

**IN THE MATTER OF:**

**NAFTA RESERVATIONS IN THE AREAS OF HEALTH  
CARE**

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**OPINION PREPARED BY DR. BRYAN P. SCHWARTZ**

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NAFTA Reservations in the areas of health care.

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I was asked recently to prepare a legal opinion that briefly identifies issues in connection with NAFTA Annex I and II that might reasonably be of concern to the Canadian Health Coalition.

OVERVIEW

To the extent that NAFTA applies to a health sector, it would permit for-profit U.S. enterprises to enter and operate in Canada. Annex II of NAFTA shields health care from the full force of NAFTA, but only to the extent that "it is a social service" that is maintained or provided "for a public purpose".

The meaning of the Annex II reservation is unclear.

Annex II probably protects physician care that is covered by provincial health plans. But, if a province permits even a few Canadian doctors to operate outside of the publicly-funded insurance plans, the door may be open for U.S. enterprises to enter in large numbers and manage clinics (whose front-line staff would still be Canadian residents) on a purely commercial basis.

In areas where private providers are permitted to "extra bill" (e.g., physiotherapists in British Columbia), it is not clear whether the service will be regarded as being for a "public purpose". There is a good chance, but no guarantee, that the predominantly public character of the funding will bring the services within the protection of Annex II.

To the extent that specific services are not listed, or removed, from the scope of insured services under provincial plans, NAFTA may guarantee the right of U.S. commercial enterprises to enter the market or expand their presence. Cosmetic surgery that is not required for any therapeutic purpose, for example, may fall outside the Annex II. So might annual check-ups if a province chooses to delist them.

Hospital services (food, laundry, diagnostic) involve a great many gray areas. It is not clear how a NAFTA dispute-settling panel would view various services that are paid for from public funds but whose providers are, in many cases, for-profit commercial enterprises.

There are strong arguments that Annex II does not shield areas in which government involvement is limited such as dental care, chiropractic services and psychological counselling.

U.S. commercial providers may use NAFTA to challenge government policies that favour the use of not-for-profit service providers. The fact that the provider is not-for-profit will not necessarily bring every service it offers with the protection of Annex II.

The United States, Canada and the Province of Ontario have already released very different interpretations of what kind of services are "for a public purpose". The U.S. interpretation might give Annex II a very narrow scope. The ultimate decision would rest with a NAFTA dispute-resolution panel.

The existence of gray areas will likely encourage U.S. providers and their federal government to put political and economic pressure on Canada to open up large areas of the health care sector. In some cases, disagreements over the interpretation of Annex II may be referred to dispute-settling panels. Canada may win some cases and lose others. As the softwood lumber saga illustrates, even winning cases does not always relieve the pressure from the United States.

Provinces can shield their existing measures that are inconsistent with NAFTA by listing them in Annex I. The deadline for doing so is March 31, 1996.

Advocacy groups who are concerned about the impact of U.S. for-profit enterprises on the economics and politics of health care might pursue several options.

One option would be to ask the federal government to attempt to negotiate a letter of understanding with the United States and Mexico on the meaning of the Annex II reservation. To provide the federal government with some negotiating leverage some provinces might announce their intention to list a massive number of reservations in Annex I.

Failing a negotiated understanding with the United States and Mexico, Canada could further develop and unilaterally pronounce its own interpretation of Annex II. Doing so would at least make it clear that Canada has not acquiesced in the very narrow interpretation offered by the United States Trade Representative.

In formulating its own interpretation of Annex II, the federal government could be urged to consult extensively with interested provinces and health-care advocacy groups.

Advocacy groups concerned about the impact of NAFTA in the health care sector could actively consult with sympathetic provincial governments about what kind of reservations should be added to Annex I. Even in the most optimistic scenario, Annex II will leave a number of health care areas unprotected from the full force of NAFTA and some governments might therefore wish to protect certain existing measures under Annex I.

### ANALYSIS

#### The Effect of NAFTA in the Absence of Reservations

1. In the absence of international agreements, a state would be free under international law to manage its economic affairs as it sees fit. Accordingly, Canada's federal level of government and its provinces would have almost unconstrained authority to exclude foreign competitors from any sector of the economy. The two major trade treaties that limit Canada's sovereignty in the service area are GATS, which is part of the world-wide GATT system, and the NAFTA treaty among Canada, the United States and Mexico.

2. The General Agreement on Trade in Services (GATS) is the latest global treaty on trade in services. It requires that countries accord "national treatment" to foreign individuals and enterprises only in such sectors as each country specifically chooses to list.

3. The "Services Chapter" of NAFTA imposes its norms on service sectors unless they are specifically exempted by "reservations". The norms are binding on Canada and the provinces (and their counterparts in the United States and Mexico) and include these:

- national treatment (Article 1202): that is, Canada or a province must extend the best treatment it gives to a Canadian provider to any U.S. or Mexican provider;

- most-favored-nation treatment (Article 1203): Canada or a province must extend the best treatment it gives to a provider from any other foreign state to any U.S. or Mexican provider;
- no requirement of local presence: Canada and its provinces cannot require a U.S. or Mexican service provider to have a "local presence" (such as a representative office).

4. The norms listed above, if applied to areas such as health care, would give a U.S. provider the right to enter an area and compete, without discrimination, with Canadian providers. The U.S. would have a valid complaint if a measure was intended to discriminate against a U.S. provider. The U.S. might even have a valid complaint against a measure that is not discriminatory by design or intent but which has the practical effect of placing greater burdens on U.S. providers.

5. The "Investment Chapter" of NAFTA, Chapter 11, contains similar norms. It also prohibits:

- performance requirements: such as a requirement that a U.S. provider purchase a certain percentage of its supplies from Canadian producers, or that the U.S. provider share some of its technology with local participants;
- local management requirements: Canada or a province cannot require a foreign investor to include a certain number of Canadian nationals on its senior management team.

6. Both the Services Chapter and Investment Chapter of NAFTA authorize foreign companies to invest and manage local activities. They do not authorize the "import" of U.S. or Mexican labour to carry out the activities. The only movement of persons that is permitted is the temporary entry of business people, including professionals.<sup>1</sup> U.S. doctors whose practice is based in the United States have the right, under NAFTA, to make visits to Canada for the purposes of providing professional services. NAFTA would allow countries to put numerical limits on the total number

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<sup>1</sup> NAFTA, Chapter 16.

of visits permitted in a year. In practical terms the biggest impact of NAFTA in areas such as health care would be the entry of U.S. investors and managers rather than the influx of front-line deliverers of health care.<sup>2</sup>

7. Article 1207 of NAFTA allows Canada or individual provinces to maintain existing "quantitative restrictions" in the service area (e.g., limiting the number of television licenses issued in an area). Canada or a province can also create a new quantitative restriction, but:

- Each quantitative restriction, whether by a province or the federal government, must be listed in Annex V of NAFTA;
- No quantitative restriction is permissible if it discriminates against U.S. or Mexican providers;
- Canada would be obliged to engage in negotiations with the U.S. and Mexico, at least every two years, on the reduction or removal of the quantitative restriction.

7.1. So if Canada or a province were alarmed by the extent to which a sector were becoming privatized or commercialized it would be able to react by limiting the number of private market entrants and perhaps limit the amount of their activity as well. But the U.S. could demand that Canada promptly enter into negotiations to reduce or eliminate those restrictions.

8. Canada has made a number of reservations to the application of NAFTA to various service sectors. These reservations block the application of the basic norms of NAFTA. In Annex II of NAFTA, Canada has provided that NAFTA's basic norms do not apply to the extent that a "social service" is provided "for a public purpose".

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<sup>2</sup> It should be recognized that some health care services can be delivered across international boundaries; X-ray or lab results could be transmitted across borders and interpreted by U.S. providers. With sophisticated technology it would be possible for a physician in the United States to view a patient through a video transmission, and provide advice to a Canadian physician who is performing a diagnosis or even surgery. To the extent that NAFTA applies with full force, there will be enhanced opportunities for U.S. commercial enterprises to engage in such cross-border services.

9. The meaning of the "social services" reservation in Annex II has become a controversial issue. Some provinces and advocacy groups have raised concerns that Annex II will not adequately restrain the increased presence and influence of U.S. for-profit participants in such sensitive areas as health care and education.

10. Whether Canada or a province welcomes foreign entrants is essentially a political value judgment.

10.1. A government might believe that increased free trade will produce the following benefits:

- More choice for consumers and possibly lower prices and better service due to competitive pressures;
- An influx of new methods and technologies that can be borrowed and adapted by local enterprises;
- Reciprocal opportunities for Canadian providers to compete in foreign markets;
- Economic growth and perhaps more job opportunities may result from expanded opportunities for economic exchange.

These considerations are well-known and constitute the underlying philosophy of NAFTA as a whole.

10.2. But Canada or a province might oppose foreign entry and competition in some sensitive sectors, such as health care, for the following reasons:

- A government might want a single-tier publicly controlled system. A single-tier system might be seen as more equitable (access to health care does not vary with wealth). It can also be argued that if better-off citizens must use the same system as everyone else they will be more willing to support government measures, including taxation, needed to ensure that the system is of high quality. Under a two-tier system the wealthy might use the private tier and allow the public tier to deteriorate;
- A government might tolerate a few private operations on the fringe (e.g., doctors who operate entirely outside of medicare). However, opening up the market to U.S. entrants might expand the fringe into a massive part of the system;

- A government might believe that it can observe and police a sector better if all aspects of it, including management, are within the borders of the province or at least Canada.
- If the public policy norms in an area include an issue such as maintaining patient confidentiality, a government and its people may feel safer if the information is never shipped outside of the jurisdiction where leaks will be hard to detect and where offenders might escape the reach of Canadian law;
- A government might believe that if service providers are all members of the local community they will not be motivated solely by profit but, by a concern for fellow-members of the polity. Corporate management will arguably put more emphasis on consumer safety or environmental protection if the adverse consequences of corporate decisions are visited on management's own neighbours;
- Once foreign providers are in a field, the range of policy options will be less. In particular, it may no longer be practical to nationalize an industry. NAFTA requires that a province must compensate U.S. or Mexican investors who are injured by a "nationalization";
- The sector might be one in which the community is attempting to express and affirm the distinctive values of the local community. It is sometimes argued that the public health system is part of the Canadian national identity so the system should be dominated by public authorities or at least by Canadian nationals.

#### The Effect of Reservations

11. As mentioned earlier, NAFTA allows governments to unilaterally exempt themselves from certain aspects of the Services Chapter. These exemptions are called "reservations". They may be inserted in either:

- Annex I of NAFTA, which exempts certain existing measures; or
- Annex II of NAFTA, which exempts entire sectors or subsectors.

12. Annex II permits a Party to exempt "any measure" in a sector or subsector from any or all of the basic norms applying to services and investment.

13. An exemption under Annex II need not be restricted to existing measures. Canada could have exempted whole categories of governmental activity. The exemption can shield both existing activities and new ones that are created after NAFTA came into effect.<sup>3</sup>

14. Annex II does not explicitly say whether it protects provincial or state measures, as opposed to only shielding measures by the central government. The understanding among both governments and commentators appears to be that Annex II does extend to state measures.<sup>4</sup>

15. Annex II came into force at the same time as NAFTA as a whole. It is too late for any party, including Canada, to change unilaterally what is already contained in Annex II. Formally amending NAFTA is possible, but would be difficult to procure. The only realistic options, if Canada or the provinces are concerned about the limits of Annex II, are:

- For Canada to negotiate and conclude a "letter of understanding" with the United States and Mexico on the meaning of the "social services" reservation;
- For anxious provinces to protect their existing measures from the full force of NAFTA by listing them as exemptions in Annex I.

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<sup>3</sup> See Article 1108(3), authorizing the use of Annex II to make reservations from the Investment Chapter, and Article 1206(3), authorizing reservations from the Services Chapter.

<sup>4</sup> "...it has been agreed that reservations respecting the sections and activities listed in NAFTA Annex II apply to provincial, state and local, as well as to federal, laws; Johnson, The North American Free Trade Agreement: A Comprehensive Guide, p. 309. In agreement is Appleton, Navigating NAFTA.

16. A province might believe that Annex II provides inadequate protection for some of its social services. If so, that province can choose an alternate route of blocking the application of NAFTA. Until March 31, 1996 (the deadline was originally earlier, but was extended by agreement of the NAFTA partners) a province can exempt existing measures from the Investment and Services norms of NAFTA.<sup>5</sup> The province must list the measure in Annex I.

17. One of Canada's reservations in Annex II reads as follows:

"Description: Cross-border Services and Investment".

"Canada reserves the right to adopt or maintain any measure with respect to the provision of public law enforcement and correction services, and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health and child care."

The same words have also been adopted in an Annex II reservation by the United States and by Mexico.

18. Canada has spelled out that its reservation on social services blocks the application of all of the basic norms in the Investment Chapter and Services Chapter of NAFTA, which (to recall once again) are:

- National treatment;
- No requirement of local presence;
- No requirement of local membership in senior management.
- Most favored nations;
- No performance requirements.

The United States and Mexico have limited the scope of their reservations; they block only the application of the first three norms and not the last two.

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<sup>5</sup> The reservation will cover measures that are amended, unless the amended version is more trade-restrictive than the measure originally listed in Annex I; NAFTA, Article 1206(3).

The Current Controversy

19. On November 29, 1995 the publication "Inside Nafta" include a story entitled "Canada, Provinces Fight Over Services Exception as Deadline Nears". The article's key points will now be reviewed.

19.1. Federal position on 31 January 1995: Annex II will be given a very broad interpretation.

- In a letter dated January 31, 1995, Mr. John Weekes, a senior federal official, told the provinces that Annex II should receive "the broadest possible interpretation including a very broad interpretation of what constitutes a public purpose";
- Mr. Weekes told the provinces that the phrase "public purpose" was deliberately left undefined in order to allow for such a broad interpretation;
- Mr. Weeks told the provinces that there was no need for them to add additional reservations in Annex II.

19.2. The U.S. suggests a much narrower interpretation of the scope of the reservation in Annex II.

- The United States Trade Representative sent a list of "guidelines" to state governments to assist them in determining whether they should protect any existing measures under Annex I;
- States were told that the Services and Investment Chapter only applies to "the provision of 'government' services (i.e. law enforcement, correctional services, social welfare, etc.) by NAFTA investors/service providers if the state allows private providers to offer similar services on a commercial basis."

19.2.1. The implications of the U.S.T.R. statement are not at all clear. At its extreme, it would mean that if any part of a sector is operated "on a commercial basis" even the governmental part of the sector would be subject to the full force of NAFTA. It is doubtful that the U.S.T.R. intended to make such an extravagant claim but it would be reassuring to have some clarification from the U.S.T.R. himself on this point.

19.2.2. The U.S.T.R.'s statement certainly does suggest that NAFTA applies to a "private provider" who is operating on a "commercial basis". What degree of government funding or regulation is sufficient to establish that the service is provided "for a public purpose" rather than on a "commercial basis"?

19.3. September 22 1995: Federal officials acknowledge possible limitations in the scope of the Annex II reservation, but continue to be optimistic that the reservation will be interpreted in a broad Manner.

In a letter to provincial trade representatives, reprinted in "Inside NAFTA", Mr. Douglas Waddel made the following points:

- As Mr. Weekes pointed out in his January 31 letter, the scope of the "social services" reservation is very broad. "Public purposes" was deliberately left undefined to allow for the broadest possible interpretation;
- Whether a service is being provided "for a public service" depends largely on how a country's own government views the situation;
- In some cases, a government will say explicitly that it is intervening in an area because the service is being provided "for a public purpose";
- In other cases, it can be inferred from the circumstances that a government has a "public purpose" view of a service;
- With respect to health services the "coverage of a service under a public health regime" [that is, government-operated health insurance] would be an important factor in showing that the service is "for a public service";
- Other types of government control and intervention" would also be relevant;
- To take a particular example, it is not clear whether cosmetic surgery that is not covered by government-operated insurance in Canada would be considered as being "for a public purpose";

- To the extent that professional services are not provided "for a public purpose", Annex II would not apply and NAFTA would ordinarily prohibit Canada and the provinces from requiring service providers to meet citizenship and residency requirements. Provinces might wish to shield such requirements by listing them in Annex I, but should be careful to say that their intent is not to in any way limit the scope of Annex II;
- Provinces should only list measures in Annex I where it is strictly necessary to do so. "Indiscriminate listing" would frustrate the purpose of Annex I, which is only to identify and protect matters not already protected by Annex II.

19.4. October 3, 1995: Ontario criticizes Mr. Weekes' letter.

The provincial government of Ontario took issue with Mr. Weekes' letter. In a comment dated October 3, 1995, Ontario argued that:

- Governmental intent, whether expressly stated or implied through the overall pattern of funding and regulation, does not determine whether a service is offered for a "public purpose";
- Any tests based on governmental activity in an area will leave unprotected entire subsectors such as dental care and psychological services, which are delivered by private operators on a commercial basis and which are not publicly funded;
- For the purposes of coming under the Annex II reservation "the service speaks for itself, as it were";
- It is dangerous for Mr. Weekes to introduce the tests he suggested because they will narrow the scope of the protection offered by Annex II.

19.5. Oregon seeks to add a broad list of exceptions to Annex I

- In a letter to The U.S.T.R. dated December 15, 1995 (and reprinted in "Inside Nafta" on December 27, 1995) the Attorney General of Oregon asks the U.S.T.R. to provide further guidance on the meaning of the "social services" reservation in Annex II;

- The Attorney General of Oregon proposes a sweeping reservation be added to Annex I, protecting all existing measures in Oregon.

20. Canadian governments are now faced with the following dilemma:

- In the public domain are now at least three different subjective interpretations (the U.S.T.R., Canadian and Ontario) of the "social services" reservation in Annex II. Oregon has publicly expressed its doubts and anxieties over the proper interpretation;
- Provinces are faced with an imminent deadline (March 31st) for deciding whether they will protect various measures in Annex I;
- The federal government is reluctant to see broad reservations added to Annex I since it views Annex II as providing reasonably adequate protection.

What is the Objectively Best Meaning of Annex II?

21. If an objective legal analysis could establish the basic meaning of the Annex II reservation, the policy choices facing governments would be much simpler.

22. The Vienna Convention on the Law of Treaties<sup>6</sup> suggests that the primary method of interpreting a treaty should be the "ordinary meaning to be given to the terms of the treaty in their context and in the light its object and purpose".

23. "Ordinary meaning": the Annex II phrase "social service that is maintained or provided for a public purpose" does not have any "ordinary meaning". Federal officials have argued that the phrase was deliberately left undefined to allow the term to be interpreted in a very broad manner. The potential problem with that approach is that there is a risk that the undefined term will be interpreted in a narrow manner. Vagueness can create both opportunities and hazards.

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<sup>6</sup> Most of the principles in the Vienna Convention have become part of customary international law. Even though the United States has not actually ratified the treaty, its norms of treaty interpretation almost certainly apply to the United States no less than other states.

24. "Context": sometimes the meaning of a phrase can be determined from examining the use of the phrase in other parts of the same text. Language from the Annex II reservation on social services is used elsewhere in NAFTA; specifically, in Article 1101.

24.1. Article 1101(4) of NAFTA says that:

"Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter".

Taken literally, the paragraph is tautological. It says that this Chapter of NAFTA applies to the extent that it applies. The most that can be taken from Article 1101(4) is that the parties were somewhat anxious about the impact of NAFTA in the social services area. However, that is already clear from the fact that all three parties entered Annex II reservations in the social services sector. The question remains: exactly what is the scope of that reservation?

24.2. Article 1110 says that expropriations can only be carried out for a "public purpose". International law has generally given states very broad scope to define "public purpose" as they see fit.

An American text, Restatement of the Law: Foreign Relations Law of the United States comments that:

"The requirement that a taking be for a public purpose is reiterated in most formulations of the rules of international law on expropriation of foreign property. That limitation, however, has not figured prominently in international claims practice perhaps because the concept of public purpose is broad and not subject to effective reexamination by other states."<sup>7</sup>

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<sup>7</sup> Similar, in U.S. constitutional law, the requirement that an expropriation be for a "public purpose" has rarely been used by the Courts to block or reverse a government decision.

24.3. It is necessary to be cautious, however, about applying the experience with expropriations to the interpretation of Annex II. Expropriations are, by their nature, acts in which a government has taken strong and decisive action and in which the government purports to be acting in the service of an overriding public purpose. Given the clear-cut characterization of the measure by a government itself, it is not surprising that adjudicators have been reluctant to reject that characterization. In the area of social services the role and perspective of government may often be more ambiguous.

24.4. It should also be remembered that under international law the fact that an expropriation is for a "public purpose" does not exempt the expropriating party from further scrutiny. On the contrary, even if an expropriation is for a "public purpose" the expropriating state is still obliged to pay "just compensation". An international adjudicator can easily accept that an expropriation is for a "public purpose" given that the adjudicator can remedy most injustices by focusing on the issue of just compensation.

24.5. By contrast, if an adjudicator accepts that a social service is provided for "a public purpose" the basic norms of NAFTA are completely blocked in Annex II cases. A complaining party has no remedy at all. So adjudicators may be more selective about finding that a "public purpose" exists.

24.6. There are, no doubt, social service areas where a government has been made reasonably clear by words and deeds (e.g., by funding the service and massively regulating its actual delivery) that the service is "for a public purpose". In such cases I would indeed expect that a dispute-settling panel would accept the perspective of the government involved and hold that Annex II shields the service from the application of NAFTA.

24.7. But in many social service areas, the role of government will be far less interventionist and it will not be clear whether the government itself regards a service as being delivered "for a public purpose".

24.8. In the area of physician care<sup>8</sup>, governments generally allow private physicians to deliver services for profit and confine themselves to paying the doctor or reimbursing the patient. The regulation of the professional may be left to a private and semi-autonomous self-regulatory body. It is very likely, in my view, that a dispute-settling panel under NAFTA

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<sup>8</sup> To take an example from the federal letter of September 22.

would consider that physician services covered by provincial health plans are indeed provided "for a public purpose", and so protected by Annex II. But even this prediction cannot be made with absolute confidence.

24.9. As the degree of government funding and regulation decreases, it becomes increasingly unclear whether a service is being provided "for a public purpose". Physiotherapists in British Columbia, for example, are permitted to extra-bill. Would the fact that a service is mostly covered by a provincial scheme keep it within the protection of Annex II? Probably - but perhaps not. Some hospital services (food, laundry) may be provided by commercial operators who are paid for out of public funds, but whose providers are not extensively regulated. In some cases, U.S. providers may be able to persuade a NAFTA dispute-resolution panel that such services are not being provided "for a public purpose".

24.10. In the area of dental care<sup>9</sup>, the government role is even less interventionist. Provinces generally do not operate public "dentalcare" insurance plans. About all most provincial governments do by way of funding is to allow consumers to deduct the costs of their care from their taxes. Dentists have their own self-regulatory bodies rather than being directly regulated by government. If governmental attitude and intervention is the predominant test (and it probably is) it is doubtful that the dental subsector is protected by Annex II from the full force of NAFTA.

24.11. In many areas, health care services are currently offered by not-for-profit Canadian providers. Many hospitals, for example, are operated by religious or charitable organizations. Canada or the provinces might wish to encourage or require physicians and patients to use such not-for-profit providers. But U.S. providers may argue that such governmental attempts to favour the not-for-profit sector - which will always be exclusively or overwhelmingly Canadian - amount to discrimination against U.S. competitors and so violate NAFTA. Annex II may be a good defence to U.S. challenges in many cases. But here again, there will be gray areas. What if the not-for-profit organization is charging a fee for a particular service and it is not covered by a provincial health insurance plan? Could the service still be characterized as a "social service" that is provided for a "public purpose"?

25. As mentioned already, a treaty term might be interpreted in light of its "object and purposes" and sometimes the general aims of a treaty will be set out in an opening section.

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<sup>9</sup> To take an example from the Ontario letter of October 3.

25.1. But the "preamble" of NAFTA provides no specific guidance on the interpretation of Annex II. On the one hand, it does mention the resolve of the parties to "preserve their flexibility to provide the public welfare". On the other hand, the preamble also mentions the resolve of parties to "create an expanded and secure market for the goods and services produced in their territories" and to "reduce distortions to trade".

25.2. Chapter One of NAFTA sets out its "objectives". These include:

"102(a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the parties";

(b) promote conditions of fair competition in the free trade area."

Nothing is said about protecting a state's social services from outside competition. The "objectives" section therefore provides a boost to those who favour a very narrow interpretation of Annex II. On the other hand, it is a principle of legal interpretation that specific provisions take precedence over general principles. The parties to NAFTA specifically allowed for reservations to the Investment and Services Chapter of NAFTA. All three of them, using virtually identical language, singled out for protection their "social services" area.

26. The Vienna Convention on the Law of Treaties recognizes as a supplementary guide to interpretation, the "travaux preparatoires" connected to a treaty. These are the records of the discussions by the parties that led to the signing of the treaty. With respect to NAFTA there is no record of the negotiating history, or at least none that is in the public domain.

27. The Vienna Convention on the Law of Treaties allows parties to clarify the meaning of treaty terms by signing letters of understanding. No such letters have been exchanged so far with respect to the meaning of Annex II. But it is not necessarily too late to do so.

28. The Vienna Convention also allows parties to establish a particular interpretation of a treaty by "subsequent practice". To recall, so far:

- The U.S.T.R. has issued an interpretation of the "social services" reservation that is very narrow;

- The government of Canada has adopted a broad interpretation of the reservation. It emphasizes "government intent" as a crucial factor in determining whether a service is provided for a public service;
- The government of Ontario adopted an even broader interpretation which looked at the intrinsic nature of the service rather than the role of government.

29. A strong argument can be made by the U.S. and Canada that have, through their statements, narrowed the area of disagreement. The Ontario position has not been adopted by either party. Unless the federal government publicly revises its position a dispute-resolution tribunal might say that Canada and the United States have at least agreed that the Canadian position of November 22, is the broadest interpretation that remains viable.

30. While international law is not entirely clear on this point I would think that the principle and practical reality are the same: a country's unilateral statements about the meaning of a treaty can be held against it. An impartial adjudicator might not be impressed with the fact that a country has previously made self-serving statements about the meaning of a treaty. But if a country has previously conceded that a treaty only provides X amount of protection, it will be difficult for that country to turn around and argue that the treaty actually provides X + Y.

31. My conclusions about the "objectively" best interpretation of the "social services" reservation in Annex II are as follows:

- I tend to agree more with the position of the federal government rather than the Ontario or U.S.T.R. interpretation to this extent: government intent, as revealed by both words and deeds, should be an important factor in determining whether a service is for "a public purpose";
- The wording and objectives of NAFTA do not provide clear guidance on how to characterize social services where the level of government intervention is only moderate. The federal government may be somewhat overly optimistic about how many disputes in the gray area will eventually be resolved in favour of Canada;

- The Ontario position is unlikely to be accepted by a dispute-settling panel looking at the meaning of Annex II. Ontario says that the extent of government involvement in funding and delivering care is irrelevant. Rather, the intrinsic nature of a service determines whether it is offered "for a public purpose". But the Ontario position has already been undermined by the fact that it is at odds with the position of the federal government. Furthermore, the Ontario position does not provide any meaningful guidance on how to determine whether a service is for a public purpose or not. The framers of NAFTA clearly intended that only some social services would be shielded from the full force of NAFTA. It is necessary to find some tests to distinguish the protected from the unprotected areas and the degree of government intervention appears to be an important and workable means of doing so<sup>10</sup>;
- Unless further work is done by the NAFTA partners, there will be many gray areas. How a particular dispute-resolution panel would decide a particular case will depend largely on the values of the persons who happen to sit on the panel.

32. Where gray areas exist in the health care sector, U.S. providers and their federal government can be expected to exert political and economic pressure on Canada and the provinces to open up markets. Canada or the United States might choose to refer some disagreements to dispute settling panels, where each side may win some cases. Sometimes, even a panel victory will not secure much relief for a part of a health sector that is under a challenge from the United States. As the experience with softwood lumber shows, pressure from the United States can be relentless.

33. I would note a further area of possible concern. To the extent that even a small part of a social service sector is deemed

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10 I would not rule out entirely that the nature of the service might be one factor in some cases. For example, a dispute-settling panel might be more inclined to accept that physician services are a "social service" that is provided "for a public purpose" in light of the medical tradition that the welfare of the patient and of the public must be paramount over the profit motive. A panel might have a different attitude towards the provision of hospital food services by private and non-professional providers.

to be outside of the scope of the Annex II reservation, the door may be opened to a massive increase in the level of commercial operations by U.S. enterprises.

34. Suppose, for example, that a province permits a few physicians to operate purely private and commercial clinics that provide laser surgery to correct nearsightedness. Further suppose that these clinics charge rates that exceed provincial health plans and patients absorb 100% of the costs. Under NAFTA the existence of this small private and commercial Canadian sector would open the way to the influx of laser clinics that are owned and managed by for-profit U.S. enterprises. A very large private and commercial sector dominated by U.S. enterprises might eventually emerge. NAFTA would protect such growth in the following ways:

- If Canadian providers are permitted in an area, NAFTA would guarantee the right of U.S. providers to enter the area as well;
- The "quantitative restriction" aspect of Article 1207 would make it difficult (albeit not impossible) to limit the extent to which the sector started to become dominated by private and commercial operators whose ranks would be swelled by U.S. entrants;
- "Rolling back the clock" by nationalizing the industry would also be difficult. Under Article 1110, if Canada or a province tried to "nationalize" an industry it would be obliged to compensate the U.S. providers who are thereby displaced.<sup>11</sup>

35. If the federal government and some of the provinces wish to promote a reasonably broad interpretation of Annex II, they might consider these steps:

- A number of provinces could threaten to list a large number of measures in Annex I;

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<sup>11</sup> Any private investor offended by a nationalization would be able to directly bring Canada or a province before a dispute settling-tribunal. No involvement of the U.S. government would be necessary; NAFTA, Article 1110 and Articles 115 et seq.