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American Integration: Bench Warmers or
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Stephen de Boer*

Introduction

Much of the recent discussion of further economic integration in the North American context¹ has focussed on issues largely implicating the three federal governments. These range from the facilitation of the cross-border movement of goods to security concerns stemming from more open borders. Looking further ahead, topics have ranged from the possibility of forming a customs union to perhaps the adoption of a common currency throughout North America. These discussions have touched surprisingly little on the role that sub-federal governments — that is, individual states and provinces — might play in any integration efforts. Yet their role in that respect is significant and should be considered.

Existing economic integration mechanisms such as the Canada-US Free Trade Agreement, its successor agreement the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) Agreement necessarily require sub-federal cooperation in order to ensure that countries fully comply with these agreements' provisions. From a Canadian standpoint, these agreements have expanded beyond the international border into areas within the constitutional jurisdiction of provincial governments:

procurement, standards, the removal of non-tariff barriers such as local presence or residency requirements, treatment of investors, services and the regulation of professions, among others.

Although Canada has developed a consultative mechanism with the provinces that is sensitive to the constitutional division of powers in this country, the United States has not done so to the same extent. The subsequent failure of US states to become fully engaged in that nation's trade commitments poses a serious threat to mutually beneficial economic integration in North America, and is indicative of problems that might arise in wider discussions on integration.

In this context, this paper will make suggestions for a more formal and constructive engagement by sub-federal states in the integration agenda, at three distinct levels: that of the respective national processes between federal and sub-federal entities, that of the negotiating processes between federal governments, and that involving sub-national governments directly with each other.

The International Legal Context for Sub-Federal Governments

Neither the US states nor the provinces of Canada are signatories to the NAFTA and WTO. This is logical since, generally, only national governments have the authority to bind their countries in an international context. However, given the breadth of control sub-federal governments have over elements of their respective national economies, signatories to international trade agreements want to ensure that sub-federal governments comply with obligations subscribed to by federal governments. At the same time, the constitutional division of powers within federal states makes it politically difficult if not impossible for national governments to bind state

and provincial governments to the provisions of an agreement without their consent.

In order to resolve this issue, international trade agreements make the US and Canadian federal governments responsible for sub-federal compliance. Article 105 of the NAFTA commits both federal governments to “ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.” Article 105 is based on Article XXIV:12 of the General Agreement on Tariffs and Trade (GATT), which attempts to achieve a similar result by requiring each signatory to “take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by regional and local governments.” In the WTO, this language was revised to make member countries “fully responsible”² for the observance of the commitments made under the Agreement while also requiring that they take “reasonable measures” to ensure observance of the Agreement by regional and local governments.

The nature of a federal government’s obligation to ensure sub-national compliance has been addressed by GATT dispute settlement panel reports. In *United States: Measures Affecting Alcoholic and Malt Beverages*³ (Beer II), a GATT panel ruled in 1992, among other things, that certain US state measures which imposed a lower tax or offered tax credits on in-state brewers violated the requirement of national treatment set out in GATT Article III, concerning national treatment on taxation and regulation. In that case, the panel ruled “that because GATT was part of US federal law, which is superior to state law, there is no constitutional impediment to bringing a state into compliance.”⁴

In an earlier case, *Canada: Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*,⁵ the US argued that Canada could ensure compliance of the provinces to the GATT ruling, which found provincial listing requirements among other things to violate

Canada’s trade commitments, because the federal parliament had the legal power to discipline provincial liquor boards.⁶ In that case, the panel did not define what a reasonable measure would be for the Canadian government to adopt in order to ensure provincial compliance, but the panel did rule that Canada must show that it has made a “serious, persistent, and convincing effort.”⁷

Reading these two decisions together suggests that the GATT panellists were cognizant of, and sensitive to, the differences between the federal structures of the United States and Canada. The panels recognized that the US had the legal authority to impose a GATT consistent solution on the states while Canada’s legal authority may not be as clear cut. At the same time, Canada could not hide behind its apparent lack of legal authority to ensure compliance. The GATT/WTO system therefore seems to be flexible enough to permit different internal solutions and is cognizant of different internal realities. The aim, however, is the same: sub-national compliance.

Overall, the case for the US federal government binding its sub-federal constituent parts to the provisions of an international trade agreement (or other agreements that enhance economic integration) seems stronger than in the Canadian context. The US government has the legal authority to impose certain measures on its states and is, in fact, required to do so by virtue of GATT Article XXIV:12. The Canadian federal government, on the other hand, does not enjoy the same clear legal authority to bind its sub-federal governments but must, according to the GATT, at least make a “serious, persistent and convincing effort” to ensure that provinces comply with international trade obligations. Theoretically, this should mean that the ability to effectively drive economic-integration efforts in areas of sub-federal jurisdiction is greater in the US. In reality, the US track record is not nearly as favourable. To understand why, one needs to look at the distinctions between the history and practices of the two countries in this area, beginning with Canada.

The Role of Provinces and States in International Trade

The role of sub-federal governments in the Canada-US context is somewhat confused by differing constitutional constraints placed upon the federal and sub-federal governments in both countries. In Canada, it has been noted, with respect to international obligations, that “the federal government holds no trump card over the provinces as a constitutional matter.”⁸ This view of Canadian constitutional law is derived from the 1937 *Labour Conventions*⁹ decision and a rather restrictive court interpretation of the federal government’s “trade and commerce” power.

The *Labour Conventions* case essentially determined that the federal government of Canada only had international competence in areas where it enjoyed constitutional jurisdiction. In areas that fell under provincial jurisdiction, as set out in Section 92 of the *Constitution Act, 1867*, the federal government could not assert international competence. In addition, the trade and commerce power bestowed upon the federal government has “never been a strong repository for federal jurisdiction over economic policy.”¹⁰ As a consequence, provincial power over property and civil rights has become the default trade power in Canada.¹¹ Thus, a distinction should be made between the federal power to negotiate and the provincial power, in many cases, to implement.¹²

The court ruling in the *Labour Conventions* case, perhaps coupled with federal and/or provincial fears of losing a challenge that would upset the ruling and the status quo, entails in practice a high level of federal-provincial cooperation for Canada, as a whole, to pursue its trade objectives.¹³ This is enhanced by the fact that both levels of government understand the importance of international markets to practically every region of Canada.¹⁴

Furthermore, in part because of exclusive powers granted to provinces under Section 92, provinces tend

to act as sovereign in their sphere and are often treated as such by the federal government. The concept of executive federalism whereby representatives of the national and provincial executive branches of government meet to discuss issues is an implicit recognition of this sovereignty.¹⁵ The Agreement on Internal Trade (AIT) signed by the provincial, territorial and federal governments in 1994 confirms the notion of respective sovereignties. The AIT also reflects the reality that “provincial governments are often the main articulators of regional interests in Canada due to constitutional powers and the weak level of regional representation in federal institutions,”¹⁶ with the noted consequence that “most inter-governmental relations take place between governments rather than within a body such as the Senate.”¹⁷

Some commentators have taken a conciliatory approach when describing the current state of federal-provincial relations, noting that “[o]n balance, Canada’s federal arrangements have worked reasonably well in dealing with our trade and investment policy concerns.”¹⁸ Others, however, have viewed the current constitutional state of play in negative terms. In one instance, the current situation was described as the “burden of exclusive spheres”¹⁹ and in another as a “disability.”²⁰ Another commentator calls the *Labour Conventions* “an inconvenient precedent”²¹ Despite these criticisms, it is noteworthy that Canada has not been so “disabled” or “burdened” that it could not commit to the obligations of the GATT, WTO, the Canada-US Free Trade Agreement or the NAFTA. In fact, the latter three agreements were all negotiated with significant input from the provinces.

The United States’ constitutional structure with respect to international trade is arguably more straightforward than Canada’s. A number of constitutional provisions, such as the supremacy clause — according to which federal law trumps conflicting state laws — commerce clause, treaty clause and the president’s authority as Commander in Chief, all support the prevalence of federal power over state power in foreign relations.²² Noted US international-trade-law

scholar John Jackson further observes that, in *Missouri v. Holland*, the Supreme Court of the United States ruled that a valid international agreement could extend federal powers beyond “what would be permissible in the absence of such an US agreement.”²³

It seems that the United States federal government has clearer constitutional authority than the Canadian federal government to enter into international undertakings and bind its sub-federal governments in the process. Although this may be true from a strictly legal perspective, it has not always played out in reality. In practice, the US federal government has been reluctant to use its legal powers to bind sub-federal governments to commitments it has made under international trade agreements: “[s]tate and local actions in the international arena are governed more by custom, political practice and intergovernmental comity than by enforcement of constitutional and statutory rules.”²⁴ For example, in some cases, the federal government may be reluctant to challenge individual states because doing so may upset that state’s representative in the Senate.

Provincial Involvement in Canadian Trade Policy

Since the commencement of the Tokyo Round of multilateral trade negotiations in the mid-1970s, the Canadian federal government has developed a practice of consulting with the provinces on international trade initiatives. This practice developed out of necessity because the Tokyo Round began to deal with issues that were within the constitutional jurisdiction of the provinces. Subsequent trade negotiations also dealt with provincial issues, so the practice of consulting with the provinces has continued. These consultations have become increasingly important because the focus of international trade negotiations and agreements has “turned overwhelmingly to ‘inside-the-border’ regu-

latory and expenditure policies that have the potential to distort and impede trade.”²⁵ Services trade, natural resource pricing and agricultural support programs are good examples of provincial policies that fall “inside the border.” The nature of these new areas of negotiation has meant that the federal government needs to look to the provinces for information and negotiation support.²⁶ Furthermore, these federal-provincial consultations are in keeping with Canada’s tradition of executive federalism and recognize the lack of constitutional authority permitting the federal government to impose obligations in areas of provincial jurisdiction. This practice of federal-provincial consultations continues in a number of fora, including quarterly meetings of federal and provincial trade officials called C-Trade, meetings between the federal minister of international trade with his or her provincial counterparts, meetings of deputy ministers concerned with trade issues and extensive consultations on trade challenges that implicate provincial measures.

The Canadian system of federal-provincial consultations has developed in a manner that is both consistent with Canada’s international trade obligations as set out in the NAFTA and GATT, as well as with the ruling in the Labour Conventions case. However, the current system presents a number of challenges for the provinces. Problems range from the substantial to the petty, with tensions sometimes erupting over issues as trivial as the number of provincial officials permitted into a meeting room or hearing. Some of the more substantive issues are addressed below.

Fashioning a Canadian Position

The federal government speaks for Canada (including the provinces) in international fora. However, what it says in many cases depends on the positions of the various provinces and on the issues being discussed. Given the differing economic strengths and interests of the provinces, the federal government often finds itself in the unenviable posi-

tion of attempting to fashion a consensus that it is not at all obvious. For example, Alberta's interest in energy issues is very different from the interests of Ontario or Quebec. British Columbia's interest in softwood lumber trade is markedly different than that of New Brunswick, which has consistently been able to obtain exclusions from US investigations of provincial softwood lumber practices.

The softwood lumber dispute of 1991 and the subsequent Softwood Lumber Agreement (SLA), which limited Canadian exports of lumber to the US from 1996 to 2001, provides an interesting example of how the development of a national position does not always reflect the aspirations of particular provinces. Three of the four largest softwood lumber producing provinces supported the SLA but Ontario did not. Ontario viewed the SLA as an arrangement designed to improve the competitive position of the western producing provinces under the guise of opening up access to a market, the United States, that was not closed at that time. Furthermore, the export restraint agreement was arguably inconsistent with the principles of free trade and in violation of NAFTA and WTO Agreement provisions on export and import controls. This posed a challenge to Ontario, whose position is generally supportive of trade agreements and which defends the benefits of free trade to stakeholders.

The federal-provincial consultative mechanism also suffers because not all provinces have the same capacity to address international trade issues. Although there is no doubt that the provinces collectively are sophisticated on trade issues, the limited capacity of smaller provinces is in stark contrast to the large number of officials that Quebec, Ontario, Alberta and British Columbia can devote to these issues. At the same time, the lack of capacity in some of the smaller provinces is offset by the high level of sophistication of their officials, who may have a narrower set of trade interests upon which to concentrate and know these issues well. No single province, however, has the trade resources, capacity or sophistication of the federal government.

Living With Canada's Trade Obligations

With respect to Canada's trade obligations, it is not always clear for either the federal or provincial governments what these obligations will mean five or ten years in the future. This is a problem for all levels of government, but the degree of uncertainty for sub-federal governments is exacerbated for a number of reasons.

First, the federal government may not expressly design new trade obligations to deal with matters that fall within sub-federal jurisdiction, either because the federal negotiators lack understanding of provincial jurisdiction or fear treading on it. In the case of NAFTA Chapter 11, concerning the protection of foreign investors and their investments, the federal government negotiated a text on the definition and basis for providing compensation for expropriated investments, without any meaningful input from provincial governments. Yet it is provincial governments that are most charged with this issue under the Canadian constitution. As a result, the provinces are left trying to educate the federal government on what expropriation law means at the provincial level as well as trying to revise their thinking on what now constitutes expropriation in the new NAFTA context.

Second, provinces were not at the table during the negotiations, so they may not have a clear understanding of the obligations. As a result, they sometimes maintain measures or introduce new measures that are inconsistent with the new trade obligations.

Third, provincial governments do not have the same resources to deal with trade negotiations and implementation of the subsequent agreements. Although the provinces generally have developed the necessary sophistication on trade matters, they sometimes face problems with respect to capacity and resources; a problem exacerbated by government cut-backs in the 1990s. Consequently, not all provincial issues are adequately flagged for federal negotiators. Even when they are, provincial gov-

ernments are not always adept at effectively communicating their concerns to federal officials because provincial officials may not have couched them in trade terms or in the language of trade agreements. The lack of provincial sophistication on some of these issues has a political component. Often, provincial ministers concerned with trade restrict their efforts to trade promotion. This limits their engagement with the federal Minister of International Trade and the provision of directions to their own provincial officials concerning the broader question of trade rules-making.

Dealing with Trade Disputes

The need to understand the scope of Canada's trade commitments is most profoundly brought to bear when a foreign government challenges a provincial government's measures as inconsistent with Canada's obligations. Federal and provincial officials consult on trade disputes that implicate provincial measures, as was the case in the US challenge of Ontario beer marketing practices, which included restrictions on private delivery of beer and imposition of minimum prices, before the GATT in the early 1990s (Beer I). Extensive consultations also occur where both federal and provincial measures are threatened by a trade challenge, such as the US challenge, before a NAFTA Chapter 20 dispute settlement panel, of Canada's replacement of import quotas on certain agricultural commodities, subject to provincial marketing boards, by tariffs ("tariffication"). The softwood lumber dispute and a challenge by New Zealand and the US of Canada's dairy export regime are also good examples of instances involving federal-provincial consultations and collaboration. In the latter case, the federal government and the provinces of Quebec and Ontario, in particular, worked together closely in defence of Canada's measures. This included provincial attendance at WTO dispute settlement hearings in Geneva.

Federal-provincial cooperation in these disputes makes sense for a number of reasons. If a foreign government targets a provincial program, the

province has the best information on the targeted program and should participate in the defence of the disputed measure. On a more practical level, the federal government needs to share the responsibility for defending the measure because it does not have the personnel and other resources to do it all on its own. Provincial participation also insures greater support for a negotiated settlement to the dispute or compliance with a dispute-settlement panel ruling. Finally, by implicating the province in the process, the federal government is ensuring that it will not have to carry all of the blame if the defence of the measure is ultimately unsuccessful.

In addition, provincial participation in the defence of its own measures has a number of wider positive consequences for Canadian international trade relations. Provincial trade officials develop valuable expertise while participating in trade disputes and begin to understand the dispute settlement process. At the same time, provincial officials also learn some of the consequences of developing non-trade compliant measures, including the cost of defending their measures.

However, not every aspect of federal-provincial relations on international trade issues is positive. It is not always possible to construct a national strategy in a trade dispute that reflects the disparate interests of the various provinces. As well, when only one province's measures are being challenged by another country, there is a risk that the federal government will have a greater interest in seeing the problem go away than in reaching a resolution to the dispute. In addition, larger national concerns can dominate the federal government's agenda in a manner that is insensitive to local issues. The federal government may not realize how politically sensitive the underlying issues are for certain provincial constituencies. From the federal perspective, the dispute may be viewed as little more than an irritant that is undermining Canada's overall trading relationship with the disputing country.

The Context for US States

The most pressing trade problems for provincial governments often involve access to the United States market. Not surprisingly, however, sub-federal governments in the United States often try to undermine such access. To better understand why and how this happens, a look at state involvement in international trade negotiations and disputes is instructive.

Problems of Federal-State Consultation

Some commentators assert that “[i]t is not politically desirable for federal officials to appear to be interfering in policies traditionally set at the state level. Consequently, federal officials often seek to play down the pre-emptive effects of an international trade agreement.”²⁷ Section 102(b)(2) of the *Uruguay Round Agreements Act*, for example, which implemented US WTO commitments in domestic law, makes it clear that the US federal government has the authority to challenge state laws in court if there is a conflict between the state law and the WTO Agreement, but the Act also states that this will only be used as a last resort in cases where a co-operative approach with the state government has not worked.

The Statement of Administrative Action that accompanied the *Uruguay Round Agreements Act* established a consultative mechanism between the federal United States Trade Representative (USTR) and state governments. A similar mechanism exists in the NAFTA implementing legislation. The Office of Intergovernmental Affairs and Public Liaison (IAPL) informs the states about trade-related matters that “directly relate to or that may have a direct effect on them.”²⁸ The IAPL transacts day-to-day communications with a State Single Point of Contact (SPOC) designated by the governor’s office in each state.²⁹ This practice risks limiting the spread of information within state governments by shutting out state legislators or other parts of the executive such as the

Attorney General who must deal directly with the impact of trade agreements on state jurisdiction and law-making. The IAPL also facilitates outreach with domestic groups such as the business community as well as agricultural, environmental, labour and consumer organizations.

The nature of both USTR- state consultations and dialogue between USTR and domestic groups creates the impression that the federal government views individual states as just another interest group and not as partners in international trade matters. Furthermore, as noted by John Kincaid, states so viewed are in a disadvantageous position to compete with wealthier groups seeking to influence US trade policy.³⁰ The IAPL also administers the Intergovernmental Policy Advisory Committee on Trade (IGPAC), containing representatives of governors associations and state and local officials, which provides advice to the USTR on trade policy matters. However, it has been noted that the US federal government has only had sporadic meetings between the USTR and representatives of the National Governors’ Association.³¹ Moreover, not all state governments have representatives on the IGPAC and, unlike in Canada, some documents, such as draft texts, are only available for viewing in Washington. This latter point alone seriously hampers the ability of state governments to meaningfully assess and convincingly “buy into” US trade liberalization initiatives.

The US federal government, therefore, seems to have made only a half-hearted attempt at establishing something akin to the consultative mechanism that exists between the Canadian government and its provincial counterparts — imperfect as that mechanism is. The US version seems to be missing a number of essential points about the Canadian consultative mechanism, particularly extensive consultations on the text of draft trade agreements.

Arguably, it is not necessary that the US adopt a consultative mechanism similar to Canada’s. The federal-provincial consultative mechanism in Canada, which accords a significant role to provincial govern-

ments, has been developed in part because of the failure of federal institutions to adequately articulate regional concerns and interests. This is not the case in the US where a strong Senate forcefully expresses the concerns of the various states and regions. However, it is not the Senate that must implement trade agreements at the local level. As such, if a fuller buy-in by the states of federal trade obligations is the objective, there is still a need in the US for a stronger consultative mechanism between the federal and state governments than the existing structure provides.

The USTR's timid consultative mechanism with the states, when added to the US federal government's general reluctance to enforce international trade obligations at the state level and these states' frequent lack of trade sophistication, has serious consequences for economic integration efforts in North America. This will be presently demonstrated with respect to trade negotiations, and the resolution of trade disputes. In fact, it could be argued that there is a relationship between the lack of prior consultation with the states and the federal unwillingness to enforce rulings.

Trade Negotiations Involving US States

One can substantiate state reluctance to participate meaningfully in international trade issues by reviewing the negotiation of the General Agreement on Trade in Services (GATS). These reportedly created a great deal of controversy when the US exempted state measures that did not even need to be exempted, since they did not violate the basic non-discrimination principle of national treatment.³² This principle generally requires states to treat foreign service providers no less favourably than like domestic service providers. In another example, US sub-federal offers not to discriminate against foreign suppliers for goods and services during the Uruguay Round's renegotiation of the Government Procurement Agreement (GPA) were so meaningless, either because of exemptions or a lack of coverage, that the Canadian government refused to offer provincial commitments to the Agreement.³³

State reluctance to participate in trade negotiations is not limited to the multilateral context. Between 1994 and 1996, the states and provinces were permitted to list reservations in Annex I of the NAFTA, which was meant to list measures that would otherwise be inconsistent with a number of the commitments in Chapter 11 (Investment) and Chapter 12 (Cross-Border Trade in Services). The idea was that a state or province could reserve and maintain any measure listed in the Annex while any NAFTA-inconsistent measure not listed could be the subject of a legitimate trade challenge. While the Canadian provinces embarked on an exhaustive process to complete this exercise, the US federal government was unable to deliver any meaningful reservation lists from the states. In order to deal with this problem, the NAFTA parties agreed to grandfather, without having to list them, all existing sub-federal measures. This result was a step backward because the exempted measures are not transparent and as such limit the scope of future liberalization.

Ironically, governors supported and actively lobbied Congress to adopt both the NAFTA and WTO implementing legislation.³⁴ This perhaps had less to do with their interest in overall trade liberalization than it did with developing market opportunities for local firms and creating an attractive economic climate for inbound investment. There is little to suggest that these governors recognized that trade liberalization might also have implications on the development of their own domestic policies, as discussed below.

Trade Disputes Involving US States

The US federal government's inability to deliver meaningful commitments from its states in trade negotiations parallels a sometimes obvious unwillingness to enforce the provisions of agreements that it has already signed and ratified. For example, in the early 1980s, neither the White House nor Congress seemed willing to order state governments to abandon their unitary taxation formulas, which generally tax the income of corporations rel-

ative to the degree to which they do business in the state in some cases in violation of international tax treaties. The politicians were loath to face the wrath of state government leaders and their constituents, even though bilateral treaties gave federal officials the right to enforce such treaties.³⁵ The short-term political price of taking such action seems to have weighed heavier than long-term economic goals as represented by trade commitments.

Washington has not always displayed such reticence. In the early 1970's, Maine attempted to use its regulations for potato marketing to stop imports from Canada, but the US federal government used the court system to quickly overturn the state's actions.³⁶ Since then, however, the US federal government has shown a reluctance to assert its authority. In 1984, for example, South Dakota banned Canadian imports of pork and live hogs because the producers were using a drug that had been banned by the US Food and Drug Administration. However, the state prohibition lasted a number of months after a similar ban on the drug was instituted in Canada.³⁷ Nevertheless, in that case, the US federal government declined to take action against South Dakota even though it seemed clear that the action was solely designed to keep Canadian imports out.

The beer dispute (Beer II) between Canada and the US provides another example, this time with respect to state laws and regulations governing the distribution and sale of beer. These laws and regulations did not, in general, deny access to Canadian beer but they did discriminate against out-of-state beer (including foreign beer) by providing preferential treatment to in-state beer. In 1992, a GATT panel³⁸ determined that 62 measures maintained by 39 state governments were in breach of US obligations under the GATT. Since the adoption of that panel report, however, the US federal government and the states have made no effort to remove GATT-inconsistent measures. In fact, the number of such measures has actually increased since the ruling.

According to estimates by the Brewers Association of Canada, since the adoption of the 1992 panel report, 50 additional "inconsistent" measures have been introduced in 40 states.³⁹ In this case, not only has the United States failed to live up to the GATT panel ruling, but the inaction of Washington seems to have allowed an increased level of non-conformity.

Perhaps the most egregious case of state interference with international trade occurred when Massachusetts passed a law in 1996 forbidding state agencies, entities and authorities from doing business with Myanmar (Burma), citing that country's human-rights violations. In addition, however, the law also added a price penalty on bids from foreign companies which were found to have done so. Although legal scholars made a strong case that this action by Massachusetts was unconstitutional,⁴⁰ the federal government did not take steps to challenge the state law. The European Union and Japan, whose businesses were adversely affected by the law, were particularly frustrated by the US federal government's inaction and raised this issue at the WTO. The USTR expressed "regret" that the European Union had taken this action and promised to "continue to consult with officials from Massachusetts and the EU in an effort to reach a mutually satisfactory solution."⁴¹ The measure was ultimately ruled to be unconstitutional by the US courts, after a challenge by a US industry group and not the federal government.

The US federal government's preference to use political pressure and negotiated settlements has at times been successful but it has also created uncertainty for Canadian interests. In 1998, South Dakota began to harass Canadian shipments of wheat, cattle and hogs by implementing tougher inspection programs and at one point actually stopped shipments of these Canadian products from entering the state. Other states in the region also participated in a program of increased inspection of these Canadian imports. These actions were widely perceived as a reaction to falling commodity prices, for which rising imports from Canada were blamed, even

though allowing greater competition for markets to the advantage of consumers is usually considered to be one of the point of freer trade.

These actions were timed to occur six weeks before mid-term congressional elections and it was speculated that the Democratic US Administration chose not to force the states involved, most of which had Republican governors, to back down because it did not want to create a backlash against Democrats in the upcoming election.⁴² Even though Canada sought to have the US federal government overturn the states' actions in the courts, Washington chose instead to negotiate a Record of Understanding (R.O.U.) with Canada aimed at providing a conspicuous response to the political concerns of the states.⁴³ At the end of the day, Washington was able to resolve the issue, but not before shipments were disrupted and uncertainty was created for Canadian farmers.⁴⁴

While the actions of South Dakota provoked the United States government to eventually take action, the Ontario-Minnesota fish dispute of 1999 demonstrates that relying on the US federal government does not always pay off. The dispute between Ontario and Minnesota arose after the failure of Minnesota to implement recommendations made by a joint Ontario-Minnesota task force on the conservation of sauger and walleye fish stocks in shared boundary waters. Because Minnesota failed to follow the task force recommendations, the Government of Ontario imposed limits on the amount of fish that could be caught and retained by non-resident anglers unless the non-resident angler purchased accommodation services in Ontario (the so-called "overnight stay requirement"). Minnesota subsequently sought the help of USTR to resolve what they saw as a violation of Canada's trade in services commitments. USTR's willingness to become engaged in this dispute, despite the relatively small economic harm suffered as a result of the Ontario measure, is thought to be related to the mid-term congres-

sional elections and the fact that the entire Minnesota Congressional Caucus and the Governor were in support of taking action.

In this dispute, the trade issue was a proxy. The real question was not whether Ontario was acting in a manner consistent with Canada's trade obligations, but how to gain increased access to an Ontario resource, as well as how to resolve conservation issues related to the boundary waters. The problem, in fact, was about conservation and environmental protection and was only disguised as a trade allegation. At the end of the day, Minnesota's characterization of the problem as a trade dispute, and the US Administration's willingness to launch a trade challenge, did not resolve the issue. In fact, the intervention of the federal governments only increased the pressure on Ontario and Minnesota to make the problem go away which, in the end, meant a solution that did little to benefit the aggrieved Minnesota interests. Ontario "solved" the trade problem by removing the overnight stay requirement but lowered catch and retention limits for all non-resident anglers. The international conservation issue has remained largely unresolved. Moreover, support for the NAFTA on the Ontario side of the boundary has been weakened because it is now perceived as a cudgel by which provincial measures can be forcibly modified even in cases where the measure itself was imposed because of intransigence on the US side of the border.

Importantly, in the context of the discussion on further integration between the two countries, this cross-border issue also suggests the broader point that trade agreements are not inherently the proper tool or forum to resolve disputes that are not fundamentally related to trade.

These disputes were counterproductive to the interests of bilateral trade in two ways. First, the states involved did not increase their trade sophistication and, in some cases, were rewarded for their actions or, in the case of beer, inaction. Moreover, behaviour such as that displayed by South Dakota might actually encourage other states to pursue unilateral, trade-inconsistent initiatives to win

concessions from Canadian interests — although whether such an action can succeed does seem to depend on the US political climate of the day.

The other, larger problem with this type of behaviour is the broader implications it may have for efforts to deepen economic integration between Canada and the United States. Canadians may begin to doubt the usefulness of formal North American integration if Washington allows states to act in ways that are clearly inimical to Canadian interests.

None of this is to say that provincial policies never run afoul of Canada's international trade obligations or that provincial measures are not also the subject of international trade disputes launched by the United States. Beer I and the Ontario-Minnesota fish dispute are excellent examples of the US targetting a provincial measure. The difference is that once a provincial measure is found not to be in compliance it is, as in the case of Beer I, amended. In contrast, Beer II demonstrates that GATT non-conformity in the US states can, at the limit, actually increase after an adverse panel ruling. Therein lies the irony that, despite the relatively superior powers of Washington over Ottawa to enforce trade decisions, sub-federal non-compliance with international trade obligations is more of a problem in the United States than it is in Canada.

Addressing Canadian Issues

As outlined above, the governments of Canada face a number of challenges with respect to international economic integration efforts. Because of the importance that secure access to US markets has for the Canadian economy, it is this country that must show leadership on this issue. Below I will present three types of initiatives that could be undertaken to address these challenges. They are: 1) improving the existing federal-provincial consultative mechanism; 2) attempting to ensure better sub-federal engagement and compliance within the United States with trade policies

set out by Ottawa and Washington; and 3) greater direct provincial engagement of the US states. This section of the paper deals with the first of these, namely identifying and addressing domestic issues

The Canadian model of federal-provincial cooperation and consultation has minimized, but not eliminated, Canada's exposure to international disputes involving sub-national measures. At the same time, further integration cannot proceed unless the provinces understand the full extent of Canada's international trade obligations. For these reasons, both the federal and provincial governments need to take steps to make the current system better.

One of the biggest problems that provinces face when dealing with Ottawa is their relative lack of trade policy capacity compared to the federal government. The inability to analyse all of the implications of the NAFTA regime for sub-federal governments, for example, has a number of negative consequences for the process of North American economic integration. First, if provincial governments are not living up to the commitments set out in the NAFTA, the process of economic integration cannot proceed at the pace intended. Second, if provinces have not yet fully comprehended the existing integration regime, they may be hesitant to endorse further integration efforts.

To be fair, it should be noted that in some areas within provincial jurisdiction, provincial officials have in-depth expertise that far exceeds the level of sophistication of federal officials. In addition, unlike trade officials in the federal department of Foreign Affairs and International Trade, their provincial counterparts tend to remain in their positions for long periods of time. This means that the latter have greater institutional memory on some trade issues than their federal counterparts, a better ability to develop an expertise in a particular area and more opportunity to develop relationships with officials in other provinces.⁴⁵

These advantages still do not compensate for the relative lack of capacity compared to the federal gov-

ernment. One obvious way to overcome this problem is for the provinces to develop expertise by retaining outside counsel and dedicating more staff to international economic issues. This may be easier said than done, but if provinces want to be players in the game, they must be willing to pay some of the price. The information shared by the federal government will be most meaningful if there are provincial officials to receive and understand it.

Provinces could also mitigate some of these capacity-building costs if they did a better job of cooperating with one another. It is interesting to note that, although the provinces and the federal government meet on a regular basis to discuss international issues, the provinces rarely meet with one another to discuss common provincial concerns. Moreover, because provinces tend to work in isolation, they rarely set the agenda for new international initiatives or approaches and are missing important opportunities to lessen costs and duplication by sharing expertise and dividing up necessary research.

With respect to the current C-Trade consultative mechanism, the provinces have taken different approaches on how this might be modified or improved. In part, these different approaches reflect how the provinces deal with international trade issues within their own jurisdictions. Some provinces treat trade as an intergovernmental matter, while others view it as part of their economic development portfolio. Provinces that place trade matters within the intergovernmental affairs portfolio appear more willing to view interaction between the federal and provincial governments in a broad, intergovernmental context and, consequently, may be more willing to consider a formal federal-provincial structure other than the current C-Trade.

Provinces that participate in C-Trade by sending representatives from their economic development departments generally tend to view the federal-provincial forum in a more narrow economic context and appear less willing to consider modifica-

tions to the existing structure. It is therefore difficult to imagine a formal structure that could adequately address these questions and differences in approach to the satisfaction of all governments.

Provinces that wish to have a more formal structure have suggested that the provinces and Ottawa replace the current informal consultative mechanism with a structure that permits provinces to participate in international negotiations and also provides them with a place at the table during international dispute-resolution procedures. It remains unclear, however, how meaningful such provincial participation would be unless provinces are willing to devote more staff and resources to international economic issues. A right to sit at the negotiating table, for example, does not necessarily make good sense if a province does not have an economic interest in the negotiations and/or if it lacks the resources to take its place at the table. Would such a structure recognize the relative importance of trade to some provinces over others? Could it be flexible enough to only involve or accord adequate weight to those provinces that have an economic stake in a particular issue to the exclusion of disinterested provinces?

Even if a formal structure were devised, there may be no effective way to bind governments to the formal arrangement, because such an intergovernmental agreement would not be enforceable by law. Indeed, such an agreement could not withstand a court reversal of the *Labour Conventions* case and as such could not be used to hem in either level of government should the existing state of the law evolve because of a court decision. Professor Grace Skogstad, Professor of Political Science at the University of Toronto, has noted that this model may be unworkable in practice and might seriously deprive the federal government of its authority by essentially granting the provinces a veto over aspects of international trade negotiations. The current system may therefore be better because the “consultative strategy avoids the joint decision-making traps that shared federal-provincial negotiating authority may create.”⁴⁶

Skogstad has reviewed a number of alternatives to the current structure including having the federal government assert its exclusive authority over international trade issues. This may upset the dicta of the *Labour Conventions* case however, which is a risky proposition if the federal government cannot achieve a court ruling that decisively overrules the case in its favour. A diametrically opposed approach would be for the Canadian government to only conclude agreements that fall within the exclusive jurisdiction of the federal government, but this would be out of step with the scope of both existing trade agreements and current trade negotiations.

A final alternative might see the federal government concluding agreements that include areas of provincial jurisdiction, but only fulfilling federal commitments. Provinces would then be given the opportunity to choose whether or not to bind themselves to those commitments that fall within their own purview. This approach was used with respect to adoption of the two NAFTA side agreements on labour and the environment and the federal government practice of seeking the explicit approval of provinces before taking on international commitments in areas of clear provincial jurisdiction, as it did in the Uruguay Round services negotiations. However, it seems unlikely that Canada's trading partners would be content with such an arrangement for all matters.

A survey of alternative mechanisms to the current consultative process would seem to suggest that the status quo, or a modified version of the status quo, is the most useful accommodation of both federal and provincial interests.⁴⁷ Canada is not so large and the number of its sub-federal units not so unwieldy that the current structure cannot continue to function, although improvements can and should be made to it. To a certain extent, this is already occurring. Meetings between trade officials from the provinces and federal government now convene quarterly. The federal government has also taken some steps to insure that provincial

officials develop further trade expertise by conducting trade seminars and conferences on specific trade issues. Those programs should continue.

The federal government also needs to devote more resources to maintaining its links with provincial trade officials outside of the formal C-Trade mechanism. Although there is a secure web page that permits the federal government to share documents with the provinces, federal officials themselves should be in greater contact with their provincial colleagues. During the C-Trade meetings, Ottawa should allocate more time to the discussion of issues to ensure that these encounters become more of a consultation session and less of a one-way communication.⁴⁸ These changes, coupled with improved trade capacity within the provinces, will go a long way toward addressing the domestic challenges to international economic integration issues. In addition to developing better links with trade officials, there needs to be a parallel development of a revitalized federal-provincial ministers' forum. This would be an important tool to assist in provinces' understanding of Canada's trade commitments. Clear ministerial direction would also give more guidance to provincial and federal officials in their consultative process.

Finally, the Canadian government needs to ensure that the provinces have a more realistic understanding of their nation's trading relationships and a more balanced understanding of liberalized trade. Unfortunately, the benefits of liberalized free trade are sometimes rather diffuse, while the risks are specific and can have highly visible effects in particular provinces. Discussion of trade initiatives must recognize that trade liberalization will both open up new markets abroad and expose local markets to increased competition.

Greater cooperation and coherence between Canadian governments on international trade issues involving sub-federal measures would mean that stronger Canadian positions could be established on trade and integration issues generally. But the usefulness of such a strengthened East-West mechanism

under the aegis of the federal government would still be of limited value in terms of improving access to the US market. As we have seen, such access is often limited by state government measures, and resolving these issues through Ottawa and Washington can very much depend on the good will of Washington to engage the states more deeply on international trade issues. Thus, I will look next at possible ways in which the issue of sub-federal involvement in trade matters could be put on the bilateral agenda. This will include the possibilities for institutional improvements that are more directly North-South or regional in scope, and that would draw the states and provinces more directly together in designing a better cross-border relationship.

Addressing Issues in the US

With respect to the issue of dealing with challenges from the United States, it is useful to review the policies that the Canadian government should not adopt. Because dealing with sub-federal governments generally complicates economic integration efforts, it may be tempting to try to further economic integration without involving this lower level of government. However, meaningful integration must include such things as trade in services, standard setting and the regulation of professions. All of these sectors are regulated at the state and provincial levels and without sub-federal involvement, economic integration will not be comprehensive. Ignoring sub-federal governments is also not risk free. The ability of the US states, in particular, to undermine the goals of its federal government, whether intentional or not, makes indifference towards sub-federal governments an unwise option.

A similar mistake would be to take a “wait-and-see” approach. There is little doubt that, over time, US states will increase their trade sophistication and begin to develop some expertise on economic integration. Although this may be the case, there are a

number of problems with such a complacent approach. States may not develop expertise fast enough to keep pace with the demand for further economic integration. A wait-and-see approach also does not address the inherent problems of differences in size and sophistication among sub-federal units, for even if trade sophistication increases over time, it may remain as asymmetrically distributed as it is now. In addition, by doing nothing, the federal government will not be able to discourage the more egregious actions taken by sub-federal states, such as the unilateral policy making evidenced in 1998 by South Dakota. Arguably, a wait-and-see approach is nothing more than passive encouragement of actions that undermine integration efforts.

Perhaps the most serious problem with a “wait-and-see” approach is that it will encourage the US federal government to further develop its consultative mechanism with the states as the only method and forum for dealing with sub-federal governments on international economic issues. The Massachusetts sanctions dispute is perhaps the best example of the US federal government preferring to consult with the states on trade issues rather than flex its constitutional authority. This dispute demonstrated that a consultative mechanism is not always useful if it is not backed up by action that will result in sub-federal compliance.

There are other problems with the suggestion that such a consultative mechanism is the only method and forum for interacting with the states. Like the Canadian federation, there is a great deal of disparity between the size and economic power of the states. However, unlike Canada, which has to deal with 13 sub-federal units, the US must deal with 50 states. The fact that Canada began consulting with the provinces in the 1970s also ensured that there would be a precedent and procedure in place when more comprehensive trade negotiations such as the Uruguay Round and the NAFTA took place. The US model, as set out in the *Uruguay Round Agreements Act*, establishes a mechanism after the

fact. It is unclear how the mechanism could be seen as pro-active if states were not consulted during the negotiation of an agreement.

The lack of prior consultations also exacerbates the problem of the lack of trade sophistication among state officials. The mechanism established by the US federal government after the negotiation of the Uruguay Round appears to consist of little more than information sharing and does not address the issue of who gets the information and what is done with it. In other words, consultations and information sharing with uninformed and perhaps unengaged parties do not constitute meaningful consultations.

The consultative mechanism works in Canada because of a clear division of federal and provincial powers, which in turn has encouraged the development of executive federalism and facilitated a means by which the two levels of government can communicate. Also there is no clear separation of legislative and executive power.⁴⁹ In almost all cases, the provincial ministers of trade or provincial premiers are capable of speaking on behalf of both the executive and legislative branches of government. In contrast, the US tends to work through a more diffuse political system⁵⁰ under which neither the federal executive nor state governors can speak on behalf of their respective governments and represent only one branch of the government. Governors, for example, may see the benefits of liberalized trade but “state representatives, particularly those regulatory officials not responsible for job creation and budgets, are less willing to see state regulatory autonomy, even autonomy used for protectionist purposes, constrained.”⁵¹

Furthermore, because of differences in the constitutional division of powers in both countries and the separation of powers in the US system of government, solutions to insuring sub-federal involvement and support for economic integration efforts are of necessity country specific. There cannot be a “one size fits all” solution to dealing with sub-federal units, a generic approach that could be prescribed, for example, within international trade agreements.

In fact, the language of both the NAFTA and GATT recognizes that different federal systems have different solutions to ensuring compliance with international trade agreements.

Promoting US Sub-Federal Engagement

Certainly, the Canadian government should try to impress upon the US federal government that an assurance of state compliance with commitments that have been made in international trade agreements is a very important matter for Canada. While it would seem unrealistic to seek express assurances from the US that it will enforce its obligations at the sub-federal level in advance of any new integration initiatives, Canada should not hesitate to raise the issue. Canada cannot expect progress on this issue if it is not willing to discuss it. Governments frequently signal to other governments a wide range of issues that they wish to address in the context of trade negotiations including specific commitments they are seeking or more general matters such as increased transparency. There is no reason why a discussion of the role of sub-federal governments in international trade could not be similarly raised.

It seems clear that by raising the issue of sub-federal governments in international trade, Canada will open itself up to an internal discussion of the issue and perhaps criticism from the United States that provinces do not always comply with international trade obligations. Canada should be able to meet these criticisms. In the first place, Canada could make it clear that the different federal structures in the two countries and the language of both the GATT and NAFTA dealing with sub-federal compliance do not require absolute symmetry. Canada could also point out that the current consultative mechanism in Canada is cognizant of its constitutional division of powers but has, nevertheless, proved successful over time. On this last point, Canada should be able to demonstrate that the track record on provincial compliance is stronger than

that of the US states. But the key is that, by inviting this criticism, Canada would have underlined the need to explore the issue of sub-federal compliance with its trading partners.

By raising this issue Canada would also be underscoring a key message that a more mutually beneficial integration of the Canadian and US economies will not occur if matters under sub-federal jurisdiction such as services, procurement or investment are subject to little more than the grandfathering of existing measures. Canadian provinces will have little incentive to open their own markets in these areas unless there is a reciprocal benefit for Canadian business. For example, it seems unlikely that Canadian provinces will agree to be bound by the WTO Government Procurement Agreement or the procurement provisions of the NAFTA, unless the US states offer to remove some of the protectionist elements of their local buying preferences.

In any ensuing discussion, Canada could suggest that it might be in the US federal government's interest to improve on the use it makes of its consultative mechanism. In fact, a carefully modified version of the mechanism could be very useful as a tool to further trade liberalization and compliance among the US states. However, the mechanism, in its current form, is no substitute for Washington asserting its authority. Having said that, the exercise of the US federal government's legal powers does not necessarily mean that it should bring on a large number of law suits to enforce sub-federal compliance, if for no other reason than the political heat that this would bring down on Washington.⁵² Ideally, the encouragement of voluntary compliance would be best, but not at the expense of abandoning the option of mandatory compliance consistent with the constitutional authority of the US federal government. Washington, therefore, could use the consultative mechanism as a condition precedent to the exercise of its legal authority to impose sub-federal compliance, but not as an alternative.

There are elements of the Canadian model that could be adopted to assist in the goal of voluntary compliance. It has been Canada's experience "that the best way to ensure the involvement of provinces and states in trade policy issues is by involving them often, and in an informed way."⁵³ This speaks both to the form and content of consultations. However, given the large number of states, it is perhaps impractical to develop a model that requires consultations with all states. Instead, it might make more sense to use institutions already in existence to facilitate consultations. For example, the Council of State Governments could be better utilized as a forum to articulate trade issues with state officials and the federal government could institute a series of regular meetings between the National Governors' Association and USTR. It should also take steps to ensure that states are accorded treatment as another order of government — and not as interest groups. This might involve restructuring of the USTR Office of Intergovernmental Affairs and Public Liaison.

Furthermore, in order to move from a more theoretical discussion of sub-federal compliance of international trade obligations to more practical initiatives, Canada could also propose the creation and institutionalisation of an international joint forum for provinces and states to facilitate discussion of trade issues. For example, during trade negotiations, sub-federal governments could be invited to jointly discuss proposals and draft text. This proposal would not permit a place at the negotiating table for sub-federal governments but could facilitate sub-federal compliance and sophistication on trade issues. Some provinces may criticise the proposal because it may not go far enough to address some of the aspirations of some Canadian provinces. However, it should be viewed by provinces and US states alike as a useful forum to discuss issues of mutual concern and because it explicitly recognizes the sub-federal governments as relevant actors.

The creation of a such a forum creates a valuable "horizontal" bridge between sub-federal governments

in addition to the “vertical” relationship that sub-federal governments now have with their central governments. To date, both the states and provinces rely on their respective national governments for information on trade initiatives. Rather than only dealing with their own national governments on issues of international concern, a forum of sub-federal governments from both sides of the border should be encouraged to discuss issues that are unique to their order of government. This is perhaps the most beneficial aspect to this proposal: the forum will facilitate face-to-face meetings of sub-federal officials. These discussions may also result in the formation of common positions amongst sub-federal governments to advocate to their respective federal governments. They could also entice sub-federal governments, particularly the US states, to view trade initiatives as more than simply opportunities for investment attraction or access to new markets abroad, but rather as mutually beneficial exercises in rule-making.

Participation in such a forum should result in an increase of trade sophistication by sub-federal governments, a development of a mutual understanding of the issues facing various jurisdictions and the creation of relationships between trade officials from the various jurisdictions. Specifically, it should become readily apparent to border states and provinces that some of their regional concerns mean that they have more in common with their US or Canadian counterpart than they do with another sub-federal government in their own country. Ontario and New York, for example, may discover that they have more in common with each other on some issues than they do with their respective western counterparts in British Columbia or California. Indeed, it is likely inevitable that provinces and states will increasingly become directly engaged with each other on matters under their jurisdictions. One recent, but by no means unique, example of this trend is the resolution of the problems that arose from recent New York state measures targeting procurement practices of certain provincial jurisdictions.

Cross-Border Regional Agreements: The Example of Sub-Federal Procurement

In 2000, the New York State Assembly modified existing legislation that allowed the state to designate other US states with discriminatory procurement regimes, for the purpose of restricting access to New York State procurement contracts, to include foreign jurisdictions. In particular, companies from jurisdictions designated under the Act could not bid on contracts with state departments and agencies. After the passage of the legislation, Ontario and Quebec were added to the list of discriminatory jurisdictions, which already included the states of Alaska, Hawaii, Louisiana, Montana, South Carolina and West Virginia.

The New York bill modifying the existing legislation was first introduced in 1999 in response to protests about an Ontario company winning a contract, subsequently terminated, for an “I Love New York” tourism guide. The awarding of the printing contract to an Ontario firm was controversial for a number of reasons. Many viewed the awarding of a contract for governmental tourism promotional material to an out-of-jurisdiction source as illogical while others argued that the low Canadian dollar made the Ontario bid cheaper.⁵⁴ It is quite likely, however, that the law was aimed at Ontario’s own Canadian preference on procurement purchases and was also a means of applying pressure on Ontario and Quebec to take on international procurement obligations that, to date, they have not undertaken. Because Ontario and Quebec are not subject to international procurement obligations, the US federal government did not have a formal remedy by which to seek recourse against these provinces. In contrast, New York is covered by the WTO Agreement on Government Procurement, which requires them, subject to certain exceptions including Buy American and small business set aside exceptions, to practice open procurement with other signatories. Although New York offered no evidence that local suppliers had difficulty obtaining

contracts in Ontario or Quebec, perceptions to that effect may have prompted the state to take action.

In July 2001, Ontario quietly announced it had dropped its Canadian preference policy. For its part, Quebec reached a formal understanding with New York in September of that same year in which it withdrew any limitations on the origin of goods and services procured. As a result, both provinces were removed from the New York list of discriminatory jurisdictions.

Ontario and Quebec-based firms did not, however, get improved access to all New York procurement opportunities, for they continue to be ineligible for New York procurement contracts subject to Buy America restrictions attached to federal funding, including those for steel and transportation projects.

If the resolution seems a bit lopsided, it did result in the creation of a number of mechanisms and potential liberalization opportunities. In particular, the agreement, which resolved the dispute between New York and Quebec established a consultative mechanism to provide early warning on “future measures affecting one another that may reduce access to public procurement.”⁵⁵ In addition, each government designated a person to assist in the resolution of disputes and as a means to “develop and to favor an increase in the reciprocal opening of their respective public procurements.”⁵⁶ For its part, Ontario signed an agreement with New York in the same year to develop co-operative mechanisms between the state and province including, among other things, a commitment to collaborate on job creation, promotion of transportation infrastructure improvements, co-operation on joint environmental and natural resource issues, and taking up joint concerns with their respective federal governments.

Toward Deeper State — Provincial Engagement

The progress that remains to be accomplished between the Canadian and the US government on matters involving sub-federal jurisdictions could be

complemented and accelerated through a sub-federal forum involving all provinces and states wishing to participate. This being said, it seems clear that in some cases, economic integration will occur on a regional scale before it occurs at a binational level. Indeed, the provinces have begun to develop a series of networks across the Canadian-United States border, as evidenced by provincial membership in US governmental organizations and the signing of memoranda of understanding between state and provincial governments. For example, many provinces have memberships in the Council of State Governments and their regional chapters. Quebec and Ontario are associate members of the Great Lakes Governors’ Association while the Atlantic provinces and Quebec participate in the New England Governors Conference. Alberta is party to a number of regional forums including the Rocky Mountain Trade Corridor, the Can/Am Border Trade Alliance, the Montana-Alberta Bilateral Advisory Council, and several US sectoral and legislative forums.⁵⁷ Ontario and Quebec have also participated in summits with New York State to promote regional interests and binational initiatives and, as discussed above, have signed agreements arising out of the New York procurement dispute.

These links, particularly in the past, were used as photo opportunities when provincial premiers and state governors paid visits to each other, and were not designed to bring about substantive actions. But many of these mechanisms could be used to discuss issues of common concern and develop economic integration within each sub-federal unit’s constitutional jurisdiction. This might include such things as promoting mutually beneficial economic development aims, road-building initiatives to facilitate border crossings, developing common tourism infrastructure or the harmonization of taxation or environmental measures. Working closely with regional states may also provide an early warning of trade irritants and potential disputes which could prevent these issues from escalating. Provinces and states could then articulate common interests and issues to their national governments.

That said, the respective constitutional powers of the sub-federal governments in each country do limit the scope of these agreements. Neither state nor provincial governments have the legal capacity to enter into anything that might be akin to a binding treaty. Thus, the success of these agreements will depend on the political commitment of the involved state and provincial governments to continue participating in these discussions, as when New York and Quebec made commitments with respect to procurement.

The Agreement on Internal Trade (AIT) signed by the Canadian provinces and federal government provides an interesting example in the Canadian context of how a political agreement can cover a wide range of important issues. Under the AIT, governments have made commitments on matters such as procurement, investment, consumer-related measures and the environment. The AIT also demonstrates that without an ongoing political commitment to the agreement, or without appropriate thought as to how governments might implement it, such a commitment may do nothing more than raise expectations that cannot be met. For example, the AIT chapter on energy has still not been completed despite the conclusion of the rest of the agreement in 1994. Despite its weaknesses, it has been argued that the AIT could “have an important normative or ‘legal’ effect even if no sovereign body has the power to compel compliance.”⁵⁸ The same might be said of any cross-border agreements between sub-federal governments provided that they are focussed and capable of achieving measurable results.

In this respect, Ottawa and Washington could envisage a framework accord that would facilitate such broader agreements, on a regional basis, between states and provinces that would consider it mutually beneficial to fast-track improvements in their trading relationship and on other issues of common interest, such as environmental standards. The framework agreement could place such cross-border regional agreements under a common aegis, such as that of the NAFTA Commission, composed of representatives of the governments of the three

NAFTA countries, in order to ensure consistency with international accords, and the ultimate role of federal governments in international trade matters.

Finally, provincial governments must guard against becoming complacent in the absence of trade-liberalization initiatives from the US states. Even if the latter decline to offer substantial liberalization in certain sectors, provinces should not be content to let the issue rest. Instead, they should take a pro-active approach and put together their own offers on sub-federal liberalization. As yet, this type of initiative has not been pursued by the provinces.

Conclusion

Some of the most significant steps towards economic integration that have been taken to date, such as tariff elimination and border facilitation issues, fall almost exclusively under the jurisdiction of federal governments. Economic integration in the North American context necessarily implicates sub-federal governments in Canada and the United States because significant sectors of the economy fall within the constitutional competence of the provinces and states. Consequently, there is real potential for sub-federal governments to undermine or reverse economic integration efforts through either deliberate actions designed to limit or harass foreign competition, or failure to share or understand the broader vision of economic integration postulated by central governments.

Until the issue of sub-federal engagement, particularly on the part of US states, is addressed, it is difficult to imagine how meaningful integration initiatives can proceed. In short, if the North American marketplace is to be integrated, the role of sub-federal governments must be recognized and these governments must be encouraged to both implement existing commitments and to contribute effectively to the development of new ones.

Notes

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- 1 The focus of the discussion will be on integration between the United States and Canada, principally concerning commercial matters involving the states and provinces. The author wishes to thank Douglas Brown, Peter Morici, Daniel Schwanen and Quebec and Ontario government officials for extensive comments on the first draft of this paper. Thanks also to Armand de Mestral, Patrick Monahan, as well as Alberta and Canadian federal government officials for helpful discussions on specific aspects of subsequent drafts. Responsibility for any remaining errors are those of the author alone.
 - 2 World Trade Organization (1994).
 - 3 GATT (1988a).
 - 4 Cooper (1993, p. 155).
 - 5 GATT (1988b).
 - 6 Cooper (1993, p. 152).
 - 7 GATT (1988b).
 - 8 Fairley (1988, p. 162).
 - 9 *A-G Can. V. A-G. Ont. et al.* (1937 1 D.L.R. The "Labour Conventions" case).
 - 10 Fairley (1988, p. 107).
 - 11 Monahan (2001, p. 21).
 - 12 McIlroy (1997, p. 433).
 - 13 Fairley (1988, p. 162).
 - 14 Bakvis and Skogstad (2001, p. 15).
 - 15 The negotiations and resulting structure of the Agreement on Internal Trade supports the notion that each level of government considers itself sovereign within its sphere. In particular, it is interesting to note that the language of the AIT replicates, in many cases, the provisions of international trade agreements.
 - 16 Kuchuka (2001, p. 31).
 - 17 Bakvis and Skogstad (2001, p. 7).
 - 18 Anderson (2001b, p. 51).
 - 19 Fairley (1988, p. 135).
 - 20 Ziegel (1988, p. 342).
 - 21 McIlroy (1997, p. 438).
 - 22 Jackson (1989, p. 63) Jackson further opines (p. 68) that "with regard to international economic matters, there appears to be no significant constitutional limitation on the powers of the federal government because of state powers. Thus any valid international agreement which has direct application, or any valid federal statute or regulation regarding foreign economic affairs will likely prevail over inconsistent state law."
 - 23 Jackson (1989, p. 68).
 - 24 Kincaid (1999, p. 118).
 - 25 Skogstad (2001, p. 160).
 - 26 Kuchuka (2001, p. 31).
 - 27 Cooper (1993, p.147).
 - 28 *2002 Trade Policy Agenda and 2001 Annual Report of the President of the United States on the Trade Agreements Program* (p. 225).
 - 29 *2002 Trade Policy Agenda and 2001 Annual Report of the President of the United States on the Trade Agreements Program* (2001, p. 225).
 - 30 Kincaid (1999, p. 125).
 - 31 Fry (1993, p.130).
 - 32 Schaefer (1999, p.77).
 - 33 Schaefer (1999, p. 78).
 - 34 Kincaid (1999, p. 124).
 - 35 Fry (1993, p.131).
 - 36 Gifford (2001, p. 126).
 - 37 Gifford (2001, p. 126).
 - 38 GATT Doc. DS/23/R.
 - 39 Morrison (2001).
 - 40 For example see: Schmahmann and Finch (1997, pp 175-207) who assert that the state enactment is unconstitutionally "infirm" under pre-emption, the foreign commerce clause and the supremacy clause of the US constitution.
 - 41 Press Release from the Office of the United States Trade Representative (1997).
 - 42 *Inside US Trade* (1998, p. 2).
 - 43 Gifford (2001, p. 127).
 - 44 Brosch (2001, p. 115). It is useful to remember that Mexican tomatoes were the target of similar actions by the Florida State officials in response to growing imports from that country.
 - 45 Kuchuka (2001, p. 30).
 - 46 Skogstad (2001, p. 161).
 - 47 Skogstad (2001, p. 163).
 - 48 Kuchuka (2001, p. 24).
 - 49 Anderson (2001b, p. 51).
 - 50 Anderson (2001a, p. 55 at 58).
 - 51 Schaefer (1999, p. 79).
 - 52 Schaefer (1999, p. 43).
 - 53 Williams (1999).
 - 54 *Memorandum of Understanding on Public Procurement between the Government of the State of New York and the Government of Quebec* (2001, clause 3).
 - 55 *Memorandum of Understanding on Public Procurement between the Government of the State of New York and the Government of Quebec* (2001, clause 4).
 - 56 *Memorandum of Understanding and Cooperation between The Province of Ontario and the State of New York* (2001).
 - 57 Information compiled by International Relations, Alberta International and Intergovernmental Relations, Government of Alberta, July 2000 (www.iir.gov.ab.ca).
 - 58 Swinton (1995, p. 197).

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Résumé

Canadian Provinces, US States and North American Integration: Bench Warmers or Key Players?

Stephen de Boer

Les provinces canadiennes et les États américains ont un rôle décisif à jouer dans la forme que prendra l'intégration économique des deux pays. Nombreux obstacles à une circulation transfrontalière plus libre et plus équitable relèvent en effet de leurs compétences. Pourtant, ce rôle n'a pas fait l'objet d'examen approfondis lors des récents débats sur l'approche du Canada envers l'intégration nord-américaine.

Le présent texte veut combler cette lacune en examinant des différends qui ont par le passé opposé États américains et gouvernements canadiens ou étrangers, proposant d'en tirer les leçons pour mieux définir notre stratégie d'intégration. Car si les pouvoirs constitutionnels de Washington lui accordent clairement le droit d'imposer aux États le respect de ses engagements commerciaux, dans les faits la situation est beaucoup moins limpide. La situation politique au niveau des États exerce une influence nettement plus directe sur le gouvernement fédéral américain que celle de nos provinces ne le fait sur Ottawa. En témoigne par exemple l'existence au Congrès américain de caucus d'État susceptibles d'offrir des votes cruciaux à l'administration américaine, de sorte que les interventions fédérales en matière de commerce dépendent souvent de la situation politique du moment.

Malgré cela, l'implication formelle des États dans les négociations commerciales internationales demeure faible, comparativement à ce qui se passe au Canada. Quoique certainement intéressés à saisir toute occasion d'affaires qui leur attirerait emplois et capitaux, les États américains ont donc tendance à sous-estimer l'importance de la réciprocité stipulée dans les règles de commerce international. Non que le système canadien de consultation fédérale-provinciale soit parfait. Ainsi, les répercussions des accords commerciaux dans les domaines de compétence provinciale sont souvent insuffisamment évaluées.

Des deux côtés de la frontière, ces problèmes viennent compromettre les avantages espérés de l'intégration économique. Pour les résoudre, l'auteur propose d'améliorer le mode fédéral-provincial d'élaboration de nos politiques commerciales. Évidemment, aucune amélioration ne pourrait satisfaire toutes les provinces, cer-

taines abordant la question sous l'angle des relations interprovinciales et même internationales, alors que d'autres l'envisagent plus strictement sous l'aspect de leur développement économique. Dans certain cas, les intérêts des uns et des autres pourraient de plus différer considérablement.

Il est malgré tout indispensable que les représentants des provinces collaborent plus régulièrement à l'élaboration des positions commerciales canadiennes. Les provinces devraient aussi échanger plus couramment leurs ressources, vu que celles-ci sont limitées et que l'une ou l'autre province aura souvent une expertise appréciable dans des domaines particuliers. Pour une coordination plus efficace et mieux informée, l'auteur propose un forum ministériel fédéral-provincial revitalisé sur les questions de commerce, où des directives générales pourraient être développées afin d'assurer une plus grande cohérence et certitude chez les différents négociateurs provinciaux qui travaillent sur les mêmes dossiers.

Concernant les problèmes transfrontaliers suscités par des mesures prises par les États américains, l'auteur propose l'adoption de mécanismes de nature nord-sud. Le premier de ceux-ci serait un forum mixte d'États et de provinces chargé de discuter et d'éclairer toutes négociations à venir entre Ottawa et Washington. On y discuterait de questions relevant de ce niveau gouvernemental, même si elles sont de nature internationale, et l'on pourrait même y établir des positions communes à défendre auprès de chaque gouvernement fédéral.

L'auteur rappelle par ailleurs qu'il existe déjà entre provinces ou États voisins de nombreuses ententes relatives à l'application des normes environnementales, au règlement des conflits ou à l'ouverture des marchés. Il propose donc d'en rationaliser l'utilisation pour en faire la base d'accords régionaux plus officiels, inspirés par exemple de l'Accord canadien sur le commerce intérieur. Pour leur part, les gouvernements centraux appuieraient ces accords en vertu d'une entente-cadre dont l'application relèverait de la Commission de l'ALENA, l'organisme ministériel qui supervise l'application de l'ALENA et veille à son développement futur.

Summary

Canadian Provinces, US States and North American Integration: Bench Warmers or Key Players?

Stephen de Boer

Canadian provinces and US states have a key role to play in shaping future economic integration between the two countries. This is because many impediments to both freer and fairer movement across national borders actually fall in within their purview. Yet, their role has by and large not been examined in recent debates over Canada's approach toward North American integration.

To remedy this gap, this paper discusses a number of past disputes involving US states and Canadian or foreign jurisdictions, and argues that such frictions should inform our strategy toward integration. While the US constitution suggests a clear-cut ability by Washington to ensure that states fall into line with US trade commitments, in practice the situation is not that simple. State-level politics have a much more direct influence on the federal US government than Canadian provincial politics do in Ottawa. This fact, embodied for example in the existence of state caucuses in the US Congress, often means that Washington's incentive to intervene with the states on trade matters is very much beholden to the politics of the moment.

At the same time, the involvement of states by the US federal government in international trade negotiations is not as much a two-way street as is the relationship between Ottawa and the provinces in such matters. As a result, while US state governments do pay significant attention to trade opportunities as a way to attracting investment and jobs, they can underestimate the quid pro quo required by the rules of international trade. Having said this, the Canadian system of federal-provincial consultation is far from perfect. Implications of trade agreements for areas under provincial jurisdiction are sometimes insufficiently evaluated.

These problems all detract from the benefits expected from economic integration on either side of the border.

To remedy these difficulties, the paper recommends improvements to the federal-provincial design of trade policy in Canada. Any proposed improvement is unlikely to satisfy all the provinces, because some consider trade matters from an interprovincial and even international

relations angle, while others see it as more strictly part of their economic development functions. Furthermore, there will be times when the interests of one province will differ sharply from that of another.

Nevertheless, greater routine involvement by provincial officials in formulating federal positions is necessary. Furthermore, provinces should more routinely share resources with each other on trade issues, given their often limited resources and yet considerable expertise in specific areas. In order to better inform and coordinate policies in this environment, the paper recommends a revitalized Federal-Provincial ministerial Forum on trade issues, where broad guidance could be issued at the ministerial level to the officials – ensuring greater consistency and certainty for officials from different provinces working on the same file.

With respect to cross-border issues involving US state measures, the paper suggests the introduction of two mechanisms that would be North-South in nature. The first of these, is a joint forum of states and provinces to discuss and inform future negotiations between Ottawa and Washington. This forum could encourage discussions of issues unique to that order of government, yet that are international in nature, and could even result in the formation of common positions by states and provinces to advocate to their respective federal governments.

The paper also points to numerous existing instances of closer negotiations and cooperation involving contiguous states and provinces, variously involving environmental standards, dispute resolution, and improved market access. Thus, as a second mechanism to improve the outcome of North-South integration, the paper recommends that states and provinces parlay these accords into more streamlined and visible regional agreements, possibly modeled after Canada's own Agreement on Internal Trade. Federal governments should encourage these accords, through a framework agreement that would fall under the aegis of the NAFTA Commission, a ministerial-level body that is charged with supervising NAFTA's implementation and ensuring its further development.