COMPLIANCE WITH CANADA'S TRADE AND INVESTMENT TREATY OBLIGATIONS: ADDRESSING THE GAP BETWEEN PROVINCIAL ACTION AND FEDERAL RESPONSIBILITY

J. ANTHONY VANDUZER AND MELANIE MALLET*

Provincial compliance with trade and investment treaty commitments is increasingly important. However, Canada's federal system makes negotiating treaty obligations in the areas of provincial jurisdiction particularly difficult. This article analyzes the challenges related to treaty commitments in areas of provincial jurisdiction, revisits the Canadian constitutional allocation of responsibility for treaty negotiation, ratification, implementation, and compliance, and explores the prospects for using intergovernmental agreement to address concerns about provincial compliance.

TABLE OF CONTENTS

* Professors J Anthony VanDuzer and Melanie J Mallet, Common Law Section, Faculty of Law, University of Ottawa. The authors would like to thank Professor Peter Oliver of the Common Law Section for his valuable comments on an earlier draft of this article and Alexander Geddes for his research assistance. The authors also thank anonymous peer reviewers for their insights. Any errors remain the authors' responsibility.

I. INTRODUCTION

Compliance with trade and investment treaty commitments by provincial and other subordinate levels of government[1] is increasingly important. Regional and multilateral trade and investment treaties have reduced tariffs and other discriminatory border measures. The success of these agreements has shifted the focus of international trade and investment negotiations to internal policies and domestic schemes of regulation that create barriers to doing business in national markets. These schemes are often within subordinate governments' jurisdiction.[2] Subordinate government regulation is particularly relevant to rules dealing with trade in services and investment, as well as such new issues as the protection of the environment and labour rights that are now routinely addressed in treaty negotiations.[3] In Canada's recently completed negotiation with the European Union for a *Comprehensive Economic and Trade Agreement* (*CETA*),[4] the EU obtained significant concessions regarding areas within provincial jurisdiction,[5] such as commitments that the provinces will not discriminate against EU suppliers in their procurement of goods and services.[6] The *CETA* negotiations, as well as the recently completed Trans-Pacific Partnership negotiations,[7] raise questions about how Canada can best manage its relations with treaty partners and provincial governments.

Canada's federal system makes negotiating treaty obligations in areas of provincial jurisdiction particularly difficult. Canada's ability to implement its trade and investment treaty commitments collides with its division of law-making powers. The federal government has exclusive authority to commit Canada to international obligations in any area,[8] but

---

1 In this context, subordinate means, in the case of states, levels of government below the national level, and, in the case of the European Union, levels of government below the level of the Union, beginning with the member states.

2 Mark A Luz & C Marc Miller, "Globalization and Canadian Federalism: Implications of the NAFTA's Investment Rules" (2002) 47:4 McGill LJ 951 at 961.

3 Aaditya Mattoo & Pierre Sauvé, "The Preferential Liberalization of Services Trade" (2010) NCCR Trade Regulation Working Paper No 2010/13 at 19; Markus Krajewski, "The Reform of the Common Commercial Policy" in Andrea Biondi, Piet Eeckhout & Stefanie Ripley, eds, *EU Law After Lisbon* (Oxford: Oxford University Press, 2012) 292; Markus Krajewski, "Of Modes and Sectors: External Relations, Internal Debates, and the Special Case of (Trade In) Services" in Marise Cremona, ed, *Developments in EU External Relations Law* (Oxford: Oxford University Press, 2008) 172 at 188–95 (regarding subordinate governments in the European Union).

4 Government of Canada, News Release, "Canada Reaches Historic Trade Agreement with the European Union" (18 October 2013), online: <www.news.gc.ca/web/article-en.do?nid=781619>. The text of the agreement was released to the public on 26 September 2014 and the revised final text, following the legal review, was released on 29 February 2016. See *Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part, and the European Union*, online: <trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf> [*CETA*].

5 Patrick Fafard & Patrick Leblond, *Twenty-First Century Trade Agreements: Challenges for Canadian Federalism* (Ottawa: University of Ottawa, 2012); Doug Saunders, "Our Petty Provincialism Threatens Free Trade Ambitions," Editorial, *The Globe and Mail* (25 May 2013), online: <www.theglobeandmail.com/opinion/our-petty-provincialism-threatens-free-trade-ambitions/article12135759/>.

6 *CETA*, *supra* note 4, c 19.

7 The *Trans-Pacific Partnership Agreement* is not yet in force. See *Trans-Pacific Partnership Agreement*, 4 February 2016, online: <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx>. For the purposes of this article, we will focus only on the *CETA*.

8 This assertion represents the orthodox view of matters, which we adopt for this article; see Peter W Hogg, *Constitutional Law of Canada*, 5th ed supp, vol 1 (Toronto: Carswell 2010) (loose-leaf 2011 supplement), at 11-2, 11-19; AE Gotlieb, *Canadian Treaty-Making* (Toronto: Butterworths, 1968); Robert Howse, "NAFTA and the Constitution: Does *Labour Conventions* Really Matter Any More?" (1994) 5:3 & 4 Const Forum Const 54 at 54 [Howse, "NAFTA"]; Joanna Harrington, "Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making" (2006) 55:1 ICLQ 121 at 122, 136–37. Quebec's provincial government has long asserted its capacity to conclude treaties with other states within its area of jurisdiction; this is often referred to as the "Gérin-Lajoie doctrine." For

compliance with international obligations in areas of provincial competence, like local procurement, is within provincial jurisdiction.[9] The federal government has no constitutional power to compel provincial compliance.[10] Canada is internationally responsible to its partners if provinces act contrary to treaty obligations, but the provinces have no legal responsibility under domestic or international law to comply with Canadian treaties.[11]

The *CETA* negotiations demonstrate that as commitments in areas of provincial jurisdiction become more important, Canada's treaty partners are likely to seek stronger assurances regarding provincial compliance. Commenting on the *CETA* negotiations, Patrick Fafard and Patrick Leblond outlined the possible consequences of Canada's inability to give such assurances.[12] They argued that the absence of a legally binding provincial obligation to perform treaty obligations compromises provincial incentives to comply. This, in turn, might undermine the reliability of Canadian obligations relating to matters within provincial jurisdiction.[13] Fafard and Leblond predicted two negative effects flowing from this state of affairs: (1) Canadian negotiators would be less successful in achieving Canada's goals because they could not offer strong assurances of provincial compliance; and (2) European traders and investors might feel they could not rely on treaty obligations requiring provincial compliance. That perception would undermine the potential trade and investment stimulus for European businesses resulting from Canadian market opening commitments. These concerns suggest that Canada must develop strategies to address the impact of federalism on treaty implementation and compliance to fully achieve its trade and investment goals.[14]

This article explains these challenges for Canada and explores possible solutions.

The first part of this article analyzes the challenges related to treaty commitments in areas of provincial jurisdiction, cast against the backdrop of *CETA*. This section outlines how trade

---

scholarship supporting this view, see e.g. Hugo Cyr, *Canadian Federalism and Treaty Powers: Organic Constitutionalism at Work* (Brussels: PIE Peter Lang, 2009); Gibran Van Ert, "The Legal Character of Provincial Agreements with Foreign Governments" (2001) 42:4 C de D 1093.

9 *Canada (AG) v Ontario (AG)*, [1937] 1 DLR 673 [*Labour Conventions*]. The situation in Quebec is modified by *An Act Respecting the Ministère des Relations Internationales*, CQLR c M-25.1.1, under which the Minister of Economy, Science, and Innovation may agree to the signing of a trade treaty that affects any matter within the province's jurisdiction (*ibid*, s 22.1). This contemplates that Quebec is only bound to the treaty if it consents to it, which requires the approval of the National Assembly (*ibid*, ss 22.3, 22.4). Following such consent, Quebec appears to be obliged to implement the treaty.

10 Most other federal systems provide a mechanism that imposes compliance on subordinate levels of government. In some cases, treaties require approval by federal legislative bodies that are representative of sub-federal territories, like the United States Senate. See e.g. Fafard & Leblond, *supra* note 5 at 12–14 (discussing Australia, the US, and Austria).

11 According to the international law rules of state responsibility regarding treaty obligations that relate to matters within the jurisdiction of subordinate state actors, a state is internationally responsible for actions that are not in compliance with the state's international obligations. A state cannot invoke any internal constitutional rules that allocate jurisdiction to subordinate levels of government as an excuse for non-compliance. See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, art 27 (entered into force 27 January 1980); International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UNGAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 43.

12 See Fafard & Leblond, *supra* note 5.

13 *Ibid*. Hogg also expresses concerns about the impact of the role of the provinces in treaty implementation and compliance: Hogg, *supra* note 8 at 11-17.

14 James P McIlroy predicted this state of affairs in a paper written in 1996: James McIlroy, "NAFTA and the Canadian Provinces: Two Ships Passing in the Night" (1997) 23 Can-US LJ 431 ("Canada's nineteenth-century division of federal and provincial powers may soon collide with the emerging global economy and the international trade agenda of the twenty-first century. Something is going to have to give" *ibid* at 439).

and investment agreements implicate provincial competence. The paper then offers background on the problems created by the gap between provincial power and federal responsibility with respect to treaty obligations and why this became a significant issue in the *CETA* negotiations.

The second part of the article revisits the Canadian constitutional allocation of responsibility for the negotiation, ratification, and implementation of treaties as well as treaty compliance as assessed through recent jurisprudence. This section contemplates the extent of the federal government's power to implement treaty obligations and compel provincial compliance with obligations in an agreement like *CETA*.

Finally, the third part of the article explores the prospects for using an intergovernmental agreement to address concerns about provincial compliance.

II. BACKGROUND

A. THE INCREASING SIGNIFICANCE OF INTERNATIONAL TRADE AND INVESTMENT OBLIGATIONS FOR THE PROVINCES AND THE RESULTING CHALLENGES FOR CANADA

International trade and investment obligations affect provincial economies. These obligations establish framework rules that govern the terms upon which Canadian policy-makers manage access to the Canadian market for goods, services, and capital from treaty partners. These rules also set standards for the treatment of foreign investors. Similarly, treaty obligations set the terms upon which Canada's treaty partners manage access to their markets for Canadian goods, services, and capital as well as their treatment of Canadian investors.

The provinces have substantial interests in the nature of the commitments undertaken by both Canada and its treaty partners. The prospects for local businesses operating in a province may improve through access to foreign markets provided by trade and investment treaties. Businesses in each province are also interested in the protection available to them as investors in the other treaty party's territory. At the same time, provincial businesses, consumers, and provincial economies are affected by treaty commitments that provide foreign businesses enhanced access to local markets for their products and that provide guarantees regarding their treatment as investors.[15] The interests of each province are distinct because they are defined by the nature of each province's local economy, including the goods and services that it produces.

---

[15] Competition from foreign goods and services may lower prices and improve product choice for business and individual consumers. Foreign investment can supplement local sources of capital, increase employment and local tax revenues, encourage productivity and innovation in local industry, and augment the transfer of new technologies and techniques to local producers. However, foreign trade and investment may also impose costs. Domestic products and producers may be crowded out, and domestic competition and entrepreneurship may be suppressed. See generally Jorge Niosi, "Foreign Direct Investment in Canada," in Lorraine Eden, ed, *Multinationals in North America* (Calgary: University of Calgary Press, 1994) 367; David Cox & Richard G Harris, "North American Free Trade and Its Implications for Canada: Results from a CGE Model of North American Trade" (1992) 15:1 World Economy 31.

Trade commitments not only affect particular provincial interests; they may also rely on provincial legislative implementation to ensure compliance. At one time, trade treaties dealt mainly with areas clearly within federal jurisdiction, like border tariffs on goods, provincial implementation and compliance were not significant issues. Beginning in the 1980s, however, the subject matter of international trade negotiations moved progressively from matters within federal competence to "behind-the-border" regulation, much of which falls to provincial responsibility. In addition to most services regulation, the provinces have shared or exclusive jurisdiction over labour rights, the environment, product standards, government procurement, and the treatment of investment.[16] As the *CETA* negotiations demonstrated, the impact of trade commitments on areas of provincial jurisdiction is growing.[17]

The effect of Canadian treaty obligations in areas of provincial competence varies with the treaty provision at issue. Some treaty provisions do not require changes to existing provincial laws or regimes. For example, the *North American Free Trade Agreement* obliges states not to expropriate the property of a foreign investor, except for a public purpose, in accordance with due process and accompanied by "prompt, adequate and effective" compensation.[18] A province could pass legislation to incorporate this restraint into law, but a province could also respect *NAFTA* by adhering to this standard in practice.[19] Similarly, trade agreement provisions that establish framework rules for regulating provincial services may not require legislated changes to provincial regimes. *NAFTA* requires the parties to endeavour to ensure that they use objective and transparent criteria for licensing and certification requirements for foreign service providers, such as competence and the ability to supply the service.[20] No provincial government adopted specific implementing legislation for this provision, presumably because their schemes of regulation already complied. Compliance with similar broad standards in *CETA* for the operation of regulatory schemes in services may not require any specific change to provincial laws.[21]

Other treaty obligations do require legislative changes to provincial regimes. The most controversial commitments negotiated under *CETA* relate to government procurement of goods and services.[22] The EU successfully sought a Canadian commitment not to

---

16 According to Grace Skogstad, these measures will include: "different regulations regarding the quality of product and service standards, as well as the qualifications of their providers" (Grace Skogstad, "International Trade Policy and the Evolution of Canadian Federalism" in Herman Bakvis & Grace Skogstad, eds, *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 3rd ed (Oxford: Oxford University Press, 2012) 203 at 209). Jeremy de Beer has written about the conflicts between provincial and federal jurisdiction in relation to intellectual property rights obligations in treaties, including most recently in "Implementing International Trade Agreements in Federal Systems: A Look at the Canada-EU CETA's Intellectual Property Issues" (2012) 39:1 LIEI 51.

17 Skogstad writes that the EU had sought prior provincial commitment to implement any negotiated measures because most of what it sought fell to areas of provincial competence, including: "concessions [affecting] cultural industries, health, the environment, labour, and agriculture" (*ibid* at 209).

18 *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [*NAFTA*].

19 As evidence of this approach, no province has passed legislation implementing *NAFTA* obligations.

20 *NAFTA*, *supra* note 18, art 1210.

21 *CETA*, *supra* note 4, art 12.3.

22 Government of Canada, "Technical Summary of Final Negotiated Outcomes, Canada-European Union Comprehensive Economic and Trade Agreement" (Ottawa: Global Affairs Canada, 2013), online: <www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ceta-aecg/ceta-technicalsummary.pdf> ["Opening New Markets"]. See e.g. Scott Sinclair, *Negotiating from Weakness: Canada-EU Trade Treaty Threatens Canadian Purchasing Policies and Public Services* (Ottawa: Canadian Centre for Policy Alternatives, 2010). More than 40 cities, towns, school boards, and municipal associations in eight provinces have passed resolutions on *CETA*, including Toronto,

discriminate against EU suppliers in some procurement decisions. It also obtained commitments that Canada would meet certain standards that go beyond Canada's *NAFTA* commitments regarding transparency and fairness in procurement procedures.[23] The EU obtained, with some limitations, a commitment that Canada would provide non-discriminatory access to procurement decisions by federal, provincial, and municipal bodies, as well as universities, colleges, school boards, and hospitals.[24] These kinds of commitments require changes to provincial laws and to the rules and procedures of many sub-federal organizations that favour local suppliers.[25]

The absence of a direct legal obligation on the provinces to comply with treaty obligations, combined with the lack of federal power to compel compliance, prompted EU concerns about the reliability of Canada's *CETA* commitments in areas of provincial jurisdiction during negotiations.[26] Similar concerns will likely affect other negotiations, like those on the Trans-Pacific Partnership, and other current and future negotiations where obligations will extend into areas of provincial competence. Canada has used various approaches to limit those concerns in the past. The next section surveys the traditional approaches to addressing the problem of provincial treaty compliance and explains why these past approaches are no longer adequate.

B. THE LIMITS OF PAST TREATY PRACTICES IN DEALING WITH AREAS OF PROVINCIAL JURISDICTION

1. INTRODUCTION

The federal government has addressed the risk of provincial non-compliance with treaties in various ways: consulting provinces on treaty negotiations, making treaty commitments that the federal government will seek provincial compliance, and limiting treaty obligations in areas of provincial jurisdiction. These approaches are less likely to satisfy Canada's negotiating partners in future negotiations when Canada's negotiating partners seek more significant commitments in areas of provincial jurisdiction.

Hamilton, and Victoria. Most of them wanted to see the municipal sector excluded entirely from the *CETA*'s procurement rules. The Council of Canadians has created a map of communities who have passed resolutions asking that local governments be excluded from *CETA*: The Council of Canadians, "CETA and Communities: Stop the Sell-Out," online: <www.canadians.org/ceta/toolkit>.

23 *NAFTA* only creates procurement commitments at the federal level. The recent "Buy American" agreement between the Canada and 37 American states gives access to some sub-federal procurement. See *Agreement Between the Government of Canada and the Government of the United States of America on Government Procurement*, 12 February 2010, Can TS 2010 No 5 (entered into force 16 February 2010).

24 WTO, Council of the European Union, EU Canada Comprehensive Economic and Trade Agreement — Landing Zones, DS 1744/12; "Opening New Markets," *supra* note 22 at 16; *CETA*, *supra* note 4, c 19.

25 Scott Sinclair, Stuart Trew & Hadrian Mertins-Kirkwood, eds, *Making Sense of the CETA: An Analysis of the Final Text of the Canada-European Union Comprehensive Economic and Trade Agreement* (Ottawa: Canadian Centre for Policy Alternatives, 2014) at 24–34.

26 Skogstad, *supra* note 16 at 209. Where implementation requires changing federal law, the implementing law must be passed by Parliament. Parliament has no constitutional obligation to do so, at least where a majority government is in office. However, treaties negotiated by the executive will be approved.

2. CONSULTATION AND ENGAGEMENT

Provinces are more likely to comply with a treaty if they participate in treaty negotiations. Typically, the federal government works closely with the provinces when negotiating international commitments.[27] Federal trade officials consult with the provinces prior to and during treaty negotiations to inform Canada's positions.[28] Federal officials attempt to identify provinces' "defensive interests" that foreign access to provincial markets would threaten. Federal officials also identify commitments that provinces would be prepared to undertake in exchange for the economic benefits that would flow from those commitments. Those benefits might be lower prices for goods and services, more product choice, and increased investment. Consultations also engage provinces' "offensive interests" in gaining improved access to foreign markets for provincially-produced goods, services, and local businesses seeking to make foreign investments.[29] Provincial engagement in developing Canada's negotiating position and the trade-offs that occur in negotiations render the outcome of treaty negotiations more legitimate from the provinces' point of view. This should promote provincial compliance with obligations in areas of provincial competence.[30] In response to EU concerns regarding provincial compliance in the *CETA* negotiations, the federal government – for the first time – permitted provincial officials to sit at the negotiating table with Canada's federal negotiators. While federal officials led the negotiations, the provinces played an unprecedented, active role.[31] Future negotiations may require the same approach when issues implicating provincial jurisdiction are fundamental to the proposed treaty.

In addition to granting provinces a role in negotiations, the federal government usually obtains an informal, non-binding commitment from the provinces regarding compliance

---

27 Skogstad has gone so far as to characterize treaty-making as a "de facto shared jurisdiction": *ibid* at 203.

28 Formal consultations have consisted recently of quarterly meetings of the C-Trade Committee between the federal minister and his or her provincial counterpart, as well as meetings at the deputy minister level. See Christopher J Kukucha, "Provincial Pitfalls: Canadian Provinces and the Canada—EU Trade Negotiations" in Kurt Hübner, ed, *Europe, Canada and the Comprehensive Economic and Trade Agreement*, Routledge Studies in Governance and Change in the Global Era (Oxfordshire: Routledge, 2011) 130 at 132–34; Stephen de Boer, "Canadian Provinces, US States and North American Integration: Bench Warmers or Key Players?" (2002) 8:4 Choices: Canada's Options in North America 1 at 5. Some treaties establish consultative bodies. Canada entered into a Framework Agreement for Commercial and Economic Cooperation (*Framework Agreement for Commercial and Economic Cooperation Between Canada and the European Community*, 6 July 1976, Can TS 1976 No 35 (entered into force 1 October 1976), online: <www.canadainternational.gc.ca/eu-ue/commerce_international/agreements-accords.aspx?lang=eng>) with the European Communities in 1976, which created a Joint Cooperation Committee (*ibid*, art 4). The Trade and Investment sub-committee of this committee was established to review, among other things, "trade irritants" between Canada and the EU, some of which related to provincial measures: See European Union External Action, "Report to the Canada-European Union Joint Cooperation Committee for 2008," online: <eeas.europa.eu/canada/docs/2008_jointreport_jcc_en.pdf>. At its most recent meeting, the sub-committee looked at a number of provincial measures. The provinces have been involved in the meetings of the sub-committee, but not consistently (Kukucha, *ibid* at 134).

29 See de Boer, *ibid* at 22.

30 Katherine Swinton, "Law, Politics, and the Enforcement of the Agreement on Internal Trade" in Michael J Trebilcock & Daniel Schwanen, eds, *Getting There: An Assessment of the Agreement on Internal Trade* (Toronto: CD Howe Institute, 1995) 196 at 204 [Swinton, "Internal Trade"], citing Thomas M Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990).

31 The significance of provincial participation will vary with the level of participation, which is highly variable across provinces (Kukucha, *supra* note 28 at 134). It is also the case that some negotiating partners may not want to have the provinces directly involved. Perhaps out of concerns regarding the efficiency of the negotiation process, or that such an approach might encourage their own sub-federal units to seek a place at the table.

before it signs a treaty that requires provincial implementation or compliance.[32] In a few cases, the federal government has required the prior passage of provincial implementing legislation.[33] As discussed below, however, nothing in Canada's federal system prevents a province from subsequently repealing or amending any implementing legislation or otherwise acting in a manner inconsistent with a Canadian treaty.[34]

3. TREATY COMMITMENTS REGARDING PROVINCIAL COMPLIANCE

Canada has also tried to make its treaty commitments to negotiating partners in areas of provincial authority more credible by agreeing to a specific federal obligation to ensure provincial compliance.[35] For example, *NAFTA* Article 105 obliges Canada to take all "necessary measures" to ensure provincial compliance with treaty obligations.[36] Effectively, this is a federal government commitment, since the federal government is responsible for international treaty obligations. Because the federal government has no constitutional power to compel provincial compliance, such a provision provides a limited assurance of provincial compliance.

4. LIMITING TREATY OBLIGATIONS IN AREAS OF PROVINCIAL JURISDICTION

a. Relying on Federal State Clauses

Another tactic Canada has used to manage the risk of provincial non-compliance is negotiating limitations on the scope of obligations in areas of provincial jurisdiction. The federal government has taken advantage of "federal state" clauses in some treaties when provinces have expressed their unwillingness to comply with particular treaty commitments. These clauses permit a country to become a party to the treaty but to opt out of treaty obligations in areas where a sub-national state actor has authority and does not agree to the obligations. Such federal state clauses are not typical in international trade and investment agreements, but they are common in international commercial law treaties.[37]

---

32 According to Skogstad, the federal government obtained provincial consent to aspects of *NAFTA* and the WTO Agreements that affected provincial jurisdiction (*supra* note 16 at 207).

33 This was done, for example, prior to Canada ratifying the *United Nations Convention on Contracts for the International Sale of Goods*, 11 April 1980, 1489 UNTS 59 (entered into force 1 January 1988) [*CISG*]. Canada initially ratified this convention only in relation to its application to provinces like Ontario that had passed implementing legislation (see e.g. *International Sale of Goods Act*, RSO 1990, c I.10).

34 In some cases decided under the *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 194 (entered into force 1 January 1948) [*GATT*], Canada has been held responsible for actions of provincial governments that have been found to be inconsistent with Canada's commitments. Some of these cases are discussed below.

35 See e.g. *GATT*, *ibid*, art 24.12; *NAFTA*, *supra* note 18, art 105.

36 By comparison, *GATT* requires only that "[e]ach contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories" (*GATT*, *ibid*, art 24.12). The *CETA* adheres more closely to *NAFTA*: "Each Party shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance at all levels of government" (*CETA*, *supra* note 4, art 1.8(2)).

37 See e.g. *CISG*, *supra* note 33, art 93. Canada has taken advantage of such clauses in the past, including when it became a party to the *CISG*. The *CISG* came into force in certain countries on 1 January 1988, and in Canada on 1 May 1992. When the treaty was ratified by Canada in 1991, Canada filed a declaration, as permitted by the treaty, in which it indicated that it only committed in relation to provinces that had already passed legislation implementing the Convention (see e.g. Ontario's *International Sale of Goods Act*, *supra* note 33). Quebec, Saskatchewan, and Yukon, which had not passed implementing legislation at the time, were excluded. All three were added in 1992 when they had

b. Positive and Negative Listing

An alternative way to limit treaty obligations in areas of provincial jurisdiction is a "positive list" approach, as found in the World Trade Organization (WTO) *General Agreement on Trade in Services*.[38] Under this approach, treaty obligations only apply to areas of activity that a country lists in a schedule of national commitments. And, even if an area of activity is listed on that schedule, a country may be able to specify particular ways in which the obligations do not apply. These kinds of limitations often preserve existing non-compliant programs in areas affected by new treaty commitments.[39] Canada has excluded the application of *GATS* disciplines from many areas of provincial jurisdiction by not listing them or protecting them with limitations inscribed into its national schedule.[40]

In most of its trade and investment agreements to date, Canada has typically agreed that all obligations apply to all levels of government. It has then carved out from its treaty obligations some or all subordinate government measures through exceptions or reservations.[41] This is "negative listing." Articles 1108 and 1206 of *NAFTA*, for example, exclude the application of certain investment and services trade obligations to all municipal government measures that existed when the agreement was signed. The same provisions contemplate including annexes to the treaty; these annexes were to list existing provincial measures that would be inconsistent with obligations in the agreement but are nevertheless permitted. By a subsequent exchange of letters, the parties agreed that they would exclude all existing provincial and state measures from the application of these provisions. *CETA*

passed the necessary legislation. See generally Helge Dedek & Alexandra Carbone, "Canadian Report" (2012) 20:1 Eur R Priv L 81 at 91–93; Robert Howse, "The Labour Conventions Doctrine in an Era of Global Interdependence: Rethinking the Constitutional Dimensions of Canada's External Economic Relations" (1990) 16:2 Can Bus LJ 160 at 178–80.

38 15 April 1994, 1869 UNTS 183 (entered into force 1 January 1995) [*GATS*].

39 See e.g. Canada's national schedule of commitments under the *GATS* lists services and activities in which it is prepared to accept certain obligations under the treaty, like national treatment and market access, but it also contains limitations for some listed activities that are designed to ensure that existing measures are permitted that would otherwise be contrary to *GATS* national treatment or market access obligations. For example, Canada agreed to provide national treatment and market access to foreign suppliers of insurance and insurance-related services in general, but included a limitation that expressly allowed Quebec to require that three-quarters of directors of a corporation providing such services must be Canadian citizens, and a majority must reside in Quebec consistent with Quebec's rules at the time. In the absence of such a limitation, Quebec's rules would discriminate against foreign insurance service providers in a manner inconsistent with national treatment: *Canada: Schedule of Specific Commitments*, GATS/SC/16 of 15 April 1994 (Supp 1–4); *Canada: Final List of Article II (MFN) Exemptions*, GATS/EL 16 of 15 April 1994 (Supp 1–2).

40 For example, health and education services are not listed in Canada's national schedule of commitments. The services of foreign legal consultants are listed, but specific provincial limitations on market access and national treatment maintained by the provinces are inscribed in the schedule.

41 The architecture of these exclusions is discussed in J Anthony VanDuzer, "The Canadian Preoccupation with NAFTA's Impact on Health Services: A Serious Issue A Non-Issue or Something in Between?" in Kevin C Kennedy, ed, *The First Decade of NAFTA: The Future of Free Trade in North America* (Ardsley, NY: Transnational Publishers, 2004) 183 at 187–89. See e.g. *Canada-Chile Free Trade Agreement*, 5 December 1996, Can TS 1997 No 50 arts G-08(1)(a)(i), H-06(1)(a)(i) (entered into force 5 July 1997); *Canada-Peru Free Trade Agreement*, 29 May 2008, Can TS 2009 No 15 arts 808(1)(a)(ii), 908(1)(a)(ii) (entered into force 1 August 2009); *Canada-Colombia Free Trade Agreement*, 21 November 2008, Can TS 2011 No 11 arts 809(1)(a)(ii), 906(1)(a)(ii) (entered into force 15 August 2011); *Agreement Between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments*, 18 March 1998, Can TS 1999 No 43 annex 1, s 2(1)(b) (entered into force 29 September 1999). The *Agreement Between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments*, 8 May 2009, Can TS 2011 No 26 art 6 (entered into force 23 November 2011) excludes all non-conforming measures in place at the time the agreement comes into force.

follows a more transparent "negative listing" approach, as it requires Canada to list all non-compliant provincial measures.[42]

c. Treaty Side Agreements Permitting Provincial Opting In

Beginning with *NAFTA*, Canada has negotiated side agreements to most of its trade agreements governing labour rights and environmental protection that affect only willing provinces.[43] For example, *NAFTA* has side agreements that relate to environmental and labour cooperation. On the date it signed each agreement, Canada declared a list of provinces that would cooperate with respect of matters covered by each agreement. Canada also undertook to use its best efforts to try to convince the remaining provinces to commit to these obligations.[44] As a result of these arrangements, neither the US nor Mexico can request consultations or initiate any dispute settlement proceedings concerning a matter related to a province's labour or environmental laws, unless that province is included in Canada's declaration under the relevant agreement and certain requirements are met.[45]

These side agreements also limit Canada's ability to raise issues of non-compliance by the other *NAFTA* parties based on the level of provincial commitments. As an example, under the *NAALC*, Canada may initiate consultations or other dispute settlement procedures regarding compliance with the agreement by another *NAFTA* party in only two situations:

1. The issue would be under federal jurisdiction if it were to arise within Canada; or

2. The issue would be under provincial jurisdiction if it were to arise within Canada but the following two preconditions have been met:

    a. The federal government and the provinces included in Canada's declaration must account for at least 35 percent of Canada's labour force for the most recent year in which data are available; and

---

42 *CETA*, *supra* note 4, arts 8.15(1)(a), 9.7(1)(a), 12.2(2)(a), 13.2.

43 *North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States*, 14 September 1993, Can TS 1994 No 4 (entered into force 1 January 1994) [*NAALC*]; *North American Agreement On Environmental Cooperation Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 14 September 1993, Can TS 1994 No 3 (entered into force 1 January 1994) [*NAAEC*].

44 *NAALC*, *ibid*, annex 46, s 7; *NAAEC*, *ibid*, annex 41, s 7. As of 2012, Alberta, Manitoba, Quebec, and Prince Edward Island had entered into intergovernmental agreements with the federal government agreeing to be bound by *NAALC*: see e.g. *Canadian Intergovernmental Agreement Regarding the North American Agreement on Labour Cooperation*, 12 May 1995, online: <labour.gc.ca/eng/relations/prov-terr/naalc.shtml>; *North American Environmental and Labour Cooperation Agreements Implementation Act*, CCSM c N95 [*Labour Cooperation Agreement*]. Each participating province has passed implementing legislation: see e.g. *Labour Cooperation Agreement*, *ibid*. These same provinces, other than Prince Edward Island, committed to the *NAAEC*. This agreement follows a virtually identical scheme to the *Labour Cooperation Agreement*. For a commentary on the constitutional implications of these arrangements, see Ian Robinson, "The *NAFTA*, the Side-Deals, and Canadian Federalism: Constitutional Reform by Other Means" in Ronald L Watts & Douglas M Brown, eds, *Canada: The State of the Federation 1993* (Montreal: McGill-Queen's University Press, 1993) 193 at 210.

45 Provincial commitments are expressed in a separate intergovernmental agreement between the federal government and the participating provinces (see e.g. the *Labour Cooperation Agreement*, *ibid*). Each province also passed implementing legislation: see e.g. *An Act Respecting the Implementation of International Trade Agreements*, CQLR c M-35.2; Robinson, *ibid* at 210) for a discussion of the implications of these arrangements.

b. Where the matter concerns a specific industry or sector, at least 55 percent of the workers concerned must be employed in provinces included in Canada's declaration.[46]

Currently, Canada meets the first requirement regarding provincial participation. Alberta, Manitoba, Quebec, and Prince Edward Island are all listed in Canada's declaration, and, with the federal government, they account for more than 40 percent of the Canadian workforce. However, Canada may only initiate consultations and the other dispute settlement procedures under the *NAALC* in matters within provincial jurisdiction at the initiative of or primarily for the benefit of a participating province.[47]

Any Canadian strategy based on carving out provinces or provincial measures from treaty commitments will have diminished viability in an increasing number of future negotiations. As noted, international trade and investment obligations applicable to provincial jurisdiction are critical to the successful completion of contemporary trade agreements, as has proved true in *CETA*.[48] Increasing provincial engagement in trade negotiations, combined with commitments to do what is needed to ensure provincial compliance, will provide some comfort to future treaty partners. But the effect of these devices is limited. New strategies to enhance the reliability of treaty commitments in areas of provincial competence could enhance Canada's negotiating position and the benefits of trade treaty commitments.

C. THE LIMITED ROLE OF THE PROVINCES IN TREATY-BASED DISPUTE SETTLEMENT

One area which may need new strategies to address provincial compliance is treaty-based dispute settlement. A key feature of most trade and investment treaties is a dispute resolution mechanism to address concerns that a state has not complied with its obligations. The design and operation of treaty-based dispute settlement procedures in Canada's treaties contemplate a very limited role for the provinces, even when a provincial measure is the basis of the dispute. Consequently, these settlement procedures do little to strengthen incentives for provinces to comply with treaty obligations or assuage treaty partners' concerns about provincial compliance. A review of the limited role of the provinces in treaty-based dispute settlement showcases the problems that arise when treaty obligations extend to areas within provincial jurisdiction.

Some preliminary context is warranted: a ratified treaty is binding on Canada as a matter of international law in relation to the actions of all levels of Canadian government, including the provinces and municipalities. Treaty obligations also extend to all entities exercising government authority, such as courts, boards, and tribunals. Failure by any of these entities to comply with Canada's international treaty obligations is a breach of that obligation.[49]

---

46 *NAALC*, *supra* note 43, annex 46, s 4.

47 *Ibid*, annex 46, s 3.

48 *CETA*, *supra* note 4.

49 John H Currie, *Public International Law*, 2d ed (Toronto: Irwin Law, 2008) at 543–44. Recently, the EU and Japan challenged the requirements of Ontario's Green Energy Program, which rewards energy producers for using equipment bought in Ontario: *Canada - Certain Measures Affecting the Renewable Energy Generation Sector (Complaint by Japan and the European Union)* (2013), WTO Doc WT/DS412/AB/R, WTO Doc WT/DS426/AB/R (Appellate Body Report), online: WTO <www.wto.org/english/tratop_e/dispu_e/cases_e/ds412_e.htm> [*Renewable Energy Complaint*]. Earlier cases

The consequences of a treaty breach depend significantly on the specific treaty involved and the dispute settlement procedures that apply. Many treaties do not contain dispute settlement procedures, but trade treaties, like *NAFTA* and the WTO Agreements, typically have their own dispute settlement procedures. Dispute settlement procedures allow a party state to claim that another party state has not complied with treaty obligations.[50] Typically, under these procedures, one state can request that an arbitral tribunal adjudicate its claims regarding non-compliance by another state after a period of consultations has expired without resolution of the dispute. Were a state to complain about a Canadian measure, including a provincial measure, and were the arbitral tribunal to find the measure to be non-compliant, Canada would have to bring its regime into compliance.[51] Canada may also be required to follow a process to promote compliance. In the face of persistent non-compliance, the aggrieved state may be entitled to ask for compensation from Canada. If the parties could not agree on compensation, the aggrieved state could retaliate by removing treaty trade concessions granted to Canada, such as commitments to reduce its tariffs on Canadian goods.[52] The state-to-state process under the WTO rules is by far the most elaborate and most frequently used treaty-based dispute resolution process.[53]

The provinces have a limited role in these procedures. Global Affairs Canada is responsible for defending against claims of provincial non-compliance because Canada's international obligations are a federal responsibility. Federal officials consult extensively with a provincial government whose measure has been challenged, because that government has the information necessary to defend the measure. But the provinces have no right or obligation to participate. In the past, where dispute resolution processes have found provincial non-compliance, the federal government has worked with the province to find a solution.[54] However, the federal government cannot force a province to comply. Further

include *Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies (Complaint by the European Communities*) (1988), GATT Doc L/6304, 35th Supp BISD (1988) 37 (provincial measures that imposed higher mark-ups on imported wine than domestic wine and discriminatory point of sale conditions); *Canada — Measures Affecting the Sale of Gold Coins (Complaint by South Africa)* (1985), GATT Doc L/5863, unadopted (provincial retail sales tax exemption for Canadian gold coins only providing protection to domestic producers of gold coins). The ultimate result of these cases was that the provinces brought their regimes into compliance. The *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 15 April 1994, 1867 UNTS 3 at 190, *General Agreement on Tariffs and Trade 1994* (entered into force 1 January 1995) [*GATT 1994*] adds the following understanding of Article XXIV(12):

> Each member is fully responsible under GATT 1994 for observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.

(*Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*, art 13.) This understanding makes clear that a WTO Member is fully responsible for the actions of subordinate governments. See also *Marrakesh Agreement Establishing the World Trade Organization*, Annex 2, 15 April 1994, 1869 UNTS 3 at 401, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, art 22(9) (entered into force 1 January 1995) [*DSU*].

50 *NAFTA*, *supra* note 18, c 20; *DSU*, *ibid*.

51 See *DSU*, *ibid*, art 21.1. There is some debate about the binding nature of WTO panel and Appellate Body decisions. See World Trade Organization, "Legal Effect of Panel and Appellate Body Reports and DSB Recommendations and Rulings," WTO Dispute Settlement Training Module: Chapter 7, online: <www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s1p1_e.htm>.

52 The procedures under *NAFTA* and the WTO are discussed in J Anthony VanDuzer, "Dispute Resolution Under NAFTA: Evolution and Stagnation" in *Asean-Canada Forum 2008* (Singapore: Institute for Southeast Asian Studies, 2010) 107.

53 *Ibid* at 115–20.

54 Kukucha, *supra* note 28 at 135. Following the WTO Appellate Body decision finding that Ontario's Green Energy Program was inconsistent with WTO rules (see *Renewable Energy Complaint*, *supra* note 49), Canada notified the WTO that it would bring the program into compliance with its obligations and that the Ontario government was in the course of developing changes to the program to bring it into compliance: Greg Tereposky, "WTO Appeal Goes Against Ontario: FIT Renewable Energy Program Violates International Obligations," *The Lawyers Weekly* (26 July 2013) 11.

complicating the matter, if a province continues to disregard treaty obligations following a determination of non-compliance, any retaliation by an aggrieved foreign state need not be limited to goods and services exported by the recalcitrant province;[55] the retaliatory measure may affect products from across the country.[56]

Dispute resolution mechanisms regarding investment commitments differ from state-to-state mechanisms in trade treaties. While state-to-state procedures, like those described above, are available in these circumstances, *NAFTA*'s investment chapter, and most other Canadian treaties dealing with investment, provide for "investor-state arbitration." This process allows an eligible foreign investor to claim relief directly from Canada.[57] An investor can seek damages from Canada through binding arbitration for any loss caused by a breach of the treaty's investment obligations by any Canadian government entity. Again, because the source of the obligation is a Canadian international commitment, the federal government is responsible for defending the claim, even if a provincial measure caused the violation. When a violation is found, the only remedy for an investor is financial compensation.[58] The federal government must pay these damages.

This gap between provincial non-compliance and federal responsibility can create political acrimony between the two levels of government. In 2008, for instance, an American investor, AbitibiBowater, complained that the government of Newfoundland and Labrador had expropriated its property without compensation, contrary to Canada's investment obligations under *NAFTA* Chapter 11. The federal government settled the case in 2010 by paying AbitibiBowater $130 million.[59] Following this case, the Prime Minister directed the Department of Foreign Affairs and International Trade Canada (as it then was) to develop a mechanism for recouping such payments from the responsible provincial government. So far, the Canadian government has not proposed a mechanism.[60]

Dispute resolution mechanisms in existing Canadian treaties do not address the challenge of ensuring provincial compliance. While the federal government consults provincial governments when provincial measures are challenged, the federal government has the exclusive right to conduct the proceedings and the obligation to deal with the consequences. The provinces have no right or obligation to participate directly in dispute resolution proceedings, are not directly bound by the result, and face no treaty-based consequences for non-compliance in most cases. This limited role for the provinces does not motivate

---

55 See e.g. *NAFTA*, *supra* note 18, arts 2018–19; *DSU*, *supra* note 49, art 22. These and other agreements contain rules specifying permissible targets for retaliation.

56 The process for determining when retaliation is permitted and what form it may take is often subject to specific requirements in each trade agreement. The rules in the WTO's *DSU*, *ibid*, are the most complex and important.

57 *NAFTA*, *supra* note 18, c 11, s B.

58 See e.g. *ibid*, art 1135. An investor may claim restitution, but the state is entitled to pay damages in lieu of giving restitution. There is no obligation for the state to amend or repeal the measure.

59 *AbitibiBowater Inc v Canada* (2010), UNCT/10/1 (International Centre for Settlement of Investment Disputes) [unpublished]. The government of Newfoundland and Labrador passed legislation in 2008 that AbitibiBowater alleged had the effect of expropriating its investments, including its property and various legal entitlements related to two hydro-electric generating facilities in the province.

60 Bertrand Marotte & John Ibbitson, "Provinces on Hook in Future Trade Disputes: Harper," *The Globe and Mail* (26 August 2010), online <www.theglobeandmail.com/report-on-business/provinces-on-hook-in-future-trade-disputes-harper/article1378647/>. For a discussion of this problem and suggestions for resolving it, see Lawrence L Herman, *Trend Spotting: NAFTA Disputes After Fifteen Years*, Backgrounder 133 (Toronto: CD Howe Institute, 2010) online: <https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/backgrounder_133.pdf>.

provincial compliance with treaty obligations. *CETA* contains dispute settlement mechanisms similar to those in earlier treaties. While it features some innovations, they do not enhance provincial involvement.[61] Accordingly, the federal government will continue to face the consequences of provincial non-compliance.

D. SPECIFIC SOURCES OF EU CONCERNS ABOUT PROVINCIAL COMPLIANCE

A number of events have contributed to the EU's fears about non-compliance with international treaties by Canada's provinces, including Newfoundland and Labrador's treatment of AbitibiBowater.[62] In addition to that case, these other events have prompted the EU's preoccupation with provincial compliance with treaty obligations in the *CETA* negotiation. First, the EU blamed the provinces for failures in two previous negotiations with Canada. Second, Quebec's interference in a subway car contract caused the EU concern about provincial governments' trustworthiness.

Canada and the EU have had treaty negotiations fail in the past because of provincial actions. In 1998, Canada and the EU entered into a Mutual Recognition Agreement (MRA).[63] The *MRA* contemplated that Canada and the EU would each accept the results of conformity assessments regarding compliance with regulatory standards by relevant bodies in the other jurisdiction. The *MRA* only applied to assessment procedures for products covered by sectoral annexes. Because the electrical safety standards annex dealt with standards within provincial jurisdiction, it contemplated a process for provincial familiarization with European standards and conformity assessment procedures. The goal was to foster acceptance of conformity assessments by EU bodies within a fixed time period. The provinces, however, refused to participate.[64] Consequently, the *MRA* did not take effect in this area, and that failure frustrated the EU.[65]

Subsequently, in 2004, Canada and the EU began negotiating a Trade and Investment Enhancement Agreement. The goal of these negotiations was to build on the 1976 Framework Agreement for Commercial and Economic Co-Operation between Europe and Canada to create new rules for trade and investment. The negotiators also sought to expand commitments on a range of other subjects, including trade and investment facilitation, competition, mutual recognition of professional qualifications, financial services, e-commerce, temporary entry, small- and medium-sized enterprises, sustainable development,

---

61 *CETA*, *supra* note 4. Investor-state dispute settlement is in Chapter 8 while state-to-state dispute settlement is provided for in Chapter 29. *CETA* contemplates that normally an EU member state will act as the respondent in investor-state claims related to measures of that state (*ibid*, art 8.21).

62 Kukucha, *supra* note 28 at 131–32.

63 *Agreement on Mutual Recognition Between the European Community and Canada*, 16 May 1998, Can TS 1998 No 40 (entered into force 1 November 1998), online: <www.international.alberta.ca/documents/Trade/can-eu-mra.pdf> [*MRA*].

64 Kukucha, *supra* note 28 at 138; Stephen B Woolcock, "European Union Trade Policy: the Canada-EU Comprehensive Economic and Trade Agreement (CETA) Towards a New Generation of FTAs?" in Hübner, *supra* note 28, 22 at 27; Stanko S Kristic, "Regulatory Cooperation to Remove Non-Tariff Barriers to Trade in Products: Key Challenges and Opportunities for the Canada-EU Comprehensive Trade Agreement" (2012) 39:1 LIEI 3 at 14.

65 Kristic, *ibid* at 14.

and science and technology.[66] These negotiations terminated without success in 2006. Officially, the parties indicated that they had stopped the negotiations to await completion of the Doha Round of WTO negotiations.[67] But the EU blamed the failure of the negotiations on the provinces.[68] According to the EU, the two main reasons for the failure of the negotiations were: (1) federal officials' inability and unwillingness to commit on matters which fell to the exclusive jurisdiction of the provinces; and (2) Canada's desire to allow the provinces to adopt an à la carte system of implementation, under which each province would decide what obligations to implement.[69] The EU felt these impediments negated Canada's capacity to form a comprehensive agreement and reduced the EU's interest in negotiating with Canada.

Finally, Quebec's conduct in 2010 surrounding a procurement contract of subway cars by the Montreal transit authority, the Société de transport de Montréal (STM), compounded EU concerns flowing from AbitibiBowater. STM initially sought bids for the supply of 342 new subway cars in 2006. It awarded the contract to the only bidder: a joint venture of a Canadian company, Bombardier Transport Canada Inc. (Bombardier), and a subsidiary of a French company, Alstom.[70] However, the STM decided to request new bids for the supply of subway cars in January 2010 because it had decided to buy significantly more cars and wished to obtain an option for even more.[71] The Bombardier-Alstom joint venture and a Spanish company, Construcciones y Auxiliar de Ferrocariles, both submitted bids.[72] The winner was to be announced on 30 September 2010.

Quebec's then-premier, Jean Charest, postponed the announcement. Then, on 6 October 2010, he proposed a special law to the Quebec National Assembly that directed the STM to negotiate and conclude a contract for the subway cars with the Bombardier-Alstom joint venture. The legislation precluded any challenge to the ultimate contract or to any other action of STM, as well as any claim against the government related to the contract. The Bill was considered in committee and passed on 7 October 2010. It came into force upon Royal Assent the next day.[73]

The ostensible purpose of this legislation was to conclude a procurement process that had run on for several years.[74] However, the effect of the legislation was to pre-empt a bid by the

---

66 Global Affairs Canada, "Canada-European Union Trade and Investment Enhancement Agreement" (2004), online: <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/tiea.aspx>.

67 *Ibid*. See also Kurt Hübner, "Canada and the EU: Shaping Transatlantic Relations in the Twenty-First Century" in Hübner, *supra* note 28, 1 at 1.

68 Kukucha, *supra* note 28 at 132.

69 *Ibid*; Sinclair, *supra* note 22 at 5.

70 Initially, in 2006, the Transit Authority had proposed to give the work to Bombardier without a competitive bid. Alstom successfully sued to stop this contract on the basis that awarding it without a tender was contrary to the applicable procurement rules (*Alstom Canada Inc c Société de transport de Montréal*, 2008 QCCS 8, [2008] RJQ 387).

71 The STM's decision that a new tendering process was required was challenged by the joint venture, but the Quebec Superior Court upheld the decision (*Bombardier Transport Canada inc c Société de transport de Montréal*, 2010 QCCS 3017, [2010] RJQ 1681).

72 "Chinese Train Company Formally Bids for Large Montreal Metro Contract," *The Guardian* (2 March 2010), online: <www.theguardian.pe.ca/Living/2010-03-02/article-1287407/Chinese-train-company-formally-bids-for-large-Montreal-Metro-contract/1>.

73 *An Act Concerning the Acquisition of Cars for the Montréal Subway*, SQ 2010, c 22.

74 "Government Tables Bill to Give Bombardier Metro Contract," *CTV News Montreal* (6 October 2010), online: <www.montreal.ctvnews.ca/government-tables-bill-to-give-bombardier-metro-contract-1.560312>.

Spanish company that was approximately $500 million less than the Bombardier-Alstom bid. This extraordinary action by the Quebec Legislature to favour a domestic business was not a breach of a trade obligation, but it was inconsistent with Montreal's procurement rules. Moreover, it provided the EU with a stark example of a province disregarding rules to the prejudice of European business interests.[75]

Based on these experiences, the EU was apprehensive in 2007 when Canada suggested renewed discussions regarding a bilateral trade and investment agreement. In response to EU concerns, the federal government invited the provinces to participate in the negotiation process.[76]

E. CONCLUSION: THE SIGNIFICANCE OF CONCERNS ABOUT PROVINCIAL COMPLIANCE

The *CETA* negotiations suggest that the absence of legal incentives for provincial compliance are problematic for negotiating partners seeking significant commitments in areas of provincial jurisdiction. In the current state of affairs, Canadian negotiators may be hard-pressed to make credible commitments in these areas. The lack of provincial responsibility for complying with Canadian treaty commitments impairs the provinces' compliance incentives. Treaty-based dispute settlement procedures do little to encourage provincial compliance.

However, it would be a mistake to overstate the significance of the provinces' lack of legal responsibility. Despite the absence of legal responsibility, the provinces have incentives to comply with treaty obligations. Provinces will likely adhere to treaty provisions if they believe that the obligations are in their best interests and that the benefits they obtain will offset the costs of compliance. Provinces also wish to present themselves as good places to do business; they therefore have incentives to comply with investment obligations to attract foreign investment and the economic benefits that flow from it. If the provinces help develop Canada's negotiating position, are consulted during treaty negotiations, and consent to the result, they may comply simply because they view the result as legitimate. Extensive provincial participation in negotiations, which was a part of the *CETA* negotiations, will encourage provincial compliance. Having the provinces at the table agreeing, or at least not objecting, to the compromises in negotiations should instill confidence in future trade partners that the provinces will comply with the outcome of negotiations.

Nevertheless, the absence of a firm provincial legal obligation to comply with trade and investment obligations weakens Canadian commitments in areas of provincial jurisdiction compared with those within federal jurisdiction and those of other countries. While the existing informal process for achieving provincial compliance may be satisfactory for

---

75 Media reports indicated that the Spanish Prime Minister, José Luis Rodríguez Zapatero, wrote a letter to Quebec Premier Charest to express his annoyance (Andrew Mayeda, "Europeans Miffed Over Montreal Subway Deal as Trade Talks Resume with Canada," *Edmonton Journal* (20 October 2010) G2; Alexandre Robillard, "Charest Defends Subway Deal Which Critic Says Threatens European Trade Agreement," *Global News* (5 October 2010), online: <www.globalnews.ca/news/98778/charest-defends-subway-deal-which-critic-says-threatens-european-trade-agreement/>.

76 Kukucha, *supra* note 28 at 134.

Canadian governments, the *CETA* negotiations suggest that it may be increasingly unsatisfactory to Canada's future trading partners.

The basic legal problem for Canada is the constitutional allocation of powers over treaty-making, treaty implementation, and treaty compliance. The next section revisits the nature of this problem. It then analyzes arguments for an enhanced federal power to implement trade and investment treaties. Such a power would enable the federal government to make more credible treaty commitments in areas of traditional provincial jurisdiction.

III. THE CANADIAN CONSTITUTIONAL CONTEXT

A. INTRODUCTION

In Canada, issues related to treaty compliance and the consequences of non-compliance have increased with more complex and expansive treaty obligations, but the law regarding treaty implementation remains subject to arrangements made in another era. These arrangements for treaty-making and implementation have been thoroughly canvassed by others.[77] In short, the *Constitution* lacks a general treaty implementing power that would allow the federal government to enact legislation to alter the law in areas of provincial jurisdiction for the purpose of complying with the obligations in a trade and investment treaty. Some scholars have argued that the *Constitution* should be amended to create such a power or have suggested that such a power may be based on existing bases of federal jurisdiction.[78] This section offers an overview of the current state of the law, followed by a discussion of the limited prospects for addressing the challenge of making credible treaty commitments based on an enhanced federal implementation power.

B. TREATY-MAKING POWER AND IMPLEMENTING ARRANGEMENTS

In Canada's federal system, consent to a treaty through ratification does not implement the treaty into domestic law. Any treaty provision requiring a change to our domestic legal system requires either executive or legislative action. Treaty negotiation and ratification are the prerogative of the federal executive. Treaty implementation requiring legislative action implicates Canada's division of law-making powers as both the federal and provincial governments can only implement treaties in their area of legislative competency.[79] Sections

---

77 See e.g. Ruth E Sullivan, "Jurisdiction to Negotiate and Implement Free Trade Agreements in Canada: Calling the Provincial Bluff" (1987) 24:2 UWO L Rev 63; Patrick J Monahan & Byron Shaw, *Constitutional Law*, 4th ed (Toronto: Irwin Law, 2013) at 311–13; Joanna Harrington, "The Role for Parliament in Treaty-Making" in Oonagh E Fitzgerald, ed, *The Globalized Rule of Law: Relationships Between International and Domestic Law* (Toronto: Irwin Law, 2006) 159 at 163–65; Law Commission of Canada, *Crossing Borders: Law in a Globalized World* (Ottawa: Law Commission of Canada, 2006) at 17–21; Rajeeve Thakur, "Chapter 11 of NAFTA and the Provinces: Will the Constitutional Question Be Asked?" (2012) 37:1 Can-US LJ 251.

78 See notes 177–80 and accompanying text, below.

79 See *Labour Conventions*, *supra* note 9. Again, we believe this summary to be the orthodox view aligned with longstanding federal practice, while acknowledging a body of scholarship supporting a contrary position. Plumbing the arguments about why and how the conduct of foreign affairs could be held jointly by federal and provincial governments is beyond the scope of this discussion.

91 and 92 of the *Constitution Act, 1867* set out federal and provincial areas of legislative competence, respectively.[80]

Neither section 91 nor section 92 refers specifically to treaty implementation, and the power to implement treaties in Canada has shifted over time. In 1867, Canada could not enter into treaties on its own behalf.[81] However, prior to 1931, Parliament was empowered under section 132 of the *Constitution* to implement the terms of any treaty to which it was bound by the United Kingdom.[82]

Following Canada's acquisition of independent statehood in 1931 through the *Statute of Westminster*, the Judicial Committee of the Privy Council determined that the federal government could no longer avail itself of section 132 because the section refers to "Empire" treaties.[83] In the seminal 1937 *Labour Conventions* case, the Privy Council pronounced that Canadian authority to implement treaty provisions would mirror the normal constitutional distribution of powers.[84] Thus, where treaty implementation required a legislative act, Parliament could legislate with regard to treaty content within its jurisdiction under section 91. The provinces retained legislative power over matters falling under section 92.

In *Labour Conventions,* the Privy Council was motivated by a concern to protect the provinces' constitutionally-prescribed powers as dictated by principles of federalism.[85] And while *Labour Conventions* prevented an enlargement of federal legislative powers into any area that was the subject of an international treaty, it also left the federal government unable to ensure compliance with international agreements involving provincial jurisdiction.[86]

CETA and other trade and investment treaties bring the issues that arise under these arrangements into sharp focus. As noted, *CETA*'s provisions deal with numerous matters within provincial competence: standards for goods, regulation of trade in services (including rules regarding recognition of professional qualifications), and rules regarding the treatment of investors and commitments not to favour local suppliers in provincial government procurement. If provinces fail to comply with *CETA*, can the federal government implement the agreement's terms to avoid non-compliance and a breach of Canada's international obligations?

The answer appears to be "no" based on a review of legislative jurisdiction in Canada relating to international economic law. The current constitutional climate would not support a prospective, freestanding federal trade and investment treaty implementation power that would circumvent anxiety about provincial implementation.

---

80 (UK), 30 & 31 Vict, c 3, ss 91–92, reprinted in RSC 1985, Appendix II, No 5.

81 Sullivan explains that Canada obtained the power to enter into treaties at some point between 1919 and 1931, and the *Statute of Westminster*, *1931* (UK), 22 & 23 Geo V, c 4 officially confirmed this power (Sullivan, *supra* note 77 at 66, citing *Reference re Newfoundland Continental Shelf*, [1984] 1 SCR 86 at 101–103).

82 See *British North America Act, 1867* (UK), 30 & 31 Vict, c 3.

83 Until 1949, the Judicial Committee of the Privy Council was Canada's ultimate court of appeal.

84 *Supra* note 9.

85 *Ibid*.

86 *Ibid*.

C. ALLOCATION OF LEGISLATIVE JURISDICTION IN MATTERS RELATED TO INTERNATIONAL ECONOMIC LAW

The federal government's ability to implement *CETA* and other treaties domestically depends on the precise subject matter of legislative provisions purporting to do so. Drafters — or courts — would assess any implementing statute or provision against the breadth of federal and provincial law-making powers in light of the interpretive doctrines of constitutional law.

1. INTRODUCTION: GENERAL DOCTRINES OF CONSTITUTIONAL INTERPRETATION[87]

Canadian courts assess legislative validity by a law's leading or primary feature, which courts call the law's "pith and substance."[88] A law's pith and substance is the law's purpose, having regard to its legal and practical effects.[89] Once a court has derived a law's purpose, it will determine whether the enacting government can sustain the law under one of its constitutionally-allocated heads of power.[90]

A law whose primary purpose sits within one of the enacting government's heads of power is valid, and a valid law's incidental effects on the other order of government's jurisdiction are tolerated.[91] The Supreme Court of Canada has also developed the "Ancillary," or "Necessarily Incidental" doctrine. This doctrine can sustain discrete federal or provincial legislative provisions that intrude into the other order of government's jurisdiction if the intruding measure sits within an otherwise valid statute. If the intrusion is severe, the impeached provision must be necessary for the broader scheme to function. If the intrusion is not severe, the impeached provision must be rationally and functionally connected to the scheme; the provision must further the operation of the broader scheme.[92]

Courts have also recognized that legislative subject matters can possess a "Double Aspect."[93] This doctrine allows both federal and provincial governments to legislate the same

---

87 The *Reference Re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837 at para 54ff [*Securities Reference*] (provides a concise synopsis of constitutional doctrines relating to federalism). A similar synopsis appears in *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 [*Canadian Western Bank* cited to SCR].

88 See e.g. *Canadian Western Bank*, *ibid* at paras 25–27.

89 Courts will also look to the context in which a law was enacted, relying on extrinsic evidence, and taking judicial notice of legislative and social context, as appropriate: see e.g. *R v Morgentaler*, [1993] 3 SCR 463 at 483–85.

90 These heads of powers have been referred to as "anchors": Peter C Oliver, "The Busy Harbours of Canadian Federalism: The Division of Powers and its Doctrines in the McLachlin Court" in David A Wright & Adam Dodek, eds, *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011) 167 at 172.

91 *Canadian Western Bank*, *supra* note 87 ("[b]y 'incidental' is meant effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature" at para 28, citing *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, [2005] 2 SCR 473 at para 28). See also Bruce Ryder, "Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers" (2011) 54 SCLR (2d) 565 at 580.

92 See e.g. *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 [*General Motors*]; *Quebec (AG) v Lacombe*, 2010 SCC 38, [2010] 2 SCR 453 at paras 32–46.

93 See e.g. *Hodge v The Queen*, [1883] UKPC 59, 9 App Cas 117 at 130. "Health" is an example of an (un-enumerated) subject matter with a double aspect: provinces have primary jurisdiction over delivery of health care services within their borders, while the federal government can prohibit conduct or products that create health risks or hazards. See *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457 at para 185 [*AHR Reference*]; *Canadian Western Bank*, *supra* note 87 at para 30;

broad subject matter if the primary purpose of each law falls within one of the enacting government's heads of power. But duplicative legislative power can lead to conflict, and federal laws are paramount over provincial laws when they conflict. Conflict exists if someone cannot simultaneously comply with both a federal and provincial law or if a provincial law would frustrate federal legislative intent.[94]

All of these constitutional doctrines are relevant in contemplating jurisdiction to implement trade and investment treaties because they would guide a court's analysis of legislative competency. A court would assess any challenged federal legislation implementing some or all of a treaty's provisions to determine whether its primary purpose could be sustained under a federal head of power. Courts would also assess how the law would affect provincial jurisdiction.

Like treaty implementation in general, assessing the federal ability to implement trade agreements is familiar academic terrain. The ratification of the *Canada-United States Free Trade Agreement*[95] and *NAFTA* both prompted thoughtful assessments of the federal government's ability to implement their terms under Canada's constitutional division of powers.[96] Commentators have also assessed the related but broader question of whether section 91 of the *Constitution Act, 1867* could support a freestanding federal treaty implementation power in place of section 132 (the power to implement "Empire" treaties).[97]

We revisit the first stream of analysis, looking specifically to the newer genre of trade and investment agreement that *CETA* represents. The discussion focuses on the scope of the heads of power that Parliament might use to anchor legislation implementing that

---

Canada (AG) v PHS Community Services Society, 2011 SCC 44, [2011] 3 SCR 134 at para 68. Provincial jurisdiction over "Health" comes from the *Constitution Act, 1867*, *supra* note 80, s 92(7) ("The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals"); *ibid*, s 92(13) ("Property and Civil Rights in the Province"); *ibid*, s 92(16) ("Generally all matters of a merely local or private Nature in the Province"); federal "protective" jurisdiction in this example would derive from the *Constitution Act, 1867*, *ibid*, s 91(27) ("The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters"). See the *AHR Reference*, *ibid*, for a complex and divided ruling on the limits of the federal government to exercise its criminal law power in relation to health.

94 *Constitution Act, 1867*, *ibid*, s 91, provides that the federal government has power "to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." See e.g. *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13, [2005] 1 SCR 188; *Marine Services International Ltd v Ryan Estate*, 2013 SCC 44, [2013] 3 SCR 53 at paras 68–69.

95 *Canada-United States Free Trade Agreement*, 22 December 1987, Can TS 1989 No 3 (entered into force 1 January 1989).

96 See e.g. Micheline Patenaude, "L'Interprétation du Partage des Compétences à l'Heure du Libre-Échange" (1990) 21:1 RDUS 1; Howse, "NAFTA," *supra* note 8; Monahan & Shaw, *supra* note 77 at 310–16; Sullivan, *supra* note 77.

97 See e.g. Torsten H Strom & Peter Finkle, "Treaty Implementation: The Canadian Game Needs Australian Rules" (1993) 25:1 Ottawa L Rev 39; Wallace W Struthers, "'Treaty Implementation … Australian Rules': A Rejoinder" (1994) 26:2 Ottawa L Rev 305; Mark A Luz, "NAFTA, Investment and the Constitution of Canada: Will the Watertight Compartments Spring a Leak?" (2000) 32:1 Ottawa L Rev 35; Law Commission of Canada, *supra* note 77. For more recent commentary, see Thakur, *supra* note 77.

agreement.[98] The section assesses the effect of more recent Supreme Court jurisprudence on earlier premises related to implementation.[99]

2. RELEVANT SOURCES OF LEGISLATIVE JURISDICTION IN MATTERS RELATED TO ECONOMIC LAW

a. Provincial Power Over Property and Civil Rights Under Section 92(13) of the Constitution

Early judicial interpretations of federal and provincial economic law-making powers remain relevant to the implementation of contemporary trade and investment treaties. The scope of two key heads of law-making power is particularly important to this discussion: the provincial power to regulate Property and Civil Rights and the federal power to regulate Trade and Commerce.[100]

The seminal *Parsons* case defined Property and Civil Rights as including dealings in property, both real and incorporeal, and, significantly, all non-criminal legal relations, notably those based in contract law.[101] Section 92(13) thus covers such matters as transactions completed within the province related to locally-produced goods,[102] the intra-provincial production and sale of goods,[103] and the regulation of farm commodities entering a jurisdiction from outside if such goods are not subjected to patently discriminatory treatment to favour local producers.[104] This head of power also authorizes provinces to regulate specific industries,[105] and it encompasses professional regulation in matters such as competency and licensing,[106] as well as labour relations.[107] Provinces find additional economic jurisdiction in various other heads of power, including section 92(16), which provides provincial authority over purely local and private matters.[108]

The cumulative effect of these heads of power is considerable provincial authority to regulate business activity. John Whyte describes the effect of *Parsons* and other early cases

---

98 Fafard & Leblond refer to *CETA* as a "second generation" trade agreement (*supra* note 5).

99 This process of assessing possible government initiatives against the scope of various heads of power is perennial sport in Canadian constitutional law. See e.g. Robert Leckey & Eric Ward, "Taking Stock: Securities Markets and the Division of Powers" (1999) 22:2 Dal LJ 250 (in which the authors assessed how various heads of federal power could support a national securities regulation scheme).

100 *Citizens Insurance Co of Canada v Parsons*, [1881] UKPC 49, 7 App Cas 96 [*Parsons* cited to App Cas].

101 *Ibid* at 110–11.

102 See *Carnation Co Ltd v Quebec Agricultural Marketing Board*, [1968] SCR 238 [*Carnation*].

103 See *Labatt Breweries of Canada Ltd v Canada (AG)*, [1980] 1 SCR 914.

104 See *Shannon v Lower Mainland Dairy Products Board*, [1938] AC 708 (PC); *Manitoba (AG) v Manitoba Egg and Poultry Association*, [1971] SCR 689. Leading constitutional scholars, including Monahan and Hogg, have thoroughly canvassed this pool of cases and have noted the difficulty of reconciling many of the cases to arrive at firm, predictable principles. See e.g. Monahan & Shaw, *supra* note 77 at 292.

105 *Parsons*, *supra* note 100 at 113; *AG (Canada) v AG (Alta)*, [1916] 1 AC 588 (PC); *Securities Reference*, *supra* note 87 at para 89.

106 See e.g. *AHR Reference*, *supra* note 93 at paras 225, 265–66 (regarding provincial competency over the medical profession and medical research); *Securities Reference*, *supra* note 87 at para 122.

107 See e.g. *Securities Reference*, *ibid* at para 88; *Tessier Ltée v Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23, [2012] 2 SCR 3 at para 11 [*Tessier*], citing *Toronto Electric Commissioners v Snider*, [1925] UKPC 2, [1925] AC 396. The federal government can regulate labour relations of "federal works and undertakings" derived from federal jurisdiction under ss 91(29) and 92(10) of the Constitution.

108 *Constitution Act, 1867*, *supra* note 80, s 92(16).

as conferring provincial jurisdiction to manage local economies.[109] This is salient for trade and investment treaties that attempt to "reach behind" national borders and into provincial jurisdictions.

b. Federal Power to Regulate Trade and Commerce

The *Parsons* case also defined the federal Trade and Commerce power.[110] Trade and Commerce seems a far-reaching power to regulate economic matters, but early decisions gave it a narrow scope. The consequence of *Parsons*, notes Whyte, was to deny "[a] large power over market regulation and commercial activity" to the federal government.[111]

The *Parsons* case determined that the federal power in section 91(2) encompassed the "political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion."[112] The federal government has had mixed success when it has attempted to rely on its power to regulate interprovincial trade (*Parsons* 1). Until the 1980s, the general Trade and Commerce power (*Parsons* 2) was rarely relied on and underdeveloped as a result.

i. *Parsons 1: International and Interprovincial Trade*

If the federal government wished to use the Trade and Commerce power to support legislation implementing an international trade and investment treaty, it could rely on its power over interprovincial trade (*Parsons* 1). *Parsons* established federal authority over tariffs and other measures related to the movement of goods into Canada from abroad under the Trade and Commerce power. Monahan and Shaw summarize the reach of this branch of section 91(2) as extending to "the regulation of goods, persons, capital, or services crossing provincial or Canadian borders for a commercial purpose."[113] This authority would cover the obligations in trade agreements that address border measures. However, courts have yet to test the scope of this power as it relates to the provisions of modern trade and investment treaties.

Constitutional scholars have canvassed the general limits of *Parsons* 1 regarding powers of economic regulation, and they have found that courts often sort out these questions by determining the limits of section 91(2) against section 92(13).[114] In terms of the federal power, Monahan and Shaw comment that "Parliament has exercised its authority to regulate imports, exports, and interprovincial trade in a wide variety of contexts for various policy objectives. Few doubts have ever been raised about the constitutional validity of these

---

109 John D Whyte, "Federalism Dreams" (2008) 34:1 Queen's LJ 1 at 14.

110 Hogg, for instance, refers to the construction of several heads of power, Trade and Commerce amongst them, against provincial power over Property and Civil Rights. See Hogg, *supra* note 8 at 20-2, 21-2 to 21-3.

111 Whyte, *supra* note 109 at 16. Ian B Lee, "The General Trade and Commerce Power after the Securities Reference" in Anita Anand, ed, *What's Next for Canada? Securities Regulation After the Reference* (Toronto: Irwin Law, 2012) 59 (the Privy Council's approach was described as "every inch of federal power [was] an inch subtracted from provincial power" *ibid* at 64).

112 *Parsons*, *supra* note 100 at 113.

113 Monahan & Shaw, *supra* note 77 at 287.

114 See e.g. Monahan & Shaw, *ibid*; Hogg, *supra* note 8 at 20-2.

enactments."[115] This last comment is true insofar as the subject matter of the legislation under review has been clearly "interprovincial." Yet that characterization is highly context-driven and the conclusion with respect to jurisdiction can be difficult to predict with any certainty. The jurisprudence is inconsistent. Courts have characterized legislation regarding some transactions completed within the province as intraprovincial even where the subject good is destined for export; however, courts have also characterized legislation regarding other similar transactions as interprovincial based on the character of the commodity involved. The paradigmatic cases treated provincial efforts to regulate sales and prices of oil and potash — both important international trade commodities — as unconstitutional extra-provincial trade regulation, even though similar regulatory measures over milk withstood scrutiny.[116] Overall, federal ability to regulate intraprovincial transactions to give effect to a broader scheme of federal regulation under section 91(2) is unsettled, as the experts note.[117]

The relevant constitutional case law does not establish an unquestioned federal power to regulate local transactions in the interest of a national scheme.[118] Peter Hogg notes that the limited body of case law supporting federal intervention in local economies deals with wheat and oil, commodities exported from both their provinces and the country as a whole. He is less confident about future judicial support for federal regulation over matters with "less obvious" interprovincial qualities.[119] The precise circumstances will determine the scope of any federal power to set national standards for goods, services, and investment, including standards to implement a trade and investment treaty.

---

115 Monahan & Shaw, *ibid* at 287 [footnote omitted].

116 The first reference is to *Carnation*, *supra* note 102, where marketing board rates on raw milk sold to a producer, who shipped most of the refined milk outside of the province, were held to be intra vires the provinces. The latter reference is to *Canadian Industrial Gas & Oil Ltd v Saskatchewan (AG)*, [1978] 2 SCR 545, where the Supreme Court characterized provincial measures essentially setting a price on gas "at the wellhead" to be ultra vires the province. The nature of the transactions in both cases, and the ultimate extra-provincial destination of the commodity in both cases, continue to strike commentators as largely similar (see Hogg, *supra* note 8 at 20-7). However, the actual products, as well as the political climate around the commodities and their producers, differed. The latter ruling raised provincial outrage and, along with other unfavourable rulings on provincial jurisdiction over natural resources, motivated the addition of section 92A to the *Constitution Act, 1867*, *supra* note 80 in 1982. That section allows provinces, *inter alia*, to set rates of primary production on non-renewable natural resources. For more comment on this point, see Hogg, *supra* note 8 at 20-3 (for a discussion of when a good enters the national stream of commerce).

117 Monahan & Shaw, *supra* note 77 at 287. See also Hogg, *supra* note 8 at 21-17. In *R v Klassen* (1959), 20 DLR (2d) 406 (Man CA), for instance, the Manitoba Court of Appeal upheld a federal prohibition on local sales of wheat outside of federal Wheat Board quotas. The Court reasoned that federal control over private, local transactions was necessary to ensure the integrity and workability of an orderly national system of a vital trade good. However, *Dominion Stores Ltd v R*, [1980] 1 SCR 844 [*Dominion Stores*] struck down federal legislation attempting to regulate labeling and product standards to ensure uniform product standards around produce. Various other cases regarding farm commodities went both ways, with the Supreme Court ultimately endorsing cooperative federal and provincial marketing schemes. See e.g. *Carnation*, *supra* note 102; *Burns Food Ltd v Manitoba (AG)*, [1975] 1 SCR 494.

118 Hogg, *supra* note 8 at 20-7; Monahan & Shaw, *supra* note 77 at 294–98. Although commentators have questioned its precedential value, *Dominion Stores*, *ibid*, had a majority of the Supreme Court strike down federal food grade standards applicable to locally produced and marketed produce, limiting the integrity of a broader federal grading system for interprovincial goods.

119 Hogg, *ibid* at 20-7.

ii. *Parsons 2: "General" Trade and Commerce*

Aside from *Parsons* 1, Parliament may attempt to support trade and investment treaty implementing measures under the "general" branch of the Trade and Commerce power (*Parsons* 2). However, recent jurisprudence suggests this power will not support "omnibus" schemes that attempt to create national uniformity in matters traditionally within provincial jurisdiction.

The scope of federal authority to regulate transactions related to national economic concerns solidified in the seminal 1989 *General Motors* case.[120] There, Chief Justice Dickson offered five criteria against which to assess laws purporting to deal with a "general" trade and commerce matter. The Supreme Court reiterated these criteria in the 2011 *Securities Reference*.[121] According to that case, laws must be: (1) part of a general regulatory scheme; (2) overseen by a regulatory agency; (3) "concerned with trade as a whole rather than with a particular industry"; (4) of "a nature that provinces, acting alone or in concert, would be constitutionally incapable of enacting"; and (5) of a nature "that the failure to include one or more provinces or localities … would jeopardize its successful operation in other parts of the country."[122]

The first two criteria are formal requirements and easily satisfied. However, the latter three criteria are substantive, meant to ensure that federal exercises of power differ from what the provinces could accomplish under their jurisdiction.[123] The fourth and fifth *General Motors* factors justify federal regulation that prevents a gap in the division of powers where provincial authority is limited and a regulated activity has a national dimension.[124] In this way, the general Trade and Commerce power can justify federal regulation of local transactions, which are also subject to provincial jurisdiction.

As made clear in the *Securities Reference, Parsons* 2 requires Parliament to legislate a distinct aspect of these economic transactions as part of a larger scheme of regulation that clearly relates to an issue of national economic concern.[125] For example, the legislation in the *Securities Reference* would have created a single national securities regime administered by a national regulator to cover all aspects of existing provincial regulation. That federal regulator would have provided "investor protection, [fostered] fair, efficient and competitive capital markets and [contributed] to the integrity and stability of Canada's financial

---

120 *Supra* note 92.

121 *Supra* note 87.

122 *Ibid* at para 80 [citations omitted]. See also *ibid* at para 83.

123 *Ibid* at paras 70, 79. See also Elizabeth Edinger, "*Reference Re Securities Act*: If Wishes Were Horses, Then Beggars Would Ride" (2013) 54:1 Can Bus LJ 1 at 9.

124 *Securities Reference, supra* note 87 at para 83.

125 For more analysis on this point, see Edinger, *supra* note 123 at 9–10. Federal reliance on *Parsons* 2 has succeeded, with legislation treating competition and trademark regulation. Both matters describe conduct or requirements that extend beyond any one industry, even if both incidentally affect some transactions completed within a single province. Goods, services, and investment moving between provinces might be adversely affected by different provincial schemes dealing with anti-competitive conduct or inconsistent trademark protection. Provinces are unable to legislate beyond their own borders to either prevent harmful anti-competitive conduct in other jurisdictions, or to offer effective trademark protection once goods leave their jurisdictions. See also *General Motors*, *supra* note 92 (on the first point), and *Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC 65, [2005] 3 SCR 302 (on the second). See also Hogg, *supra* note 8 at 20-15 to 20-21.

system."[126] The *Act* purported to deal with a range of issues, including prospectus filing requirements, regulation of derivatives, civil remedies, and the conduct of securities brokers.[127] The legislation did not impose national rules, and the regime would have applied only in provinces that opted in and relinquished local securities regulation.

The Supreme Court unanimously rejected the federal proposal, and it described the scheme as beyond the scope of *Parsons* 2. Assessing the proposed legislation against the scope of the Trade and Commerce power, the Court cautioned that this general power cannot support federal laws "merely aimed at centralized control over a large number of local economic entities."[128] Rather, the power supports laws dealing with genuine national economic matters, rather than pre-existing provincial ones.[129] And, the Court cautioned against having duplicative federal legislation in areas of provincial regulation because this would trigger federal paramountcy in these areas.[130] The federal government hit the significant stumbling block of long-standing, extensive securities regulation in each Canadian province and territory.[131] Case law from the 1930s established securities as a matter generally falling to provincial jurisdiction over property and civil rights under section 92(13).[132] Although courts had established federal jurisdiction over some aspects of securities regulation, such as those incidental to federal power to incorporate corporations and to regulate foreign investment,[133] the proposed federal legislation in the *Securities Reference* went beyond these limited areas of federal jurisdiction.

Moreover, the Court determined that circumstances had not changed so as to justify federal legislative expansion into all aspects of securities regulation.[134] The Court acknowledged that the proposed statute dealt with aspects of securities regulation that

---

126 *Securities Reference*, *supra* note 87 at para 95.

127 *Ibid* at para 30.

128 *Ibid* at para 79 citing *Canadian National Transportation Ltd v Canada (AG)*, [1983] 2 SCR 206 at 267.

129 *Securities Reference*, *ibid* at para 83. Parliament has successfully relied on the general Trade and Commerce power to uphold competition and trademark laws. The Court was convinced of the former's fit under the *Constitution Act, 1867*, *supra* note 80, s 91(2), as competition is not particular to any one industry; it is economic conduct related to various goods that flow between provinces.

130 *Securities Reference*, *ibid* at para 85. The Court also noted that federal jurisdiction to regulate anti-competitive behaviour does not remove provincial jurisdiction to regulate distinct aspects of competition, such as "consumer protection" (*ibid* at para 88).

131 Each regulator coordinates with its counterparts; securities regulation is harmonized in many areas across jurisdictions. This is accomplished through an organization of regulators called the Canadian Securities Administrators (CSA) that decides on rules, regulations, and policies that should be enacted and applied in each jurisdiction; or in all jurisdictions agreeing with the position of the CSA. See generally, J Anthony VanDuzer, *The Law of Partnerships and Corporations*, 3rd ed (Toronto: Irwin Law, 2009) at 466–69. The federal government is undertaking new plans to create a securities regulator in cooperation with willing provinces. So far, only Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island, and Yukon have agreed to participate: Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System, 15 April 2015, online: <www.fin.gc.ca/n15/docs/moa-pda-yukon-eng.pdf> [Cooperative Capital Markets MOA]. Quebec is challenging this initiative: Janet McFarland, "Quebec Heading to Court to Challenge National Securities Regulator," *The Globe and Mail* (8 July 2015), online: <www.theglobeandmail.com/report-on-business/industry-news-the-law-page/quebec-heading-to-court-to-challenge-national-securities-regulator/article25352978/>.

132 *Lymburn v Mayland*, [1932] UKPC 5, [1932] AC 318 confirmed in *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 [*Multiple Access*]; *Global Securities Corp v British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 SCR 494.

133 Hogg, *supra* note 8 at 17-5, 21-26. See e.g. *Multiple Access*, *ibid* at 175–81.

134 The federal government relied solely on the general branch of the trade and commerce power in defending its legislation. It did not argue that securities regulation did not have a provincial aspect. Instead, it argued there was a concurrent federal power based on the contemporary nature of securities markets. See also Edinger, *supra* note 123 at 10. She also comments that the evolving character angle is new to the doctrine (*ibid* at 5, 10).

provincial legislation could not feasibly address, including national data collection and some aspects of systemic risk in securities markets.[135] However, the validity of these provisions could not anchor federal jurisdiction over the entire Act. Outside of these discrete provisions, the Court found that most aspects of securities regulation remained local in nature. Indeed, the legislation simply reproduced many aspects of existing provincial law, including the regulation of trades and occupations related to securities in each province.[136] In the Court's view, the pith and substance of the proposed scheme was the "day-to-day regulation of securities"[137] in the provinces. That purpose is "essentially a matter of property and civil rights within the provinces"[138] and not a matter of genuine national importance that transcended local, provincial concerns. The Act dealt with so many matters of provincial jurisdiction in such depth that the Court determined these were more than incidental.[139] No distinct federal aspect emerged from the legislation, so the Court declared the Act ultra vires in its entirety.[140]

The Court specifically rejected the federal government's policy arguments that a national securities regulator was the best and most efficient way to regulate securities markets. In the absence of jurisdiction, the Court urged an extra-constitutional, cooperative approach to effect consistent policy in securities regulation.[141]

This case suggests federal legislation to implement international trade or investment will not be immune to challenge if it intrudes into or duplicates established areas of provincial jurisdiction. It also suggests that implementing legislation emerging from treaty commitments will not support unlimited legislative licence for the federal government to implement all aspects of a comprehensive agreement like *CETA*.

c. Federal Power to Legislate for the "Peace, Order and Good Government" of Canada

Another avenue the federal government could explore in justifying the implementation of an international trade and investment treaty is its power to legislate matters for the Peace, Order and Good Government of Canada, the "POGG power."[142] This power permits the federal government to exercise jurisdiction over areas that are not specifically enumerated in section 91 or section 92.[143] POGG allows the federal government to fill constitutional gaps, and it can permit the federal government to legislate on issues of national concern.

---

135 The Court adopted the following definition of systemic risks: "risks that occasion a 'domino effect' whereby the risk of default by one market participant will impact the ability of others to fulfil their legal obligations, setting off a chain of negative economic consequences that pervade an entire financial system": *Securities Reference*, *supra* note 87 at para 103, citing Michael J Trebilcock, *National Securities Regulator Report* (2010), Reference Record, vol I, 222 at para 26. In the Court's view, "such risks can be evasive of provincial boundaries and usual methods of control": *Securities Reference*, *ibid* at para 103.

136 *Securities Reference*, *ibid* at para 123.

137 *Ibid*.

138 *Ibid* at para 116. The result in the case is consistent with decisions on references to provincial courts of appeal in Alberta (*Reference re Securities Act (Canada)*, 2011 ABCA 77, 332 DLR (4th) 697) and Quebec (*Québec (PG) v Canada (PG)*, 2011 QCCA 591, [2011] RJQ 598).

139 *Securities Reference*, *ibid* at para 129.

140 *Ibid* at paras 128–29, 134.

141 *Ibid* at paras 130–32.

142 The POGG power is derived from the opening paragraph of the *Constitution Act, 1867*, *supra* note 80, s 91. It is not a specifically enumerated power.

143 *R v Hydro Québec*, [1997] 3 SCR 213 at para 65 [*Hydro Québec*].

Could treaty implementation be a gap in the *Constitution*? POGG has a limited role to fill constitutional gaps by correcting what Hogg refers to as an incomplete distribution of constitutional powers.[144] Hogg suggests that the gap-filling capacity of POGG could correct the void left by the now defunct section 132 of the *Constitution*. Lack of express federal jurisdiction to implement treaties, he explains, is a gap, since the federal government has power to commit Canada to treaty obligations.[145] Logically, implementing jurisdiction must complement the power to ratify the treaty. Hogg's theory is perhaps appealing, but no court has endorsed it, and the Privy Council rejected that theory in *Labour Conventions*.[146]

But POGG also gives the federal government jurisdiction over matters of national concern in some circumstances.[147] The National Concern branch of the POGG power is harder to describe, comprehend, and apply than the "gap" branch, but it could support federal legislation implementing international trade and investment commitments.[148] The power supports permanent, plenary, and exclusive federal legislative action in areas of national importance. The logic behind this power is that certain matters may have once been local, but they have changed character over time to become national issues.[149] The National Concern doctrine allows the federal government to regulate the local dimensions of a matter to the exclusion of provincial governments.

That said, the limited case law on National Concern shows considerable judicial unease with POGG's potentially distorting effects on the division of powers. Judges have concluded that subject matters must be truly "single, distinct, and indivisible" to be matters of national concern; they cannot be a renamed collection of existing subject matter under provincial jurisdiction. For example, when speaking about "inflation" in the *Anti-Inflation Reference*, Justice Beetz commented that "inflation" lacked conceptual unity and distinctiveness,[150] and was really just an amalgam of existing provincial subject matters, such as "[t]he control and regulation of local trade and of commodity pricing and of profit margins … the contract of employment, including wages."[151] According to Justice Beetz, Parliament could not use the National Concern doctrine to control "inflation" because there would be no identifiable end

---

144 An example of a constitutional gap emerged in *John Deere Plow Co Ltd v Wharton*, [1914] UKPC 87, [1915] AC 330, where the Privy Council effectively "read in" a federal power to incorporate companies with federal objects, in the absence of an explicit constitutional power to do so. The Court reasoned that express provincial power to incorporate companies with provincial objects had to be complemented by a corresponding federal power to prevent gaps in the constitutional text. The provinces, the Court explained, could not legislate extra-provincially, and thus the power to create companies that could operate across the country must reside in Parliament.

145 Hogg, *supra* note 8 at 11-15, "treaty legislation is a distinct constitutional 'matter' or 'value' under the power-distributing provisions of the Constitution, and that is no part of the provincial legislative power."

146 *Ibid* at 11-15, 17-6. See also Cyr, *supra* note 8 at 228–39. In *MacDonald v Vapor Canada Ltd*, [1977] 2 SCR 134 at 168–69 [*MacDonald*], Chief Justice Laskin endorsed the theory, but the comment is *obiter*. See also Thakur, *supra* note 77 at 46 (for references to *MacDonald* and other cases with *dicta* questioning *Labour Conventions* as well as academic commentary).

147 For the sake of completeness, we add that the POGG power also has an Emergency Branch, explained and relied upon in the *Reference re Anti-Inflation Act*, [1976] 2 SCR 373 [*Anti-Inflation Reference*]. This branch of the power has languished since that contentious reference, but scholars generally agree that it supports temporary disturbances in the normal constitutional allocation of powers that persist for the duration of the federally-adjudged emergency. Given that a temporary situation justifies recourse to the power, its usefulness in the trade and investment context appears limited.

148 Much ink has been spilled about the appropriate scope of the POGG power and its impact on the balance of legislative power in Canada. See e.g. Jean LeClair, "The Elusive Quest for the Quintessential 'National Interest'" (2005) 38:2 UBC L Rev 355.

149 *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 [*Crown Zellerbach*].

150 *Anti-Inflation Reference*, *supra* note 147 at 457–58.

151 *Ibid* at 441.

to the scope of Parliament's power. This, he feared, would distort the textual allocation of powers between federal and provincial governments.[152] That same fear would frame any judicial consideration of attempts to use the National Concern doctrine in the context of international trade and investment treaty implementation.

The same concern resonated in the *Crown Zellerbach* decision, which is the leading authority for the National Concern doctrine.[153] In that case, a thin majority affirmed that federal authority exists where a matter possesses "singleness, distinctiveness and indivisibility" that distinguishes it from a matter falling to provincial jurisdiction.[154] On this note, Justice LeDain explained that courts will look to "provincial inability" as one factor to assess whether the "singleness" test is made out: "it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter."[155] In *Crown Zellerbach*, the majority characterized marine pollution as a single, distinctive, and indivisible matter of national concern, whereas the minority considered the subject matter to be more broadly environmental. The minority was concerned that marine pollution was really federally-arrogated provincial jurisdiction over land, industry, and local affairs.[156]

Thus, *Crown Zellerbach* illustrates the doctrine's tenuousness as a federal basis for legislation. Justice LaForest's dissent echoed concerns from *Anti-Inflation Reference*, particularly the doctrine's effect on the regulation of intraprovincial activities.[157] Like Justice Beetz, he spoke about the slippery slope of the federal government assuming jurisdiction under the guise of re-characterized provincial subject matters.[158] Judges have been wary of

---

152 *Ibid* at 443–44. Justice Beetz stated:

> [I]t must be conceded that the *Anti-Inflation Act* could be compellingly extended to the provincial public sector. Parliament has not done so in this case as a matter of legislative policy but, it could decide to control and regulate at least the maximum salaries paid to all provincial public servants notwithstanding any provincial appropriations, budgets and laws. Parliament could also regulate wages paid by municipalities, educational institutions, hospitals and other provincial services as well as tuition or other fees charged by some of these institutions for their services. Parliament could occupy the whole field of rent controls. Since in time of inflation there can be a great deal of speculation in certain precious possessions such as land or works of arts, Parliament could move to prevent or control that speculation not only in regulating the trade or the price of those possessions but by any other efficient method reasonably connected with the control of inflation. For example Parliament could presumably enact legislation analogous to mortmain legislation and even extend it to individuals. Parliament could control all inventories in the largest as in the smallest under-takings, industries and trades. Parliament could ration not only food but practically everything else in order to prevent hoarding and unfair profits. One could even go further and argue that since inflation and productivity are greatly interdependent, Parliament could regulate productivity, establish quotas and impose the output of goods or services which corporations, industries, factories, groups, areas, villages, farmers, workers, should produce in any given period. Indeed, since practically any activity or lack of activity affects the gross national product, the value of the Canadian dollar and, therefore, inflation, it is difficult to see what would be beyond the reach of Parliament.

153 *Crown Zellerbach*, *supra* note 149.

154 *Ibid* at 432.

155 *Ibid*.

156 *Ibid* at 454–58.

157 *Ibid* at 444: "[W]hat is sought to be regulated in the present case is an activity wholly within the province, taking place on provincially owned land."

158 In dissent, Justice La Forest wrote:

> Regulation to control pollution, which is incidentally only part of the even larger global problem of managing the environment, could arguably include not only emission standards but the control of the substances used in the manufacture, as well as the techniques of production generally, in so far as these may have an impact on pollution.… The challenge for the courts, as in the past, will be to allow the federal Parliament sufficient scope to acquit itself of its duties to deal with national and international problems while respecting the scheme of federalism provided by the Constitution (*ibid* at 447–48).

the National Concern doctrine's potential to effect constitutional reformulation by stealth. Few cases have considered the National Concern doctrine since *Crown Zellerbach*, and judges have articulated their discomfort with the doctrine in cases following that decision.[159] When read in the light of more recent case law, the National Concern doctrine's ability to support trade and investment treaty implementing legislation is unclear at best.

d. Synthesis: Federal Jurisdiction to Implement Trade and Investment Treaties

i. *The Scope of Federal Power*

As the law now stands, the federal government cannot assure trading partners that it has all required jurisdiction to implement a comprehensive trade and investment treaty. A definitive assessment of the scope of the federal government's power would require either a reference to the Supreme Court, as in the *Securities Reference*, or a challenge of the federal implementing legislation.

In either context, a court would be unlikely to uphold an omnibus federal statute regulating economic activities like investment, the supply of services, and provincial procurement simply because the statute flowed from an international treaty. This is true whether the federal government were to use POGG or the Trade and Commerce power as a possible anchor. Trade and investment treaties might be matters of national importance, but a court would consider the specific content of the implementing statute to identify its various aspects, both provincial and federal. In doing so, a court could be influenced by the fact that the legislation was intended to implement an international treaty obligation. However, it would avoid allowing a federal initiative to implement trade treaties to become a licence for the federal government to overtake areas of provincial jurisdiction in the absence of a significant national concern.

---

[159] The Quebec Court of Appeal considered the National Concern doctrine when determining the constitutionality of federal tobacco control legislation in *RJR-Macdonald Inc v Canada (AG)*, [1993] RJQ 375 (CA), rev'd [1995] 3 SCR 199. While a majority of the Court upheld the validity of the legislation under the *Constitution Act, 1867*, *supra* note 80, s 91(27), a differently-constituted majority found that it violated section 2(b) of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] and could not be saved under section 1, reversing that part of the Quebec Court of Appeal's decision. The Court also considered the National Concern doctrine in *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327, using this power to complement federal jurisdiction over nuclear power facilities grounded predominantly in the *Constitution Act, 1867*, *ibid*, ss 91(29), 92(10)(c). The majority noted the largely international and extra-provincial characteristics of nuclear energy to support its reasoning on the POGG power. In *Hydro Québec*, *supra* note 143, Justice LaForest upheld Parliament's expansive toxic substances regime under the federal Criminal Law power after indicating why the POGG power would be an inappropriate anchor. He began by noting that the test from *Crown Zellerbach* was necessarily "demanding" because of "the high potential risk to the Constitution's division of powers presented by the broad notion of 'national concern'" (*ibid* at para 67). Here, the challenged *Canadian Environmental Protection Act* (*CEPA*) purported to regulate "a wide array of substances, not only … chemical pollutants" (*ibid* at para 68). Parliament had cast its definition of regulated "toxic" substances broadly (*ibid* at paras 68–72) and did not distinguish "between types of toxic substances, either on the basis of degree of persistence and diffusion into the environment and the severity of their harmful effect or on the basis of their extraprovincial aspects" (*ibid* at para 75). Justice LaForest determined this was an insufficient anchor justifying federal jurisdiction. On the issue of provincial inability, *CEPA*'s application to chemicals that were relatively confined, rather than "diffuse, persistent and serious" undermined the application of this portion of the *Crown Zellerbach* doctrine (*ibid* at para 76). Provinces could regulate chemicals with localized effect. These factors meant the broad subject matter of the legislation failed the "singleness, distinctiveness and indivisibility" required to satisfy the test.

The extent to which the federal legislation intruded on provincial matters would also play a role in any judicial analysis. Carefully crafted implementing legislation could support some intrusion into traditional areas of provincial jurisdiction if those intruding provisions could be saved by other constitutional doctrines. Ian Lee suggests that the federal government may not have run afoul of the division of powers in the *Securities Reference* had it aimed for narrower securities regulation and adhered to aspects firmly within federal jurisdiction.[160] Lee notes that the Court may have upheld a smaller number of jurisdictionally-suspect provisions based on the "Necessarily Incidental" doctrine if the federal government had created narrower legislation, tightly confined to areas of federal authority.[161] In the context of *CETA*, the treaty contains various commitments that require federal implementation, including obligations relating to import and export restrictions,[162] as well as to customs and duties on goods entering the country.[163] Those matters already reside within federal jurisdiction under *Parsons* 1. Legislation implementing obligations in these orthodox trade areas could support incidental measures implementing commitments in other, related areas,[164] but such an approach would not justify large-scale intrusions into provincial jurisdiction.

However, limiting the implementing legislation to mostly federal areas of jurisdiction may not be sufficient in all cases. An example helps illustrate that assertion. Federal legislation implementing *CETA*'s tariff and market access commitments targeted directly at the flow of goods and services across Canada's border[165] would fit within federal jurisdiction over international trade. But *CETA*'s services rules also prohibit Canadian governments from imposing market access limitations that focus on domestic regulatory arrangements. For example, *CETA* prohibits numerical quotas on the number of suppliers of a particular service in a region, even where these quotas apply equally to domestic and foreign businesses.[166]

---

160 Lee, *supra* note 111 at 59, 67. Malcolm Lavoie reflects on what might constitute the opaque requirement of "trade as a whole" under the *General Motors* test: Malcom Lavoie, "Understanding 'Trade as a Whole' in the *Securities Reference*," Case Comment, (2013) 46:1 UBC L Rev 157. Lavoie comments that the Court has not articulated a workable definition of what this means, and he proposes that it relates to "emergent properties." In relation to the national economy, he suggests that it refers to properties "that cannot [be] readily … reduced to the properties of individual market actors, transactions, or provincial markets" (*ibid* at 168); properties that emerge "from the dynamic interactions of many different transactions and how they impact price and market supply" (*ibid* at 169); and properties which are "not reducible to the level of a particular industry" (*ibid*). Lavoie's definition would apply to "[s]ystemic risk in capital markets," as in the *Securities Reference*, *supra* note 87, and to competition and trademarks (*ibid* at 171).

161 Lee, *ibid* at 65–66.

162 *CETA*, *supra* note 4, c 2.

163 *Ibid*, c 6.

164 An example might be commitments regarding the sale of wines and spirits. In *CETA*, the parties only agreed to seek mutually-agreed solutions to the EU's concerns about differential provincial mark-ups for domestic wines (*ibid*, Annex 30-C). The federal government apparently asserted an implementation power in relation to commitments regarding provincial wine and spirit marketing in *NAFTA*. Section 20 of the *North American Free Trade Agreement Implementation Act*, SC 1993, c 44 gave the federal cabinet the power to make regulations to give effect to *NAFTA*, *supra* note 8, arts 312–13, including "requiring or prohibiting the doing of anything" unless provincial governments have complied with these obligations. Article 312 imposes, among other things, restrictions on requiring that imported distilled spirits be blended with local distilled spirits (*ibid*, art 312). Article 313 contains a commitment related to the standards and labelling of certain products, including, for example, a commitment not to permit the sale in Canada of a product as "Bourbon Whiskey" or "Tennessee Whiskey" unless it was manufactured in the United States in accordance with US standards (*ibid*, art 313). These are matters within provincial jurisdiction. This federal authority has not been used to address provincial non-compliance or challenged.

165 *CETA*, *ibid*, c 2, 9.

166 *Ibid*, c 8, 9. See "Opening New Markets," *supra* note 22 at 11–12. The *CETA* also contains commitments that provinces will not change their regulatory schemes to make them more restrictive for foreign services suppliers.

Any such quota would be provincially imposed, and would limit access to provincial markets. *CETA* attempts to dismantle these barriers. Yet if Parliament prohibited such provincially established quotas as part of an Act regulating tariffs and other barriers to cross-border trade, the implementation provisions would likely not be "Necessarily Incidental" to the federal legislation.[167] Provincially established limits regarding numbers of service suppliers permitted in a region would implicate entrenched provincial jurisdiction over contracts and licensing of local businesses under section 92(13). If the federal government relied on the "Necessarily Incidental" doctrine to sustain such provisions, the court would characterize them as highly intrusive, thus attracting the "necessity" standard. In other words, the federal government would have to demonstrate that its Act could not function without the invasive measures. But the federal government could reduce tariffs and border controls without dismantling local non-discriminatory restrictions on access to services markets. Thus, the stringent doctrinal standard would likely not be satisfied.[168]

This discussion suggests that the limitations on federal jurisdiction might undermine the effective implementation of treaty commitments. The *Securities Reference* also suggests that a court will not give weight to federal arguments based on the need for optimal or unified regulation or consistent compliance with treaty requirements.[169]

ii. *The Problem of Characterization*

As the previous section suggests, comprehensive federal legislation purporting to fully implement an expansive, contemporary agreement like *CETA* would be hard to characterize as entirely within federal power. Arguing that the pith and substance of such an Act is "International Trade and Investment," or the implementation of international trade and investment, would be a convenient but vague description of the legislation; it describes the treaty context, but not the legislative content. As in the *Securities Reference* and the *AHR Reference*,[170] a reviewing court would assess the legislation to find provisions regulating subject matters within provincial jurisdiction, such as professional regulation and local government procurement of goods and services. Pieces of the federal Act would likely survive this examination, but sections that intruded deeply into provincial jurisdiction would likely not survive. The federal government would likely be unable to characterize federal legislation implementing an international trade and investment treaty like *CETA* in a way that would protect it from constitutional attack.

---

167 See *supra* notes 92, 161–64, and accompanying text.

168 Similarly, other *CETA* provisions set standards that are not related to a single trade or profession, but that may purport to impose significant constraints on provincial regulatory freedom: for example, rules setting standards for technical barriers to trade (*CETA*, *supra* note 4, c 4), sanitary and phyto-sanitary measures (*ibid*, c 5), the treatment of foreign investors by governments (*ibid*, c 8), the regulation of foreign services suppliers (*ibid*, c 9), mutual recognition of professional qualifications (*ibid*, c 11), and domestic regulation (*ibid*, s 14). It is not clear to what extent, if at all, commitments will require any change to existing provincial regimes or will meaningfully limit provincial policy space. Such an assessment would require a detailed analysis of each set of provisions, which is beyond the scope of this article.

169 *Supra* note 87.

170 The *AHR Reference*, *supra* note 93, dealt with the federal criminal law power, not the POGG or Trade and Commerce power. That said, the case produced a badly fractured decision that showed at least four judges' inclination to limit Parliament's formerly broad latitude to uphold legislation under its Criminal Law authority.

The POGG cases reviewed confirm this problem. *Anti-Inflation Reference* and *Crown Zellerbach* both contain judicial cautions against relabeling and transferring areas of longstanding provincial jurisdiction. "International Trade and Investment," like the environment or inflation, relates to a cluster of activities in a range of fields, many of which are firmly within provincial competence. POGG is meant to be reconcilable with the constitutional allocation of powers, and conferring plenary federal jurisdiction to Parliament in areas deeply affiliated with local economies is contentious. Thus, the judicial cautions in the jurisprudence still resonate.

This concern about characterization is compounded because POGG displaces provincial jurisdiction to legislate concurrently.[171] The absence of case law around POGG following *Crown Zellerbach* suggests the federal government knows this doctrine is risky. Gerald Baier notes that the federal government did not attempt to defend any part of its *Assisted Human Reproduction Act* on the POGG power notwithstanding the recommendation to do so by the Royal Commission on whose report the legislation was based.[172]

Finally, although the *Securities Reference* dealt with the Trade and Commerce power, the doctrine's conceptual similarities to POGG are germane.[173] So too are the Supreme Court's warnings about invading provincial jurisdiction under a potentially far-reaching source of federal power.[174] The complex *AHR Reference*, albeit related to the federal Criminal Law Power, reinforces what Bruce Ryder calls an emerging posture of strongly pronounced judicial opinions with regard to central versus provincial power.[175] Ryder also cites a "defensive judicial response" to federal attempts to regulate long-standing areas of provincial competence.[176]

iii. *(Trade and Investment) Treaty Implementation as a National Concern*

The practical results of *Labour Conventions* have prompted calls for the courts to revisit the decision and recognize a freestanding federal treaty implementing power to replace section 132 of the *Constitution Act, 1867*.[177] Such a power could answer issues flowing from the division of legislative authority and limits on federal power. But courts are unlikely to do so.

Such open-ended treaty implementing power would be argued under the National Concern branch POGG power, or the general Trade and Commerce power, if the context is trade and

---

171 *Crown Zellerbach*, *supra* note 149 at 432–33.

172 Gerald Baier, "The Courts, the Constitution, and Dispute Resolution" in Bakvis & Skogstad, *supra* note 16, 79 at 82.

173 See also Edinger, *supra* note 123 at 14.

174 In speaking about the *Securities Reference*, *supra* note 87, Edinger comments that the decision "preserved and protected the scope of existing provincial legislative jurisdiction under s. 92(13)" (*ibid* at 1–2).

175 Ryder, *supra* note 91 at 595.

176 *Ibid*. Again, the *AHR Reference*, *supra* note 93, dealt with the federal criminal law power. Recent cases on labour relations jurisdiction further illustrate the Supreme Court's resistance to transferring or dividing long-standing provincial jurisdiction. See e.g. *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 SCR 407; *NIL/TU,O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 SCR 696; *Tessier*, *supra* note 107.

177 See e.g. Cyr, *supra* note 8 at 217.

investment treaties.[178] A court would have to accept that treaty implementation writ large is a matter of national concern — or that trade and investment treaty implementation fits within the general Trade and Commerce power — thereby creating a precedent for federal domestication of economic treaties. Once accepted, the federal government would have a basis to legislate any treaty-related provisions. This power would make it easier for Parliament to provide assurances to future treaty partners that Canada would comply with its commitments.

Academic arguments in support of a federal treaty implementation power underline the economic risks associated with provincial non-compliance with treaty obligations. These arguments derive support from Hogg's description of the "most important element of national concern" as "a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it adverse consequences for the residents of other provinces."[179] In the trade and investment context, non-compliance by a province with a treaty could provoke dispute settlement proceedings and, ultimately, retaliation by other treaty parties. In the context of a bilateral treaty, provincial non-compliance could jeopardize the treaty itself. Retaliation would expose other provinces to economic loss. Moreover, the possibility of provinces opting out could jeopardize the prospects for successful treaty negotiation.[180] The ripple effects caused by the recalcitrant player exemplify why uniform federal control is desirable. While relevant under the POGG and conceptually similar Trade and Commerce doctrines, such arguments are likely "non-starters" in the current constitutional climate.[181]

Against these harms to national interest, other constitutional realities must be weighed. In the *Securities Reference,* the Supreme Court cautioned that the general Trade and Commerce power is not a basis for what is "optimal" from the point of policy cohesion and effectiveness.[182] This suggests that the perceived advantages of more effective and uniformly implemented treaty-making cannot justify a significant intrusion into provincial jurisdiction. Since the content and consequences of any future trade and investment agreements are

---

178 See e.g. Hogg, *supra* note 8 at 11-15; Strom & Finkle, *supra* note 97 ("[i]t remains possible for the Supreme Court of Canada to reconsider Lord Atkin's view of section 132, or, alternatively, the POGG clause in the *Constitution Act, 1867*, thereby restoring the reasoning of Viscount Dunedin in the *Radio Reference* case" at 56 [footnotes omitted]). See also Stewart Elgie, "Kyoto, the Constitution, and Carbon Trading: Waking a Sleeping *BNA* Bear (or Two)" (2007) 13:1 Rev Const Stud 67 at 90–103, where the author explores some of these arguments in the context of implementing the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 148 (entered into force 16 February 2005).

179 Hogg, *supra* note 8 at 17-14 to 17-15.

180 Howse, "NAFTA," *supra* note 8 at 56. Howse argues that, so long as federal action does not intrude into provincial jurisdiction more than is necessary to address the trade and investment liberalizing objectives of the treaty, it should be found to be constitutional. Additionally, Howse argues that the bottom line should be a sort of minimal impairment principle, and that this can be met on the following basis: provinces were extensively consulted during negotiations, there was no evidence of disagreement at the time, and most provinces have the same economic vision as reflected in *NAFTA* focusing on open trade and investment. Howse likens this approach to the principle of subsidiarity applied in the EU. See also, William R Lederman, "Legislative Power to Implement Treaty Obligations in Canada" in William R Lederman, ed, *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada* (Toronto: Butterworths, 1981) 350 at 355–57; Sullivan, *supra* note 77, noting a contrary view expressed in Katherine Swinton, "Federalism and Provincial Government Immunity" (1979) 29:1 UTLJ 1; Debra P Steger, "Canadian Implementation of the Agreement Establishing the World Trade Organization" in John H Jackson & Alan O Sykes, eds, *Implementing the Uruguay Round* (Oxford: Clarendon Press, 1997) 243 at 282–83.

181 On this, see Cyr *supra* note 8 at ch 3.

182 *Securities Reference*, *supra* note 87 at para 90.

unknown, condoning an abstract, prospective treaty implementing power is unlikely, even if the power was confined to economic agreements.

Canada's treaty negotiating experience to date is another challenge to a free-standing federal treaty implementation power.[183] *NAFTA*, as well as more recent trade agreements like those with Peru and Colombia, demonstrate Canada can negotiate trade treaties that impose some obligations in areas of provincial jurisdiction. While treaty disputes have arisen involving the provincial measures, these have been relatively few and are usually resolved to the mutual satisfaction of both parties.[184] The *CETA* negotiations suggest that circumstances might be changing, so there may be a greater need for assurances of provincial compliance with trade treaties. The EU expressed significant concern about provincial compliance and the corresponding credibility of Canadian commitments under *CETA*. But the fact that the negotiations concluded without any more certainty regarding a federal implementing power undermines any argument that such a power is essential.

Finally, the federal government has asserted no desire for an enlarged treaty implementation power in relation to trade and investment treaties, much less a general power to implement all treaties.[185] It has not done so in the past, and commentators are uniformly of the view that this has not been part of the federal government's current agenda.[186] Without any federal appetite to pursue this, arguments regarding the constitutional basis for doing so are moot and will remain unresolved.

iv. *In Sum: The Division of Powers Remains a Stumbling Block*

Canada's constitutional law will not assist the federal government in providing its treaty partners with guarantees regarding provincial compliance with treaty obligations for a number of reasons. First, "treaties," even "comprehensive trade and investment treaties," describes a range of matters, many of which will fall within provincial jurisdiction.[187] The labels are too vague and protean to be useful in balancing government powers in a federal system.

Second, the Supreme Court has limited both the POGG and general Trade and Commerce powers to protect the balance of federal and provincial jurisdiction. These doctrines are unlikely anchors for an open-ended treaty or trade and investment treaty implementing power.[188]

---

183 Cyr, *supra* note 8 at 217, makes this same point.

184 See *supra* note 49.

185 A rare example of the federal government apparently asserting an implementation power occurred in the *North American Free Trade Agreement Implementation Act*, *supra* note 164 and accompanying discussion.

186 See Gregory J Inwood, Carolyn M Johns & Patricia L O'Reilly, *Intergovernmental Policy Capacity in Canada: Inside the Worlds of Finance, Environment, Trade, and Health* (Montreal: McGill-Queen's University Press, 2011) (federal officials suggested that the federal government could challenge *Labour Conventions*, *supra* note 9, but "the political consequences of launching such an action were judged as too costly" at 241).

187 Cyr, *supra* note 8 at 231.

188 Indeed, it is not clear that a definitive test can be devised, or why this should take place in the courts as opposed to the political sphere if a balancing of interests is required. See the discussion of the approach advocated by Howse, discussed in *supra* note 180 and the accompanying text, above.

If arguments about constitutional competence are unlikely to resolve the challenges associated with treaty obligations within provincial jurisdiction, the issue becomes how to accommodate both provincial prerogatives and the increasing demands for assurances of provincial compliance. Short of a constitutional amendment, various formal and informal alternatives exist.

One alternative is delegation. Delegation is one solution to legislative responses contingent on shared federal and provincial legislative power. Courts have determined that legislative delegation is constitutionally impermissible: transferring law-making power is tantamount to informally rewriting or redistributing the constitutionally-determined distribution of powers.[189] But courts have endorsed cooperative schemes of administrative inter-delegation. Using this device, the federal government, for example, can delegate administrative responsibilities to a provincially-created board or agency, which the province often creates for that purpose. The difference between this practice and legislative delegation is that it involves the statutorily-ordained receipt of administrative powers by a provincial executive body rather than the receipt of law-making powers by a legislative body. Such delegation often accompanies federal incorporation by reference of the standards or requirements of the complementary provincial scheme.[190] Courts have accepted this approach to circumventing the problem of tacit constitutional amendment even though the results often look little different than a transfer of law-making power. But the logic of the administrative approach is that the federal government has exercised its own power by expressing its sovereign decision to allow a provincial executive actor to implement a legislative plan that Parliament has created. Moreover, delegations are revocable. Administrative inter-delegation underlies current arrangements in such areas as: interprovincial transport[191] and farm marketing.[192]

---

189 *Nova Scotia (AG) v Canada (AG)* (1950), [1951] SCR 31. See also David Schneiderman, "The Delegation Power Past and Present" (1992) 3:3 Const Forum Const 82.

190 In an incorporation by reference, Parliament's legislation authorizing provincial execution of a scheme would refer to the relevant provincial legislative standards or conditions under which the provincial board will exercise its powers. Referential incorporation might be static or "ambulatory," meaning that Parliament consents to the (changing) standards that might exist in the province "from time to time." See e.g. *Coughlin v Ontario (Highway Transport Board)* (1967), [1968] SCR 569 [*Coughlin*]. For information on incorporation by reference, see generally John Mark Keyes, *Executive Legislation*, 2nd ed (Markham: LexisNexis Canada, 2010) at ch 12.

191 *Motor Vehicle Transport Act*, RSC 1985, c 29 (3rd Supp). The dissent in *Coughlin*, *ibid* illustrates how an inter-delegation coupled with an ambulatory incorporation by reference looks little different than an actual legislative delegation. Thus, the distinction between these two variations of delegation can be fine and almost illusory.

192 *Farm Products Agencies Act*, RSC 1985, c F-4, its associated regulations, and cases, such as *Fédération des producteurs de volailles du Québec v Pelland*, 2005 SCC 20, [2005] 1 SCR 292 [*Pelland* cited to SCR]. In farm marketing schemes, provinces control production and contracts, and through that, labour and intraprovincial sales, whereas interprovincial trade falls to federal jurisdiction. But to establish a fair system characterized by predictable commodity supply, stable pricing, and equal benefit and burden, overall production caps and quotas are logically set at the centre, and divided up between the provinces. Technically, however, the federal government cannot dictate the terms of intraprovincial trade to the provinces. But all governments might agree to negotiate toward a common end, and then conveniently predetermine how to divide up legislative tasks, the receipt of executive tasks amongst various administrative agencies, and draft legislation accordingly. After a long series of provincial squabbles and retaliatory measures, governments cooperatively combined their jurisdiction to effect successful and enduring chicken and egg marketing schemes. See *Reference re Agricultural Products Marketing Act*, [1978] 2 SCR 1198 [*Agricultural Reference*]; *Pelland*, *ibid*. Hogg explains the complex mechanics of the *Agricultural Reference* (Hogg, *supra* note 8 at 20-7 to 20-9). In some contexts, governments have engaged in administrative inter-delegation for pragmatic reasons. *Winner v SMT (Eastern) Ltd*, [1951] SCR 887 located federal jurisdiction to regulate interprovincial transportation, which prompted administrative arrangements to unite the implementation of that power with existing provincial schemes to regulate intraprovincial transport. A more recent example is an agreement between the federal

In the present context, such administrative delegation could be possible even for subjects in which the provinces hold all the power required to secure specific treaty commitments, such as professional regulation. In principle, the provinces could agree to a limited delegation scheme that permits the federal government to implement treaty commitments on professional regulation. In such an arrangement, the provinces could legislatively authorize a federal board to execute obligations regarding professional standards over training, licensing, and admission to conform to the treaty.[193]

In the following section, we explore this and other "extra-constitutional" devices to address treaty implementation and compliance.

IV. USING AN INTERGOVERNMENTAL AGREEMENT TO ADDRESS CONCERNS REGARDING PROVINCIAL IMPLEMENTATION OF AND COMPLIANCE WITH INTERNATIONAL TREATY OBLIGATIONS

A. INTRODUCTION

The federal and provincial governments have entered into hundreds of agreements, many designed to skirt the challenges associated with Canada's constitutional division of powers.[194] Recent Supreme Court of Canada cases, like the *Securities Reference*, encourage Canadian governments to cooperate to address areas in which provincial and federal governments both have some of the jurisdiction necessary to construct a complete scheme. An intergovernmental agreement (IGA) could address the implementation and compliance concerns identified above and enhance the credibility of Canadian treaty commitments in areas of provincial jurisdiction.[195]

Of course, an IGA treating provincial commitments related to treaty implementation and compliance (a treaty compliance IGA) would face substantial political challenges. One of those challenges would likely be whether, in return for a provincial compliance commitment, the federal government would have to formally engage provinces in treaty negotiations, a

government and some provinces to cooperate in establishing a securities regulation regime to govern aspects of securities law that are both federal and within the jurisdiction of participating provinces and territories. Currently British Columbia, Saskatchewan, Ontario, New Brunswick, Prince Edward Island, and Yukon have signed on: Cooperative Capital Markets MOA, *supra* note 131. Of course, this is the initiative that Quebec is currently challenging on jurisdictional grounds: see McFarland, *supra* note 131.

193 No Canadian treaty to date mandates specific standards for individual professions. And, this particular example becomes a bit murky. As noted, the courts forbid legislative delegation, but do allow administrative inter-delegation coupled with incorporation by reference, such that the practical difference between the two devices is hard to perceive. In the professional regulation example, however, the provinces could delegate to any federal board with a relevant mandate. But if the delegation was coupled with an incorporation by reference in the provincial delegating statute, the jurisdictional basis of the federal legislation referentially incorporated becomes unclear.

194 See e.g. Jeffrey T Parker, *An Institutional Explanation of the Formation of Intergovernmental Agreements in Federal Systems* (PhD Thesis, University of Western Ontario School of Graduate and Postdoctoral Studies, 2012), online: Electronic Thesis and Dissertation Repository <ir.lib.uwo.ca/etd/382>. Parker concludes that "Canada is among the most active federations in forming intergovernmental agreements in this comparative analysis, forming 92 national accords between 1945 and 2009, an average of 1.46 per year. This makes Canada the second-most prolific in terms of agreement creation and in a group with Australia and Germany as the most active in forming new intergovernmental institutions" (*ibid* at 168).

195 It would also be possible to create a formal process for provincial participation in the negotiation and approval of international treaties in an IGA. This has been previously proposed by the provinces, but no formal steps have been taken (Inwood, Johns & O'Reilly, *supra* note 186 at 223–26, 237–38).

demand the provinces have made in the past.[196] In 2010, for example, the Council of the Federation sought a framework for provincial participation in treaty negotiations.[197]

New federal-provincial negotiation arrangements and their attendant challenges, as well as an assessment of the political challenges that a treaty compliance IGA would face, are beyond the scope of this article. The following discussion simply presents preliminary design issues associated with using an IGA as a mechanism for greater assurance of provincial compliance. This discussion considers as possible models the *Agreement on Internal Trade*[198] and a recently adopted European regulation addressing the respective roles of the EU and its member states in investor-state arbitration.

Inspired by international trade and investment treaties, the *AIT* commits Canada's federal government and its provinces to not impose interprovincial barriers or discriminate against persons, goods, services, or investments "irrespective of where they originate in Canada."[199] The *AIT* also contains compliance and dispute settlement procedures, similar in design to those in trade treaties, but the *AIT* has adapted them for internal use in Canada.[200] These procedures deal with some of the issues that an IGA dealing with treaty compliance would have to address.

The EU has provided a possible template for the allocation of financial responsibility associated with treaty–based disputes involving provincial measures.[201] This would be a vital

---

196 *Ibid* at 237–38, 255; Skogstad, *supra* note 16 at 207–208, 215.

197 The Council of the Federation, News Release, "Strengthening International Trade and Relationships" (6 August 2010), online: Canada's Premiers <www.canadaspremiers.ca/en/latest-news/17-2010/166-strengthening-international-trade-and-relationships>. The communication stated that it wanted a framework that addressed the following:

> The role of provinces and territories in the management of international agreements that affect their jurisdiction; [and]
>
> The role of provinces and territories in any institutional mechanisms that are established to implement an agreement.

198 *Agreement on Internal Trade*, 18 July 1994 (entered into force 1 July 1995), online: <www.ait-aci.ca/wp-content/uploads/2015/08/AIT-Original-with-signatures.pdf> as of 2 May 2007 [*AIT*]. In 2005, the federal government and several provinces entered into an IGA regarding implementation and compliance with international labour cooperation agreements: *Canadian Intergovernmental Agreement Regarding the Implementation of International Labour Agreements*, online: <www.labour.gc.ca/eng/relations/prov_terr/lca.shtml> [*Labour IGA*]. This IGA may also provide a useful model for developing a treaty compliance IGA. This IGA commits participating provinces to comply with the provisions of listed labour cooperation agreements (*Labour IGA*, *ibid*, art 2), provides a cooperative process to be followed where dispute settlement is initiated by the other state party in relation to a Canadian measure (federal or provincial) (*Labour IGA*, *ibid*, art 6), and allocates financial responsibility to the Canadian government whose measure triggers an obligation to pay a monetary assessment (*Labour IGA*, *ibid*, art 8).

199 *AIT*, *ibid*, art 101(3)(b). Recently, a number of province-to-province agreements have been entered into, most of which contain their own compliance and dispute settlement procedures: e.g. *New West Partnership Trade Agreement*, British Columbia, Alberta, and Saskatchewan, 30 April 2010 (entered into force 1 July 2010), online: <www.newwestpartnershiptrade.ca/the_agreement.asp> [*NWPTA*]; *Trade and Cooperation Agreement between Ontario and Quebec*, 11 September 2009 (entered into force 1 October 2009), online: <www.ontario.ca/document/trade-and-cooperation-agreement-between-ontario-and-quebec>.

200 *AIT*, *ibid*, c 17. The *AIT* procedures are based on the WTO and *NAFTA* models with some significant variations (Robert Howse, "Between Anarchy and the Rule of Law: Dispute Settlement and Related Issues in the Agreement on Internal Trade" in Trebilcock & Schwanen, *supra* note 30, 170 at 171).

201 EC, *Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party*, [2014] OJ, L 257/121, art 3 [*EU Regulation*]. An initial proposal was made by the Commission in 2012: EC, *Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established*

component of any treaty compliance IGA. The *EU Regulation* deals with the allocation of financial responsibility between the EU and member states where a member state measure has been challenged in investor-state arbitration. As with the *AIT*, this regulation illustrates possible design options and challenges that would confront drafters of a treaty compliance IGA.

But even if these design challenges could be resolved and the political hurdles overcome, an IGA remains an imperfect instrument for addressing provincial treaty compliance. The legal enforceability of IGAs is tenuous. Their most significant weakness is that they cannot constrain the power of provincial legislatures. In the final section of this part, we discuss some of these limits on the effectiveness of IGAs.

B. WHAT MAY BE INCLUDED IN AN IGA DEALING WITH CANADIAN TREATY OBLIGATIONS?

A fundamental issue regarding the scope of a treaty compliance IGA would be whether it extends only to a particular treaty or to all treaties Canada negotiates in the future. The provinces would be less likely to commit to implementing and complying with future treaty commitments; they would be more likely to agree to implement specific obligations that have been fully negotiated and fixed in legal text.

With that caveat in mind, three kinds of provisions seem necessary for an effective treaty IGA, whether relating to a single treaty or trade and investment treaties generally. First, each province could commit, to the federal government and to each other, that it would comply with treaty obligations that relate to areas within its jurisdiction. Second, each province could submit to a dispute settlement procedure that any other Canadian government could initiate by claiming that the province had not complied with its applicable treaty obligations.[202] Finally, subject to caveats, each province could agree to be financially responsible for the costs of treaty-based dispute settlement proceedings related to defending its actions that are claimed to be contrary to Canadian treaty obligations. Each province could also agree to be liable for the amount of any award of damages in an investor-state arbitration relating to a provincial measure.

1. PROVINCIAL COMMITMENTS TO IMPLEMENT AND COMPLY WITH CANADIAN TREATY OBLIGATIONS

The effectiveness of provincial commitments in a treaty compliance IGA will be determined, in part, by the dispute settlement and compliance procedures to enforce them.

---

by international agreements to which the European Union is party, COM/2012/0335 final – 2012/0163(COD). These rules were amended by the European Parliament in May 2013 and referred back to the International Trade Committee. In April 2014, the Parliament passed a resolution with certain further changes: EC, *European Parliament legislative resolution of 16 April 2014 on the proposal for a regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party*, COM/2012/0335 – C7-0155/2012 – 2012/0163(COD). The final *EU Regulation* was published in the Official Journal of the EU on 28 August 2014 and came into force on 17 September 2014.

202 Existing trade and investment treaties provide a variety of models for state-to-state dispute settlement. See *supra* notes 50–56 and accompanying text for a brief description of the procedures under *NAFTA*, *supra* note 18 and the WTO *DSU*, *supra* note 49.

But the strength of the parties' underlying commitment also depends on how they structure this commitment. Two main issues emerge in relation to this question: is the commitment binding or only aspirational, and to what extent does the commitment extend to sub-federal entities other than provinces?

A commitment in a treaty or other agreement can be made binding using mandatory language or aspirational with language securing parties' best efforts. The *AIT* provides examples of both. The general obligation not to discriminate uses mandatory language: each party "shall accord to goods of any other Party treatment no less favourable than the best treatment it accords to…its own like, directly competitive or substitutable goods."[203] In contrast, the *AIT* uses aspirational language for conforming with certain standards: each province is obliged only to use its "best efforts to bring its legislation, regulations and policies into conformity with [standards that may be approved by the Standards Committee on Wine of the Canadian General Standards Board]."[204] Such an aspirational obligation requires provinces to make good faith efforts to comply. Provinces do not breach the agreement, even if they fail to achieve full compliance with an obligation, as long as they make good faith efforts. In the international treaty context, mandatory language creating a binding commitment to comply would provide greater assurances of provincial compliance to treaty partners. Using mandatory language would also mean that compliance could be adjudicated under a dispute resolution procedure.

A second scope issue is the extent to which a treaty compliance IGA would extend to the actions of bodies other than provincial legislatures and executives. Again, Canada is responsible for the actions of all state actors as a matter of international law, and this includes municipalities, schools, courts, and even private actors exercising delegated state authority.[205] The *AIT* provides that the provinces are responsible for the actions of all subordinate bodies:

> Each Party is responsible for compliance with this Agreement:
>
> (a) by its departments, ministries and similar agencies of government;
>
> (b) by its regional, local, district or other forms of municipal government, where provided by this Agreement; and
>
> (c) by its other governmental bodies and by non-governmental bodies that exercise authority delegated by law, where provided by this Agreement.
>
> For greater certainty, "other governmental bodies" includes Crown corporations.[206]

---

[203] *AIT*, *supra* note 198, art 401(1). The binding nature of this commitment is limited by *ibid*, art 300, which provides as follows:

> Nothing in this Agreement alters the legislative or other authority of Parliament or of the provincial legislatures or of the Government of Canada or of the provincial governments or the rights of any of them with respect to the exercise of their legislative or other authorities under the Constitution of Canada.

As well, the limitations that apply to all IGAs discussed in *supra* note 198 and accompanying text, also apply.

[204] *Ibid*, art 1007(2).

[205] See notes 11, 49.

[206] *AIT*, *supra* note 198, art 102.

A similar provision would be necessary in an IGA dealing with treaty compliance aimed at ensuring compliance by subordinate government actors to make more credible Canadian treaty commitments that implicate such actors. In *CETA*, for example, government procurement commitments undertaken by Canada extend to municipalities, universities, school boards, and hospitals.[207]

2. PROVINCIAL SUBMISSION TO DISPUTE SETTLEMENT

As suggested, subjecting the provinces to a dispute resolution process would be an important component of a meaningful treaty compliance IGA. Both Canada and its trading partners have an interest in provincial commitment to a dispute resolution mechanism to enhance the credibility of treaty obligations in areas of provincial jurisdiction. But the ultimate impact of a dispute resolution process would rely on the perceived effectiveness of the process.

The *AIT* dispute settlement procedures suggest one approach to dispute settlement. The *AIT* allows the federal government, or a province concerned that a measure of another government is not consistent with its obligations, to initiate a dispute settlement process to address the concern. The main elements of the *AIT* process may be described as follows:

(1) Where a party considers that a measure of another party is, or a future measure would be, inconsistent with the other party's obligations under the *AIT*, it may request consultations by a notice to the other party as well as all other parties to the agreement;

(2) If the consultations do not lead to a mutually satisfactory resolution within 120 days, either party may request a panel of three experts to determine whether the measure is non-compliant;

(3) If the panel finds the measure is non-compliant, and a mutually satisfactory resolution is not reached by the parties within a year, the complaining party can request a compliance panel of experts to determine whether the measure has been brought into compliance; and

(4) If the compliance panel finds that the measure has not been brought into compliance, the panel can impose a monetary penalty, though payment does not relieve the non-compliant party of its obligation.

Other parties to the *AIT* with a substantial interest in the dispute may participate in the consultations before the panel.[208] In the event of continuing non-compliance, the Committee on Internal Trade may authorize a complaining party to retaliate by "suspend[ing] benefits

---

[207] *CETA*, *supra* note 4, Canada's Schedule to Annex 19-2 and 19-3.

[208] *AIT*, *supra* note 198, arts 1702–709. Monetary penalties are enforceable in provincial courts and, in some cases, against standby credits deposited by the provinces with the *AIT* Secretariat (*ibid*, arts 1701(4)(b), 1707(2)). Failure to pay a monetary penalty or comply with the *AIT* can lead to a removal of access to *AIT* dispute resolution procedures (*ibid*, art 1707(3)). No monetary penalty has ever been awarded.

of equivalent effect" or by taking retaliatory action until a mutually satisfactory solution is reached.[209] The *AIT* contains an appeal process for panel decisions.[210]

The *AIT* also authorizes individuals and businesses to initiate dispute settlement proceedings against an allegedly non-conforming province.[211] For this purpose, a business includes a foreign investor with a subsidiary organized and operating in Canada.[212] Compared to government claims, private party claims face two additional hurdles, and remedies are limited.

The first hurdle a private party faces is that it must request a province with which it has a substantial and direct connection to initiate the claim on its behalf.[213] Only if the province refuses can the private party initiate a complaint on its own. Next, a "screener" appointed by the province must decide whether the complaint should be allowed to proceed. The screener must reject any frivolous or vexatious claim and can only approve a claim if a "reasonable case of injury or denial of benefit"[214] exists. Following approval by the screener, the private party may request consultations with the province or the establishment of a panel.[215] If a panel finds non-compliance, the private party and the province must try to agree on a resolution that "shall normally conform with the recommendations of the panel."[216] No damages or penalties are available in a complaint initiated by a private party, but a panel may award costs to the private party.[217]

---

209 *Ibid*, art 1709(3). The Committee on Internal Trade is established by the parties to the *AIT* and consists of "cabinet-level representatives of each of the Parties or their designates" (*ibid*, art 1601). Suspending benefits would likely mean that the complaining party would introduce barriers to goods or services from the recalcitrant province. Such retaliation has never been used and would undermine the overall goal of the *AIT*, which is to reduce barriers to internal trade. Armand de Mestral has criticized the provision permitting suspension of benefits as inappropriate and possibly unconstitutional in a domestic instrument (Armand de Mestral, "A Comment" in Trebilcock & Schwanen, *supra* note 30, 95 at 96).

210 *AIT*, *ibid*, art 1706(1).

211 *Ibid*, arts 1710–18.

212 Standing is granted in these circumstances under the *NWPTA*, *supra* note 199 between British Columbia, Alberta, and Saskatchewan. As well, damages may be awarded directly to the private claimant. See Robin Hansen & Heather Heavin, "What's 'New' in the New West Partnership Trade Agreement? The NWPTA and the Agreement on Internal Trade Compared" (2010) 73:2 Sask L Rev 197 at 229–31. The *AIT* does not grant standing to foreign suppliers that have no office in Canada for the purposes of the procurement provisions. This was confirmed in *Northrop Grumman Overseas Services Corp v Canada (Attorney General)*, 2009 SCC 50, [2009] 3 SCR 309.

213 *AIT*, *supra* note 198, art 1710. Substantial connection means the person resides or carries on business in the province, the person has suffered an economic injury or denial of benefit, and the consequences of that economic injury or denial of benefit are being felt in the province.

214 *Ibid*, art 1712(4)(c).

215 See Certified General Accountants Association of Canada, *Making Trade Dispute Resolution in Canada Work: Certified General Accountants' Experience with Canada's Agreement on Internal Trade* (Ottawa: CGA Canada, 2006), at paras 6–16 [CGA Report] (which recommends more direct access for domestic and foreign businesses). Another report recommended that the process of amending the *AIT* should be more open and inclusive of non-government stakeholders and the Canadian public: Public Policy Forum, *Canada's Evolving Internal Market: An Agenda for a More Cohesive Economic Union* (Ottawa: Public Policy Form, 2013) at 15, but it did not address private access to dispute settlement.

216 *AIT*, *supra* note 198, art 1717.

217 *Ibid*, Annex 1716.3.

The *AIT* dispute settlement process provides a ready and familiar model that might be adapted for inclusion in a treaty compliance IGA.[218] The key features of the process in such an IGA might include a consultation period, followed by a legal determination by an ad hoc panel regarding whether a breach of obligation occurred. If the panel finds non-compliance, the parties would engage in a compliance procedure that would involve attempts by the parties to reach a mutually satisfactory solution for some period of time and sanctions for continuing non-compliance. But even if this basic model was attractive, designing a dispute settlement process for a treaty compliance IGA would involve some new and challenging issues.[219]

Fundamentally, dispute resolution procedures in the IGA would have to balance the interest of a recalcitrant province, in being free to change its regime as it sees fit, against Canada's interest in a mechanism that provides strong assurances of treaty compliance. These interests include prompt and effective provincial action to address non-compliance. The kind of balancing required in a treaty compliance IGA may be different from that in the *AIT*. An IGA-based dispute settlement procedure relating to treaty compliance would operate in a different context from procedures in the *AIT* and Canada's trade and investment treaties. The basis of a complaining party's claim under the *AIT* and these treaties is that it is directly affected by another's breach. But where the federal government or another province is the complainant in a treaty compliance IGA, it is not the direct beneficiary of the Canadian obligation that a province is alleged to have breached. The beneficiary of the treaty obligation is the other state that is party to the treaty. As a matter of general principle then, greater deference to domestic policy flexibility might be appropriate in dispute settlement proceedings under a treaty compliance IGA.[220]

The distinctive context also affects the appropriate remedies. Remedies under the *AIT* and Canadian treaties contemplate that the complaining party has suffered a loss as a consequence of the other party's breach. Trade and investment treaties, like the WTO Agreement and *NAFTA*, require a party in breach of its obligations to compensate a complaining party in the context of continuing non-compliance. In some circumstances, these treaties and the *AIT* also contemplate allowing a complaining party to suspend benefits in relation to the goods, services, or investors of the party in breach. These are not appropriate in a treaty compliance IGA. While all Canadian governments have an interest in

---

218 Before it was substantially strengthened in the *Tenth Protocol of Amendment*, Amendment to *AIT*, *supra* note 198, 16 January 2009 (entered into force 7 October 2009), online: <www.ait-aci.ca/agreement-on-internal-trade>), the *AIT* dispute settlement procedures were widely criticized as slow and toothless. See e.g. CGA Report, *supra* note 215; Robert Knox, "Improving How the Agreement on Internal Trade Currently Works" (2002) 2 Asper Rev Intl Business & Trade L 273. It remains to be seen if the amendments are effective to address these concerns.

219 While the WTO dispute settlement process is considered one of the most effective state-to-state procedures, there is a wide range of concerns regarding the effectiveness of its compliance procedures. See generally Gary N Horlick, "Problems with the Compliance Structure of the WTO Dispute Resolution Process" in Daniel L M Kennedy & James D Southwick, eds, *The Political Economy of International Trade Law: Essays in Honor of Robert E Hudec* (Cambridge: Cambridge University Press, 2002) 636; Donald McRae, "Measuring the Effectiveness of the WTO Dispute Settlement System" (2008) 3:1 Asian J WTO & Intl Health L & Policy 1.

220 Alternatively, it might be argued that there should be less flexibility where at least one Canadian government seeks compliance with a Canadian international obligation on the basis that the fact that the claim was brought suggests a strong domestic interest in compliance.

compliance,[221] the federal government and the other provinces do not necessarily suffer losses where a province fails to comply with a treaty like *CETA*. Consequently, remedies providing compensation or allowing retaliation would not be appropriate in a treaty compliance IGA. Monetary penalties to induce compliance, like those contemplated in the *AIT*, would be more appropriate and more effective.[222] The parties would also have to consider the appropriate use of any amount paid as a monetary penalty.

Perhaps the most difficult design issue regarding dispute settlement would be the extent to which private parties, including foreign-controlled private parties, could initiate complaints. Access by private parties to dispute settlement procedures, especially foreign parties from treaty partner states, would make provincial treaty compliance commitments more credible. However, states have not allowed private parties to use treaty-based procedures to seek treaty compliance or other relief directly in relation to most treaty obligations.[223] This is true of *CETA*.[224]

The exception to this rule is investor-state arbitration. However, as the number of investor-state cases grows, states, commentators, and citizens have developed concerns about an investor's right to claim compensation against a state alleged to have failed to comply with its treaty obligations.[225] Some states have complained that defending against investors' claims is expensive and resource intensive even if they win.[226] Others criticize the perceived failure of investment arbitration tribunals to adequately account for the state's right to act in the public interest.[227] Indeed, the inclusion of investor-state arbitration in the *CETA* continues to generate concern and may slow or even preclude ratification of the treaty by some member states.[228] In the *AIT* context, private access has not generated the same concerns. This is likely because private parties must overcome significant hurdles to bring their claims, and they enjoy limited available relief that does not include financial compensation. However, businesses have complained that these hurdles significantly diminish the procedure's

---

221 See also Loleen Berdhahl, "(Sub)national Economic Union: Institutions, Ideas, and Internal Trade Policy in Canada" (2013) 43:2 Publius 275 at 283 (regarding the general consensus across the country in favour of trade liberalization through international trade and investment treaties, and the significant role of the provinces in pushing forward internal trade liberalization).

222 Berdhahl found that government officials thought that the introduction of monetary penalties in 2009 would increase the likelihood of compliance with the *AIT* (Berdhahl, *ibid* at 279). She also notes that British Columbia and Alberta had previously agreed to monetary penalties in their 2007 bilateral agreement, the *Trade, Investment and Labour Mobility Agreement*, Alberta and British Columbia, signed 28 April 2006 (entered into force 1 April 2007), online: <www.tilma.ca/pdf/TILMA_Agreement_April2009.pdf> (Berdhal, *ibid* at 285).

223 Nicolas Hachez & Jan Wouters, "International Investment Dispute Settlement in the Twenty-First Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model" in Freya Baetens, ed, *Investment Law Within International Law: Integrationist Perspectives* (Cambridge: Cambridge University Press, 2013) 417 at 417. International legal obligations operate between states. Thus private enforcement is not contemplated.

224 See *CETA*, *supra* note 4, c 29, art 30.6.

225 These and other concerns are summarized in J Anthony VanDuzer, Penelope Simons & Graham Mayeda, *Integrating Sustainable Development Into International Investment Agreements: A Guide for Developing Country Negotiators* (London, UK: Commonwealth Secretariat, 2013) at 410–13.

226 Diana Rosert, *The Stakes Are High: A Review of the Financial Costs of Investment Treaty Arbitration* (Winnipeg: International Institute for Sustainable Development, 2014).

227 Caroline Henckels, "Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration" (2012) 15 J Intl Econ L 223.

228 Indeed, some German politicians have suggested that Germany may refuse to ratify *CETA* because it includes investor-state arbitration: Thomson Reuters, "Canada-EU Free Trade Deal to Be Rejected by Germany, Says Report," *CBC News* (26 July 2014), online: <www.cbc.ca/news/world/canada-en-free-trade-deal-to-be-rejected-by-germany-says-report-1.2718981>.

utility.[229] Therefore, any provisions for private access to dispute settlement in a treaty compliance IGA would have to include features that balance effective access for private parties, in the interests of promoting treaty compliance, against provincial interests in protection from inappropriate challenges and avoidance of costly proceedings.[230]

The *AIT* does not address one other key issue regarding dispute settlement in a treaty compliance IGA. How would the agreement's domestic dispute settlement process relating to provincial non-compliance operate alongside a claim pursued by another state or a foreign investor regarding the same provincial measure? If a state party to the treaty has taken no action in relation to a measure, pre-emptive corrective action under the IGA against a non-compliant province might be desirable. Local, early, and effective resolution of compliance concerns might prevent an international treaty-based dispute from arising.

If a dispute settlement procedure under the treaty had already been initiated by a foreign state against Canada, would parallel proceedings under an IGA be useful? The additional cost of parallel proceedings is a concern. Another concern is the possibility of inconsistent results from the two processes. If the treaty-based procedure found the provincial measure to be a breach of the treaty but the IGA process did not, the former decision might be seen as illegitimate by the recalcitrant province. That perception would reduce the likelihood of compliance. If non-compliance continued, other state parties might devalue provincial commitments, and that would undermine the essential goal of the IGA. If the IGA process found non-compliance but the treaty-based process did not, no reason for action would exist under the domestic procedure. If the treaty process and the IGA process both find non-compliance, enforcement procedures under the IGA might be designed to complement and support enforcement procedures under the treaty. An IGA could permit the federal government or another province to use any enforcement mechanisms under the domestic process to encourage a province to bring its regime into compliance. In this way, the procedures in the IGA would provide greater assurance of eventual provincial compliance.

This discussion suggests only a few of the complex issues that would need attention in a dispute settlement procedure in an IGA dealing with provincial compliance. The next section deals with a related issue: should the provinces bear financial responsibility for the defence of any provincial measure in treaty-based dispute settlement, including the amount of any investor-state award?

3. PROVINCIAL FINANCIAL RESPONSIBILITY FOR TREATY-BASED DISPUTE SETTLEMENT RELATED TO PROVINCIAL MEASURES

Obliging each province to be responsible for any costs associated with defending its measures in dispute settlement under trade and investment treaties might seem

---

229 See *supra* notes 211–17 and accompanying text. Of the 55 dispute settlement procedures initiated under the *AIT* as of August 2014, 11 were by private parties. See "Status of AIT Disputes by Chapter" (April 2016), online: <www.ait-aci.ca/wp-content/uploads/2015/05/Dispute-statistics-by-Chapter-English-apr-2016.pdf>.

230 Various mechanisms have been included in the *CETA*'s investment chapter to encourage early settlement of disputes, including mediation, a requirement that tribunals deal with jurisdictional and other challenges prior to the merits stage of an arbitration, and an express power for tribunals to dispose of claims early on the basis that they are manifestly without merit or an abuse of process (see *CETA*, *supra* note 4, arts 8.20, 8.32, 8.33).

straightforward. In practice, though, developing IGA provisions mandating provincial responsibility would confront practical and technical issues.

One issue that could arise relates to the role of provinces in a dispute settlement process. In return for undertaking responsibility, would the provinces demand more control over treaty litigation that would give rise to such costs? As mentioned, the federal government currently consults provinces extensively about any treaty-based dispute settlement proceedings. However, the federal government retains control of, and is fully responsible for, the proceedings, including those relating to provincial measures. If the provinces were held responsible for the costs of proceedings, they might demand more involvement. This involvement could include the right to determine how the measure is defended and the terms on which a claim is settled. Of course, provincial capacity to engage in international dispute settlement proceedings differs from that of the federal government, and a province may or may not be interested in having a role in dispute settlements.[231] Charles-Emmanuel Côté recently reported that Quebec has an interest in both defending itself and being responsible for the costs of investor-state arbitration,[232] but not all provinces would be willing or able to undertake a substantial role in dispute settlement. Certainly, no province can match the experience of the trade law bureau of Global Affairs Canada, which has defended numerous WTO cases and *NAFTA* investor-state arbitration claims, as well as many cases in other international contexts.[233] This experience, coupled with the federal interest in managing Canada's international obligations, suggests that the federal government should continue to have a substantial role in treaty-based dispute settlement. Any arrangement for greater provincial involvement in a dispute settlement process would have to be responsive to the need for a federal role as well as these differences in capacity and experience across Canadian jurisdictions.

The EU has recently addressed the allocation of financial responsibility between the EU and its member states in relation to investor-state arbitration. The EU's approach provides both an indication of the issues that could arise in a treaty compliance IGA related to provincial financial responsibility and an example of how they might be resolved.

The 2009 Lisbon Treaty shifted competence to negotiate foreign investment treaties from the member states to the EU level.[234] In connection with its new responsibilities, the EU has developed a framework governing the allocation of financial responsibility in investor-state

---

231 As discussed in Inwood, Johns & O'Reilly, *supra* note 186 at 233–37; Skogstad, *supra* note 16 at 216.

232 Charles-Emmanuel Côté, "Toward Arbitration between Subnational Units and Foreign Investors?" (2015) Columbia FDI Perspectives No 145, online: <http://ccsi.columbia.edu/files/2015/04/No-145-C%C3%B4t%C3%A9-FINAL.pdf>. Certain labour cooperation agreements negotiated by Canada as side agreements to free trade agreements (see *supra* notes 43–46 and accompanying text) contemplate that each participating provinces will be financially responsible for any monetary assessment under the agreement that result from that province's action. See e.g. *Agreement on Labour Cooperation Between Canada and the Republic of Honduras*, 5 November 2013, Can TS 2014 No 25, Annex 4(5) (entered into force 1 October 2014).

233 WTO cases are listed online: <www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm>. Canada has defended, or is defending, 18 WTO cases and 22 *NAFTA* investor-state arbitration claims. Canada has also been a complainant in 34 WTO cases and a third party in many more. This number of investor-state cases does not include claims that are inactive or withdrawn. The claims are listed online: <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx>.

234 EC, *Consolidated Version of the Treaty on the Functioning of the European Union*, [2012] OJ C 326/47, art 207.

disputes relating to EU-negotiated investment obligations. This allocation tries to reconcile member state interests in relation to investor claims that relate to their measures with overall EU interests. The basic rule is set out in a European Parliament and EU Council regulation published in August 2014.[235] The *EU Regulation* requires the EU to bear the financial responsibility for the treatment of an aggrieved investor by an EU institution, body, or agency. A member state will be financially responsible for its treatment of an aggrieved investor, unless its treatment was required by EU law. Financial responsibility includes any amount payable under an award by an arbitral tribunal or as part of a settlement as well as the costs of the arbitration.[236]

Allocation of responsibility for the conduct of the defence against an investor's claim generally follows financial responsibility, with several important exceptions. If, on behalf of the EU, the European Commission receives an investor's request for consultations, or a notice of intention to make a claim relating to a member state's measure, it must inform that state.[237] Similarly, a member state that receives a request for consultations or notice of a claim under an EU investment treaty must inform the Commission.[238] Representatives from both the Commission and the member state participate in the initial consultations with the investor.[239] The Commission and the concerned member state then consult each other on managing the dispute.[240]

In general, when a member state is financially responsible for damages arising from a claim, that state acts as the respondent in defending against the claim.[241] When a member state acts as respondent, it must keep the European Commission informed of developments in the case, including any significant procedural steps taken. The member state must also provide any relevant documents to the Commission and permit Commission participation in the delegation involved in the proceedings.[242] The Commission must have an adequate opportunity to identify any point of law or any other element of EU interest that the dispute raises.

If the EU could be financially responsible for an investor's claim, it acts as the respondent through the European Commission.[243] Unlike member state-run proceedings, the EU has no obligation to keep member states informed regarding the litigation when the EU is solely responsible.

This new framework contemplates an EU prerogative to act as the respondent to safeguard the Union's interests, even in disputes involving measures of a member state. However, the EU can only do so in cases where: (1) the dispute also involves treatment afforded by the EU or possible EU financial responsibility, such as where the treatment afforded by a member state was required by EU law; or (2) similar treatment is being challenged in a related claim against the EU under the WTO Agreements. In the latter context, a WTO panel must have

235 *EU Regulation*, *supra* note 201.
236 *Ibid*, art 3.
237 *Ibid*, arts 7–8.
238 *Ibid*, art 8(2).
239 *Ibid*, art 7.
240 *Ibid*, art 6.
241 *Ibid*, art 3.
242 *Ibid*, art 10.
243 *Ibid*, art 4.

been established, the claim must concern the same legal issue, and EU control over the investor-state claim must be necessary to ensure consistent argument between the two cases.[244]

The *EU Regulation* also contemplates that a member state might prefer that the EU act as a respondent even if the claim relates only to a measure of that state. A member state can decline to act as a respondent.[245] Deference to the superior technical expertise of the European Commission might explain why a state would decline to act. In such a case, the EU conducts the defence. In these circumstances, or those in which the European Commission asserts its right to respond, the European Commission must conduct the defence of the measure in a manner that protects the financial interests of the member state concerned.[246] The European Commission must cooperate closely with the member state, promptly notify it of any significant procedural steps, provide relevant documents, and consult frequently with the member state.[247] The member state can insist on its own representation in the European Commission delegation at its own expense.[248]

The *EU Regulation* contains detailed rules on settling disputes. If only member state responsibility is involved, then only the member state can authorize settlement.[249] If both the EU and the member state are exposed to responsibility, the EU must consult with the member state, and it cannot settle without the member state's agreement.[250] When the EU alone might be responsible, it has full control over settlement decisions.

This review of the new EU framework suggests some features that may be necessary in a Canadian IGA dealing with provincial responsibility related to dispute settlement. In investor-state cases, pinning financial responsibility on a non-conforming province would be consistent with former Prime Minister Harper's stated preferences in the wake of AbitibiBowater. Recall that the federal government paid a substantial amount to settle a foreign investor's investor-state claim arising out an action by the government of Newfoundland and Labrador.[251] Undoubtedly, an allocation of financial responsibility to the provinces modelled on the *EU Regulation* would create stronger incentives for provincial compliance and therefore create stronger assurances of compliance with treaty commitments in areas of provincial jurisdiction.

However, adopting this kind of approach would be a dramatic break from the present situation and would face a number of challenges. Some provinces would be reluctant to agree to financial responsibility in any circumstances. Some provinces, like Ontario, Quebec, and Alberta, might agree to assume financial responsibility, but would seek control of the litigation process and settlement decisions. Other provinces might prefer the federal government take control, in light of its expertise and experience, even if the province could ultimately be financially responsible. If the treaty compliance IGA contemplated provincial

---

244 *Ibid*, arts 9(2)–9(3).
245 *Ibid*, art 9(1)(b).
246 *Ibid*, arts 9(4), 11.
247 *Ibid*, arts 9(6), 11.
248 *Ibid*, art 9(6).
249 *Ibid*, arts 3, 14–15. This is the case even if the EU is acting as the respondent.
250 *Ibid*.
251 See *supra* note 59 and accompanying text.

control over the defence of claims relating to provincial measures, a provincial option to decline to take responsibility for the litigation, like the member state option in the European framework, would likely be necessary. Indeed, such an option would be more important in the Canadian context; while all European states have some experience dealing with international claims, this is not true for Canadian provinces.[252]

In addition to managing provincial involvement in dispute settlement, a treaty compliance IGA would need to set out circumstances in which the federal government could take carriage of a dispute to assert national interests or priorities even if the underlying conduct was provincial. Such national interests might include the existence of similar programs or measures at the federal level or in other provinces. Following the EU approach, Canada could also demand carriage when it is involved in other dispute settlement proceedings related to the same or similar measures.

Where the federal government assumed control of a case, either at the request of a province or because of such an overriding national interest, a treaty compliance IGA should require it to keep the province informed. Similarly, provinces who assume control of a defence would have to keep the federal government apprised of any developments to ensure that any national interest receives protection. Given the expertise of the federal government in international dispute settlement, some level of federal involvement in a provincially-led case might be desirable in all cases.

One additional complication not addressed in the EU framework is the responsibility for the actions of other actors for which the states are internationally responsible, like municipalities and courts. The actions of both kinds of institutions have been the subject of investor-state claims, and the provinces might be unwilling to assume financial responsibility for their actions.[253]

An IGA dealing with treaty compliance might not have to address all of these issues in detail — or at all — but the new *EU Regulation* illustrates relevant considerations related to dispute settlement procedures. However, regardless of its ultimate content, a treaty compliance IGA would have limited force and efficacy.

---

252 Twenty EU Member states have been the subject of investor-state claims. Those claims can be found on italaw, online: <www.italaw.com>.

253 For example, the actions of the city of Acapulco were the subject of the main claims in *Waste Management, Inc v United Mexican States* (2004), 43 ILM 967 (International Centre for the Settlement of Investment Disputes). Decisions by the courts of Mississippi were the target of the claim in *The Loewen Group, Inc v United States of America* (2003), 42 ILM 811 (International Centre for the Settlement of Investment Disputes).

C. LIMITATIONS ON IGAS

Various political and legal imperatives[254] make an IGA an imperfect response to the problem of provincial compliance. The federal government would likely be unable to secure provincial agreement for an IGA extending to any treaty agreed to by the federal government. Trading partners would derive most assurance from such a far-reaching IGA in place at the time of negotiation. But a federal-provincial agreement committing the provinces to implement any future treaty obligations is implausible. Politically speaking, no province would assent to a prospective IGA given the numerous areas which future trade agreements might address.

More feasible are discrete IGAs that address the requirements of specific treaties. One-off, after-the-fact agreements to secure provincial cooperation may not assuage trading partners' concerns heading into the negotiations, but they are likely more palatable to provincial governments. In this model, provinces would know the content of each agreement and could agree to exercise their jurisdiction as required.

The *realpolitik* of IGAs might present a more difficult hurdle than constitutional imperatives, but a further legal issue associated with IGAs is the uncertainty about their binding effect. However, many scholars believe an IGA can be made binding on the parties in a manner analogous to a contract if its language is sufficiently clear.[255] In addition to language setting out a clear intention to be bound, dispute resolution processes involving binding third party adjudication and imposing consequences for non-compliance, including monetary penalties, suggest a binding agreement.[256]

---

254 Any IGA would have to conform to the *Charter*, *supra* note 159. Ontario courts rejected an earlier claim that the investor-state obligations in *NAFTA* violated the *Charter* and other constitutional requirements: *Council of Canadians v Canada (AG)* (2006), 227 DLR (4th) 527 (Ont CA). A claim by the Hupacasath First Nation that their rights were affected by the Canada-China Foreign Investment Promotion and Protection Agreement, and so the government was obliged to consult with them before ratifying the treaty, was rejected by the Federal Court and Court of Appeal: *Hupacasath First Nation v Canada (Foreign Affairs*), 2013 FC 900, 288 CRR (2d) 253, aff'd 2015 FCA 4, 379 DLR (4th) 737.

255 Joseph Eliot Magnet, *Constitutional Law of Canada*, 9th ed, vol 1 (Edmonton: Juriliber, 2007) at 143; Alastair R Lucas & Cheryl Sharvit, "Underlying Constraints on Intergovernmental Cooperation in Setting and Enforcing Environmental Standards" in Patrick C Fafard & Kathryn Harrison, eds, *Managing the Environmental Union: Intergovernmental Relations and Environmental Policy in Canada* (Kingston: McGill-Queen's University Press, 2000) 133 at 147–51, 154; Johanne Poirier, "Intergovernmental Agreements in Canada: At the Crossroads Between Law and Politics" in J Peter Meekison, Hamish Telford & Harvey Lazar, eds, *Canada: The State of the Federation 2002* (Montreal: McGill-Queen's University Press, 2004) 425 at 431–34. Poirier also notes that some intergovernmental agreements are constitutional in nature, such as those setting the term of entry for new provinces, and that such constitutional IGAs are undoubtedly binding (*ibid* at 432). See also Nigel Bankes, "Constitutionalized Intergovernmental Agreements and Third Parties: Canada and Australia" (1992) 30:2 Alta L Rev 524; Swinton, "Internal Trade," *supra* note 30; Robinson, *supra* note 44 at 193 (citing Richard Simeon, "Federalism and Free Trade" in Peter M Leslie, ed, *Canada: The State of the Federation 1986* (Montreal: McGill-Queen's University Press, 1987) 189 at 202). But see Sujit Choudhry, "Strengthening the Economic Union: The *Charter* and the *Agreement on Internal Trade*," (2002) 12:2 Const Forum Const 52 at 57.

256 Poirier, *ibid* at 433–34. A proposal to remove any uncertainty and render such agreements enforceable was part of the Charlottetown Accord package of constitutional reforms that failed to win approval: "Appendix 2: Draft Legal Text, October 9, 1992" in Kenneth McRoberts & Patrick Monahan, eds, *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) 311 at 340–41.

But IGAs can only be binding in a limited sense. IGAs are typically acts of the executive branch, although some agreements are governed by statute in some provinces.[257] As executive acts, the agreements only bind the executive.[258] No intergovernmental agreement can change existing laws in the province, nor can it prevent a provincial legislature from subsequently acting inconsistently with the agreement or even repudiating it. This provincial power is a fundamental aspect of parliamentary supremacy.[259] If provincial actors suspect the political costs of concessions over professional regulation, for example, come to outweigh the benefits, political expediency might prompt them to repeal earlier promises to comply with treaty commitments.

The impact of this last limitation could be mitigated, but not entirely overcome, if the provinces passed legislation reflecting their commitment to comply with a treaty and other obligations in an IGA.[260] Of course, this would not prevent the same or a subsequent legislature from amending or repealing the legislation, but embedding IGA commitments in legislation would represent a meaningful public undertaking.[261] Unless and until the legislation is repealed or amended, the statute giving effect to the IGA would be binding and enforceable by third parties in provincial courts. A legislature could also impose so-called "manner and form" requirements that would constrain the ability of the legislature to amend or repeal the IGA legislation. While examples of these requirements are rare, experts like Hogg believe they are legitimate and binding.[262]

V. CONCLUSION

Under the Canadian Constitution, the federal government has the exclusive authority to make treaties for Canada. The provinces, however, have an increasingly important role in implementing and respecting Canada's international trade and investment treaty obligations. This shared allocation of power has led to a high degree of cooperation between federal and provincial governments in treaty negotiations and compliance. To date, cooperation has been informal despite occasional requests from the provinces for more institutionalized arrangements. Overall, existing modes of cooperation appear to have been largely successful in accommodating the interests of federal and provincial governments.

---

257 See e.g. *Act Respecting the Ministère du Conseil Exécutif*, CQLR c M-30; *Intergovernmental Affairs Act*, RSNL 1990, c I-13; *Government Organization Act*, RSA 2000, c G-10.

258 Though there is some uncertainty regarding to what extent the executive branch can agree not to exercise its discretionary powers (Poirier, *supra* note 255 at 434).

259 Swinton, "Internal Trade," *supra* note 30 at 198; Hogg, *supra* note 8 at 12-9. Both cite the *Reference re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 [*CAP*].

260 Some provinces have passed legislation to give effect to their commitments under the *AIT*, including the dispute settlement provisions: e.g. *Internal Trade Agreement Implementation Act*, SNS 1995-96, c 8; *An Act Respecting the Implementation of the Agreement on Internal Trade*, CQLR c M-35.1.1. The Cooperative Capital Markets MOA contemplates that each participating province and the federal government will enact legislation to give effect to the cooperative arrangement (Cooperative Capital Markets MOA, *supra* note 131, ss 3, 8.2-8.3, 10.1, 10.3).

261 Hogg, *supra* note 8 at 12-15.

262 *Ibid* at 12-11 to 12-19. Manner and form requirements might include minimum time limits before amendments or repeals are permitted or unanimous approval requirements. Swinton, "Internal Trade," *supra* note 30 at 200, notes that Justice Sopinka in *CAP*, *supra* note 259 at 323, suggested that manner and form requirements are rarely found and should be interpreted narrowly. Swinton is skeptical regarding their effectiveness: Swinton, "Internal Trade," *supra* note 30 at 208. As mentioned, Hogg is less so: Hogg, *ibid* at 12-11 to 12-12. His examples include requirements to hold referenda before proceeding with certain specified types of legislation. He comments, "while … Parliament … cannot bind itself as to the *substance* of future legislation, it can bind itself as to the manner and form of future legislation" (*ibid* at 12-12 [emphasis added]).

However, circumstances are changing. The approaches traditionally relied on by Canada to address the need for provincial compliance have become inadequate in the eyes of Canada's treaty partners. As evidenced by the *CETA* negotiations, Canada's treaty partners have begun to seek stronger assurances regarding provincial compliance with Canadian treaty obligations. Providing such assurances may be increasingly important in the future to ensure that Canada can meet its negotiating goals and realize the benefits of its commitments.

Our analysis suggests that overarching and enduring solutions might be beyond federal constitutional reach, especially in light of recent case law. Delegated arrangements may be possible, but these would require significant concessions by Canadian provinces. Intergovernmental agreements, often used to circumvent constitutional constraints, could provide some assurances to trading partners. The *AIT* and recent *EU Regulation* on allocating responsibility in investor-state arbitration provide insights into design issues that would arise. But a significant number of conceptual, legal, and practical issues would first require attention and might hamper the usefulness of an IGA.

The greatest assurances for trade partners would come from a treaty compliance IGA mandating strong provincial obligations, enforceable through a dispute settlement process with effective sanctions. However, provinces would resist such hard and unprecedented obligations as an unwelcome constraint on their authority. Weaker commitments with weaker remedies might be acceptable to the provinces, but even these might be conditioned on the provinces playing a more institutionalized role in the negotiation of treaty commitments. This would represent a wide-ranging reorientation of how Canada engages in international affairs.

Perhaps the most basic challenge to an IGA would be finding the right balance between effective compliance and appropriate deference to provincial policy-making flexibility. Arrangements which are technically possible might be politically unpalatable. Assuming the federal government could secure meaningful provincial agreement, that agreement could be ephemeral; short-term political expediency could win out over commitments to external parties, and that would undo the promise of an IGA.

While the current climate does not appear to be hospitable for these options, external pressures may make some form of lasting federal-provincial compact on treaty compliance feasible. Future negotiations are likely to implicate areas of provincial jurisdiction, and show the persistence of this issue ever more deeply.