.

NAFTA has brought the state sovereignty issue to the political forefront because it illustrates this conflict between the promotion of free trade and the preservation of state autonomy.[10] Under NAFTA, states are to be informed of and included in trade negotiations that

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4. *See supra* note 2; *cf.* Samuel C. Straight, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216, 221 (1995) (asserting that the dispute resolution mechanism under the international trade agreement coupled with the federal government's commitment to enforce NAFTA obligations creates fears of lost state sovereignty). For more historical background on states' concerns regarding state sovereignty, *see generally* THE FEDERALIST NOS. 37-63, at 224-390 (James Madison) (Clinton Rossiter ed., 1961) (stressing a formal division of powers between the national and state governments that favor state sovereignty and limits the extent of enumerated national powers).

5. Globalization is the "process of denationalization of markets, laws and politics in the sense of interlacing peoples and individuals for the sake of the *common good*." Jost Delbruck, *Globalization of Law, Politics and Markets: Implications for Domestic Law: A European Perspective*, 1 IND. J. GLOBAL LEGAL STUD. 9, 11 (1993) (emphasis in original).

6. *See* Friedman, *supra* note 3, at 1443; *see also* David P. Fidler, *Caught Between Traditions: The Security Council in Philosophic Conundrum*, 17 MICH. J. INT'L L. 411, 444 (1996) ("Globalization shares with the liberal faith in economic interdependence the goal of *eroding* state sovereignty to build connections and interests between people of the world." (emphasis added)).

7. *See, e.g.*, General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 194 [hereinafter GATT]; *see also* The North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296-456 & 605-800 [hereinafter NAFTA].

8. *See supra* notes 1-2.

9. For example, both the new GATT Uruguay Round Agreements and NAFTA require the federal government to enforce U.S. international trade agreement obligations on state governments in areas such as services, investment, energy, procurement, and standards. *See generally* Morel, *supra* note 1.

10. *See* Wolski, *supra* note 2; *see also* Bickerstaff Heath & Smiley, *supra* note 2; Jones, *supra* note 1; *North American Free Trade Agreement and Implementing Legislation: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 103rd Cong., 1st Sess. 33 (1993) [*NAFTA Implementing Legislation Hearings*].

directly affect their interests.[11] However, while the U.S. government may not want to imperil its relationship with state governments, its primary objective remains to negotiate a politically satisfying settlement that will not ultimately hinder the progress of free trade. Therefore, what remains to be seen is whether states are indeed allowed to play a role in international trade negotiations that affect their interests. To appreciate the American states' predicament under NAFTA, this Comment will examine a hypothetical dispute to illustrate the conflict between free trade and state autonomy. This hypothetical dispute introduces the situation that would arise if Mexico, a NAFTA member, imposed a heightened agricultural import requirement for health and safety reasons under NAFTA Sanitary and Phytosanitary (S&P) Measures.[12]

> Suppose that Mexico introduces a new requirement that U.S. sweet cherries be fumigated to eliminate agricultural pests, severely affecting three American states. However, the U.S. believes that the fumigation requirement is unnecessary because Mexico does not have a developed sweet cherry industry that requires such a protective measure, and an inspection and certification procedure, similar to the one already in place, would be sufficient to eliminate the risk of pests. Moreover, the U.S. also has reason to believe that Mexico has instituted the requirement to pressure the U.S. into lowering its standards for the import of certain Mexican agricultural products.

Under NAFTA guidelines, the affected states should be informed and included in negotiations because the new requirements could pose serious economic consequences for the states,[13] but the states' interests may hinder the U.S. government's ability to solve the issue in a politically expedient way. What happens then if the U.S. government does not uphold its obligations to states under NAFTA? Is there a negative impact on state sovereignty? If so, do states have a constitutional right, as well as a method, to safeguard against such an intrusion on their sovereignty?

Both state and federal leaders will need to work together to preserve state sovereignty in the face of challenges posed by trade agreements. The U.S. government has no constitutional obligation to

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11. NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified at 19 U.S.C.A. § 3301), § 102(b)(1) [hereinafter Implementation Act].

12. NAFTA, *supra* note 7, art. 712; *see also infra* notes 126-140 and accompanying text for a discussion of NAFTA S&P measures.

13. For example, the cost in new chemicals and equipment for the cherry industry may be very high. The industry would also need the problem resolved by the next growing season.

consult with individual states when negotiating trade agreements.[14] It does, however, have an obligation under NAFTA to "consult with the States for the purpose of achieving conformity of State laws and practices with the Agreement."[15] Greater federal-state communication will balance the struggle between the federal government's goal in promoting free trade and individual state governments' interests in protecting their sovereignty.

Part II of this Comment examines the federalist principles that influence the existing federal-state framework of authority. Part II also discusses the federal government's constitutional authority over state compliance with U.S. trade obligations and whether states have any constitutional or legal authority to demand more autonomy in conducting their trade and commerce.

Part III introduces NAFTA and discusses the U.S. government's obligation to individual states under NAFTA to consult with states in trade matters that will affect state interests. Part IV then examines how the NAFTA federal-state consultation process can serve as a safeguard against the federal government's infringement on state sovereignty.

This Comment concludes that NAFTA, by requiring increased communication between federal and state government leaders, can have a positive impact on state sovereignty. Because the federal government is obligated under the NAFTA federal-state consultation process to include states in on-going NAFTA trade policy decisions and negotiations,[16] a balance between free trade and state sovereignty is attainable. Using the NAFTA consultation framework as a model, the federal government and the states now have the opportunity to promote free trade *and* preserve state sovereignty.

II. AMERICAN FEDERALISM AND THE PRICE FOR FREE TRADE

The principle that individual states' power be properly balanced against the federal government's power in order to protect the rights of American citizens dates back to our country's foundation.[17] Although our federal system of government is structured such that a healthy balance between state and national governments is struck, the pendulum of economic, political and social change often swings far and throws off balance the equilibrium established between the two powers.

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14. See Part II.B.1.a-b for a discussion of the constitutional aspects.
15. Implementation Act, *supra* note 11, § 102(b)(1).
16. Implementation Act, *supra* note 11, § 102(b)(1).
17. *See infra* notes 18-32 and accompanying text.

Thus, when international trade policy conflicts with a state's traditional role of regulating and protecting its interests, the balance in our federal system of government is upset. This Comment next explores the U.S. government's foundation in federalism and how that foundation requires that a balance be maintained between federal and state government.

A. *The Origins of American Federalism*

The United States has a federalist system of government under its Constitution.[18] This system, whereby the national government and the government of each of the fifty states coexist, developed out of the tumultuous relationship that existed between the original thirteen states and the national government under the Articles of Confederation.[19] Under the Articles, the national government was paralyzed because it had no means with which to exercise power over the people directly, had no authority to make and enforce binding law, and had to rely on the states' voluntary cooperation.[20]

The effect of this disunity upon the nation's economy and its role in world politics was the main concern of the politicians who gathered at Philadelphia in 1787 for the drafting of the Constitution.[21] The Antifederalists advocated against ratification of the Constitution because it took too much power from the state governments.[22] They saw the states, rather than a central government, as the best guardians of the citizens.[23] On the other hand, the framers of the Constitution saw a central government representing one unified view as being more effective in pursuing national interests.[24] Consequently, an important debate evolved around the role and function of the two systems of government.[25]

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18. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988).

19. Harry N. Scheiber, *Federalism and the Constitution: The Original Understanding*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES, 85-98 (Lawrence Friedman and Harry N. Scheiber eds., 1978).

20. *Id.*; *see also* Paul J. Scudiere, *In Order to Form a More Perfect Union*, *in* THE CONSTITUTION AND THE STATES: THE ROLE OF THE ORIGINAL THIRTEEN IN THE FRAMING AND ADOPTION OF THE FEDERAL CONSTITUTION 3, 5 (Patrick T. Conley et al. eds., 1988) (quoting Alexander Hamilton's lament that a less centralized, natural government would allow for: "[A]n uncontrollable sovereignty in each state [that] will make our nation feeble and precarious.").

21. *See* Scudiere, *supra* note 20, at 5; *see also* THE FEDERALIST NO. 15, at 106-108 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

22. Scheiber, *supra* note 19, at 87.

23. *Id.*

24. *Id.*

25. *Id.*; *see generally* 1 Records of the Federal Convention of 1787 (Max Farrand ed., 1911).

The compromise reached by the convention was to adopt a "federal" system of government in which the maintenance of the states and their governments would be as important to the preservation of the Constitution and the Union as the safekeeping of the national government.[26] To ensure the institution of a strong central government that was properly balanced against independent state governments, the framers drafted a Constitution that "established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States."[27] The Constitution gives Congress the power to regulate individuals, not states,[28] by founding the federal system of government on two principal premises:

> [t]he first was structural: it involved "engrafting" the system of national government onto the existing system of states by giving the states as such a direct representation in Congress and by leaving with the states major powers in controlling the process of elections. The second feature was operational: it involved a formal division of powers between the states and the national government, with government at both levels operating on individual citizens in pursuit of the common interest.[29]

Individual citizens are the essential components of government and "[t]he government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals."[30] Thus, by instituting formal, properly balanced divisions between state and national government authority, the framers were able to "reduce the risk of tyranny and abuse from either front"[31] and ensure that individual citizens would be influential members of the federal system of government. Because this balance between the states and the federal

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26. *See* Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869) ("[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."); Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926) ("neither government may destroy the other nor curtail in any substantial manner the exercise of its powers"); Tafflin v. Levitt, 493 U.S. 455, 458, (1990) ("under our federal system, the States possess sovereignty concurrent with that of the Federal Government"); Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) ("the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere").

27. Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869).

28. New York v. United States, 505 U.S. 144, 166 (1992); *see also* THE FEDERALIST NO. 15, at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("We must extend the authority of the Union to the persons of the citizens—the only proper objects of government.").

29. Scheiber, *supra* note 19, at 88.

30. THE FEDERALIST NO. 16, at 116 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

31. *Gregory*, 501 U.S. at 458.

government is crucial to the protection of individual citizens, any shift in economic, political or social conditions that disrupts the established equilibrium requires an adjustment to restore the balance.[32]

At that point, "the constitutional line between federal and state power . . . [that is,] . . . whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States"[33] needs to be evaluated once again. For example, the concern over the proper division of authority between the federal government and state governments has recently gained national attention due to a growing imbalance within our current federalist system.[34] This imbalance results from the struggle between the U.S. federal government's goal of promoting free trade and the individual state governments' interests in protecting their citizens, industries, and economies.

B. The Growing Imbalance of American Federalism

The integration of domestic and foreign markets through international trade agreements has led to difficulty in defining the proper role of individual American state governments in international trade policy.[35] Trade agreements have an increasing impact upon state governments primarily for three reasons. First, state economies have gradually become more reliant on international commerce as states have become more heavily involved in the international marketplace.[36] Second, there is an increased emphasis on binding state governments to obligations within international trade agreements.[37] Third, the scope of trade agreements is being enlarged to encompass areas where normally only state governments exercised jurisdiction.[38]

Although federal trade negotiators cannot ignore state sovereignty, the U.S. federal government is the primary actor in international trade

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32. *See* Laurence J. Aurbach, *Federalism in the Global Millennium*, 26 URB. LAW 235 (1994).

33. *New York*, 505 U.S. at 155.

34. *See supra* notes 1-2.

35. *See* Friedman, *supra* note 3, at 1442.

36. Friedman, *supra* note 3, at 1441; *see also* Aurbach, *supra* note 32, at 235; Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 821-822 (1989).

37. Matthew Schaefer, *Note on State Involvement in Free Trade Negotiations, the Development of Trade Agreement Implementing Legislation, and the Administration of Trade Agreements*, in LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, § 3.6 (John H. Jackson et al. eds., 1995) [hereinafter INTERNATIONAL ECONOMIC RELATIONS].

38. *Id.*; *see also infra* notes 118-136 and accompanying text for examples of how NAFTA encroaches upon areas, such as environmental and sanitary and phytosanitary, and health and safety regulations, in which only state governments previously exercised jurisdiction.

policy and has the authority to negotiate binding trade agreements that limit a state's sovereign ability to make and institute regulatory policy choices.[39] Aside from congressional representation, state input in trade negotiations is limited to advice. The fact that states have no veto power or binding advisory capacity adds to the sense of helplessness felt by states as the federal government obligates states to international trade agreements upon which state leaders can only offer advice. Therefore, as states find themselves becoming more active participants in the global marketplace, state governments are watching their ability to regulate and protect their interests come into conflict with the federal government's objective of promoting free trade.[40]

1. Is State Sovereignty Really the Price of Free Trade?

Is the federal government infringing on state sovereignty by promoting free trade? Is the federal government restricting or prohibiting state actions that affect international trade? If it is, are there any constitutional limitations on its ability to do so? Not all government officials agree that trade agreements significantly alter the existing federal balance between state and national government.[41] Some officials argue that fears of diminished state sovereignty are unwarranted because states have been operating under trade obligations for almost fifty years (since the institution of GATT in 1947).[42] These obligations have not changed to a great extent with the passage

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39. *See* Jones, *supra* note 1. In explaining how binding international trade agreements infringe upon, or place constraints on, a state's ability to regulate and protect its interests, the author notes:

> International trade commitments under NAFTA and GATT are expected to produce challenges to longstanding state regulations and legislation in many areas. Foreign competitors can claim that a state regulation or statute constitutes a trade barrier because it offers a competitive advantage or a de facto subsidy to U.S. businesses. This type of complaint, typified by the U.S.-Canada "Beer Wars," is expected to be more frequent under the broader NAFTA than under the more carefully defined GATT agreement. Other areas open to dispute include banking and insurance, the trucking industry, environmental regulations, government procurement, occupational licensing and export promotion programs.

Id. at 1.

40. *See NAFTA Implementing Legislation Hearings*, *supra* note 10, at 36 (Senator Ted Stevens explaining to Michael Kantor, U.S. Trade Representative, his concern about state sovereignty: "We are a Federal Government of limited powers with reserved powers to the States. And I fear and I am concerned about what NAFTA and the side agreements do to State powers. I think that . . . negotiated executive agreements between . . . very strong federal governments . . . are negating a lot of States' rights.").

41. Telephone Interview with Clayton Parker, Office of the U.S. Trade Representative, Washington, D.C. (Jan. 9, 1996).

42. *Id.*

of the WTO[43] or NAFTA and states have the same rights under more recent trade agreements, such as NAFTA, as under previous trade agreements.[44] Furthermore, trade agreement obligations are essentially just another form of government regulation of commerce under this nation's Commerce Clause and states have always been subject to Commerce Clause requirements.[45]

On the other hand, there is concern among state government officials that free trade is being advanced at the expense of state sovereignty because international trade agreements place constraints on those state actions that affect international trade.[46] In addition, states have no constitutional protection on which to rely if their ability to make and enforce state laws is constrained by trade agreements.[47] This lack of protection, in addition to the effects of globalization and trade agreements like NAFTA, has placed state sovereignty in a precarious position. The next section addresses the federal government's authority to restrict or prohibit international trade activity and how those restrictions affect state sovereignty.

a. Constitutional Enforcement of Trade Agreements

While it is clear that the federal government has always had the authority to impose on the states both domestic and international regulations, the federal government had not used this authority to bind the states to an international trade agreement that compromised a state's ability to independently regulate and protect its own individual interests until the signing of NAFTA. NAFTA signifies a change in this policy because the trade agreement mandates uniform regulations, thereby requiring states to regulate according to NAFTA guidelines in areas that were previously left to independent state regulation.[48] In

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43. 33 I.L.M. 1143 (1994).

44. Interview with Clayton Parker, *supra* note 41. For example, under NAFTA articles 904 and 712, each state has the ability to set its own regulatory standards under the following conditions: the standards must be consistent with requirements set out by agreements, such as those based on science; the standards must not be applied in a discriminatory manner; and, the standards must not impose undue restrictions on the free flow of trade. *See also* Shaefer, *supra* note 37, at 182 (NAFTA "grandfathers" in certain existing state measures that could otherwise violate NAFTA requirements, such as those in the services, financial services, and investment chapters, if the measures are identified within a year or two.).

45. Interview with Clayton Parker, *supra* note 41.

46. Telephone Interview with Professor Robert Stumberg, Georgetown University Law Center, Harrison Institute for Public Law (Jan. 9, 1996). His research has affirmed the states' concerns that the impairment of their autonomy under trade agreements will ultimately lead to economic problems, such as job loss.

47. *See infra* notes 54-59 and accompanying text.

48. *See supra* note 38.

addition, globalization has required states to become international economic actors. Therefore, increased regulation, on an international scale, will have greater effect on state regulatory authority than it would have in the past.

While states have traditionally had no constitutional basis to protect their sovereignty in the face of federal regulation, the larger obstacle for states in terms of protecting their sovereignty is authority the federal government possesses to bind the American states to trade agreement obligations without their consent.[49] Moreover, if state actions are viewed as negatively affecting U.S. trade obligations, they are subject to challenge by the federal government on three grounds: federal statutory preemption; unconstitutional restrictions on commerce; and unconstitutional interference under the Supremacy Clause.[50] Thus, although the federal government has not used its constitutional authority to overrule inconsistent state laws in the nearly half-century history of GATT or the five years that CUSFTA[51] has been in effect, the federal government clearly has the authority to restrict or prohibit state international trade activity.[52]

b. Authority to Bind the States

United States trade agreements are generally negotiated as either treaties[53] or executive agreements.[54] Although both are considered treaties and equally binding in international law, the distinction between treaties and executive agreements is unclear in U.S. constitutional law.[55] What is clear, however, is that an executive agreement implemented into law by Congressional enactment or executive branch

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49. It is argued by some critics that states need not be consulted during trade negotiations and have given their consent to the federal government because their interests are represented in Congress; *see generally* INTERNATIONAL ECONOMIC RELATIONS, *supra* note 37, §§ 3.2-3.3.

50. *See* Howard N. Fenton, III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 NW. J. INT'L L. & BUS. 563, 571 (1993).

51. Canadian-U.S. Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281, 293.

52. Interview with Clayton Parker, *supra* note 41.

53. *See* INTERNATIONAL ECONOMIC RELATIONS, *supra* note 37, § 3.3. Treaties are constitutionally required to be ratified by a two-thirds Congressional vote, but the Constitution makes no mention of executive agreements.

54. *Id.* With an executive agreement, the President accepts an agreement as a binding obligation of the U.S. without any congressional participation and the agreement is either self-executing, i.e., it directly gives rights to individual citizens by its own terms, or non-self-executing, i.e., requires the national government to effectuate the rights imposed by the international obligation.

55. Edmond McGovern, INTERNATIONAL TRADE REGULATION: GATT, THE UNITED STATES AND THE EUROPEAN COMMUNITY, § 2.232 (2nd ed. 1986); *see also* INTERNATIONAL ECONOMIC RELATIONS, *supra* note 37, § 3.3.

regulation pursuant to preexisting statutory authority has the same force in domestic U.S. law as a treaty.[56] Indeed, executive agreements are the principal means by which the U.S. enters into obligations under international trade agreements.[57] Therefore, because they have treaty status in U.S. law, trade agreements not only bind the states and require state governments to uphold these obligations,[58] but they also prevail over inconsistent state law.[59]

The federal government not only has the authority to bind the states to trade agreement obligations, but it also has certain constitutional mechanisms to ensure that the states uphold U.S. trade obligations. These mechanisms include statutory preemption, the Commerce Clause, and the Supremacy Clause.

i. Statutory Preemption

When the federal government enacts a statute or signs a treaty that might later conflict with state law, whether the federal law preempts existing state laws or state action in that area depends upon the federal government's intent.[60] The federal government's intent to preempt is evident when it has consistently undertaken regulatory or rule making activity in a particular area, or has acted in a manner that indicates an attempt to occupy the field.[61] If the federal government has acted with the intent to exclude state action, then the state law will be preempted unless it can be characterized as an exercise of spending or police powers.[62] However, because "NAFTA does not automatically 'preempt' or invalidate State laws that do not conform to

56. INTERNATIONAL ECONOMIC RELATIONS, *supra* note 37, § 3.3.

57. McGovern, *supra* note 55, § 2.232.

58. *See generally* INTERNATIONAL ECONOMIC RELATIONS, *supra* note 37, at § 3.3-3.4; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. e (1987) ("Since any treaty or other international agreement of the United States, . . . is federal law . . ., it supersedes inconsistent State law or policy whether adopted earlier or later.").

59. United States v. Belmont, 301 U.S. 324, 331 (1936) (holding that "the external powers of the United States are to be exercised without regard to state laws or policies.").

60. INTERNATIONAL ECONOMIC RELATIONS, *supra* note 37, § 3.6; Fenton, *supra* note 50, at 572 (the test for determining whether the state law is preempted is whether the federal government intended to preempt state action through legislative or executive trade control regimes).

61. Fenton, *supra* note 50, at 572.

62. *Id.*

NAFTA's rules,"[63] this Comment will not discuss the issue of the federal government preempting state action under NAFTA.

ii. Unconstitutional Restrictions on Commerce

It is fairly well established in today's constitutional jurisprudence that the federal government holds preeminent authority, if it chooses to exercise it, over states in almost all issues that have commercial overtones, such as international trade policy and agreements.[64] Even when the federal government has not preempted a particular area by statute or treaty, when state action in that area places an impermissible burden upon international trade, it interferes with commerce in violation of the Commerce Clause of the Constitution.[65] However, state regulation of commercial activity is usually free from the federal government's scrutiny when the state is acting as a market participant[66] instead of as a market regulator.[67] As a market participant the state's action does not impose an excessive burden upon interstate commerce.[68]

When a state regulation is claimed to impermissibly burden commerce, the state will often raise the Tenth Amendment in defense of its action.[69] The Tenth Amendment was initially held to bar the

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63. The North American Free Trade Agreement Implementation Act Statement of Administrative Action, *in* NORTH AMERICAN FREE TRADE AGREEMENT TREATY MATERIALS, Booklet No. 8 1-15, at 8 (James R. Holbein et al. eds., 1994) [hereinafter Statement of Administrative Action].

64. INTERNATIONAL ECONOMIC RELATIONS, *supra* note 37, § 3.6.

65. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

66. A state acts as a market participant when it spends money to run a proprietary enterprise or to subsidize private businesses. *See* White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983); Reeves, Inc. v. Stake, 447 U.S. 429 (1980); Hughs v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

67. A state acts as a market regulator when it enacts regulations that impose commercial barriers or discriminates against an out-of-state article of commerce in favor of local interests. *See* C&A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

68. *See* South Central Timber Development Inc. v. Wunnicke, 467 U.S. 82 (1984) (holding that the dormant commerce clause does not prohibit a state—acting as a market participant, instead of as a market regulator—from imposing burdens upon commerce within the market of which it is a participant); Trojan Technologies, Inc. v. Pennsylvania, 916 F.2d 903 (3rd Circ. 1990) (determining that the Pennsylvania Steel Products Procurement Act, which directed Pennsylvania state agencies to require use of only U.S.-made steel in public works projects, did not violate the Commerce Clause because Pennsylvania is a market participant in the steel market), *cert. denied*, 501 U.S. 1212 (1991).

69. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

federal government from actions that impaired a state's ability to perform its traditional functions.[70] Over the past twenty years, however, the Supreme Court has inconsistently applied Tenth Amendment protection to state and local governments in Commerce Clause cases.[71] This inconsistency has engendered a certain amount of legal uncertainty with respect to how much leeway states have when regulating in areas affecting commerce.

The current majority has, however, hinted at a change in the Court's Commerce Clause jurisprudence by placing greater importance on the federalist principles that the Constitution was founded on and on the Tenth Amendment.[72] In a 5-4 vote, the majority in *U.S. v. Lopez* invalidated a federal statute enacted for the purposes of regulating commerce on the grounds that it was beyond Congress' Commerce power.[73] However, unless *Lopez* signals a change in Supreme Court jurisprudence, except for the instances when a state's regulation of commercial activity is considered permissible under the market participant doctrine, states can be sure that any regulation of commercial activity that affects domestic or international commerce will be scrutinized for any burdens the regulation might impose upon the free flow of commerce.

iii. Unconstitutional Interference Under the Supremacy Clause

The Supremacy Clause establishes that the Constitution and the federal laws and treaties that flow from it are superior to state law.[74] Consequently, when state and federal laws conflict, the Constitution requires that the incompatible state law be invalidated.[75] For example, even if a federal statute implementing a trade agreement is

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70. *See* National League of Cities v. Usery, 426 U.S. 833, 842 (1976); Fry v. United States, 421 U.S. 542, 547 (1975).

71. National League of Cities, 426 U.S. 833 (5-4 decision) (holding that the structure of the federal system and the Tenth Amendment placed some limits on the federal government's power to regulate state and local government commercial activities); Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985) (5-4 decision) (overruling *National League of Cities*, the Court declined to define the breadth of Congress' Commerce Clause powers under the federal system; however, it did conclude that the Constitution did not expressly guarantee state sovereignty to the extent that it may not be displaced by a proper exercise of Congressional delegated powers); New York v. United States, 505 U.S. 144 (1992) (declining to reconsider the holding in *Garcia* for stare decisis purposes, the Court concluded that under the Commerce Clause, the federal government could not compel or order states to regulate private commercial activity because the Constitution leaves to states an inviolable sovereignty through the Tenth Amendment).

72. *See* U.S. v. Lopez, 115 S. Ct. 1624 (1995).

73. *Id.*

74. U.S. CONST. art. VI, § 2.

75. INTERNATIONAL ECONOMIC RELATIONS, *supra* note 37, § 3.3.

considered an unconstitutional interference with state power, the federal law prevails.[76] Further, federal law will prevail over incompatible state law when a statute implements a trade agreement because more reason exists to conclude that Congress, when it implements a trade agreement into domestic law, intends to carry out the obligations under the trade agreement.[77]

Whether federal law prevails under the Supremacy clause becomes a more complex issue when a third party is involved, such as a foreign subnational government whose interest may be affected by the incompatible American state law.[78] Although there are strong federalist concerns that states should have the authority to regulate and protect their citizens and economies, the Supremacy Clause reinforces the equally strong sentiment that the U.S. should have only one voice, that of the federal government, articulating its international trade policy.[79]

2. The Political Process as Protector of State Sovereignty

Some state leaders contend that the current federalist balance does not adequately protect states from federal government interference with a state's ability to freely participate in international trade activities.[80] As a result of the limited weight the Supreme Court has given the Tenth Amendment, states have effectively no constitutional protection when faced with the federal government's exercise of authority under the Commerce and Supremacy Clauses in enforcement of trade agreement obligations at state government levels.

On the other hand, there are politicians, as well as Supreme Court justices,[81] who are confident that the political process ensures that the States will not be confronted with laws which unduly burden their

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76. *Id.*

77. *Id.*

78. Julie Long, Note, *Ratcheting up Federalism: A Supremacy Clause Analysis of NAFTA and the Uruguay Round Agreement*, 80 MINN. L. REV. 231, 246 (1995).

79. *See* Fenton, *supra* note 50, at 573. *See generally* United States v. Pink, 315 U.S. 203 (1941); Hines v. Davidowitz, 312 U.S. 52 (1940); Zschernig v. Miller, 389 U.S. 429 (1967); Japan Line Ltd. v. County of L.A., 441 U.S. 434 (1979); Wardair Canada, Inc. v. Florida Dep't of Revenue, 477 U.S. 1 (1986).

80. *See* Morel, *supra* note 1. *But cf.* Dan Morales, *The Evolving Protection of State Laws and the Environment: NAFTA from a Texas Perspective*, 5 U.S.-Mex. Occas. Paper 1-54 (1994). The author suggests that the implementing legislation and the Statement of Administrative Action work together to ensure that states will have the opportunity to protect their rights. The end result is that NAFTA, as implemented by Congress, provides for more protection of state law than any previous trade agreement in U.S. history.

81. *See Garcia*, 469 U.S. at 556.

abilities.[82] According to these voices, the structure of the federal government has been constitutionally arranged for the purpose of protecting state sovereignty:[83] each state has two Senators representing its interests in Congress, states are given general control over electoral qualifications for federal elections, and states have a special role in presidential elections by means of the electoral college.[84] In addition, political pressure from state constituents is protection against congressional interference with state sovereignty.[85] For example, the Constitution's Commerce and Supremacy Clauses grant the federal government the legal authority to enforce NAFTA provisions within state jurisdictions, but federal government officials might be unwilling to confront state governmental leaders if it means that the federal officials might injure their political image, either with the state officials, or with constituents.[86] However, it is debatable whether the procedural structure of the federalist system truly acts as a check against Congress' ability to infringe on state sovereignty. A number of recent changes in how Congress works[87] have probably diminished the weight Congress gives to the legitimate interests of states.[88]

Still, state autonomy is an essential ingredient of federalism.[89] If Congress does not regulate matters affecting commerce in a way that balances state autonomy against the interests of an integrated national economy, our government will be unable to "reconcile the Constitution's dual concerns for federalism and an effective commerce power."[90] The need for an integrated national economy coincides with the federal government's interest in speaking with one voice in the

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82. *Id.*

83. *Id.* ("[T]he principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal government action.").

84. *Id.* at 564.

85. *But see* New York v. U.S., 505 U.S. 144, 169 (Justice O'Connor stating that "[a]ccountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation.").

86. *See* Dr. Earl H. Fry, *Sovereignty and Federalism: U.S. and Canadian Perspectives Challenges to Sovereignty and Governance*, 20 CAN.-U.S. L.J. 303, 311 (1994).

87. Such as the direct election of Senators, as well as the expanded interest of national interest groups, whose influence in Congress appears to be greater than that of the states.

88. *See Garcia*, 469 U.S. at 587-88 (O'Connor, J., dissenting) ("The political process has not protected against these encroachments [Congress' infringement on state sovereignty through federal legislation] on state activities, even though they directly impinge on a State's ability to make and enforce its laws.").

89. *Id.* at 588.

90. *Id.* at 581.

international arena.[91] For example, if the federal government does not ensure that U.S. obligations under a trade agreement are upheld by states, states may impose burdens upon international trade that conflict with national trade policy goals and damage the free flow of trade.[92] The Supreme Court has concluded on numerous occasions that allowing variant state policies to qualify federal trade policies would be a dangerous practice.[93]

Therefore, unless a state regulation that burdens free trade has a legitimate police power purpose, or the state is a market participant, the state regulation is prohibited by the federal government under its Commerce and Supremacy Clause authority.[94] The federal government must be able to demonstrate that it can achieve state conformity with U.S. trade obligations and goals in a global economy. If the ability of our nation to speak with one voice is impaired, the U.S. will not likely retain its position as an effective world leader in advocating free trade.

III. NAFTA FEDERAL-STATE CONSULTATION PROCESS

Because today's political process may no longer provide a state with a feasible and effective way to address its grievances regarding trade policy, each state is placed in a precarious position. Wholesale invalidation of state law potentially in conflict with federal trade goals is neither politically feasible nor good policy. If the States are consistently prohibited from regulating trade in a way that protects their interests, the balance that American federalism is founded on will never be regained.[95] NAFTA's implementation of a cooperative mechanism for state participation in federal decisions concerning international trade activities should alleviate the fears that NAFTA violates state sovereignty and restore that balance.

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91. *See supra* note 80.

92. *Id.*

93. United States v. Pink, 315 U.S. at 232 ("If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power."); Hines v. Davidowitz, 312 U.S. at 63 ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."); Zschernig v. Miller, 389 U.S. at 440 ("[State] regulations must give way if they impair the effective exercise of the Nation's foreign policy.").

94. *See* Fenton, *supra* note 50, at 572.

95. *Garcia*, 469 U.S. at 581 ("The true 'essence' of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme.").

A. NAFTA

On November 17, 1993, three years after the initiative was launched by former President Bush, the United States House of Representatives voted 234 to 200 to approve NAFTA.[96] Three days later, the United States Senate also gave its approval,[97] and on December 8th, President Clinton signed the bill authorizing the implementation of the North American Free Trade Agreement.[98] NAFTA entered into force on January 1, 1994.[99]

NAFTA is the most comprehensive international trade agreement ever negotiated.[100] It provides a solid framework for the liberalization of trade barriers throughout the Western Hemisphere and serves as a catalyst for negotiations to liberalize trade barriers on a multilateral basis.[101] Within fifteen years, NAFTA will create the world's largest integrated market for goods and services by gradually eliminating all trade tariffs between the world's largest, eighth largest and fifteenth largest national economies.[102]

However, in promoting the free movement of workers, products, and services between Canada, Mexico, and the United States, NAFTA requires greater uniformity and regulatory coordination than prior trade agreements.[103] In order to successfully integrate NAFTA member economies, trade liberalization and commercial expansion must be carried out in a nondiscriminatory manner.[104] Thus, the U.S. federal

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96. 139 CONG. REC. H10,048 (daily ed. Nov. 17, 1993).

97. 139 CONG. REC. S16,712-713 (daily ed. Nov. 20, 1993).

98. *Id.*

99. Fry, *supra* note 86, at 304.

100. H.R. REP. No. 361, 103rd Cong., 1st Sess. 1 (1993), *reprinted in* 4 U.S.C.C.A.N. 2552, 2558 (1993).

101. *Id.* All tariffs with regards to U.S. bilateral trade with Canada will be eliminated by 1999. Most tariffs in U.S. bilateral trade with Mexico will be eliminated by 2004. *Id.*; *see also* Fry, *supra* note 86, at 304-306.

102. 4 U.S.C.C.A.N. at 2558. Canada and Mexico are the United States' first and third largest trading partners. With NAFTA, the three trading partners. *Id.* With NAFTA, the three trading partners will create a combined economy of $6.5 trillion and 370 million people. *Id.* at 2731.

103. NAFTA would fail if it were possible for individual states to maintain separate regulations different than those in the NAFTA because it would be extremely difficult for member countries to have knowledge of and to comply with varying regulations. If such knowledge was required, NAFTA trade benefits would be essentially nullified because NAFTA members would find the varying regulations a deterrent to using the agreement.

104. *See* Raymond B. Ludwiszewski and Peter E. Seley, *'Green' Language in the NAFTA: Reconciling Free Trade and Environmental Protection*, in THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS, 375-395 (Judith H. Bello et al. eds., 1994).

government mandated that state laws and regulations conform to the standards set out within the NAFTA framework, thereby binding the State governments.[105]

Historically, the federal government rarely considered state regulations when negotiating international trade agreements,[106] yet it typically did protect state authority over regulatory concerns within a state's borders.[107] NAFTA, however, requires the federal government to ensure that states' health, safety, and environmental standards conform to the basic trade principles of national treatment and nondiscrimination.[108] Because this uniformity of regulation significantly narrows the state regulatory sphere, NAFTA severely limits state sovereignty.

Furthermore, if NAFTA members do not enforce these obligations on their subnational entities, conflicting state laws can be challenged by another NAFTA member.[109] That member can then seek permission to retaliate or simply take unilateral actions to gain compliance.[110] Because NAFTA countries can now challenge state laws that in the past were only constrained by the U.S. or state constitutions as trade barriers, states must be ready to defend such challenges.[111] Now more than ever, American states should be particularly concerned with defending trade agreement challenges because sanctions for noncompliance with the agreement now entail punitive tariffs, posing a costly risk to states and their industries.[112]

To gain a better understanding of why a state's leaders might view NAFTA as infringing upon their state sovereignty, this Comment now returns to the hypothetical scenario set out in the introduction. Suppose the American states affected by the new fumigation requirement decide not to comply with Mexico's new standard. Mexico is entitled to impose a standard more stringent than the international standards which bind NAFTA members in order to protect its citizens,

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105. When Congress approved NAFTA, it bound both the federal government and the states to its terms; *see* Statement of Administrative Action, *supra* note 63; Implementation Act, *supra* note 11. NAFTA subjects state laws and regulations to basic trade principles of national treatment and nondiscrimination. NAFTA, *supra* note 7, art. 301, 712.

106. Doug Farquhar, *NAFTA and Its Effect on State Environmental Policies*, *in* STATE LEGISLATURE REPORT (National Conference of State Legislatures, Denver, CO), July 1995 at 1.

107. *Id.*

108. *Id.* at 2.

109. *See* NAFTA, *supra* note 7, chp. 7; *cf.* chp. 9.

110. Morel, *supra* note 1, at 5.

111. Farquhar, *supra* note 106, at 7.

112. *See* NAFTA, *supra* note 7, ch. 19.

as long as the standard is imposed in a nondiscriminatory manner.[113] After negotiations with Mexican trade officials, the U.S. government may agree with Mexico's new standard and may decide to enforce it against the states.[114]

The only method of protection that the states could feasibly employ, for their cherry industries and for themselves, is the political process.[115] The states cannot bring a claim against the U.S. government,[116] nor can they protest the Mexican standard, unless the U.S. government agrees to bring the grievance before a NAFTA panel.[117] Thus, without any protection, the states and their industries face potentially debilitating economic consequences. As this hypothetical example indicates, the integration of individual state regulations into NAFTA standards is one example of how the federal government's trade policy has encroached upon states' authority, which was previously unaffected by international trade obligations.[118]

NAFTA standards rules affect individual states by inviting scrutiny of state regulations that may restrict international trade.[119] This scrutiny is of particular concern to states because it affects authority to regulate in such areas as the environment, natural resources, and consumer safety.[120] Examination of NAFTA Sanitary and Phytosanitary (S&P) measures, one set of standards rules contained within NAFTA, reveals some of the risks encountered by states when regulating in the face of existing trade agreement obligations.[121]

Although NAFTA members may "adopt, maintain or apply any sanitary or phytosanitary measure necessary for the protection of human, animal or plant life or health in its territory,"[122] state standards are compromised by the standards harmonization process of NAFTA.[123] The NAFTA standards harmonization process carries serious implications for states trying to adopt, maintain or apply S&P measures. First, a NAFTA member can impose a higher S&P

113. NAFTA, *supra* note 7, art. 712.

114. Implementation Act, *supra* note 11, § 102(b)(2).

115. *See supra* notes 80-94 and accompanying text.

116. *Id.*, § 102(c).

117. *Id.*

118. Paul M. Orbuch and Thomas O. Singer, Ph.D., International Trade, the Environment, and the States: An Evolving State-Federal Relationship 1-22, 1 (1995) (unpublished manuscript, on file with the *Seattle University Law Review*).

119. *Id.* at 3.

120. *Id.*

121. NAFTA, *supra* note 7, art. 712.

122. *Id.*

123. Orbuch and Singer, *supra* note 118, at 1.

standard than the international standard,[124] as long as the higher standard is necessary for the protection of human, animal or plant life,[125] is based on scientific principles,[126] and does not "unjustifiably discriminate between [that member's] goods and like goods of another Party."[127] Second, the NAFTA member objecting to the higher standard bears the burden of demonstrating that the higher standard has no scientific validity.[128]

There is, however, one distinct advantage associated with a NAFTA member's ability to impose a higher standard. States can provide additional protection for their citizens and interests because NAFTA does not prohibit a state from maintaining standards higher than those of the agreement.[129] NAFTA only requires states to comply with the above mentioned rules when determining the level of standard imposed.[130] On the other hand, there are several disadvantages involved with the ability to impose a higher standard. First, a higher standard could easily be used to cloak a NAFTA member's efforts to restrict a particular import from another NAFTA member. Second, the legitimate use of a higher standard may trigger a challenge if it is viewed as a discriminatory trade barrier subject to challenge. Thus, an American state's standards that are more restrictive than those maintained by a NAFTA trading partner are subject to international trade challenges if they prevent the sale of noncomplying goods.[131]

Turning back to the scenario set out in the introduction, to rebut Mexico's claims that the regulation is necessary for health and safety purposes, the American states could certainly argue that Mexico's heightened S&P measure "creates a disguised restriction on trade between the Parties."[132] However, the affected states would then have the difficult burden of proving that the heightened standard is not based on scientific principles and constitutes an obstacle to free trade.[133] Consequently, it is difficult for a state to regulate in a way that protects its interests. Further, the ability to impose higher standards potentially could be utilized by other NAFTA members as

124. NAFTA, *supra* note 7, art. 713.
125. *Id.* at art. 712.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at art. 713.
130. *Id.*
131. *Id.* at art. 712.
132. *Id.*
133. *Id.*

an effective trade weapon to debilitate American industries. This scenario under NAFTA S&P standards is one example of how federal trade policy infringes upon state authority previously unaffected by international trade obligations[134] and constrains a state's ability to regulate its own interests.

Limitations on state sovereignty, such as the ones imposed under NAFTA's S&P standards, are at the root of the growing imbalance within our current federalist system. As trade arrangements like NAFTA increase global economic integration, the struggle within our federalist system between the interests of the state and federal governments could increase and potentially cripple the federal system upon which our nation's government is founded. The question then becomes how will the balance be regained? Is there a mechanism in place to safeguard against the growing imbalance? The NAFTA federal-state consultation process is one such safeguard against the growing imbalance.[135] The administrative consultation procedure set out in the NAFTA legislation should help delineate the appropriate division of authority between state and federal governments when international trade policy intersects with traditional state roles in protecting their interests.[136]

B. Relationship of NAFTA to State Law

NAFTA is a nonself-executing congressional executive agreement entered into by the President under the authority of the Omnibus Trade and Competitiveness Act of 1988.[137] NAFTA's provisions are incorporated into United States domestic law through federal statute—the NAFTA Implementation Act.[138] The NAFTA implementing legislation, approved by Congress when it passed NAFTA, determines the legal relationship between NAFTA, federal law, and individual state law.[139]

The terms of NAFTA's implementing legislation are as important as the terms of the agreement itself because NAFTA, as a trade agreement, requires a separate law to be brought into effect. Indeed, of particular importance to both federal and state leaders was the federal-state consultation process contained within NAFTA's

134. Orbuch and Singer, *supra* note 118, at 1.

135. Implementation Act, *supra* note 11, § 102(b)(1)(B).

136. *Id.*

137. *See* Benson, *supra* note 1, at 572; *see also* discussion of executive agreements as authority in U.S. law, *supra* notes 52-58 and accompanying text.

138. Benson, *supra* note 1, at 572.

139. Implementation Act, *supra* note 11, § 102(a) and (b).

implementing legislation.[140] The federal government, prompted by states' concerns over potential legal threats raised by NAFTA, made a commitment to state sovereignty through NAFTA's implementing legislation.[141] Thus, NAFTA presents opportunities as well as conflicts. Although there is clearly a conflict between the desire of individual states to protect their interests and the federal government's pressure upon states to conform with NAFTA standards, NAFTA is the first U.S. trade agreement in which states have the "opportunity to participate in the resolution of trade challenges that affect state law."[142]

1. NAFTA Statement of Administrative Action

The NAFTA Statement of Administrative Action describes the Administration's definitive interpretation of NAFTA and the actions proposed to implement the agreement.[143] The Statement of Administrative Action is especially significant to the States because it contains the federal government's declaration that it is "committed to carrying out U.S. obligations under the NAFTA, as they apply to the States, through the greatest possible degree of state-federal consultation and cooperation."[144] In addition to assisting states in conforming their laws and practices to NAFTA, the administration, through the United States Trade Representative (USTR), has pledged to involve the States to the greatest possible extent in the development of United States positions on NAFTA issues by: providing for the reciprocal exchange of information and advice between the States and the Executive Branch regarding any matter under NAFTA that may have a direct effect on state interests; seeking advice from the States and taking such advice into account when formulating U.S. positions; and permitting state representatives to assist in relevant federal agency preparations for such work.[145]

The federal government also recognizes that each state may need advice and input regarding NAFTA trade-related matters that affect its interests. In order to "take into account the views of state governments in implementing the NAFTA with respect to any matter that may directly affect their interests,"[146] the USTR has designated

140. Implementation Act, *supra* note 11, § 102(b)(1)(B).
141. Implementation Act, *supra* note 11, § 102(b)(1).
142. Morales, *supra* note 80, at 1.
143. Statement of Administrative Action, *supra* note 63, at 1.
144. *Id.* at 9.
145. *Id.*
146. *Id.* at 10.

a "NAFTA Coordinator for State Matters."[147] The NAFTA Coordinator, serving as a liaison between the Executive Branch and the States, has an obligation to relay advice and information to states on NAFTA trade-related matters that affect a State's interests, such as, "implementation of the NAFTA in any area . . . in which the States exercise concurrent or exclusive legislative, regulatory or enforcement authority; dispute settlement proceedings challenging state measures; and, . . . inquiries from other NAFTA countries concerning state measures."[148] This obligation reveals the federal government's cognizance that state standards affected by NAFTA cannot be modified without consultation with the affected states.

States also have a duty in this consultative procedure. Each state must communicate with the federal government about NAFTA trade-related matters that affect state interests.[149] The governor's office in each state has the responsibility of designating their own NAFTA coordinator to transmit information to the USTR and to disseminate information received from the USTR to relevant state offices.[150] In addition, the Statement of Administrative Action calls for the governors to "jointly designate one or two Governors as principal point(s) of contact with USTR on particular matters affecting state interests."[151] Thus, the Statement of Administrative Action specifically addresses "the importance of coordination and consultation with state governments in areas of special importance or sensitivity to them, including with regard to state laws protecting human, animal or plant health or the environment."[152]

2. NAFTA Implementation Act

NAFTA is the first treaty through which states have been guaranteed the right to be informed and to participate in trade matters affecting the states.[153] In response to states' concerns about the potential legal threats raised by NAFTA,[154] the NAFTA implement-

147. *Id.* at 9.
148. *Id.* at 9-10.
149. *See id.*
150. *Id.* at 10.
151. *Id.*
152. *Id.*
153. Schaefer, *supra* note 37, at 182.
154. *See* Morales, *supra* note 80, at 14-15 (describing the background against which the NAFTA federal-state consultation process was developed: Throughout the NAFTA ratification process, states were cognizant of a particular GATT dispute settlement case which affected state laws and in which the states did not receive notice nor the opportunity to participate. Thus, the states were seeking a more involved role in future international trade disputes. As a result, the

ing legislation contains many specific provisions that guarantee states the ability to protect their laws: the right to be notified if a state law is challenged; the right to participate in the defense of state laws; and, the right to be notified of proceedings other than challenges that have the potential to affect states.[155] The federal-state consultation provision contained within the Implementation Act, as well as provisions set out within the Statement of Administrative Action reflects the federal government's commitment to increasing communication with the States about trade-related matters that affect their interests.[156]

The NAFTA consultative framework is codified under section 102(b)(1)(B) of the bill as the Federal-State Consultation Process. This consultative framework for communications with states in international trade matters reinforces the administration's goals and objectives contained within the Statement of Administrative Action and establishes procedures for the following:

> 1) grandfathering or revising state laws and regulations consistent with NAFTA to avoid conflicts with the agreement;
> 2) informing states on matters under the agreement affecting states;
> 3) providing opportunities for states to advise and inform the U.S. trade representative on agreement issues affecting states;
> 4) responding to the information and advice received from the states in developing the United States' positions on agreement issues affecting states; and,
> 5) involving states to the greatest extent practicable in developing the United States' positions regarding agreement issues affecting states.[157]

USTR worked with the states in developing a federal-state communication system regarding international trade matters.).

155. Implementation Act, *supra* note 11, § 102(b)(1)(2) and (c); *see also* Statement of Administrative Action, *supra* note 63, at 11 (reinforcing state involvement by stating that

> where a state measure is at issue, USTR will invite state representatives to attend panel hearings and, where appropriate, to make presentations to the panel on the state measure concerned . . . . Should a panel determine that a state measure is inconsistent with the NAFTA, USTR will work cooperatively with the state concerned to fashion a mutually agreeable settlement of the dispute in conformity with U.S. obligations under the Agreement.).

156. Implementation Act, *supra* note 11, § 102(b)(1).

157. *Id.* at § 102(b)(1)(B).

> The Trade Representative shall establish within the Office of the United States Trade Representative a Federal-State consultation process for addressing issues relating to the Agreement that directly relate to, or will potentially have a direct impact on, the States. The Federal-State consultation process shall include procedures under which - (i) the Trade Representative will assist the States in identifying those State laws that may not conform with the Agreement but may be maintained under the Agreement by reason of being in effect before the Agreement entered into force;

The Federal-State Consultation Process affirmatively establishes the USTR's obligation to confer with states regarding NAFTA issues that "directly relate to or that may have a direct effect on [States]."[158] Thus, in conformity with the established NAFTA consultative framework, the federal government is committed to carrying out U.S. obligations under NAFTA, as they apply to the States, through the greatest possible degree of federal-state consultation and cooperation.

The impact of NAFTA upon state law is remarkable and will only become more pronounced as trade among the United States, Canada, and Mexico increases.[159] Each state's concern for protecting its economies and citizens need not be compromised by the goal of free trade. Congress and the state legislatures will each play an important role in protecting state laws and sovereignty under NAFTA.[160] The expanded federal-state cooperation and communication procedures established by the NAFTA Statement of Administrative Action and Implementation Act and implementing legislation are the tools by which the U.S. government can realize the full economic and cultural benefits of free trade while preserving states' autonomy.

IV. SAFEGUARDS FOR STATE SOVEREIGNTY

Do the States have the ability to safeguard against limitations placed upon their regulatory authority if the NAFTA consultative framework fails and the federal government does not uphold its obligations to states? In the hypothetical scenario, for example, if the

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(ii) the States will be informed on a continuing basis of matters under the Agreement that directly relate to, or will potentially have a direct impact on, the States;
(iii) the States will be provided opportunity to submit, on a continuing basis, to the Trade Representative information and advice with respect to matters referred to in clause (ii);
(iv) the Trade Representative will take into account the information and advice received from the States under clause (iii) when formulating United States positions regarding matters referred to in clause (ii); and,
(v) the States will be involved (including involvement through the inclusion of appropriate representatives of the States) to the greatest extent practicable at each stage of the development of United States positions regarding matters referred to in clause (ii) that will be addressed by committees, subcommittees, or working groups established under the Agreement or through dispute settlement processes provided for under the Agreement.

Id.

158. Statement of Administrative Action, *supra* note 63, at 9.

159. Chile will soon become a member of NAFTA. *See* U.S. Dep't. of State Dispatch, "Post-Summit Priorities in the Hemisphere," Vol. 6 (1995).

160. *See generally* Implementation Act, *supra* note 11; *see also* Statement of Administrative Action, *supra* note 63.

U.S. government agrees with Mexico that the American states' actions are incompatible with NAFTA's obligations, under NAFTA's federal-state consultation process, the U.S. government is committed to the task of working with the affected states to help them comply with NAFTA. The language of NAFTA, however, does not create a constitutional requirement that the federal government actually consult with the states. Nor do the states have any recourse, other than the political process, to ensure that the federal government meets its consultation obligation. Thus, the affected states in the hypothetical scenario would find themselves in a precarious position if the U.S. government sided with Mexico and did not honor its obligation under the NAFTA consultative framework. Due to the lack of existing constitutional safeguards against infringement on state sovereignty, each state should take the responsibility to utilize the federal-state consultation process to ensure that its interests are protected.

Although the NAFTA federal-state consultation process is not without flaws, it does provide a framework from which the States and the federal government can build an appropriate safeguard for state sovereignty that will restore the balance of American federalism. The NAFTA federal-state consultation process and the U.S. government's commitment to consult with states on trade related issues promise to eliminate much of the guesswork from federal-state communications concerning international trade policy. For example, the USTR is obligated to communicate each state's responsibilities in a timely manner so that each state has an opportunity to comply and to notify others within the state of these obligations.[161] The NAFTA consultative framework also provides each state with definite procedures, such as the opportunity to submit information regarding trade related matters that impact the states to the USTR[162] and other points of contact, such as the NAFTA coordinator,[163] to ensure that states have the chance to preserve their regulatory authority.

Communication between the federal government and each state can be improved upon to further safeguard against the failure of the consultation process and limitations on state regulatory authority. There are several ways in which communication between the two powers can be enhanced, thereby increasing the likelihood of success for the consultation process. First, the federal government should actively foster state government input. Partnerships between federal

161. Morales, *supra* note 80, at 18.
162. Implementation Act, *supra* note 11, § 102(b)(1)(B)(iii).
163. *See* Statement of Administrative Action, *supra* note 63.

and state regulatory authorities will provide an important avenue for state participation in fulfilling trade agreement obligations.[164] Second, the federal government should develop other mechanisms for communicating with state governments to achieve common goals under trade agreements.[165] Finally, the federal government should support and encourage bilateral and trilateral communications between subnational governments.[166] For example, in the hypothetical, Washington State and Mexico should communicate regarding the appropriate fumigation requirements for cherries. This type of communication will benefit state governments from both sides.

Not only will more effective utilization of the NAFTA consultative process benefit both state and federal governments, but if states also become more involved in the established administrative process, the federal government will be able to make more informed policy decisions by listening to and considering state input. Federal-state relations in implementing NAFTA are likely to be cooperative in nature.[167] Therefore, if the federal government and the states meet their obligations under the NAFTA federal-state consultation process, NAFTA will preserve state sovereignty while enhancing international trade.

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164. *See* Enrique Manzanilla, The Future for State/Federal Partnerships in the Environment, Address Before the Lyndon B. Johnson School of Public Affairs Conference on The Impacts of Trade Agreements on State/Provincial Laws (Nov. 10, 1995) (transcript available in Univ. of Texas at Austin Lyndon B. Johnson School of Public Affairs Library).

165. *Id.*; *see also* Robert Stumberg, Balancing Democracy & Trade: The Impact of GATT & NAFTA on State Law, Address Before the Lyndon B. Johnson School of Public Affairs Conference on The Impacts of Trade Agreements on State/Provincial Laws, (Nov. 10, 1995) (transcript available in Univ. of Texas at Austin Lyndon B. Johnson School of Public Affairs Library). Stumberg asserts that strategies for balancing democracy and trade should include the following:

> (1) Internal Policymaking process: identify policy alternatives, elicit a record of testimony and comments on the alternatives, write a report that establishes the purpose and necessity for the approach chosen;
>
> (2) Upward Harmonization Process: shared environment compacts, shared model policies with an interactive drafting process, cooperative code revision process for after-the-fact harmonization;
>
> (3) Drafting: articulate a recognized policy purpose, coordinate standards with those of other states or federal law, meet requirements for general trade agreement exceptions, stay within specific US reservations, avoid explicit trade restraints; and
>
> (4) Government relations: create a NAFTA review commission with state representation and meaningful standards of review, share information across separations of power (governor, agencies, legislature, attorney general), create an Internet dissemination system to overcome the bottlenecks between USTR, governors' trade representatives, and the rest of state government.

Id.

166. *See* Manzanilla, *supra* note 164.

167. Interview with Clayton Parker, *supra* note 41.

V. CONCLUSION

Despite concerns that NAFTA will impermissibly violate state sovereignty, it is possible to promote free trade and to preserve state sovereignty under NAFTA. However, to maintain an appropriate balance between the federal government's NAFTA obligations and the sovereignty of the fifty states, the existing relationship between federal and state governments' conflicting interests must be adjusted. One way to adjust the balance is through consultation and cooperation between the federal and state governments.

While the federal government has no legal duty to consult with the states, the creation of the NAFTA federal-state consultation process represents an awareness by the federal government of the importance of consulting with states about U.S. trade policy, and a willingness to do so. In order for the consultation process to work successfully, each state must take responsibility for communicating with the federal government about trade issues that affect its interests. If both federal and state leaders work together and utilize the NAFTA federal-state consultation process, the American federalist system will stand ready to face the challenges of globalization.