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A Proposal for a Borderland Dispute Settlement Continuum Mechanism

Noemi Gal-Or (Kwantlen Polytechnic University)¹

Abstract

The malaise felt by both Canadians and Americans regarding several areas of trade does not exist in a vacuum. It is not difficult to surmise that besides the genuine tension owing to actual implementation of liberal trade principles in the trade practise between the two states, and to their diverging interpretations of these principles, lies also some political opportunism. Not only has the US pursued a unilateralist course in its trade relations with Canada; it did so also in matters security, which have created, at least a perception, of an unfavourable impact on Canadian economic interests. The US current beleaguered international reputation in matters foreign policy regarding both security and economic issues may therefore tilt the pendulum in Canada's favour. From a power contest point of view, perhaps now is the time and opportunity for Canada to reap also international "moral" (juridical), in addition to economic, gains.

Introduction

This paper arises against the backdrop of growing litigiousness in international economic relations, and particularly between two old friends, Canada and the United States (US).¹ Only a few months after the resolution of the Softwood Lumber Dispute, two new issues are potentially following on its heels: Canada's request for World Trade organisation (WTO) agricultural consultations with the US, and the specific place within it for Canada's corn producers. The malaise felt by both Canadians and Americans regarding several areas of trade does not exist in a vacuum. It is not difficult to surmise that besides the genuine tension owing to actual implementation of liberal trade principles in the trade practise between the two states, and to their diverging interpretations of these principles, lies also some political opportunism. Not only has the US pursued a unilateralist course in its trade relations with Canada; it did so also in matters security, which have created, at least a perception, of an unfavourable impact on Canadian economic interests. The US current beleaguered international reputation in matters foreign policy regarding both security and economic issues may therefore tilt the pendulum in

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Canada's favour. From a power contest point of view, perhaps now is the time and opportunity for Canada to reap also international "moral" (juridical), in addition to economic, gains. This paper, which is limited to the effect of *political and legal institutionalisation* of borderland *economic* regimes, may consequently be just in time.

Canada and the US are parties to the Canada-US Free Trade Agreement and to the successor North American Free Trade Agreement (NAFTA). As the titles of the agreements suggest, the regime established in them is free trade, which represents the lowest common denominator on the economic integration spectrum. In free trade, trade - and in the NAFTA investment also - are taking exclusive primacy over any other concerns (e.g. the environment and labour, which were addressed in side agreements precisely in order to relegate them to the margins). Canada and the US are also members of the WTO. Their recourse to the justice mechanisms of both the WTO and the NAFTA, concerning the same disputes, resulted in conflicting decisions by the respective tribunals and reflected a flaw in the overall legal and justice design where forum shopping is encouraged and facilitated.

In the larger scheme of things, it is common knowledge that the WTO is currently in a deadlock. In fact, the Doha Round has been stalled precisely due to the developed-developing countries' disagreement in matters market access and trade in *agriculture*. What appear to have remained operative are the Dispute Settlement Understanding (DSU) and its Dispute Settlement Body (DSB), carrying on as if in a separate sphere from the rest of the WTO body. Moreover, as we know, Canada has been pushing for improvements of the still developing WTO adjudicative mechanism. While generally appreciative of the WTO DSU, experience has brought to the fore "certain deficiencies in the rules and procedures that may impede"² the objective of this part of the WTO agreement. This has prompted Canada to submit proposals for improvements to the DSU, which address its concerns regarding the treatment of business confidential information; the panel selection process; and transparency. The two latter clearly represent public policy and public good concerns. These efforts however, similar to the rest of the Doha Round negotiations, have also been suspended as part of the Doha Round stasis.

So why would Canada initiate new dispute settlement³ procedures at this time? To be sure, one would expect that since the Canada-US Free Trade Agreement (CUSFTA, 1989) and the North American Free Trade Agreement (NAFTA, 1994), both states would be more, not less, inclined to resolve contentious issues by means of bilateral negotiations, or at least through the more tailor-cut regional dispute settlement mechanisms. In the wake of the conclusion of the almost perennial softwood lumber dispute, the slate would have seemed to be cleared for renewed *bona fide* bilateralism. Yet, as never before, there seems to be a "momentum" of litigiousness reigning in the Canada-US economic relations. And most interesting about this is that Canada had chosen to initiate precisely a WTO (multilateral) rather than a NAFTA (bilateral-regional) dispute proceeding in its efforts to enforce free trade. Is the WTO DSU mechanism more attractive than the NAFTA one?⁴ NAFTA Article 705: Export Subsidies⁵ lays down a specific organisational structural plan, namely a Working Group on Agricultural Subsidies designed to work toward the elimination of all export subsidies affecting the Parties' agricultural trade relations. So why is Canada availing itself of the WTO route?

One of the answers may lie in the mindset of those involved in trade (politicians, governments, stakeholders including the legal profession, accountants, business, and not the least, academia). Since the idea of regional integration is relatively novel in North America, and moreover - still

very controversial – balancing the pro and con of “going NAFTA” versus “going WTO” is not surprising. It is precisely at this backdrop that I am suggesting to consider a shift in gear and think out of the proverbial box. Therefore, in the time remaining, I will address the political governance and institutional framework conditions necessary for adjudicative innovation. I will follow with a proposal for a continuum based alternative model of adjudicative dispute settlement in North America incorporating the prevailing mechanisms and coupled with a tailor cut borderland component and an adjusted WTO regional DSB branch. This model is therefore not exclusive of the other models; rather, it forms part of an integrated procedural dispute resolution continuum embedded in a hierarchical institutional order, and available to voluntary members.

Multi-level governance and multi-level dispute settlement

The process of economic globalisation has been effecting political and legal developments, altering the way and nature of private-public, public-public, and private-private relations. The arenas within which these relations are taking place have been growing in number with a laddering of international, regional, and national levels of public policy making and legal arrangements, each enjoying some level of autonomy. As well, the processes occurring within these arenas have been transforming concurrently. While enabling more private-private relations, the public-public rapport has also been diversifying with an increasing variety of processes comprising of multilateral versus more limited regional, and bilateral negotiations. The different combinations of arena and process, and private and public relations, have produced new economic and legal regimes referred to as convergent, de-bordering, multi-level governance, etc. At the same time, a counter-reaction to the real or perceived loss of traditional control by the national jurisdiction has been registered, leading to counter-globalisation tendencies and referred to as the de-globalisation process. Regardless of the debate whether globalisation is continuing or reversing, one arena which has constantly remained relatively marginalised throughout this pendular movement is the borderland.

In reality, the borderland represents a region replete with private-private, private-public, and public-public interactions, garnering the attention of business, yet failing to sincerely attract the attention of policy makers or academia; it has continued to figure as an object subordinate to the national, regional, and international levels of policy. This oversight concerning the importance of the borderland may have to do with a top down mindset so typical of politics, but contradictory of the business approach. In fact, the inter-national borderland, which represents the physically most *tangible* interface between national jurisdictions, is also the smallest and lowest micro-level policy making in inter-“Nation-State” relations. Yet, unlike the regional and inter-national levels of *governance*, politics at the borderland have not yet become sufficiently institutionalised to earn this epithet. Based on the many insights gained from both the experience and theory of regionalism, there is however no reason to oversee the value of the borderland.

The public good approach

The public good approach offers a good as any, and perhaps more succinct, way to incorporating the *borderland* in public policy considerations. Publicness defined as comprising of nonrivalry of benefits,⁶ nonexcludability of nonpayers,⁷ and aggregation of technologies,⁸ are identified as important for the prognosis of provision of regional public goods (RPG). (Sandler 5) The approach, which is specifically designed to address the role of international organisations in encouraging supply of public goods in developing countries, is equally useful for the discussion of the *borderland* also in developed countries for two reasons. First, it is embedded in the broad level-of-governance perspective for it distinguishes in addition to the RPG, also the transnational public good (TPG), the global public good (GPG), and the national public good (NPG) as related to market globalisation and technology. This in itself is a good reason to test the usefulness of the notion of *borderland public good* (BPG) as a new and complementary public policy analytical tool.

Second, this public good approach, which applies to a variety of generally independent types of public goods, e.g. health, environment, transportation, communication, and security oversees another kind of public good, which is of common importance to all those addressed, namely *justice* (law, rules, regulations, dispute settlement, etc.). Arguably, the same proposition in favour of RPGs over GPGs as well as those inhibiting RPGs compared to GPGs are valid also regarding BPGs. (Sandler 15) Similar to the regional level, even more accentuated at the *borderland* level, are the supportive arguments. These include the limited number of participants, spatial and cultural proximity which mitigate uncertainty, availability of regional trading blocs as accommodating necessary infrastructure, favourable characteristics of publicness, and a history of, and future for, interaction at the *borderland* level.

A corollary to the level-of-governance approach is the concept of *subsidiarity*, which plays an important role also in the public good approach. Subsidiarity, which represents the principle that the decision-making jurisdiction coincides with a region's public good, and which has been "invented" in the process of European integration, applies equally to the smaller components within the region, including the *borderland*. "Localized regional benefits increase the evolution of regional institutions from shared culture, norms, concerns, experiences, and values."⁹ Subsidiarity is valuable under certain conditions, among other things, when it bolsters interregional innovation and avoids "'mission creep' of multilateral institutions" (Sandler 17). Applied to Cascadia,¹⁰ this advantage supports the development of Cascadia specific institutions, for instance, the dispute settlement facilitation project proposal developed but yet to be implemented, by the Pacific Northwest Economic Region (PNWER) Private Council, and the proposal for a small claims court. (Gal-Or 2002) On the other hand, subsidiarity is constraining where economies of scale and scope are involved. (Sandler 17). This would justify setting up a regional WTO office¹¹ including a DSB branch at the regional level, which would be available to serve also *borderland* interests where they are affected by larger economies of scale and scope.

Indeed, in the case of Cascadia, all the "provision of public good factors" apply and they may be couched within the broader NAFTA and WTO framework, where necessary. The inhibiting factors, which include absence of donor spillovers due to the *borderland* specificity of benefits; absence of a leader nation; rivalries and local conflicts; uncertainty due to lack of information; lack of global culture of support for the *borderland* initiatives and resultant lack of capacity; past disappointments; and absence of entities to offer security on investments – all are either of

negligible significance, if any at all, in the striving economy of Cascadia, or can be bridged and materialised provided there is sufficient good will. Some seeds reducing or countering these possible disadvantages have already been sown and are persisting as, for example, in the institution of the PNWER. This and similar local endeavours provide a solid beginner foundation for the development and adoption of a BPG approach. (Gal-Or 2002) Paraphrasing on Sandler, (15) in an ideal world, borderland *institutions* will coordinate its member nations to supply BPG.

The borderland public good approach implemented

“Knowledge is the quintessential [...] public good”, (Sandler 20) and any knowledge, including region-specific knowledge, “also represents an intergenerational public good that provides nonrival benefits to the current and future generations.” (Sandler 21) Knowledge is indeed the asset that borderland regions have been capitalising on to build institutions designed to further develop for the BPG. In this section, several European borderland initiatives capitalising on borderland specific knowledge and their incorporation within the European Union (EU) will be juxtaposed with their North American counterparts embedded within the NAFTA. Borderland specific knowledge encourages communication, which is conducive to the resolution of disagreements even before they develop into disputes, and in diffusing disputes that transcended the confines of mere disagreements. It saves recourse to quasi-litigious and litigious proceedings. European experience in this area is therefore valuable also for the NAFTA region.

Europe

Six European borderland regions provide a persuasive example for the potential benefit borderland communities expect to accrue from enhanced cooperation. In the region comprising the jurisdictions of the province Luxembourg in the Walloon region of Belgium, Lorraine in France, and the Grand Duchy of Luxembourg – the agglomeration known as Pôle Européen Développement (P.E.D.) was established, by the respective governments, in a top-down approach “to seek common regional political solutions”.¹² Bottom-up inducement was however required to turn this initiative into the 1997 formation of La Grande Région, consisting of six regions and adding the counties of Saarland and Rheinlandpfaltz in Germany, and the German speaking part of Belgium to the original three constituent national members. This borderland region of over 11 million inhabitants is an institutionalised entity: Each 18 months a summit of governmental heads convenes, assisted in-between summits by various bodies, including a committee for economic and social matters. (Facts & Experience 9)

The region comprising all of Northern Ireland and certain areas in the provinces of Connacht, Leinster, and Ulster in the Republic of Ireland encompasses a population of 2 million. It was formed in the Good Friday Agreement of 1998 to address various issues ranging from farming, to tourism and transportation. The region was institutionalised at the government level as The North/South Ministerial Council. (Facts & Experience 13).

Flesburg, Northern Friesland County and Schleswig-Flensburg County in the region of Schleswig in Germany and South Jutland County in Denmark, with 700,000 inhabitants, makes the smallest populated region among those reviewed here. It is run by a joint Regional Council of 42 members (21 on each sides) and three observers, representing a mix of politicians and

stakeholders including two national minority groups. It convenes 6-8 times a year and comprises of six political committees representing different areas in the broad spectrum of issues for borderland cooperation. (Facts & Experience 27, 29).

The Euregio Maas Rijn is a tri-national borderland region comprising the regions/provinces of the German speaking Limburg and Liège in Belgium, Southern Limburg in The Netherlands, and Aachen in Germany. Cooperation within this region of 3.7 million inhabitants addresses a wide scope of issues ranging from culture to finance to physical planning and more. The region displays its institutionalisation through the Euregio Council established in 1995, which is organised in a two-chamber structure bringing together politicians and stakeholders, wherein an important role has been played by the business sector. A higher level of institutionalisation would be achieved if and when the Council transformed into what it hoped to be - a transborder agency. (Facts & Experience 18, 20) Here, the business sector also cooperates with the local academic institutions in matters research and development.

In the Øresund Region, politicians have started to actively pursue crossborder cooperation since 1993 in what was a top-down approach later widening to include also bottom-up initiatives. Yet, it is still being lead from the top. It totals a constantly growing population currently numbering a population of 3.6 million. The region comprises of the counties and cities on both sides of the Capital region of Denmark and regions of Skåne in Sweden. Being institutionalised, the region is run by the Øresund Committee meeting 4 times a year, and assisted by a secretariat.¹³ Transportation, health, and academic cooperation are some of the many issues of cooperation in the Øresund Region which identifies its main strategic objectives to be the promotion of sustainable economic growth, daily integration (including interaction between rules and systems), and connecting the region.

Finally, the Upper-Rhine region of Alsace in France, the Cantons of Basel Stadt, Basel Land, and Aargau in Switzerland, and the Land of Baden-Wuerttemberg and the region of Sued-Pfalz in Germany form perhaps the most developed borderland region not only in Europe but in the entire world. The tri-national area is home to 5.7 million people and has enjoyed a long history of cooperation. Two major organisations devoted to the tri-national region at large are the Upper-Rhine Conference and the Regio TriRhena, which are complemented by several other bodies. Here too, cooperation encompasses the business sector, educational stakeholders, and other players. (Facts & Experience 23-24)

Any comparison with other non-European borderland regions immediately underlines the advantage enjoyed by the European borderland regions. Surely, the latter have been benefiting from unprecedented supportive conditions and circumstances as enabled by the European integrative process. Seen from a BPG analytical perspective, most of the downsides arising in the comparison between RPG and GPG have been mitigated – at the analytical comparable level of RPG versus BPG - in the European case. For one, subsidiarity has been a European integrative initiative; has been demanded by the local regions within the member states; and proven to function well within the European supra- and inter-governmental edifice. Moreover, the EU provides for wider regional institutional frameworks and processes *within which the smaller borderland initiatives may find anchor and support*; the EU has developed programs specifically oriented to encourage such cooperation in the context of its cohesion and regional policies; and set up respective institutional bodies and processes.¹⁴ And above all, the EU has provided a well-founded legal and justice framework facilitated by now two well established courts - the Court

of First Instance and the European Court of Justice. The European Court of Human Rights (of the Council of Europe) is complementing this system as well as other sector specific adjudicative administrative bodies.

It is therefore not surprising that “[o]n a European level, there are growing expectations for border regions being dynamos for growth and for implementing the single market, and for cooperation across borders being a model for integration in the entire European Union”. (Øresund Region) Strengthening the profile of the borderland region in the European capital is where the prognosis regarding the provisions BPG, RPG, TPG, GPG, and NPG coincide. Important to note is the fact that in the most developed region - the Upper-Rhine - partnership with Switzerland, which is *not* a member of the EU was not blocked by the difference in legal and justice systems. Switzerland and the EU have maintained a tradition of bilateral cooperation well prior to their cooperation agreement of 2002, which further cemented this relationship. All these are absent in the NAFTA. But then, the history of the Canada-US relations (and US-Mexico, for that matter) represents a unique case in itself, different from the European experience. Consequently, the NAFTA parties will do better to learn from the European institution building process, rather than emulate either process or institutions.

Despite the process of European integration, the borderland regions are still facing various legislative barriers in many areas. However, solid structures are available not only at the local, but at the European regional level – and national levels too - to assist in ironing out differences and “bridging”, (Øresund Region) not harmonising, rules and systems.

North America

North America is, of course, a different story altogether. NAFTA represents a relatively young experiment in integration, engaging a limited number of states with a different (from the European) historical experience and memory, special balance of power among its members, and a recent transformative challenge (security, 9/11), to mention a few distinguishing features. Providing BPG, and even RPG, therefore encounters more of the disadvantages described by Sandler, when compared with the advantages of pursuing provision of public goods at the global, transnational, or national levels. Yet, the conditions at least in some regions, notably the Canadian-American borderlands, and specifically the Pacific Northwest, are not that different from the European borderlands (in some cases even more homogeneous) and are holding the promise for success in BPG provision.

There are four main borderland regions straddling the Canada-US border. While borderland interactions have been intensifying across the board, they are still mainly centered on economic activities described as forming clusters and economic hubs.¹⁵ The West - often referred to as the Pacific Northwest or Cascadia, includes the Canadian provinces of British Columbia, Alberta, and the Yukon Territory; and the US States of Alaska, Washington, Idaho, Oregon, and Montana, home to a population of 18 million. Its common economic concentrations are in transportation and logistics, heavy construction services, oil and gas production and services, agricultural products, fishing, and fishing products.

Another Western cross-border cluster, relatively sparsely populated, consists of the western part of the Prairies-Great Plains cross-border region, which includes on the Canadian side the Albertan cities of Edmonton and Calgary (overlapping also as part of Cascadia) and Winnipeg,

and several other cities in Manitoba; and Minneapolis in the State of Minnesota in the US. The economic focus there is on heavy machinery.

The Great Lakes-Heartland region centres around Toronto in Canada's Ontario and Detroit in US' Michigan and their respective satellite communities, with a focus on the automotive industry including the building of fixtures equipment and services, and a metal industry, totalling a population of 43.4 employable people.

In the East, two border regions are identified. Quebec with Montreal as the region's chief Canadian player with a population of 7.3 million¹⁶, and New England and the Massachusetts Bay's area with its sphere of influence along the New England Coast up and including Atlantic Canada, amounting to about 16.2 million inhabitants.¹⁷ The two regions share an economic focus on forest products and footwear, but are distinguished through Quebec's additional leather, footwear, publishing and printing, and furniture industries, and the Atlantic Provinces' centralisation on agricultural products, distribution services, fishing and fishing products, and power generation transmission. (The Emergence of Cross-Border Regions 8-9)¹⁸

A comparison between the EU and the North American Canada-US borderlands is difficult to draw in exact terms. The angle taken by the reports on the EU regions is understandably determined by the regions' embeddedness in a significantly advanced integrative process ranging up to almost the creation of a constitutional confederation, and traced back to a process that began on the heels of WWII. In comparison, the focus of reports on the North American borderlands, and here - on Canada-US border regions, reflects the fact that North America has only recently embarked on integration. Furthermore, this integration process has been limited to the creation of a free trade area and a regional security parameter (most recently). Also, a review of the relevant North American literature (The Emergence of Cross-Border Regions 41-45) reveals that the researchers' attention is attuned to regions within provinces and states which are not in every case close to the international border; and to interaction between provinces rather than regions within provinces that are located directly along the border. With this caveat in mind, only one region along the Canada-US border matches most closely the EU type borderland.¹⁹

Cascadia

Cascadia constitutes part of the larger Pacific Northwest region, which justifies the denomination of borderland even in a European comparison.²⁰ It is however important to note that from an institutional perspective, Cascadia is the most developed borderland along the Canada-US border. This is what makes it a good candidate for further integrative developments - including in the area of law, regulations, and dispute resolution. The authors of the report on the Emergence of Cross-Border Regions identify four types of cross-border organisations, all of which exist in Cascadia. They reflect the two approaches to borderland integration observed in the European cases, namely top-down and bottom-up. They include, respectively, general-purpose intergovernmental, single-purpose intergovernmental, city oriented, and civil oriented organisations.²¹

An initiative which is unique for it represents an equal public-private partnership and is incorporated as law in its member provinces/states statutes is the Pacific Northwest Economic Region (PNWER). It occupies a leadership role as the most integrated and active institutions,

with seventeen working groups including agriculture, environment, high-tech, transportation, etc., and is perhaps to credit for the highest ranking in “thickness and intensity” among the rest of the Canada-US crossborder regions. (The Emergence of Cross-Border Regions 19) However, while relatively prolific, the list of crossborder linkages, which has come to address even the nationally sensitive immigration and security sectors, does not provide for anything approaching, for instance, the “bridging” of rules and systems pursued by the Øresund Region. At the backdrop of globalisation propelled competitive pressures, and in the absence of a NAFTA regional and universally accessible dispute resolution mechanism, much of the irritations generated by unsatisfactorily resolved disputes, or disputes which have not been pursued due to lack of justice avenues, (Gal-Or 2002) spills over and affects the goodwill and the amount and quality of mutual knowledge in the borderland region.

Dispute resolution as a borderland public good

The most recent publication regarding the state of NAFTA is the tri-national task force report addressing the integration prospects in North America.²² Among the many challenges identified, it mentions that

...regulatory differences among our three countries raise costs instead of reducing them. [...] [D]isputes in these [trade] areas have been a source of disagreement among our countries. Furthermore, the NAFTA partners have been unable to resolve a number of important trade and investment disputes, which has created continuing tension in our commercial relationships”. (Building a North American Community 4)

According to the report, the strategy fit for North America - a unique partnership in itself - should be integrated “recognising the extent to which progress on each individual component enhances achievement of the others”. (6) It acknowledges that while most trade disputes had been successfully resolved through the application of NAFTA dispute settlement mechanisms, there remain several areas where disputes have been lingering and the NAFTA approach have proven insufficient. To rectify this failing, one solution identified was the establishment of a permanent tribunal for North American dispute resolution:

The current NAFTA dispute resolution process is founded on ad hoc panels that are not capable of building institutional memory or establishing precedent, may be subject to conflicts of interests, and are appointed by authorities who may have an incentive to delay in a given proceeding. As demonstrated by the efficiency of the World Trade Organization (WTO) appeal process a permanent tribunal would likely encourage a faster, more consistent, and more predictable resolution of disputes. (22)

These recommendations – particularly when considered in the broader context of the report - mesh with all the approaches to provision of NPG, GPG, TPG, RPG, and BPG. However, in the part entitled “What we should do now” (24) and the remainder of the text, the task force fails to address the significant concept of subsidiarity; the closest it comes to itemising an agenda for early action is in identifying priority sectors. However, there is no attention paid to the

usefulness of delegating responsibility vertically, from the regional inter-governmental North American level to the local borderland arenas.

In its interim report on the Emergence of Cross-Border Regions, the authors identify several policy implications arising from Canada-US regional opportunities and challenges. (25) They maintain that globalisation has encouraged cross-border regional integration, interdependence, and specialisation in responding to the region's demands, and consequently, made cross border regions into key features of North American integration. At the same time, cross-border organisational capacities are still at a minimum although new policy frameworks to accommodate different levels of government and more diversified stakeholders (similar to PNWER) are warranted to generate economies of scope, increase efficiency, and regional competitiveness. "It is noteworthy that most countries in western Europe have already decentralized their regional development policies. Perhaps it is time to consider this in a North American cross-border context." (The Emergence of Cross-Border Regions 25) Subsidiarity as regional issue management "may also prove more practical and easier to address local and regional issues and *resolve disputes* in the context of cross-border regions". (The Emergence of Cross-Border Regions 25, emphasis added) If so, a BPG approach – currently often of negligible importance on the broader, more universal dimension of public good, may prove sensible.

Validating the importance of BPG could help mobilise the increased participation of diverse local stakeholders and give them a voice also at higher levels of policy making. Similar to the insight gained from the European survey, (Facts & Experience) the authors of Emergence of Cross-Border Regions suggest that solidifying a cross-border focus and activities would enhance the sharing, and improve the quality, of information. This is necessary for both public policy at the borderland level, and clearer mutual understanding among policy makers and stakeholders at the elementary borderland, sub-national, and up to the national governmental, levels. The benefits can be said to spill over from the borderland for the BPG assists in solidifying, and integrates with, the public good at the national and inter-national levels. Arguably, recognising BPG as an ingredient of NPG and RPG, and consequently possibly also of TPG and GPG, would bolster a genuine pluralist democracy across all these levels of governance and contribute to aligning of foreign policies.

A proposal for a dispute settlement approach at the borderland level

In the previous sections, I made the case for dispute settlement at the borderland level. I now turn to propose a concrete approach for the establishment of a procedural dispute settlement continuum reflecting, and adjusted to, the hierarchy of levels of governance and the corresponding provision of public goods. In the following discussion, I suggest in broad brush lines a design for a procedural dispute settlement continuum encompassing and *converging* procedures at the borderland, regional, national, and international levels. The continuum is *multifaceted*. It encompasses an *escalating variety of adjudicative models* focusing on alternative dispute resolution mechanisms, and starting with facilitation, moving through neutral investigation, mediation, and culminating with adjudication. It permits national court procedures under certain specified conditions. It is also a continuum of *adjudicative instances* and provides for *escalating entry levels* designed to accommodate various characteristics of the dispute in view of defusing its intensity and leading to a faster, less time and resource consuming process, and a simple settlement (defusing tensions rather than planting the seeds

for the next dispute). Therefore, it includes at every stage provisions of inducement for early resolution coupled with penalties for unjustified “stretching” of the process into unnecessary next stages and/or levels.

For instance, softwood lumber disputes affecting *borderland interests* and stakeholders will have their procedural *entry level* at the borderland level and apply to cases where softwood lumber is *traded in the borderland region* (not across the entire Canada-US or North American region). The local entry level will accommodate all *sizes of interests* (small, medium size, and large firms and borderland producers or professional or other interest associations).²³ The borderland entry level will apply to all *types of actors* involved in a dispute (private-private, public-public, or public-private). Should such disputes be interconnected with other broader disputes and involve interests, trade,²⁴ dimension of interests, and actors beyond the borderland area, and the dispute cannot be broken down into locally specific “sub-disputes”, the entry level will be at a North American sub-regional level, e.g. East, Middle, West but may be initiated with a NAFTA or WTO regional tribunal. These levels of adjudication will also serve as the next level of “escalation” should the borderland provide only the threshold to begin a procedure (e.g. facilitation or mediation) or an appeal from a borderland small court judgment. The final adjudicative instance will be an appellate body constituted at a pertinent NAFTA level, WTO, or a party’s national court. A judgment enforcement arrangement should preferably be agreed on at the national inter-governmental level to lend legitimacy and finality to the procedure.²⁵

At its early stages, the dispute settlement continuum will be voluntary, based on modest membership fees and significant public and private sector financial and promotional support. It should be considered an investment in a BPG service, which once solidly established, and enjoying a secured favourable reputation, should become self-supporting.

Elsewhere, I have already proposed the first leg for a borderland dispute settlement continuum. (Gal-Or 2002) It combines PNWER’s Private Sector Council’s ADR Service project proposal and NAFTA’s Advisory Committee on Private Commercial Disputes, Sub-Committee IV of the NAFTA 2022’s small claims court suggestion. A skeleton for a genuine borderland dispute settlement agency, it could be complemented by a NAFTA *regional* adjudicative instance aimed at satisfying disputants through a ladder process to be determined by the characteristics of the dispute as identified above: Preponderance of borderland interest, borderland as location of transaction, size of interest, and type of actors.²⁶ The scaling design includes also Pauwelyn’s idea (which has to this day remained mute) to establish regional WTO offices supplemented by WTO inspection mechanisms mimicking the World Bank’s and regional development banks’ practice. (59) These structures will have to be incorporated within the larger trade and investment regime already established in the NAFTA and the WTO precisely in order to rectify the problems of duplications and rivalry which resulted from the non-planned and non-coordinated proliferation of international courts and tribunals. A consciously pre-meditated and crafted re-arrangement along the lines of the continuum may emerge as a welcome “straightening of the adjudicative noodles” in the proverbial and larger spaghetti bowl.

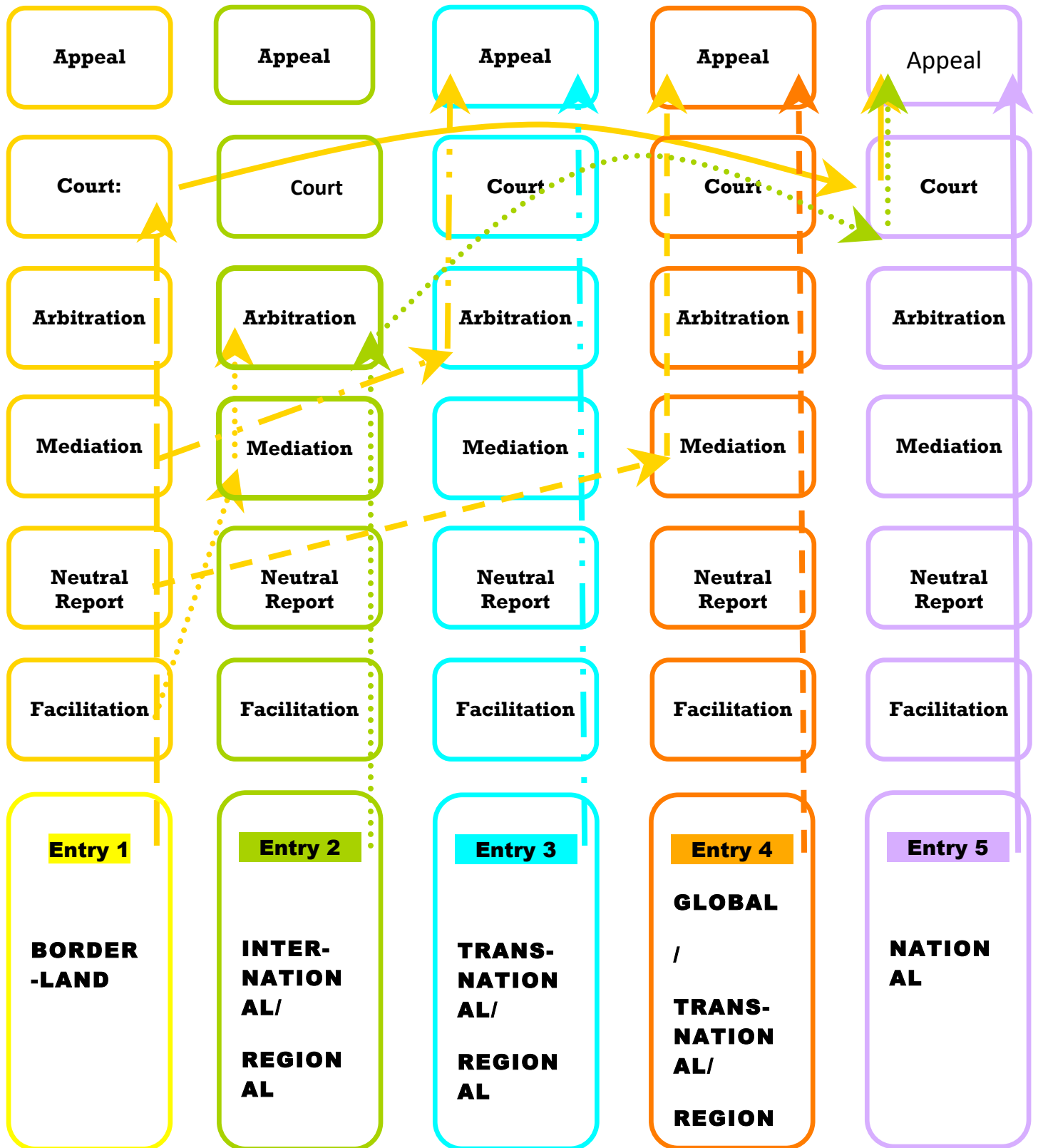
Conclusion

This paper makes a proposal to rectify the state of affairs where the public interest, at various level of governance, suffers from the unprecedented multitude of competing procedures in different fora. Causing great expense, stretching over a very lengthy period of time, they often fail to, rather than, deliver the resolution needed to assist in the provision of public goods.

In the first section of the paper, I described the litigious thread which has been running through the Canada-US trade relations. I suggested that a crucial reason for the development of this culture within the trade relations may lie is the remoteness of the dispute settlement proceedings from the immediate inter-national local where the subject matter of the dispute forms an integral part of daily life. I then proceeded to discuss multi-level governance and multi-level dispute settlement and introduce the borderland as a relevant and necessary fundamental ingredient. I identify the public good approach as a useful tool to conceptualise the convergence of the various levels of governance with the various models and instances of dispute settlement. I highlight the importance of the principle of subsidiarity, already recognized in the European context as workable, effective, efficient, and fair. Consequently, I am proposing a new approach in the conceptualization of the provision of the public good, namely the provision of the public good at the borderland level (BPG). I describe how it is already being implemented in Europe, and compare it with the embryonic phases taking place in North America, notably the Pacific Northwest. I then identify dispute resolution as a specific form of public good and conclude by proposing a design for a multifaceted and laddered borderland dispute settlement continuum.

Although the EU integrative model can serve only as general guidance for the North American experiment (whether regional or borderland), the concept of subsidiarity developed and tested in the EU and wider European context (Council of Europe) over a long period of governance, and validated through plenty adjudicative experience, proves helpful.²⁷ It is not for nothing that the European borderlands are prospering in terms of world economic competitiveness. Indeed, a fundamental requisite is a reliable justice system. This is precisely the vacuum to be filled in North America. Adding a borderland dispute settlement capacity embedded within a laddered continuum of dispute settlement mechanism offers a unique approach tailored to North American characteristics. It takes into consideration the interconnectedness of the BPG, RPG, NPG, and GPG; innovates by introducing new structures but also maintains features of existing mechanisms thus benefiting from NAFTA's experience, and specifically - the WTO's jurisprudential history.

Appendix I – Model of Dispute Settlement Process



Endnotes

¹ For an analysis of the impact on justice caused by the proliferation of international courts and tribunals see Gal-Or, Noemi. "The Concept of Appeal", *Dispute Resolution – International Treaties and Trade*, International Law National Section, CBA Canadian Legal Conference and Expo 2006, St. John's, Newfoundland and Labrador, Aug. 13-15, 2006, CD ROM [hereafter: Gal-Or 2006]. Although this proliferation is one of the most important reasons for the proposals made in this paper, I will not elaborate on it for lack of space.

² Canada and the WTO. Dispute Settlement Contribution of Canada to the Improvement of the WTO Dispute Settlement Understanding. http://www.international.gc.ca/tna-nac/wto_dispute-en.asp. Retrieved, January 15, 2007.

³ I use the terms dispute resolution and dispute settlement interchangeably.

⁴ I will not explore and elaborate on the reasons for this here.

⁵ "Article 705: Export Subsidies

6. The Parties hereby establish a Working Group on Agricultural Subsidies, comprising representatives of each Party, which shall meet at least semiannually or as the Parties may otherwise agree, to work toward elimination of all export subsidies affecting agricultural trade between the Parties. The functions of the Working Group shall include:

(a) monitoring the volume and price of imports into the territory of any Party of agricultural goods that have benefitted from export subsidies;

(b) providing a forum for the Parties to develop mutually acceptable criteria and procedures for reaching agreement on the limitation or elimination of export subsidies for imports of agricultural goods into the territories of the Parties; and

(c) reporting annually to the Committee on Agricultural Trade, established under Article 706, on the implementation of this Article." NAFTA Chapter Seven on Agriculture and Phytosanitary Measures (<http://www.international.gc.ca/nafta-alena/chap07a-en.asp?#Article701>) retrieved Jan. 15, 07

⁶ "Benefits are nonrival when a unit of the good can be consumed by one agent without detracting, in the least, from the consumption possibilities still available for other agents from the same unit. Sandler, Todd. "Regional Public Goods and International Organization", *Review of International Organization* (2006) 1: 6, note 1.

⁷ "Benefits are nonexcludable when they are available to all would-be consumers once the good is supplied." Ibid.: 6, note 1.

⁸ "[H]ow individual contributions add to the overall level for consumption." Ibid.: 6.

⁹ D.C. North quoted in Sandler at 15.

¹⁰ For definitions of Cascadia and the Pacific Northwest see, Gal-Or, Noemi. "Commercial ADR in Cascadia", *Canadian Journal of Regional Science* (2002) Vol. 24: 2 [hereafter: Gal-Or 2002].

¹¹ Pauwellyn, Joost. "The Transformation of World Trade", *Michigan Law Review* (2005) 104:1, 59.

¹² *Facts and Experience. An Introduction to Cross-Border Regional Labour Markets in Europe*. ØAR, Øresundsregionens Arbejdsmarkedspolitiske Råd, Øresundskomiteen, November 2004 www.oresundskomitee.org, 8 [hereafter: Facts & Experience].

¹³ It is nevertheless largely driven by a "broad, informal network and a process influenced by 'the learning region'". *The Ongoing Development of the Øresund Region. Action Plan for the Øresund Committee 2005-2006*, www.oresundskomitee.dk/english [hereafter: Øresund Region].

¹⁴ For instance, at a European level – the network of European Metropolitan Regions and Areas (METREX), <http://www.eurometrex.org/EN/>.

¹⁵ For the latest detailed review see, The Emergence of Cross-Border Regions. Interim Report. November 2005, Policy Research initiative, PRI Project North American Linkages, Government of Canada.

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- ¹⁶ *Population and Dwelling Counts, for Canada, Provinces and Territories, 2001 and 1996 Censuses - 100% Data*. Statistics Canada, <http://www12.statcan.ca/english/census01/products/standard/popdwel/Table-PR.cfm>, retrieved January 21, 2007.
- ¹⁷ Ibid., and *Census 2000 Population Results for New England 1990 – 2000*. U.S. Bureau of the Census, <http://www.dlt.ri.gov/lmi/census/pop/neweng.htm>, retrieved 21 January, 2007.
- ¹⁸ Another crossborder classification includes the provinces of Alberta, Saskatchewan, and Manitoba within the Prairies-Great Plains area as well as the US States of Montana, Wyoming, North Dakota, South Dakota, and Minnesota; for the Great Lakes-Heartland region Ontario with Michigan, Indiana, and Ohio; and for the East – Quebec with Vermont, Maine, New Hampshire, and New York, and Atlantic Canada with Maine, New Hampshire, Massachusetts, Rhode island, and Connecticut. Brunet-Jailly, Emmanuel, Susan E. Clarke, Debora L. VanNijnatten, Derek Jansen, Christian Boucher and André Downs. *Leader Survey on Canada-US Cross-Border Regions*. Policy Research Initiative, Government of Canada, Working Paper Series 012, February 2006, 7.
- ¹⁹ Certainly, geographical proximity dimensions in Europe are favouring the borderland epithet, whereas the magnitude of Canadian and American regions requires a broader geographical approach.
- ²⁰ The definition of Cascadia, which has been widely debated (from geopolitical, environmental, ideological, cultural, etc. angles), (Gal-Or 2002) is immaterial to the present discussion.
- ²¹ A short and non-exhaustive list includes the Alberta and British Columbia associate membership of the American Council of State Governments-West, a forum without a supporting structure nor resources, and weaker than its Eastern counter-parts; the British Columbia/Washington Environmental Cooperation Council, and the British-Columbia/Washington Mobility and Trade Corridor (IMTC), which includes public and private members from both sides of the border; the Cascadia Mayors Council for British Columbia, Washington, and Orgeon; the Pacific Corridor Enterprise Council (PACE) representing business, the environmentally oriented Northwest Environment Watch, the think-tank Discovery Institute promoting a Cascadia transportation project, and the bioregion focused Cascadia Institute. (The Emergence of Cross-Border Regions 14-18)
- ²² *Building a North American Community*. Council on Foreign Relations Press, May 2005 http://www.cfr.org/publication/8102/building_a_north_american_community.html, retrieved 17 January, 2007. It must be noted that this report was so far not politically endorsed and that it contains individual reservations noted by members of the task force regarding various elements of the report.
- ²³ “There is a large literature suggesting that there should be an important leap forward in terms of NAFTA or North American organizations to address pressing cross-border issues, such as dragging trade disputes...”. (The Emergence of Cross-Border Regions 27) The authors explore also the specific advantage to be gained by Canada from such approach, which is beyond the scope of this paper.
- ²⁴ Or for that matter, any economic related interaction affecting economies of scale and scope.
- ²⁵ Incorporating international law within domestic law has proven a persistent problem impeding on the effectiveness of the international dispute resolution regime. One recent example is provided in the *Council of Canadians, Canadian Union of Postal Workers, Charter Committee on Poverty vs. AG of Canada* (the so-called UPS case) Ontario Supreme Court of Justice, Court File No.: 01-CV-208141, July 8, 2005. An encompassing account of this subject in general is found in *International Law Decisions in National Courts*, Thomas M. Franck and Gregory H. Fox (eds.), New York: Transnational Publishers, Inc., 1996.
- ²⁶ A more detailed development of the continuum conceptualisation for borderland dispute resolution will most likely prompt additional characteristics.
- ²⁷ The *European Charter of Local Self-Government*, CETS No.: 122, adopted by the Council of Europe Committee of Ministers in 1985, entered into force, 1 September, 1988, “sets out the principle that effective local self-government is essential to democracy. It serves as a model for legislative reform for local democracy. The principle that the delivery of public services should be delegated to the level closest to the citizen – the principle of subsidiarity, equally laid down in the Charter – was also

recognised by the European Union in its draft Constitutional Treaty. <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=122&CM=1&DF=&CL=ENG>, retrieved 18 January, 2007. Most recently, the *Council of Europe Report of the Group of Wise Persons to the Committee of Ministers* (CM(2006)203 November 2006) reiterated the cornerstone value of the “principle of subsidiarity” in the context of the European Court of Human Rights, and made ten improvement recommendations, which bear relevance to the role of courts in integrative systems also beyond the European context.