14

Governance for a Competitive North America: A Canadian Strategy

Louis Bélanger

The election of Barack Obama to the presidency of the United States will almost certainly bring about significant changes in the attitudes and preferences of the American government in policy areas directly affecting the future of the Canada-US trade partnership. The Canadian government should act strategically and seize this opportunity to break the institutional ceiling that has so far limited all attempts to make the North American free-trade area sustainable and more competitive.

The Institutional Containment of North American Free Trade

The North American free-trade area is facing an institutional deficit that hinders its competitiveness. Advocates of stronger and more ambitious institutions for the region often contemplate geopolitical and social goals that go beyond trade matters.[1] Nevertheless, we should not lose sight of the important fact that, even at the strictly economic level, new institutions are indispensable. Indeed, they will be crucial to developing in any significant way and even to merely sustaining, the free-trade area created by the 1989 Canada-United States Trade Agreement (CUSTA) and expanded by the 1994 North American Free Trade Agreement (NAFTA) fifteen years ago.

The institutional model under which NAFTA operates combines highly detailed pre-established rules and a quasi-absence of ongoing decision-making capability.[2] Although NAFTA is equipped with several technical working groups and a minister-level Free Trade Commission, the latter have almost no authority to create new rules or modify existing ones. One positive and reassuring aspect of this fixity is that it provides predictability and protects the deal against opportunistic political manoeuvres. However, it is the source of two sets of serious problems. First and most obviously, it makes the agreement extremely hard to amend and to adapt to changes in the economy or to advances made in other trade agreements. The risk here is that NAFTA could gradually become obsolete, eroding the value of Canada's access to the US market as Washington carries on its policy of competitive liberalization and signs cutting-edge agreements with other countries. Second, a fixed agreement seriously limits the depth and benefits of free trade. Thus, while the 1994 agreement is without a doubt exemplar of what can be achieved in the absence of continuous rule-making authority, there are levels and areas of trade liberalization that simply cannot be reached by relying exclusively on pre-established rules.

1 See, for example, Robert Pastor, "The Future of North America," *Foreign Affairs* 87: 4 (July/August 2008), 84-98.

2 For a more detailed analysis, see Louis Bélanger, "NAFTA: An Unsustainable Institutional Design," in Gordon Mace, Jean-Philippe Thérien and Paul Haslam, eds., *Governing the Americas: Assessing Multilateral Institutions* (Boulder CO: Lynne Rienner, 2007), 195-212.

One good example of the suboptimal situations engendered by discarding secondary-ruling capability can be found in NAFTA's rules of origin. A customs union based on a common external tariff for all the member countries is a more efficient way to create freer trade among members. In the case of NAFTA, there would be an immense advantage in administering the rules and tariffs applicable to non-regional products solely at their point of entry in North America and leaving the Canada-US and the Mexico-US borders free from tariff controls. However, a common external tariff requires continuous coordination in order to adjust to evolving trade relations with third countries, which means ongoing rule-making, or secondary-ruling. To avoid this, NAFTA's architects opted for a free-trade agreement which relies on the alternative rules-of-origin solution and requires discriminating, at each intra-regional border, between products that truly originate from the trade-zone member countries (or that have been sufficiently transformed within their borders) and products that are simply imported from a third country. This is a second-best mechanism that is costly for governments to administer and costly for business to comply with.[3] Moreover, it opens the door to protectionist manipulations of levels of "regional content" and, therefore, can undermine what the Free Trade Agreement is supposed to achieve.

Another clear example of the costs of avoiding rule-making capability can be found in NAFTA's approach to coordinating trade remedies. Ideally, countries in a free trade pact would exempt each other from the application of their respective anti-dumping (AD) and countervailing duties (CVD) laws and adopt a common system of competition rules and policies. Again, such a system would necessitate not only enforcement through a regional dispute settlement authority; but it would also require the ongoing adjustment of regional rules on dumping and on other distorting practices such as subsidies. The alternative, the dispute settlement mechanism established by NAFTA's Chapter 19, which provides for the review of the AD/CVD determinations of each country's national agencies, has been plagued by delays. Moreover, it has been ineffective in bringing about the settlement of prolonged conflicts, like the softwood lumber dispute, which have hurt the economy and eroded political support for the agreement.

In some areas, like origin determination and competition policies, the restriction imposed on the development of North American trade institutions has led to halfway, second-best measures. In others, it has made it virtually impossible to achieve significant trade liberalization. This is most obviously the case for regulatory convergence.[4] Harmonizing regulations, from those affecting food safety to those in the area of professional accreditation, in order to guarantee the free flow of goods and services, cannot be done successfully without "dynamic rule making."[5] This is necessary

3 The overall cost of the rules of origin system for Canada has been estimated at 1.04 percent of GDP. See Madanmohan Ghosh and Someshwar Rao, "Répercussions économiques d'une éventuelle union douanière canado-américaine," *Horizons* 7:1 (July 2004), 34.

4 Michael Hart analyses the costs of regulatory discordance and reports OECD data that estimate them at between 2 and 10 percent of overall production costs. "Steer or Drift? Taking Charge of Canada-US Regulatory Convergence," CD Howe Institute Commentary, No. 229 (March 2006), 9.

5 *Ibid*., 21.

for the simple reason that governments are permanently making new rules and unmaking others and regulatory activities are central and sensitive functions of the modern state that cannot be preordained. Thus, the concordance of regulations is an area that has largely been left out of NAFTA and one that the three governments have since failed to tackle successfully despite the fact that it is arguably today's most significant challenge for the future of trade liberalization.[6]

One imperfect but significant attempt made by the three governments to compensate for NAFTA's institutional gap was the establishment in 2005 of the Security and Prosperity Partnership of North America (SPP). Essentially an agenda-led summitry process, the SPP comprises twenty trilateral working groups at the bureaucratic level reporting to ministers semi-annually and to the chief of governments annually. It was envisaged at its inception as an "ongoing process of cooperation" that could be expanded "by mutual agreement as circumstances warrant."[7] However, no formal agreement was ever signed and actions that would need domestic legislative approval have been ruled out.[8] Regulatory cooperation is a central horizontal component of the SPP agenda, but seeking convergence simply through information sharing and awareness raising among regulators has obvious limits. Without the authority to decide on binding common rules, convergence can be sought, but neither achieved nor secured. Still, the SPP process has potential, with its annual summit and its mechanism of cabinet-level coordination with one minister in each country responsible for each of the two pillars – security and prosperity – and one minister responsible for overall coordination. As we will see below, it would not take much to inject some real rule-making capability into the SPP.

Pushing Up the Ceiling

The zeal with which North American trade institutions have been deprived of rule-making capability is often blamed on the idiosyncrasies of treaty-making practices in the United States and the latter's domestic political system of checks and balances. Congress both has the constitutional power to regulate foreign commerce and harbours a suspicion of executive aggrandizement through legally binding international commitment. This in good part explains the reticence of Americans to opt for on-going decision-making devices instead of permanent rules when the mechanism of North American integration is negotiated. Moreover, it is the main reason why European-style supranationalism, that is, the delegation of regional law-making authority to international organizations, has been rejected as a model for the governance of the North-American free trade area. This being said, between these two extremes – European-style supranationalism and the situation in which NAFTA and the SPP have left us – there is a broad zone that needs to be explored.

6 David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Cambridge, MA: Harvard University Press, 1995).

7 White House, *Joint Statement by President Bush, President Fox and Prime Minister Martin*, March 23, 2005 (available at http://www.whitehouse.gov/news/releases/2005/03/20050323-2.html).

8 Greg Anderson and Christopher Sands, *Negotiating North America: The Security and Prosperity Partnership* (Washington: Hudson Institute, 2007).

The United States, like other states, does engage in "living" international arrangements. Its Constitution is silent on treaty amendment or modification.[9] Judicial decisions and past treaty-making practice have certainly helped to establish certain parameters, but this is an area where conflicting legal doctrines, clashing inter-branch interests and increasingly complex international governance have brought a large dose of uncertainty.

All international agreements can ultimately be amended by following the same ratification procedure that was applied to create them in the first place. For practical reasons, multilateral treaties generally provide for amending procedures that would not lead to a complete reopening of negotiation, but apart from some notable exceptions, they require unanimous consent among states and domestic actions equivalent to ratification.10 Therefore, the *ex post* flexibility of many cooperation mechanisms negotiated with the United States is highly dependent on how they were domestically processed, at their inception, for ratification purposes. Agreements that are classified in the United States as *Article II treaties* require a supermajority vote in the Senate; *congressional-executive agreements* require a majority vote in both houses of Congress; and *sole executive agreements*, as well as agreements made by virtue of an existing treaty, are concluded solely by the President without legislative approval. In addition, as we will see in more detail below, the United States can enter into politically-binding agreements that are surprisingly effective while remaining almost totally outside the reach of Congress. Of course, international secondary-ruling is more effective when domestic legislative action, which can be subjected to endless delays and caught in partisan quagmires, is not necessary every time a new rule is adopted.

Although a comprehensive treatment of the US treaty-making practice is impossible here, a few quick observations are in order. First, the choice of the appropriate ratification route for an agreement is a political, non-justiciable issue and there is growing support in the American legal community for the principle of "interchangeability" between treaties and executive agreements. Second, while standard trade agreements like NAFTA are always treated as congressional-executive agreements,[11] this is not necessarily the case for all commerce-related arrangements. Over the past two decades, the United States has ratified a significant number of agreements dealing with trade and investment issues as Article II treaties.[12] Third, although precise data on sole executive agreements are difficult to get, experts agree that the relative number of

9 Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate*, January 2001, 171-184.

10 See Andrew T. Guzman and Jennifer Landsidle, *The Myth of International Delegation*, Berkeley Program in Law & Economics, Working Paper Series, No. 226 (2008).

11 The argument that NAFTA, because of its scope, should have been ratified as an Article II treaty and should therefore be considered unconstitutional has been defended by prominent law scholars and brought, without success, before the courts. See Laurence H. Tribe, "Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation," *Harvard Law Review* 108: 6 (1995), 1221-1303 and Bruce Arnold Ackerman and David Golove, *Is NAFTA Constitutional?* (Cambridge, MA: Harvard University Press, 1995).

12 A recent survey for the 1980-2000 period has found 27 treaties dealing with commercial issues and 43 dealing with investments. The two categories surveyed represent 18 percent of the Senate's treaty ratification activity. For a complete list, see Oona A. Hathaway, "Treaties' End: The Past, Present and Future of International Lawmaking in the United States," *The Yale Law Journal*, Vol. 117, 2008, p. 1266, note 69.

international agreements concluded by the president without congressional ratification is on the rise.[13] In fact, sole executive agreements occupy a central position in the web of Canada-US legally-binding cooperative arrangements. The NORAD agreement was negotiated in 1958 as an executive agreement and has since been periodically renewed and adapted without congressional interference. Trade relations can also be governed by sole executive agreements, as in the case of the 1996 and the 2006 Softwood Lumber Agreements. Thus, Congress is not always an inescapable obstacle when it comes to establishing new cooperative agreements with the United States, or to adapting existing ones.

What has been said so far about amendments and ratification mainly relates to modifications to the basic rules of an agreement, its "constitutional" elements. However, many international agreements contain provisions for secondary ruling that explicitly isolate parts of the binding rules. The latter, which are more technical in nature and generally located in annexes or schedules outside the main body of the treaty, can be modified more expeditiously and securely as compared to what is normally called for in more basic commitments. These are the kind of rules for which ongoing coordination will be necessary if we want to deepen NAFTA. In some cases, the agreement itself and the implementing US legislation impose an alternative mode of domestic ratification for these types of secondary rules, but in other cases, amendments become binding even without ratification. We find a good example of the first possibility in the case of NAFTA itself. The otherwise inflexible agreement in fact permits some technical modifications to the original classification of products for origin determination or to the schedule for tariff elimination that do not require full ratification procedures by Congress. Rather, they require a more simple presidential proclamation preceded by consultations with the House Ways and Means Committee and the Senate Finance Committee.[14] In other agreements, however, similar modifications can be decided on without any congressional notification. For example, the United States is party to several international bodies in which "tacit amendment" procedures are in force.[15] Tacit amendments become binding on a state if it acquiesces simply by failing to object, which means without the need for ratification.

So, the idiosyncrasies of the domestic process by which the United States binds itself to international agreements make it an uneasy partner. However, the American treaty-making process is much

13 For example, Van Alstine estimates that 15,000 sole executive agreements have been concluded "in the past 50 years," which means an average of 300 agreements every year, while according to Hathaway, only 5.5 percent of all executive agreements are of the "sole" type, which would mean an average of 8 every year. See Michael P. Van Alstine, "Executive Aggrandizement in Foreign Affairs Lawmaking," *UCLA Law Review* 54: 2 (2006), 319 and Oona A. Hathaway, *art. cit.*, 1287, note 130.

14 House of Representatives, *An Act To Implement the North American Free Trade Agreement*, 103rd Congress, 1st Session (House Document 103-159, Vol. 1), 1993, Sec. 103 and 202.

15 Among them are the International Maritime Organization, the International Convention for the Regulation of Whaling, the Chemical Weapons Convention and the Montreal Protocol on Substances that Deplete the Ozone Layer. See Curtis A. Bradley, "Unratified Treaty Amendments and Constitutional Process," unpublished manuscript prepared for the Duke Workshop on Delegating Sovereignty, 6 February 2006.

more fluid and capable of innovation than most Canadians imagine. Moreover, the United States is confronted with the same global reality faced by other states. Optimal and mutually beneficial solutions to many international problems require more than cemented promises about how each will act in the future; they necessitate permanent rule-making capability. It is a reality to which US diplomacy is adapting, sometimes awkwardly, but inevitably.

International Rule-Making in Trade-Related Areas

The fact that it is more difficult to inject flexibility into trade agreements like NAFTA than in other types of agreements negotiated with Washington has more to do with domestic politics and more specifically the "politics of delegation," than with constitutional restraints. Secondary ruling at the international level is less controversial and easier to organize when it involves regulatory activities that Congress has already delegated statutorily to the executive branch. Hence, more than 50 agencies, employing nearly 250,000 employees, are by delegation producing 4,000 new federal rules every single year.[16] Historically, trade has been a policy area where delegation was kept at a low level, but as the international trade agenda is expanding beyond its traditional core, things are evolving.

The level of executive discretion possessed by individual US agencies implicated in the SPP process on the "prosperity" side provides a good indication of the capability of the executive branch to engage in the kinds of rulemaking collaboration that would be necessary to deepen NAFTA.[17] The available data show that by departing from traditional trade issues and enlarging the scope of economic cooperation, especially towards regulatory convergence issues, the prosperity pillar of the SPP is covering policy areas where the executive branch of the US government has considerably more delegated authority at its disposal.[18] Compare, for example, the 3,300 regulations promulgated by the Department of Transportation since 2005 to the 34 promulgated by the Department of the Treasury.[19] Historically, Congress has exercised a firm and direct

16 James L. Gattuso, *The Rulemaking Process and Unitary Executive Theory*, Testimony before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee, May 6, 2008 (available at http://www.heritage.org/research/regulation/tst050708a.cfm).

17 I rely here on my own compilation made in good part by crosschecking information divulged following a Freedom of Information Act request to the US federal government by Judicial Watch. Fourteen different agencies of the executive branch – from eight departments – and two independent agencies have been active in one or more of the ten SPP working groups on the prosperity side.

18 David Epstein and Sharyn O'Halloran have created an index of "executive discretion" to measure levels of delegated authority vested by Congress in executive agencies by computing the average of the percentage of provisions in bills that contain specific delegation of decisions. Once we possess this measurement for each bill, we can use sectoral classifications of laws or congressional committee's involvement in the passage of bills to evaluate the level of discretion for a specific policy area. They built their index on the basis of congressional legislative activity during the 1947-1990 period. When I refer in this text to "historical" levels of executive discretion, I base my observations on their measurement. See Epstein and O'Halloran, *Delegating Powers. A Transaction Cost Politics Approach to Policy Making Under Separate Powers* (Cambridge: Cambridge University Press, 1999), esp. Chapters 5 and 8.

19 According to data compiled with the help of the "Regulation Tracker" on the Justia.com website (http://regulations.justia.com).

control over tax and other revenue-raising policies. Therefore, the old stock of trade policy, tariff measures, is a policy area where the executive branch must content itself with particularly low levels of delegated authority. American legislators periodically delegate impressive levels of authority to the president for the negotiation of trade agreements, but once these deals are sealed, Congress keeps a firm grip on all matters related to customs and tariff regulations. By contrast, in complex and informationally intense policy areas targeted by non-tariff barrier measures and economic regulatory cooperation – like energy, consumer protection, transportation, or telecommunications – rule-making is more widely delegated. This is even more true of social regulatory areas like public health, public safety, or environmental protection, where incentives for delegating are high for Members of Congress because constituency-based political benefits are difficult to identify. Thus, the SPP working groups on the environment, energy, e-commerce and transportation include agents of the executive branch who benefit from relatively high levels of discretion and possess significant amounts of rule-making authority.[20]

20 These four groups are led, respectively, by the Department of State, but with the participation of the Environmental Protection Agency, an agency classified as independent by the Department of Transportation, the Department of Energy and the Department of Commerce, but with the participation, among others, of two independent commissions, the Federal Trade Commission and the Federal Communications Commission. Incidentally, these four groups are also at the top of the list in terms of accomplishing SPP objectives. We have only indirect measures of the level of executive discretion of individual agencies. My general evaluation here is made by looking at the level of discretion (Epstein and O'Halloran's index) in the legislative activity of committees and linking agencies to committees' jurisdiction (under House Rule X and according to frequency of witness appearances). The reported levels of completion of initial objectives for each working group after one year was: *Environment*: 56 percent; *Energy*: 48 percent; *E-Commerce*: 45 percent; *Transportation*: 39 percent. The worst results come from the working groups in the security pillar: *Aviation Security*: 0 percent; *Science and Technology Cooperation*: 0 percent; *Border Facilitation*: 6 percent; *Law Enforcement Cooperation*: 7 percent; *Travellers Security*: 7 percent. As computed on the basis of the August 2006 "Report to Leaders" (available at http://www.spp-psp.gc.ca/progress/reports-en.aspx). The Movement of Goods working group showed an impressive 50 percent level of completion and is led on the US side by the Office of the United Sates Trade Representative, whose level of executive discretion is difficult to assess because of its status as part of the Executive Office of the President.

Windows of Opportunity: Executive Discretion and International Delegation

The Bush presidency has been marked by the ascendancy of a relatively new brand of political and judicial conservatism that advocates a strong executive. In a sense, Bush's version of the "unitary executive" doctrine – that only the president should exercise executive authority, including the interpretation and completion of statutes and that Congress should not be allowed to infringe on this authority by any means – is a doctrine of extreme executive discretion.[21] Logically, such a version of the unitary executive doctrine should help to secure and expand the amount of regulatory authority in the executive branch's hands and therefore facilitate international cooperation in areas where secondary ruling is needed.[22] But this potential has been thwarted in the past eight years by a corresponding mistrust of international institutions.

The outgoing administration's antipathy toward international organizations and its resistance to the expansion of international law have been forthright.[23] From the withdrawal from the Anti-Ballistic Missile Treaty to the refusal to sign the Kyoto Protocol and to the restrictive interpretation given to its obligations under the Geneva Convention, the US foreign policy under Bush has been remarkably coherent in its approach toward international commitments.[24] This attitude of suspicion has not been confined to high politics issues; it has affected low politics as well and, more specifically, the US government's capacity to engage in regulatory cooperation. As we have seen, effective regulatory cooperation requires some assurance that secondary rules emanating from international regulatory bodies will find their way into each country's domestic system. In order to guarantee this, administrative agencies are often directed by law to implement international standards and assimilate them in the form of domestic regulation as international bodies decide on them. One authoritative jurist estimates that "(t)he US Code is replete with (such) international assimilations".[25] Now, the Bush administration has directly contested the legality of these provisions

21 See Jack Goldsmith and John F. Manning, "The President's Completion Power," *The Yale Law Journal* 115 (2006), 2280-2312 and Harold Hongju Koh, "Setting the World Right," *The Yale Law Journal* 115 (2006), 2350-79.

22 All the more so since the exclusive authority of the executive branch in foreign affairs and, therefore, the defence of its capacity to participate in international negotiations and in the work of international organizations without the interference of Congress, is another foundation of the unitary executive doctrine put forward by Bush. See George W. Bush, *Statement on signing H.R. 1646, the Foreign Relations Authorization Act, Fiscal Year 2003*, The White House, September 30, 2002. On the intimate link between the principles of the unitary executive and the regulatory activity of the state, see James L. Gattuso, *op. cit.*

23 The influence of this brand of conservative anti-internationalism was felt well before Bush's arrival at the White House. See Peter J. Spiro, "The New Sovereigntists: American Exceptionalism and Its False Prophets," *Foreign Affairs* 79:6 (November/December 2000), 9-15.

24 See Ivo H. Daalder and James Lindsay, *America Unbound: The Bush Revolution in Foreign Policy* (Hoboken, NJ: John Wiley & Sons, 2005).

25 Edward T. Swaine, "The Constitutionality of International Delegations," *Columbia Law Review* 104 (2004), 1519. For examples, see Glen M. Wiser, *POPs, PIC and LRTAP: The Role of the US and Draft Legislation to Implement These International Conventions*, Written Testimony Before the Subcommittee on Environment and Hazardous Materials, United States House of Representatives, July 13, 2004 (Available at http://www.ciel.org/Publications/Wiser_Hearing_July04.pdf).

on the ground that by obligating the executive branch to take into account the decisions of an international body, Congress unconstitutionally delegates its legislative authority. An example is the process of the difficult (and still pending) ratification of the Stockholm Convention on Persistent Organic Pollutants. The administration has used this argument – sometimes referred to as the "international non-delegation doctrine" – because the implementing bill before the Senate would require the Environment Protection Agency to incorporate new pollutant listings, decided by the Convention's Conference of the Parties, in its regulation. It is quite obvious that if the United States systematically applies this line of reasoning in the negotiation of future international arrangements, the already difficult task of engaging them in secondary-ruling cooperation at the regional level will become an almost impossible one.[26]

President Obama has already committed himself to foreign policy agendas grounded in much more positive conceptions of multilateralism and international law. During the campaign, he has emphasized the necessity for the United States to strengthen and reform international institutions, global as well as regional.[27] Furthermore, members of his campaign's team of chief advisors on foreign and trade policy are strong advocates of the development of international law and the adherence by the United States to international standards.[28] So, the ideological resistance toward international commitments that has further constrained the US government's capacity to engage in international rule-making over the past eight years, even at the most technical level, will almost certainly weaken under the next administration.

But what about executive discretion? It is inevitable that the notion will be tabooed for a while, in view of the close association between the unitary executive theory and some highly contested initiatives, like the creation of the military commissions mandated to judge the "enemy combatants" detained at Guantanamo and the program of domestic surveillance deployed by the National Security Agency after 9/11. Bush's version of the doctrine, however, must be placed in the context of the long-term process of consolidation of the president's interpretive and administrative powers launched at the time of the New Deal and sanctioned in 1984 by the Supreme Court in its famous *Chevron* decision. What has been accomplished during the

26 Fortunately, the constitutional foundations of the international non-delegation doctrine seem shaky. The question, therefore, is will it survive the current administration as a political principle of action. On the constitutionality issue, see Edward T. Swaine, *op. cit.*, 1519-1522 and Lisa Heinzerling, Testimony of Lisa Heinzerling Before the Subcommittee on Environment and Hazardous Materials, United States House of Representatives, July 13, 2004, 19-22 (Available at http://www.law.georgetown.edu/faculty/Heinzerling/Testimony/POPs_Testimony_July_2004.pdf).

27 See Barack Obama, "Renewing American Leadership," *Foreign Affairs* 86:4 (July/August 2007), 2-16.

28 For example, Susan E. Rice, originally a Brookings Institution fellow and an Obama foreign policy adviser, is a proponent of the further legalization of the "responsibility to protect" set of norms while Daniel K. Tarullo, who is on the economic team of advisers, has defended, against the current administration's opposition, the incorporation of international labour standards in free-trade agreements. See respectively, Susan E. Rice and Andrew L. Loomis, "The Evolution of Humanitarian Intervention and the Responsibility to Protect," in Ivo H. Daalder, ed., *Beyond Preemption: Force and Legitimacy in A Changing World* (Washington: Brookings Institution Press, 2007), 59-95 and Daniel K. Tarullo, *A Sensible Approach to Labor Standards to Ensure Free Trade* (Washington: Center for American Progress, March 2007).

Bush presidency is a significant shift in the balance of power inside the American conservative legal community. This shift is toward a new pro-executive school of thought and against the traditional conservative proponents of states' rights who forcefully resisted this historical trend by defending a greater deference to Congress.[29] So, even if Obama has been critical of the use by President Bush of signing statements to defend the unitary executive doctrine, he will almost certainly abide by its principles, as did all recent presidents.[30] There will be no backlash against executive authority that would strip the next president of the reserve of rule-making authority he needs to engage in meaningful economic and regulatory cooperation, especially in the current economic context. Moreover, the new occupant of the White House will be in an even stronger position because of the Bush administration's transformative impact on the legal thinking of the Right about executive powers.[31]

Dealing With the "Fair Trade" Factor

To what extent do the discontentment about free-trade agreements we have heard during the campaign and the specific grievances directed by Obama toward NAFTA, make all hope of rejuvenating North American economic cooperation vanish? Even if it is true that, in the United States as everywhere else, party leaders who campaign on protectionist platforms usually soften their stands once elected, there are good reasons to think that this time, an ordinary post-electoral about-face will not do. The "fair" trade agenda, put forward by a coalition of trade skeptics of varying degrees united behind common demands like the inclusion of labour and environmental standards in trade agreements, has simply become too electorally significant. Analyses of the results of the 2006 midterm elections show that, depending on how the candidates' stand on trade is evaluated, between 22 and 37 congressional seats previously held by free traders were taken by trade skeptics, with absolutely no transfer in the opposite direction.[32] Campaign strategists, especially on the Democratic side, have taken notice and many candidates, as well as the Democratic National Committee itself, have put "fair" trade at the centre of their platform for this year's election.[33] The result is, according to Public Citizen, a net additional gain of 32 congressional seats for protectionist "fair" traders in 2008.[34] Surely, this is an issue for which

29 Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries that Defined America* (New York: Henry Holt, 2006), 213-214.

30 See Christopher S. Yoo, Steven G. Galabresi and Anthony J. Colangelo, "The Unitary Executive in the Modern Era, 1945-2004," *Iowa Law Review* 90:2 (2005), 601-731.

31 As well as on the composition of the courts, beginning with the nomination of Judge Alito on the Supreme Court.

32 Simon J. Evenett and Michael Meier, *The US Congressional Election in 2006: What Implications for US Trade Policy?*, Swiss Institute for International Economics and Applied Economic Research, November 14, 2006; Public Citizen, *Election 2006: No to Staying the Course on Trade*, Public Citizen's Global Trade Watch, November 8, 2006.

33 See Public Citizen, *Election 2008: Fair Trade Gets an Upgrade*, Washington, November 10, 2008 (Available at http://www.citizen.org/documents/ElectionReportFINAL.pdf) and Democratic National Committee, *The 2008 Democratic National Platform: Renewing America's Promise*, August 25, 2008, 26-27.

34 See Public Citizen, *op. cit.* Public Citizen's numbers may be inflated, but if they are only half right, this is still a significant transfer.

voters will expect action from Congress. We know that the Democratic Party now firmly control both houses. We also know that Congress as a whole is even more pro-"fair" trade than it was in 2006. What are the implications for a Canadian strategy favouring a more competitive North American market?

Congress alone cannot force a renegotiation of or a withdrawal from NAFTA; these actions fall under the presidential power of initiative in foreign affairs. Soon or later, Obama will have to be seen as fulfilling his promise to reform NAFTA. In themselves, his demands are not problematic from a Canadian point of view. First, he has insisted on the necessity to limit the recourse to investment protection measures in a way that, in essence, copies the language used in most trade agreements recently negotiated by both Canada and the United States with third countries. Second, he is calling for the incorporation of labour and environmental standards into the agreement itself, in addition to the existing NAFTA side agreements. A good example of what this proposal means is provided by the recent protocol amending the US-Peru free trade agreement. It was signed in accordance with the "New Trade Policy for America" that the Democratic-led Congress negotiated with the Bush administration in 2007 in order to secure the ratification of the US-Peru and US-Panama free trade agreements. Essentially, these protocols provide recourses – which may lead to benefits suspension – if a party fails to respect its basic obligations under already established labour and environmental multilateral agreements in a manner materially affecting mutual trade or investment.[35] These are rather innocuous demands, which may raise concerns in Mexico, but which can certainly be accommodated without harming any key NAFTA benefits. The danger, of course, considering the fact that behind the meek "fair-trade" discourse hide less amicable protectionist forces, is to have other issues raised in the process. And the best way to avoid opening this Pandora's box, for Canadians and Mexicans but also for the new US administration, will be to focus on the limited changes advocated by Obama. Thus, we should not think of using this eventual amending procedure to bring other significant proposals to the table.

The main point here is that, because of the anti-free trade mood in Congress, we cannot expect to obtain any improvement, institutional or otherwise, to the North American free-trade area through amendments to the original NAFTA text or by any other means requiring legislative action on the American side. However, Congress cannot really undo the 1994 agreement and there is no reason to believe that Mr. Obama wants that. Are we thus condemned to the status quo?

An Institutional Strategy

Canada just cannot afford to let the North American free-trade area stagnate and gradually lose its competitiveness. Yet, no significant step towards greater openness between our three economies will be made unless we convince our partners to reach beyond the NAFTA model of cast-iron rules. We must create a mechanism that would provide the secondary-ruling capability that North America needs to seriously address issues like regulatory convergence, common external tariffs and trade remedies coordination. Ideally, we should do this by directly redesigning

35 See the final version of the *United States-Peru Trade Promotion Agreement*, at chapters 17, 18 and 21 at http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html).

NAFTA's institutions, but the strength of the "fair" traders and other protectionists in Congress will make this road almost impassable. We thus have to turn our attention to the executive and think strategically about what can be done at this level, knowing that some important, mostly doctrinal, stumbling blocks – which prevented the Bush administration from dipping into its executive rule-making capacity to engage internationally – will soon be lifted. One obvious avenue would be to, instead of proposing an entirely new initiative, further formalize the already existing executive-level SPP process and inject into it some concrete rule-making capability. A first step, in order to reassure those who might question the legitimacy or the constitutionality of such an evolution, would be to make the new institution and its associated rules politically-binding rather than legally-binding.

In international affairs, political commitments are often more solid and effective than legal ones. One good example of what can be achieved by cooperating through non-legal means is provided by the Organization for Security and Co-operation in Europe (OSCE). The OSCE is an international forum for collective security vested with the mandate of fostering, among its member states, the observation of common standards in three areas (or "baskets"): human rights, politico-military affairs and environmental and economic cooperation, including regulatory and border-crossing facilitation issues. The OSCE features almost all the characteristics of a full-fledged international organization. It has its Charter, an annual Council of Ministers and a Permanent Council made up of ambassador-level representatives, a rotating Chairman-in-Office, a Secretary General, a well-staffed secretariat located in Vienna, a respectable budget and even its own international "Court of Conciliation and Arbitration." However, through the different institutional metamorphoses that the OSCE has known since its creation, it has retained its status as a political organization based on no international legal commitments. All the written agreements on which the organization has been built, beginning with the 1975 Helsinki Final Act, have in fact been carefully crafted as politically-binding documents rather than legally-binding treaties.[36] As the OSCE developed, especially following the new mandate and capacity it received to face the security challenges of a post-Cold War Europe, the issue of its legal status was often raised. But the United States has so far prevailed in its efforts to prevent any reconsideration of the essentially political nature of the institution.[37] By doing so, the successive US administrations have never had to seek formal legislative approval for their commitments towards the OSCE process. In reaction and ignoring objections raised by the executive branch,[38] the US Congress created an independent Commission on Security and Cooperation in Europe with the mandate

36 The 1975 Helsinki Final Act, as well as the 1990 Charter of Paris, contain the same provision which calls for the transmission of the agreements to the Secretary General of the UN, but specify that they are not "eligible for registration under Article 102 of the Charter of the United Nations."

37 See Miriam Shapiro, "Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation," *The American Journal of International Law* 89:3, 631-7.

38 See Jacqueline Paquin Granier, "Human Rights and the Helsinki Conference on Security and Cooperation in Europe: An Annotated Bibliography of United States Government Documents," *Vanderbilt Journal of Transnational Law* 13:529 (Spring/Summer 1980), 540.

of monitoring the Helsinki process and taking part in its development and implementation. This commission plays an active advisory role and exercises some level of oversight, but is not a standing committee of the House or of the Senate – even if it looks like one – and, therefore, remains deprived of any legislative jurisdiction.[39] So, as far as the United States is concerned, the international cooperation that takes place inside the OSCE framework falls exclusively within the realm of the executive branch.

One obvious effect of the legal nature of the OSCE is that its decision-making bodies do not directly create legal "obligations," but politically-binding "commitments" to internalize the standards that have been collectively adopted. Consequently, enforcement cannot be assured through judicial recourse; rather, it is obtained by a system of continuous monitoring that involves transparency measures, appointed "rapporteurs," fact-finding missions and a multi-stage problem resolution mechanism.[40] Of course, member states can always, as they did, for example, in the case of the Open Skies Treaty, translate their commitments into legal obligations by signing separate, formally distinct instruments, which may or may not require domestic legislative action. It must be added that to say that legally nonbinding commitments cannot be enforced by means of judicial remedies does not mean that they are entirely without legal consequences. For example, they can be relevant in interpreting the disputed provisions of previous international agreements that are legally binding, like NAFTA.[41]

The SPP, with its annual summit, its mechanism of ministerial coordination and its working groups organized in two different "baskets" – prosperity and security – possesses the embryonic structure of an international organization similar, in institutional and legal terms, to the OSCE. In a sense, upgrading the SPP to a level of institutionalization similar to that of the OSCE would resemble the process by which the initial "Conference on Security and Co-operation" (1973-1975), with its three main committees and eleven subcommittees, evolved to become the international institution we have today. In order to achieve this goal, the three governments would have to negotiate and sign a political declaration that would have many of the ordinary characteristics of a treaty but would not contain the usual final clauses on ratification and entry into force. To make things even clearer and reassure potentially worried domestic audiences, a provision could be added stating that the declaration does not affect the international rights and obligations of the three states and that, because it is not a treaty or an international agreement, it is not eligible for registration under Article 102 of the UN Charter. The most important provisions of the declaration would transform the now informal SPP ministerial meetings into a formal council with rotating chairmanship; create a permanent council that would become

39 This hybrid commission consists of nine senators, nine House members and only one representative for each of the departments of State, Defense and Commerce. See Margaret E. Galey, "Congress, Foreign Policy and Human Rights Ten Years After Helsinki," *Human Rights Quarterly* 73:3 (1985), 334-72.

40 See Thomas Buergenthal, "The CSCE Right System," *George Washington Journal of International Law and Economics* 25: 2, 1991), 333-86.

41 *Ibid*., 379.

the converging point for the working groups' deliberations and would have the mandate to decide on politically-binding regional standards; and establish a monitoring mechanism. Many other provisions could be added. For example, since there are already some levels of duplication between the SPP and the NAFTA working groups, the declaration could seek to establish clear institutional links between NAFTA and the newly created bodies.

From the perspective adopted here, the advantages of upgrading the SPP along the lines of the OSCE model would be significant. The new institutional forum – which might go by the name of the Organization for Security and Economic Cooperation in North America (OSCNA) – would promulgate regional standards that the three governments would then be politically committed to internalize. The commitment would be made at the highest political level rather than at the bureaucratic level and the decision-making process, at least its formal part, would be open and public. Decisions would not be legally binding, but a centralized mechanism of surveillance and monitoring, which does not exist in the SPP, would maintain a political pressure reinforced by the momentum of annual summits. In areas where the new organization will have acquired sufficient levels of technical credibility and efficiency, we could well see the development of a system of harmonization through assimilation where federal agencies are required by domestic statutes to consider regional standards when issuing their own, even if the practice is not formally inscribed in international legal obligations. Such an institution would also be a natural incubator for more legally-binding agreements. For example, when required and depending on the level of discretion at the disposal of the executives in a particular policy area, the three governments would be well positioned to translate the politically-binding decisions negotiated in the framework of the new organization into a legally-binding executive agreement and even, if the circumstances are favourable, into a treaty. Last, but not least, such an organization would not only give some degree of satisfaction to those who are preoccupied by the transparency of the liberalization process, but could eventually serve as a vehicle for the development of the comprehensive regional trade agenda, that would incorporate environmental and labour issues, which Obama has called for.

Concluding Remarks

NAFTA has left us with the limited level of trade liberalization possible when parties to a free-trade agreement stop short of inducing permanent rule-making capability in their cooperation scheme. The SPP has so far failed to make up for this institutional deficit, which ultimately hinders Canada's competitiveness in the world economy. Engaging the new Obama administration in a process of regional economic cooperation that benefits from secondary-ruling, by upgrading the SPP, will be a delicate enterprise, but it is feasible. Moreover, Canada – as well as Mexico – can hardly afford not to try.

Louis Bélanger, currently a Université Laval professor, was also recently past Director of the Quebec Institute for Advanced International Studies at Laval. *This paper is a contribution to the* Canada-US Project, Blueprint for Canada-US Engagement*, sponsored by Carleton University.*