Governing the North American Free Trade Area: 
International Rule-Making and Delegation 
in NAFTA, the SPP, and Beyond

(Formerly: «The North American Free Trade Area under Obama: An Institutional Strategy»)

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Introduction

The North American free trade area seems to have reached an impasse. On the one hand, it is facing an institutional deficit that hinders its competitiveness. Deprived of adequate rule-making mechanisms, the three economic partners—Canada, Mexico, and the U.S.—cannot effectively adapt the regional trade and investment regime instituted by the now fifteen years-old North American Free Trade Agreement (NAFTA). For the same reason, they have not yet been able to address pressing new problems, the first in rank being the whole issue of regulatory coordination. Simply put, without serious institutional reform, the NAFTA compact is not sustainable.1 On the other hand, because of the regional asymmetry of powers, deeply ingrained attitudes toward sovereignty, and idiosyncratic treaty-making practices, any form of European-style supranationalism has definitely been ruled-out as a conceivable way to administer the economic

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zone. The question, therefore, is should North Americans abandon any prospect of deeper economic integration and get prepared for the inevitable decline of free trade in the region?

This paper try to answer this question by first pointing out that supranationalism, or international delegation of authority, is not in any way a necessary condition for efficient international rule-making. In fact, as we will see, *ex post* or continuous rule-making is almost never delegated in international cooperative agreements. The key ingredient of effective international rule making is not the external delegation of authority, but rather the level of domestic executive autonomy states are able to pool and coordinate through often sophisticated international institutions. We will see that this is even the case in Europe, and since the U.S. can be considered our “hard case” here both theoretically and in the North American political context, I will discuss examples of international rule-making bodies to which the U.S. is a party, that are operating exclusively in the perimeter of the executive branch, even without the requirement of any form of legislative ratification.

Informed by this perspective on international rule-making, the paper offers an original assessment of NAFTA and the more recent Security and Prosperity Partnership of North America (SPP). In particular, I conduct an in-depth comparative analysis of the level of executive discretion pooled in the SPP working groups and conclude that the SPP amalgamates enough executive autonomy to constitute a basis for the establishment of a non-treaty international rule-making body. Then, the paper suggests paths by which the three governments could upgrade the SPP design in a way that would permit to break the institutional ceiling that has so far limited all attempts to deepen the process of North American integration, and provide the region with the rule-making capability it needs.

1. **International Rule-Making and the Delegation Problem**

Signing international treaties, or other legally-binding instruments like free trade agreements, is the conventional way for states to commit themselves towards the rules by which they attempt to govern the global economy and other international issue areas. In the majority of cases, these international legal agreements are definitive; that is, they do not provide for any means of adding
new rules or modifying existing rules apart from renegotiation or the equivalent of renegotiation. But, renegotiation can be costly and adaptation may be necessary in order to cope with a changing world. So, even if states value stable rules, they sometime decide to opt for non-definitive, or flexible, international agreements, which provide for *ex post* rule-making, or secondary ruling. They will then create a decision-making body (a commission, a council, a general assembly, or a conference of parties) and grant this entity with the authority to decide on rules that were not initially stipulated in the original agreement.

When they do so, states jealously keep this *ex post* rule-making capability for themselves. The bodies to which the rule-making authority is granted are in fact almost always collectives made of all the members of the agreements themselves. Koremenos has coined the expression “internal delegation” to describe this phenomenon and to distinguish it from “external delegation”, that is delegation to a third party\(^2\). In a statistical survey she recently conducted on a sample of ninety-seven (97) international agreements, she found rule-making capability in the provisions of only ten (10) of them. In all cases, this capability was internally delegated and not externally delegated\(^3\). In another, more qualitative survey, Guzman and Landsidle, who dispute the very notion that “internal delegation” should be considered as delegation, reach a similar conclusion: «[T]o date states have delegated legislative or decision-making authority to supra-national entities in extraordinary few instances. Moreover, in virtually every instance the delegation is narrowly cabined in term of its scope, its importance, and its ability to actually influence state conduct.»\(^4\)

So, the process by which states organize *ex post* rule-making authority (the authority to add new rules) is radically different from the process by which they organize *ex post* adjudicative authority (the authority to interpret and enforce existing rules).\(^5\) While states frequently and truly delegate adjudicative power to third parties (international tribunals or *ad hoc* panels), they maintain a firm grip on rule-making by designing decision-making procedures in which they

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themselves will remain the deciders. This means that, *stricto sensu*, there is generally no delegation involved in international rule-making, if we define delegation the way it is usually done in political science: «a conditional grant of authority from a principal to an agent that empowers the latter to act on behalf of the former».

Clearly, there is no separate agent usually involved in international delegation. Therefore, it also means that states do not surrender significant degrees of autonomy or sovereignty when they engage in international rule-making.

If there is no real delegation at play, what then makes international rule-making mechanisms different from plain renegotiation? Basically, it is the fact that they provide for amending mechanisms that do not require full domestic ratification on the part of the contracting parties. For example, many international agreements contain provisions for secondary ruling that explicitly isolate parts of the binding rules—more technical in nature and often put aside from the main body of the treaty, in annexes or schedules—, and allow for a more expedite and secure way to modify them than what is normally called for in more basic commitments. Sometimes, the agreement itself 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 that we will describe below in fact permits some minor modifications to the original classification of products for origin determination or to the schedule for tariff elimination, that do not require full ratification procedures. On the U.S. side, this means that instead of going back to Congress, the adoption of the new rules requires a Presidential proclamation preceded by consultations of the Committee on Ways and Means of the House of Representatives and the Senate Committee on Finance.

The second possibility is to be found international agreements containing “tacit amendment” procedures. Tacit amendments become binding on a state if it acquiesces simply by failing to object after a given period of time, which means without the need of ratification.

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7. See Andrew T. Guzman and Jennifer Landsidle, *op. cit.*

8. (House of Representatives 1993a, Sec. 103 and 202)

very few and recent instances, like in the case of Montreal Protocol on Substances that Deplete the Ozone Layer, states cannot opt out from new rules even if adopted by a majority vote. But, as Guzman and Landsidle show, these provisions cover a limited number of highly technical and not very consequential rules.10

Thus, states can and most of the times do engage in international secondary-ruling without delegating their decision-making authority and getting entangled in supranational institutions. This is how and why the U.S., in spite of being so jealous of its sovereignty, do engage, like other states, in “living” international arrangements. The main difficulty lies elsewhere. It arises not from the problem of international delegation, but from the problem of domestic delegation. In order to commit their respective states in favor of new international rules, the executives participating in secondary-ruling process must themselves have the power to translate international commitments in enforceable domestic rules. In some instances, when the executive agencies already possess large amounts of authority, derived from constitutions or delegated by legislative bodies, the organization of secondary-ruling can be rather unproblematic. But when, on specific issues, agencies do not possess the constitutional or delegated authority to regulate domestically, international rule-making is much less easier. This is even the case in the European Union, despite the formidable development of supranational institutions. Surprisingly, a recent empirical analysis by Eberlein and Grande reports, «… it is striking that the European agencies, insofar as they carry out regulatory tasks at all, are far from having the powers (rule-setting, implementation, dispute settlement) typical of classical independent regulatory agencies»11. In the specific area of economic regulation, «(t)he bulk of regulatory activity here lies unambiguously at member-state level.»12 European states achieve regulatory coordination more efficiently through intergovernmental, rather than supranational, institutions. So, international delegation is not a prerequisite. Domestic delegation, however, is critical according to Eberlein and Grande:

Externally, regulatory networks can perform their co-ordination function only on the precondition that participants be allowed a certain degree of independence and de facto room for manoeuvre in their decisions. A national regulatory authority that has no

significant powers within its respective national regime, for instance, will find it hard to become effectively involved in transnational networks because it will lack the capacity for making credible commitments to partners.\(^{13}\)

Since the U.S. case will be central in the discussion below, it can be used as a useful example here. The U.S. constitutional practice gives more autonomy to the president, and therefore to the executive branch, to engage directly, and in a more flexible manner, in international rule-making in the security area than in the trade area. National security clearly falls within the president’s plenary powers as commander in chief, even if Congress retains the power of military appropriations.\(^{14}\) These concurrent powers explain why, with the exception of arms control treaties, all defence international agreements negotiated by the U.S. are nowadays submitted for ratification as congressional-executive agreements.\(^{15}\) This being said, the president’s direct authority in this realm, plus the cumulative effect of his power to make international agreements «as authorized by treaty», have clearly contributed to the development of more flexible international commitments. For example, post-world war treaties signed with allies have subsequently given legal legitimacy to several significant agreements negotiated as sole executive agreements.\(^{16}\) One of them, NORAD, has gone as far as establishing a joint Canada-U.S. military command for the defence of North-American airspace and was regularly amended without the need of ratification.\(^{17}\) The contrast with the situation for trade-related matters is striking. Congress has always exercised a firm and direct control over tax and other revenue raising policies and the House Committee on Ways and Means has closely guarded its rule-making authority in these areas. Therefore, the old stock of trade policy, made of tariff measures, is a policy area where the executive branch must content itself with particularly low levels of delegated authority. American legislators are periodically delegating to the president impressive levels of authority 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. Accordingly, traditional trade agreements negotiated by the U.S. have been carefully crafted as definitive agreements, and the implementing legislations passed in Congress take extra precautions in

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\(^{13}\) Ibid., p. 103.


\(^{15}\) See tables in Oona A. Hathaway, *art. cit.,* pp. 1258 and 1260.

\(^{16}\) See John Yoo, *op. cit.,* p. 285.

making sure that no *ex post* decisions coming out from the few bodies created by these agreements could be interpreted as self-executing.

A different situation occurs in areas where the legislative branch exercises its constitutional authority, but has been more willing to delegate regulatory matters to the executive branch. In such instances, it is easier for the executive branch to unilaterally commit itself internationally. In the U.S., this can be achieved by tacit amendment or, if needed, by “sole executive agreements” as well as “agreements made by virtue of an existing treaty”, that are concluded solely by the President without legislative approval. Although precise data on sole executive agreements are difficult to get, experts agree that the relative number of international agreements concluded by the President without congressional ratification has been important and on the rise.\(^\text{18}\) Congress can also, by law, direct administrative agencies to implement international rules and standards and assimilate them as domestic regulation as international bodies decide them. One authoritative jurist estimates that “(t)he U.S. Code is replete with (such) international assimilations”.\(^\text{19}\) It is important to note that international assimilation, as we have seen below does not require the existence of an international legally binding agreement.

To sum up this section, international rule-making is a complex affair but, contrary to common wisdom, international delegation and the related issue of sovereignty costs are not the main factors making it difficult. Domestic delegation—that is the amount of delegated authority the executive effectively control and how it is delegated—, plays a much more significant role.

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\(^\text{18}\) 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% 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, vol. 54, no. 2, 2006, p. 9 (?) and Oona A. Hathaway, *art. cit.*, p. 1287, note 130.

2. Trade Liberalization With and Without Rule-Making Capability

Currently, as we will see in greater details in the next section of the paper, NAFTA and the SPP have almost no rule-making capability. One positive and reassuring aspect of this fixity is that it provides predictability and protects the deal against opportunistic political manoeuvres. However, 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.

A first, patent, example of the suboptimal situations engendered by discarding secondary-ruling capability can be found in NAFTA’s rules of origin regimen. The most efficient way to create a free trade area is by establishing a common external tariff for all the member countries. 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 relies on the alternative rules-of-origin solution, which calls for 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. The overall cost of having NAFTA operate under a rules of origin system in comparison to a common external tariff system has been estimated, for Canada, at 1.04% of its GDP\(^2\). Moreover, it opens the door to protectionist manipulations of levels of “regional content” and therefore risks undoing precisely what the Free Trade Agreement is supposed to achieve.

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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.

Rules of origin and protection against abusive trade remedies are important aspects of any conventional free trade agreement. However, the kind of trade restrictions and distortions they are aimed at eliminate or reduce, mainly tariffs and subsidies, are today pretty much under control. The new frontier of trade liberalization is now clearly the reduction of regulatory obstacles to transborder trade. While, over the last quarter of century, privatization and market liberalization have led to a retreat of the state as a direct provider of certain public goods, it has reinvented itself as the “regulatory state”\(^\text{21}\). “Protective regulations” (the regulatory activity aimed at protecting consumers, the environment, labour rights, public health and safety)\(^\text{22}\) as well as “economic regulations” (the regulation of infrastructural and utility sectors like communications, railways, energy, and water distribution)\(^\text{23}\) have steadily increased and have had a significant impact on trade. In some cases, because they are designed in a way that imposes higher costs on some importers, regulations have been used as protectionist non-tariff barriers. More generally, though, regulations affect trade because differences in domestic regulations impose significant compliance costs to producers operating in different jurisdictions; in other words, there is no true global—or regional—market without concordant rules. Hart has analysed the costs of regulatory discordance for exporters and reports OCDE data that estimate them at between 2% and 10% of


\(^{23}\) See Burkhard Eberlein and Edgar Grande, *op. cit.*, pp. 95-96.
their overall production costs.\textsuperscript{24} Regulations also impact on trade because they have become a central issue in trade policies. Indeed, trade-policymakers must increasingly take into account the preoccupation of constituencies who fear that free trade will make it easier for economic agents to simply flee from regulations’ reach by moving their activities in more accommodating jurisdictions. For all these reasons, regulatory coordination has become a central issue of trade liberalization.

The problem is that coordinating or 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.”\textsuperscript{25} This is necessary for the simple reason that governments are permanently making new rules and unmaking others, and regulatory activity is a central and sensitive function of the modern state that cannot be preordained. In the U.S. alone, and only at the federal level, more than 50 agencies, employing nearly 250 000 employees, are producing 4 000 new rules every single year.\textsuperscript{26} National governments are acutely aware of the way regulations «affect not only the competitive position of firms within a country, but between or among different countries.»\textsuperscript{27} Thus, as it has been recognized in several studies, efficient regulatory coordination requires flexible, not definitive international agreements.\textsuperscript{28} Because it lacks secondary-ruling capability, the concordance of regulations is an area that has largely been left out of NAFTA. As we will see below, regulatory cooperation has been a central horizontal component of the SPP agenda, but seeking convergence simply through information sharing and awareness raising among regulators has obvious limits.

\begin{itemize}
\item \textsuperscript{25} \textit{Ibid.}, p. 21.
\item \textsuperscript{27} David Vogel, \textit{op. cit.}, p. 13.
\end{itemize}

The institutional model under which NAFTA operates combines highly detailed pre-established rules and a quasi-absence of rule-making capability.\textsuperscript{29} It is a definitive agreement, not a flexible one. NAFTA is equipped with several technical working groups and a minister-level Free Trade Commission (FTC), but with almost no authority to create new rules or modify existing ones. The FTC has the mandate to monitor the implementation of the Agreement and can settle interpretive disputes with the possible help of a panel system. Thus, NAFTA gives the Commission limited political interpretive authority. The FTC has no real mandate to modify the Agreement in the future; the clause on modifications in the last chapter of the Agreement makes no mention of it.\textsuperscript{30} This basically means that NAFTA does not provide for endogenous modifications: additions or amendments to the Agreement would have to be processed from outside the Agreement’s framework, through the same diplomatic channels and domestic ratification procedures required for brand new agreements. It is thus not surprising that such modifications have never occurred. If, in general, it is not granted with the power to amend the Agreement, there are two specific instances where alterations to the Agreement require actions from the FTC: it has a role to play in negotiating eventual accession of other states\textsuperscript{31} and, as mentioned above, for authorizing technical and limited—tacit—amendments, as in the case of modifications to rules of origin or customs regulations\textsuperscript{32}. The later instance is the only real rule-making authority the FTC has, that is apart from purely procedural rule-making.

The FTC used its interpretive authority in 2001 when it attempted to clarify some provisions pertaining to the operation of Chapter 11’s arbitration tribunals (Canada 2001).\textsuperscript{33} In the end, tribunals have operated according to the Commission’s interpretive note, but this move has not gone unchallenged\textsuperscript{34}. As for the Commission’s authority to modify technical provisions as the

\textsuperscript{29} For a more detailed analysis, see Louis Bélanger, \textit{op. cit.}
\textsuperscript{31} \textit{Ibid.}, Art. 2204.
\textsuperscript{32} \textit{Ibid.}, Art. 414 and 512.
\textsuperscript{33} Canada, Department of Foreign Affairs and International Trade, M. Pettitgrew se félicite des interprétations adoptées à la réunion de la Commission de l’ALENA au sujet du chapitre 11, Communiqué no. 116, August 1, 2001.
\textsuperscript{34} One panel’s ruling indicated clearly that such clarifications could not, in any circumstances, be interpreted as modifications of the original text of the Agreement, thus setting clear limits to the use of interpretations to indirectly amend the Agreement (See: \textit{In the Matter of An Arbitration Under Chapter Eleven of the North...}}
classification of products for origin determination or the schedule for tariff elimination, it remains subjected to each state’s implementation procedures. Thus, the Commission does not directly enact these modifications.

This brief overview of the delegation of authority vested in the Commission reveals that NAFTA has been carefully crafted to ensure that, even in its most technical and trivial aspects, absolutely no measures or ruling coming out of the work of its institutions could be conceived as self-executing. That is, no decisions are enforceable without appropriate domestic legislative (in the U.S. and Mexican cases) or executive actions.

The North-American leaders did not at first consider the necessity of supplementing the restrained NAFTA coordination institutions. In 2000, soon after he became the Mexican president, Vicente Fox tried to engage his American and Canadian counterparts with his «Vision 20/20» agenda, which proposed improved policy coordination and, among other things, the creation of a customs union. The initiative was coldly received, especially by the Canadian government. A first post-NAFTA trilateral meeting took place in 2001 during the Third Summit of the Americas in Quebec City, but remained without immediate sequel. It took four other years and the September 11 events with their tightening effects on the U.S. border to again bring together the three heads of states and government. They gathered in Waco, Texas, in 2005 to launch the Security and Prosperity Partnership (SPP) with the objective of keeping North American borders close to security threats while open to the movement of legitimate people and goods.

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On conventional trade issues, the SPP agenda has not had the ambition to bring liberalization much further than the limits established by NAFTA, but it nevertheless attempted to reanimate some technical discussions and provide the kind cooperation at the operative level that NAFTA’s working groups failed to sustain. Thus, the content of the economic pillar of the SPP was «reflective of the fact that the soft political mandate for such negotiations (…) contained in NAFTA (the built-in agenda) had been insufficient.»³⁸ And it didn’t take long for pressures to orient the new mechanism toward the completion of NAFTA to manifest themselves. First, it took the form of a willingness to better activate NAFTA’s own limited capacity to decide on secondary rulings. In their first Report to Leaders in June 2005, ministers of the three countries announced: «The three countries have forwarded a trilateral document setting out each country’s domestic procedures to modify NAFTA’s temporary entry appendix on professionals to the NAFTA Free Trade Commission for approval».³⁹ However, there is no indication that the FTC has ever followed suit. Then, in 2006, a North American Competitiveness Council (NACC) was created in order to provide the SPP with input from the business sector. This new consultative body brought in the process recommendations that clearly aimed at completing NAFTA (in the areas of rules-of-origin and origin certification and intellectual property) or supplementing it with new primary laws (proposals for the negotiation of an Agreement on Regulatory Cooperation and Standards and for a new Trilateral Tax Treaty).⁴⁰ These pressures clearly indicate that stakeholders conceive the SPP as the necessary mechanism for institutionalized ex post coordination that NAFTA failed to establish.

In fact, the SPP has been designed in a way that put the focus on the better implementation of already existing agreements rather than on the production of new ones. For the moment, the SPP was and is still foreseen as essentially an agenda-led intergovernmental process. The Waco Summit established twenty trilateral working groups at the bureaucratic level reporting to ministers on a semi-annual basis and foresaw an «ongoing process of cooperation» that could be expanded «by mutual agreement as circumstances warrant», but no formal arrangement was

signed and no future or regular summits were envisioned.\textsuperscript{41} Afterward, decisions were made to convene in Cancun (2006), Montebello (2007), and New Orleans (2008). These agenda-setting summits at the presidential and prime-ministerial level are supported by a loose structure 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. In the U.S. (see Figure 1) the Secretary for Homeland Security is responsible for the security pillar, the Secretary for Commerce is responsible for the prosperity pillar, the Secretary of State has overall coordination responsibility, and bureaucratic coordination authority has been assumed by the Director for Western Hemispheric Affairs in the National Security Council.

As Anderson and Sands have summarized it, SPP’s activity has so far been strictly limited to implementing existing laws without contemplating to supplement them with additional primary law-making:

> Perhaps the most important feature of the SPP design is that it is neither intended to produce a treaty nor an executive agreement like the NAFTA that would require congressional ratification or the passage of implementing legislation in the United States. The SPP was designed to function within existing administrative and legislative authority already residing with the executive branch. Rules and standards could be set, law enforcement and national prerogatives pursued, all within the broad parameters of constitutional authority or prior congressional authorization.\textsuperscript{42}

In a Report for Congress on the SPP, the Congressional Research Service goes at length explaining how limited the SPP should be in its ambitions as long as it remains an executive-only affairs:

> The SPP is not a trade agreement, nor a form of economic integration, and goes only as far as leading to some measure of regulatory harmonization among the United States, Canada, and Mexico. The SPP working groups are not contemplating further market integration in North America. Such a move would require a government approval process within each of these countries. In the United States, such an agreement would require the approval of the U.S. Congress.\textsuperscript{43}

\textsuperscript{41} White House, Joint Statement by President Bush, President Fox, and Prime Minister Martin. Security and Prosperity Partnership, Office of the Press Secretary, March 23, 2005.
\textsuperscript{42} Greg Anderson and Christopher Sands, \textit{op. cit.}, p. 17.
4. Domestic Delegation and the SPP Linkages

Could NAFTA and the SPP be reformed in order to provide the North American free trade area with the necessary secondary-ruling capacity it needs? As for NAFTA, as long as it is considered in U.S. treaty-making practice as traditional trade agreement, in spite of its scope, Congress will probably never accept to loosen its grip and delegate significant levels of rule-making authority. This being said, an upgrading of NAFTA in its current form or another to “treaty status”, which would give the U.S. executive branch more discretion for its implementation, should not be totally excluded.  


45. The argument proposing 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 courts. See Laurence H. Tribe, «Taking Text And Structure Seriously : Reflections on Free-Form Method in Constitutional Interpretation», *Harvard Law Review*, vol. 108, no. 6, 1995, pp. 1221-
an *Article II treaty* (requiring a supermajority vote in the Senate), or as a *congressional-executive agreement* (require a majority vote in both houses of Congress), remains 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. Moreover, if standard trade agreements like NAFTA are always treated as congressional-executive agreements in the U.S., it is not necessarily the case for all commerce-related arrangements. Over the past two decades, the U.S. has indeed ratified a significant number of agreements dealing with trade and investments issues as Article II treaties. A recent survey for the 1980-2000 period has found 27 U.S. treaties dealing with commercial issues and 43 dealing with investments. The two categories brought together represent 18% of the Senate’s treaty ratification activity.\(^{46}\) However, if the convertibility of NAFTA is theoretically feasible, politically it remains a long shot.

As we have seen, contrary to NAFTA, the SPP has no legally-binding foundations. However, rather than focusing on international delegation, a thoughtful evaluation of the SPP as an eventual rule-making regional body should take into consideration its potential in term of domestic delegation. After all, as the European model suggests, regional economic rule-making capability is more often coming out of intergovernmental networks benefiting from strong domestic executive authorities, rather than in supranational institutions. As domestic delegation is concerned, the most striking difference between NAFTA and the SPP is that the latter significantly enlarges, beyond traditional trade issues, the scope of economic cooperation and, at the same time, mixes this enlarged economic agenda with security issues. The question to be asked is: what do these linkages bring to the table in terms of executive authority? This section, offers an answer to this question by analyzing the first years of U.S. participation in the SPP process. A complete analysis, covering also the Canadian and Mexican cases would obviously have been more desirable, but an exclusive focus on the U.S. can be defended on two grounds. First, as we will see below, precise information on each government’s participation in the SPP working groups has been extremely difficult to collect. In these circumstances, the time and costs of including the three cases in the analysis would have been prohibitive, at least for a first cut

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evaluation. Second, because of its relative power and the peculiarities of its political system of check and balance, which imposes a high level of constraint on the executive branch, the U.S. is definitely the hard case here: it is the level of executive autonomy on the U.S. side that is likely to define the potential for secondary-ruling capability for the tripartite cooperation scheme.

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### Table 1

**Main U.S. Agencies participating in the Prosperity Pillar of the SPP**

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<tr>
<th>SPP Working groups</th>
<th>Members 2005-2006 (U.S. Departments and Agencies)</th>
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<tr>
<td>E-Commerce</td>
<td>Department of Commerce&lt;br&gt;International Trade Administration (Dept. of Commerce)&lt;br&gt;Department of State&lt;br&gt;United States Trade Representative&lt;br&gt;Federal Trade Commission (Independent)&lt;br&gt;Federal Communications Commission (Independent)</td>
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<td>Energy</td>
<td>Department of Energy</td>
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<td>Environment</td>
<td>Department of State&lt;br&gt;Environmental Protection Agency (Independent)</td>
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<td>Financial Services</td>
<td>Department of Treasury</td>
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<td>Food and Agriculture</td>
<td>Department of Agriculture&lt;br&gt;Foreign Agricultural Service (Dept. of Agriculture)&lt;br&gt;Food and Drug Administration (Dept. of Health and Human Services)</td>
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<td>Health</td>
<td>Department of Health and Human Services</td>
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<tr>
<td>Manufactured Goods and Sectoral/Regional Competitiveness</td>
<td>International Trade Administration (Dept. of Commerce)</td>
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<td>Movement of Goods</td>
<td>United States Trade Representative</td>
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<td>Department of Transportation</td>
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In order to assess the capability of the executive branch to engage in the kinds of rulemaking collaboration that interests us here we first need to identify the individual U.S. agencies that have been implicated in the SPP process. Over the two first years of existence of the SPP, a total of 10 different agencies from the executive branch and 4 independent agencies have been active, at different hierarchical levels, in one or more of the 20 SPP working groups. Tables 1 and 2 list the participating agencies. No official list of agencies or contact persons is made available by the government. Thus, this compilation has been made by using information found in internal documents, divulgated following several Freedom of Information Act requests to the U.S. federal
government by Judicial Watch, and crosschecking it with agencies websites, organizational charts and directories.\textsuperscript{47}

\begin{table}[h!]
\centering
\begin{tabular}{|c|c|}
\hline
\textbf{SPP Working groups} & \textbf{Members 2005-2006 (U.S. departments and agencies)} \\
\hline
Aviation Security & \textit{Transportation Security Administration} (DHS), \textit{Customs and Border Protection} (DHS) \\
\hline
Bio-protection & \textit{Department of Homeland Security}, \textit{Department of Health and Human Services}, \textit{Department of Agriculture} \\
\hline
Border Facilitation & \textit{Department of Homeland Security}, \textit{Customs and Border Protection} (DHS), \textit{Department of Transportation} \\
\hline
Cargo Security & \textit{Customs and Border Protection} (DHS), \textit{Department of Homeland Security}, \textit{Department of Commerce}, \textit{Nuclear Regulatory Commission} (independent), \textit{Department of State}, \textit{Department of Energy} \\
\hline
Intelligence Cooperation & \textit{Department of Homeland Security}, \textit{Federal Bureau of Investigation} \\
\hline
Law Enforcement Cooperation & \textit{Department of Homeland Security}, \textit{Department of Justice}, \textit{Customs and Border Protection} (DHS) \\
\hline
Maritime Security and Transport & \textit{US Coast Guard} (DHS) \\
\hline
Critical Infrastructure & \textit{Department of Homeland Security}, \textit{Department of Energy}, \textit{Transportation Security Administration} (DHS), \textit{Department of Transportation}, \textit{International Boundary and Water Commission} (Dept. of State), \textit{Department of Health and Human Services}, \textit{Food and Drug Administration} (Dept. of Health and Human Services), \textit{Animal and Plant Health Inspection Service} (Dept. of Agriculture), \textit{Food Safety and Inspection Service} (Dept. of Agriculture), \textit{Department of Agriculture} \\
\hline
Science and Technology Cooperation & \textit{Department of Homeland Security}, \textit{Customs and Border Protection} (DHS) \\
\hline
Traveler Security & \textit{Customs and Border Protection} (DHS), \textit{Transportation Security Administration} (DHS), \textit{Department of Homeland Security}, \textit{Department of State} \\
\hline
\end{tabular}
\caption{Main U.S. Agencies participating in the Security Pillar of the SPP}
\end{table}

Unfortunately, we do not have a systematic and direct measure of the level of delegated authority entrusted in each of these agencies. However, we can create an indirect measure using Epstein and O’Halloran’s index of “executive discretion”.\textsuperscript{48} This index has been computed for each congressional committee as the average percentage of provisions appearing in bills passed in

\textsuperscript{47}. This has been a time-consuming and painstaking operation, in part due to the fact that the documents divulged were often subjected to heavy editing. So, I recognize a margin of error here and these tables should not be considered as definitive, even if the level of accuracy here certainly fits our purpose.

which authority is delegated to the executive branch.\textsuperscript{49} In order to attribute a specific index to each agencies, I have linked agencies to committees on the basis of the committees’ legislative jurisdictions listed in under House Rule X and on the basis of frequency of appearances of witnesses from each agency before committees from 1998 to 2005.\textsuperscript{50} Finally, when more than one agency is involved in a single working group, I have averaged the index. The result is graphically presented in Figure 2.

The data suggest that the agencies participating in the “prosperity” pillar of the SPP enjoy significantly more executive discretion than the ones involved in the “security” pillar. Historically, Congress has indeed maintained a relatively high level of control over domestic security and law enforcement policies and regulations.\textsuperscript{51} The 9/11 attacks and the subsequent creation, in 2002, of the DHS certainly have boosted executive autonomy in the new “homeland” security area\textsuperscript{52}, even if Congress has since begun to reorganize and reassert its oversight over the Department’s activities.\textsuperscript{53} It is important to note, however, that the redefinition of the security agenda in the context of North American cooperation has gone even beyond the newly conceived administrative limits of homeland security.

\textsuperscript{49} Epstein and O’Halloran use data from the 1947-1990 period, so they do not have an index for the more recent Committee on Homeland Security. Therefore, I have attributed to this committee the average index of the four main committees that have transferred jurisdictions to the new Committee on Homeland Security when it was created in January 2005. They are, if we use the old terminology applied by Epstein and O’Halloran: Internal Security, Judiciary, Public Work and Transportation, and Ways and Means. On transfers of jurisdiction to the benefit of Homeland Security, see Judy Schneider, \textit{Committee System Rules Changes in the House, 109\textsuperscript{th} Congress}, CRS Report for Congress, January 5, 2005.

\textsuperscript{50} Using the GPO Access search engine available at [http://www.gpoaccess.gov/chearings/search.html]

\textsuperscript{51} The House Judiciary Committee and the defunct Internal Security Committee rank at the low end of Epstein and O’Halloran’s classification of committee’s lawmaking activity according to levels of discretion granted to the executive branch. Yet, they do not reach the bottom positions occupied by committees like Ways and Means or Budget. See Epstein and O’Halloran, \textit{op. cit.}, p. 205.


The DHS leads all the working groups constituting the security pillar of the SPP and therefore dominates the process in a way that has no parallel on the prosperity side. But, despite the ubiquitous nature of its mandate, the Department has had to involve numerous other agencies in the process (See Table 2). For example, representatives of the Department of Energy, the Department of Transportation, the Department of Health and Human Services, the Food and Drug Administration, and the Animal and Plant Health Inspection Service and Food Safety and Inspection Service of the Department of Agriculture have been participants on the U.S. side in the sole working group on critical infrastructures.\(^{54}\) These agencies bring with them significant levels of executive discretion to the table.

A close look at the “prosperity” pillar shows an important and fascinating discrepancy between “old” and “new” trade-related policy issues. Historically, as mentioned above, Congress has

\(^{54}\) This working group was renamed “Protection, Prevention and Response Working Group” in 2006.
exercised a firm and direct control over tax and other revenue raising policies and the House Committee on Ways and Means has closely guarded its rule-making authority in these areas. Therefore, the old stock of trade policy, made of tariff measures, is a policy area where the executive branch must content itself with particularly low levels of delegated authority. By contrast, in complex and informationally intense policy areas targeted by non-tariff barriers measures and economic regulatory cooperation, like energy, consumer protection, transportation, or telecommunications, rule making is much more widely delegated. And it is even more so in more social regulatory areas like public health, public safety, or environmental protection, where incentives for delegating are high for congressmen, perhaps because constituency-based political benefits are difficult to identify. Compare, for example, the 3300 regulations promulgated by the Department of Transportation since 2005 to the 34 promulgated by the Department of Treasury.\footnote{According to data compiled with the help of the “Regulation Tracker” on the Justia website.} Thus when we look at the working groups constituting the prosperity pillar of the SPP, we see agencies that are bringing to the table very different levels of executive discretion. For example, the working groups on the environment, energy, e-commerce, manufactured goods competitiveness, and transportation bring agents of the executive branch benefiting from relatively high levels of discretion. On the other hand, the working group on financial services is led on the U.S. side by the Department of Treasury, an agency operating under tight control by Congress. On the whole, however, it is quite evident 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 U.S. government has considerably more delegated authority at its disposal.

It is interesting to note that the working groups with the higher index of executive discretion are also the ones that seem to have been the most efficient. It is not possible to make here a rigorous assessment of each of the working groups accomplishment. However, in August 2006, the ministers responsible for the SPP published their second Report to Leaders, to which was annexed a complete list of each of the working groups initial objectives with a mention of their level of achievement.\footnote{August 2006 “Report to Leaders” available at http://www.spp-psp.gc.ca/progress/reports-en.aspx.} On this basis, we can calculate the percentage of accomplished objectives for each group, and use the result as a convenient—although very approximate—measure of
efficiency. Figure 3 compares each group’s accomplishment score with its level of executive discretion.

![Figure 3](image)

On average, the working groups of the prosperity pillar, which also benefit from higher levels of delegated authority, show significantly higher levels of accomplishment (41% on the prosperity side vs. 14% on the security side). More importantly, almost all the working groups making the top of the list for objectives accomplishment (*Environment*: 56%; *Energy*: 48%; *E-Commerce*: 45%; *Transportation*: 39%) have high scores on our executive discretion index. The only exception is the *Movement of Goods* working group, which combined an impressive 50% level of completion with a “low” level of executive discretion, but is led on the U.S. side by the Office of the United States Trade Representative, whose level of delegated authority is difficult to assess because of its status as part of the Executive Office of the President. The worst results all come from the working groups in the security pillar (*Aviation Security*: 0%; *Science and Technology*...
Cooperation: 0%; Border Facilitation: 6%; Law Enforcement Cooperation: 7%; Travellers Security: 7%), which scored “medium” levels of executive discretion.

To sum up, in contrast with international security, traditional internal security is a policy area where, historically, the U.S. executive branch has not secured the amount of discretionary authority on which innovative forms of international commitments can easily be built. As the SPP experience has shown, however, North American trilateral cooperation is evolving towards enlarged conceptions of homeland and regional security and, in the process, more autonomous sectors of the governments, at least on the American side, are brought in. It is the case, for example, in the areas of transport security and critical infrastructures. Concurrently, on the “prosperity” side of the SPP, we have witnessed a similar and even more pronounced evolution towards the amalgamation of new policy issues, for which the executive branch has inherited high levels of delegated authority, to more conventional trade issues, for which the legislative branch has always exerted tighter control. As long as they permit to build a base of delegated authority that would facilitate the transition towards the kind of institutions the region needs— institutions vested with the permanent rule making capability required to sustain and reinvigorate the North American free trade area—, these linkages are promising.

5. **Non-treaty international rule-making**

In spite of its potential in terms of domestic delegation, the SPP itself has not evolved to become a rule-making institution. It has, until now, essentially sought coordination simply through information sharing and awareness raising among agencies. One reason that can in part explain why the SPP was prevented to clearly promulgate regional rules and standards, even non-binding ones, is the Bush administration well-known mistrust of international institutions. On the other hand, the way the SPP was carefully designed to assemble an agenda of cooperation built exclusively on the executive branch’s areas of competence and delegated authority, can also be seen as a legacy from another fixation of the Bush era; the “unitary executive”. Bush’s unitary executive doctrine—defending that only the president should exercise executive authority, including the interpretation and completion of statutes, and that Congress should not be allowed

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to infringe on this authority—was a doctrine of extreme executive discretion.\textsuperscript{58} Its aim is to secure and expand the amount of regulatory authority in the executive branch’s hands, and should therefore facilitate international cooperation in areas where secondary ruling is needed.\textsuperscript{59} Moreover, 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, and recently reaffirmed by Obama.\textsuperscript{60}

Can the SPP develop as an effective rule-making body despite its lack of legal foundation in a treaty or other kind of legally-binding instrument? As we have seen in the first part of this paper, delegation of authority to supranational bodies is not a necessary condition for the development of international secondary ruling capability. In this section, I use two examples to show how intergovernmental bodies that, like the SPP, do not benefit from the strong legal base of a treaty or another similar kind of binding agreement, can effectively generate international rules.

The first example of non-treaty rule-making comes from an area of international regulation very few people were familiar with before the current economic crisis; international finance. In the aftermath of the Mexican and Asian financial crises in the mid- to late 1990s, when it became evident that an international regulatory regime was needed in order to discipline the global financial market, states could quite naturally have turned themselves to the existing international financial institutions, the World Bank and the International Monetary Fund (IMF). Many, in particular, considered the IMF to be the natural decision-making forum for the harmonization of financial regulatory standards.\textsuperscript{61} Not only such a task would have been coherent with the existing mandates of the IMF and the World Bank, but also both bodies are rare instances of real delegation in the world of international organizations. They operate under voting systems that

\textsuperscript{59}. On the intimate link between the principles of the unitary executive and the regulatory activity of the state, see James L. Gattuso, \textit{op. cit.}.
combine pooled sovereignty and weighted majority, command impressive staffs of highly qualified professionals, and are mandated, by treaty, to make legally-binding decisions. In spite of this, in 1998, the major economic powers decided instead to create a new entity, the Financial Stability Forum (FSF).

The FSF regulatory activity has no international legal foundation. It is, in the language of Drezner, a “club-based organization”. It has been established by a non-legally binding decision of the G-7, itself an ad hoc political organization with no legally-binding foundations, not formally different from the North American Leaders’ Summit that oversees the SPP process. The FSF promulgated in 2000 a “compendium of standards” covering twelve different areas of financial regulation, from insurance and banking supervision to money laundering. Some of the standards have remained untouched since their promulgation, but others have been continuously revised. Recently, facing another major global financial crisis, the new G-20 has again opted in favour of an enlarged FSF, renamed Financial Stability Board (FSB), to broaden the scope and tighten international financial regulations. The G-20 members declared that, compared to the old FSF, the new FSB would benefit from “a stronger institutional basis and enhanced capacity”. It now has a permanent decision-making organ, the Plenary, with biannual meetings, a full-time Secretary General, and an enlarged secretariat. It remains, however, a non-treaty organization and its decisions are politically-, rather than legally-binding. Nevertheless, compliance with FSF regulations has been remarkable.

The second 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

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62. Ibid., pp. 75-78, 136.
63. “At its inception, each G-7 member was assigned three members—one slot for a finance ministry official, one slot for a central bank official, one slot for a financial regulatory authority. Three other countries—Hong Kong, Australia, and the Netherlands—had a total of five members. The remaining sixteen members consisted of representatives from [international financial institutions], the [Bank of International Settlements] and its emanations, and preexisting regulatory bodies.” Ibid., p.136.
64. The different codes and standards are available at: http://www.financialstabilityboard.org/cos/key_standards.htm.
65. To make additional room for all G-20 members, plus Spain and the European Commission.
68. Daniel W. Drezner, op. cit.
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. 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 essentially political nature of the institution has been preserved. This means that 
the member governments, including the successive U.S. administrations, have never had to seek 
formal legislative approval for their commitments towards the OSCE process and that the 
international cooperation that takes place inside the OSCE framework falls exclusively within the 
realm of their executive branch.

One obvious effect of the legal nature of the OSCE is that, as in the FSF/FSB case, its decision-
making bodies do not directly create legal “obligations,” but politically-binding “commitments”

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69. 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.”
70. See Miriam Shapiro, “Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation,” The 
71. In the U.S., ignoring objections raised by the executive branch, the Congress created an independent 
Commission on Security and Cooperation in Europe with the mandate of monitoring the Helsinki process. 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. (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, Vol. 13, No. 529, Spring/Summer 1980, p. 540.) 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 
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.\(^\text{72}\) Of course, member states can always at some point, 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 non-legally binding 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.\(^\text{73}\) In a North American context, NAFTA ad hoc tribunals could for example use rulings from an upgraded SPP.

The SPP, with its annual leaders summit, its mechanism of ministerial coordination, and its working groups possesses the embryonic structure of an international organization similar, in institutional and legal terms, to the FSF/FSB and 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 U.N. Charter. The most important provisions of the declaration would transform the now informal SPP ministerial meetings into a formal “Council” or “Plenary” with rotating chairmanship; create a permanent “Board” or “Steering Committee” that would become 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.

6. Conclusion

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 the free trade area’s competitiveness in the world economy. Yet, the SPP amalgamates enough executive autonomy to constitute a serious basis for the establishment of a non-treaty international rule-making body.

From the perspective adopted here, the advantages of upgrading the SPP along the lines of the FSF/FSB or OSCE models would be significant. The new institutional forum would have the authority to 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 current 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 currently 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. Finally, such an institution would 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.
But, the key feature of the new regional body would obviously be that its authority to decide on new rules would not be “supranational”. First, there would be no external delegation involved but only, to come back to Koremenos’ oxymoronic terminology, “internal delegation”. Second, since the pool of rule-making authority involved will be contained in the perimeter of the executive branch authority, no legally-binding ratification will be required.