

Federalism Responds? International Trade Agreements and Sub-Federal Consultation in Canada and the United States: The Role of CTrade and IGPAC

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This study examines the impact of international trade agreements on the consultative linkages between central and sub-federal governments in Canada and the United States. CTrade is a series of meetings between Ottawa and the provinces that occurs four times annually. In the United States, a less regularized, and arguably more volatile, process of consultation takes place between the Office of the United States Trade Representative (USTR) and the Intergovernmental Policy Advisory Committee (IGPAC). In Canada, all provinces are members of CTrade whereas IGPAC has varied representation from states, municipalities and federal legislators. Differences in these consultative frameworks are due to constitutional realities, previous Supreme Court decisions, a lack of bureaucratic capacity and annual budget cycles in US states, IGPAC's tendency to focus on broad issues of federalism, and an absence of successful international trade disputes targeting American sub-federal jurisdiction. In addition, the US is not a trade dependent nation, which allows domestic interests, such as the White House, Congress, USTR negotiators, and prominent corporate interests, to control the policy process. Critics of CTrade and IGPAC, however, do note similar shortcomings related to a lack of substantive consultation, document access, agenda setting, and a hierarchy of sub-federal representation. In both cases it is also clear that practices of *interstate* and *intrastate* federalism have defined intergovernmental responses in this policy area. On a broader level, these observations raise questions regarding the role of the state in the contemporary international system. If the form and function of federalism in the US and Canada has consistently defined central and sub-federal responses to foreign trade commitments it suggests a level of autonomy that challenges arguments citing an "erosion" of state sovereignty.

Executive Federalism and International Trade in Canada

The Provinces and GATT

Federal-provincial consultation in Canada is commonly referred to as "executive federalism." As early as the 1960s, Donald Smiley described this process as "the relations between elected and appointed officials of the two orders of government in federal-provincial interactions and among the executives of the provinces in interprovincial interactions."¹ At first, federal-provincial meetings were related to the framing of constitutional proposals and the negotiation and implementation of fiscal and other financial agreements. They were also viewed as a natural outgrowth of an executive driven domestic policy process in which both levels of government attempted to maximize autonomy and jurisdiction.² Executive federalism further thrived due to the lack of effective brokerage mechanisms for provincial representation within federal institutions.³

During the Kennedy Round of General Agreement on Tariffs and Trade (GATT) negotiations the practice of executive federalism expanded into international trade policy. Several provinces, for example, submitted formal reports on tariff policy and called for greater involvement in the GATT process. Ottawa, however, was reluctant to expand the

¹ Donald V. Smiley, *Canada in Question: Federalism in the Eighties*, 3rd ed. (Toronto: McGraw-Hill Ryerson, 1980), 91.

² Herman Bakvis and Grace Skogstad, "Canadian Federalism: Performance, Effectiveness, and Legitimacy," in *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, eds. Herman Bakvis and Grace Skogstad (Toronto: Oxford University Press, 2002), 4-5.

³ Donald V. Smiley, *The Federal Condition in Canada* (Toronto: McGraw-Hill Ryerson, 1987), 85.

role of the provinces and noted clear constitutional guidelines regarding federal control over the negotiation of international tariffs. By the time the Tokyo Round began in 1973, however, the GATT's agenda shifted to non-tariff barriers (NTBs). As a result, negotiations on visible tariffs were replaced by discussions on government procurement, subsidies, and other technical barriers. Sectoral negotiations on fisheries, resource-based products, and agriculture also involved areas of provincial jurisdiction. Given the scope of the issues involved, the federal government understood it would need the support of the provinces if it were to successfully negotiate a binding international agreement under the GATT's federal-state clause. Article XXIV:12, which was later incorporated into the World Trade Organization (WTO), states 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 territory."⁴

At the beginning of the Tokyo Round the only formal mechanism for provincial input was the Canadian Trade and Tariffs Committee (CTTC). The committee, chaired by a federal deputy minister, gathered briefs from business, unions, consumer groups, the provinces, and all other interested parties. In order to better represent regional interests a more direct forum for the provinces was established in 1975 with the creation of an ad hoc federal-provincial committee of deputy ministers. In August of 1977, a Canadian Coordinator for Trade Negotiations (CCTN) was appointed with the mandate to coordinate relevant information from the provinces, the federal bureaucracy, industry, and other non-governmental organizations.⁵ Despite these changes, British Columbia, Alberta, Ontario, and Quebec, continued to push for a greater role in the Tokyo Round negotiations. These provinces also sent delegates to Geneva but Ottawa refused formal provincial representation in the Canadian delegation. For the most part, however, relations between both levels of government were cordial during the GATT negotiations. Ottawa kept provincial officials informed and most of the provinces submitted useful analysis to the negotiating team. The federal government also benefited from access to detailed positions on domestic jurisdictional issues such as procurement and provincial liquor boards.⁶

Federal-provincial consultative mechanisms became further institutionalized following the Tokyo Round. Senior officials met regularly on newly created federal-provincial committees and ministers responsible for trade took steps to improve existing channels of communication. Ottawa and the provinces also worked closely on sectoral disputes such as softwood lumber and transborder trucking. It was also at this time, however, that questions arose regarding the willingness of provinces to comply with difficult economic commitments. In 1985, for example, Ontario's refusal to follow

⁴ Douglas M. Brown, "The Evolving Role of the Provinces in Canadian Trade Policy," in *Canadian Federalism: Meeting Global Economic Challenges?* eds. Douglas M. Brown and Murray G. Smith (Kingston: Queen's University Institute of Intergovernmental Relations, 1991), 90. This language was tightened in Article 103 of the Canada-United States Free Trade Agreement (FTA), which stipulated that the "parties to this agreement shall ensure that *all necessary measures* are taken in order to give effect to its provisions ... by state, provincial and local governments." Article 105 of the North American Free Trade Agreement (NAFTA) also incorporated the "all necessary measures" language of the FTA.

⁵ Brown, "The Evolving Role of the Provinces in Canadian Trade Policy," 91.

⁶ *Ibid.*, 93.

provisions regarding liquor and wine distribution exposed Canada to a GATT challenge by the European Community. Ottawa argued that the Canadian constitution prevented the federal government from forcing Ontario to adhere to GATT rules. The dispute panel, however, disagreed, noting in 1988 that “the measures taken by the Government of Canada were clearly not all the *reasonable* measures as might be available to it to ensure observance of the provisions of the General Agreement by the provincial liquor boards, as provided in Article XXIV:12”⁷ The dispute also came in the aftermath of Ottawa’s refusal to include provincial representatives on Canada’s delegation to the GATT ministerial meeting in 1982.⁸

The Provinces and the Canada-United States Free Trade Agreement

Despite these tensions, the provinces continued to push for greater participation in the Canada-United States free trade negotiations. In the spring of 1985, the four premiers of British Columbia, Alberta, Saskatchewan and Manitoba announced support for bilateral free trade, but requested “full provincial participation” in upcoming negotiations. Some, but not all, of the other provinces expressed similar positions. Ontario, while somewhat cautious in their support for a comprehensive trade agreement with the US, supported the principle of full participation. Quebec supported both. The Atlantic provinces endorsed negotiations but “were neutral on the question of full provincial participation.”⁹

Debate regarding the role of the provinces continued until Don Getty, the newly elected premier of Alberta, proposed a compromise in March 1986. Specifically, Getty called for, on behalf of the provinces, “joint control over Canada’s chief negotiator; full provincial representation on the Canadian negotiating team, including the option of ‘being in the room’ with the Americans; full participation in the negotiating strategy; and full information sharing in confidence with the federal negotiators.”¹⁰ Although Ottawa was reluctant to accept these recommendations, federal officials understood that a defined provincial role was essential if the FTA was to be completed. Finally, in June 1986 the provinces accepted a compromise that called for first ministers meetings every three months, and ongoing consultation between the CCTN and the newly created Trade Negotiations Office (TNO), which would include additional ad hoc committees as required. The provinces, however, also accepted the authority of Simon Reisman, Canada’s Chief Negotiator, and were not granted representation in the TNO.¹¹

With consultative mechanisms now in place Canada entered into bilateral trade negotiations with the United States. A consensus was first reached on specific sectoral issues. When Canadian officials pressed for “a binding mechanism” that would circumvent US trade remedies Washington demanded commitments from Canada

⁷ General Agreement on Tariffs and Trade, *Panel on Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies: Report of the Panel Adopted on 22 March 1988 (L/6304-35S/37)* (Geneva: General Agreement on Tariffs and Trade, 1998), 38. Italics mine.

⁸ Sean Riley, “Federalism and Canadian Trade Policy: The Early Days of the Mulroney Government,” in *The Provinces and Canadian Foreign Policy, Proceedings of a Conference, University of Alberta, March 28-30, 1985*, eds. Tom Keating and Don Munton (Toronto: Canadian Institute of International Affairs, 1985), 47.

⁹ G. Bruce Doern and Brian W. Tomlin, *Faith and Fear: The Free Trade Story* (Toronto: Stoddart Publishing, 1991), 128.

¹⁰ Brown, “The Evolving Role of the Provinces in Canadian Trade Policy,” 94.

¹¹ *Ibid.*, 94-95. See also, Douglas M. Brown, *Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada* (Montreal and Kingston: McGill-Queen’s University Press, 2002), 123-125.

limiting the use of subsidies. This impasse resulted in a breakdown of negotiations in September of 1987.¹² Ottawa's consultation with the provinces to this point focused on technical issues. The CCTN was the main forum of discussion but various sub-committee, ministerial, and quarterly first ministers meetings supplemented its work, as set out in the federal-provincial agreement. Despite concerns regarding openness and information sharing by both levels of government most participants thought consultations were relatively successful. While not part of the formal federal delegation, the provinces did have an impact on the direction and substance of the talks. As Douglas Brown has noted, the degree of input from the provinces exceeded "that of most other domestic actors, including the private sector, other federal departments and [P]arliament. Only the TNO itself, the Prime Minister's Office and the special subcommittee of the federal cabinet on trade appeared to have greater access to the negotiating process."¹³

The last stage of negotiations, which followed the Canadian walkout in September, lasted until October 4, 1987. Although not completely satisfied with the American proposal, the Canadian delegation eventually accepted the tabled amendments. Provincial participation during the last month was extremely limited. In fact, leading up to the October 3rd deadline imposed by US Congress "fast track" legislation there was no formal consultation with the provinces. There were also no meetings with the provinces in the period leading up to the release of the final legal text of the agreement.¹⁴ As a result, there were aspects of the final deal the provinces were unaware of, especially in terms of the new trade dispute process.¹⁵ Despite this lack of consultation, the content of the FTA produced few surprises for the provinces. Provisions dealing with the Auto Pact, energy, and cultural initiatives, were all discussed in detail during earlier negotiations. Other items, including agriculture, alcohol, exceptions, national treatment, services and investment, also received a great deal of attention in earlier federal-provincial meetings.

NAFTA and the Evolution of the Federal Provincial Committee System

Shortly after the implementation of the FTA, the CCTN became the Committee for the Free Trade Agreement (CFTA) on which each province had one official representative. Ottawa also established a series of consultative committees with various provincial departments to address sectoral concerns and on-going trade irritants. Similar sectoral committees were also set up for the stalled Uruguay Round. These developments, however, did not represent a departure from the federal-provincial relationship that existed prior to the FTA. The provinces received more information, but still had no formalized role in the formulation of Canadian foreign trade policy.

¹² Judith H. Bello and Gilbert R. Winham, "The Canada-USA Free Trade Agreement: Issues of Process," in *Negotiating and Implementing a North American Free Trade Agreement*, ed. Leonard Waverman (Vancouver: The Fraser Institute/Centre for International Studies, 1992), 33.

¹³ Brown, "The Evolving Role of the Provinces in Canadian Trade Policy," 95

¹⁴ Douglas M. Brown, "The Evolving Role of the Provinces in Canada-US Trade Relations," in *States and Provinces in the International Economy*, eds. Douglas M. Brown and Earl H. Fry (Berkeley and Kingston: Institute of Governmental Studies Press and Queen's University Institute of Intergovernmental Relations, 1993), 114.

¹⁵ The implementation of the FTA in areas of provincial jurisdiction was still a concern of both levels of government following the negotiations. Ottawa eventually decided against enforcing the FTA by law in each province and instead passed Bill C-130, *An Act to Implement the Free Trade Agreement Between Canada and the United States of America* in Parliament.

Following the 1988 First Ministers' Conference, Ottawa agreed to enter into negotiations with the provinces to institutionalize federal-provincial ties in this policy area. Although the provinces continued to push for a more inclusive role there was no consensus on the form and content of these proposed linkages. Quebec, for example, tabled an initiative in 1990 calling for the creation of a "hierarchy" of provincial participation that would allow access for a select number of provinces based on specific areas of jurisdiction. A number of officials, however, especially from the smaller provinces, were concerned the Quebec proposal would create a consultative system dominated by BC, Alberta, Ontario and Quebec. British Columbia was also critical of the plan because it "essentially gave Quebec and Ontario a veto that was not extended to other provinces."¹⁶ In addition, Ottawa expressed concern regarding the constitutional implications of an agreement. As a result, discussions aimed at formalizing a role for the provinces came to a standstill by the end of 1990.

There was considerable cooperation between Ottawa and the provinces, however, in the initial stages of NAFTA negotiations. Although both sides continued to debate the meaning of "full" participation, an agreement was reached regarding changes to the existing federal-provincial committee system on international trade. Not only did the CFTA remain in place to deal with on-going issues of federal-provincial concern, but Ottawa and the provinces also agreed to create the Committee for North American Free Trade Negotiations (CNAFTN). Cooperation between both levels of government was evident throughout the CNAFTN process. The provinces received copies of every draft proposal tabled by the US and Mexico as well as information on a number of specific sectoral issues. On several occasions, the provinces also had access to material not yet reviewed by cabinet.¹⁷ Even federal officials conceded that linkages between Ottawa and the provinces were now extremely formalized. In the words of one representative, "we got to a point where a CNAFTN meeting could be held within a couple of hours using a conference call."¹⁸

Although CNAFTN appeared to represent an important step forward, several provinces had ongoing concerns.¹⁹ In fact, some participants perceived the institutionalization of these ties as an attempt to co-opt the provinces into the policy process. Specifically, it was suggested by some officials that Ottawa's commitment to information sharing was really an effort to limit the input of provincial governments. By overwhelming the provinces with detailed information several delegations were unable to keep pace with the federal agenda and, therefore, had limited influence in specific policy areas. Other provincial trade representatives, however, disagreed.²⁰ These officials suggested the main challenge for provinces was a lack of bureaucratic resources and expertise to cover all areas of the negotiations. They also endorsed the ongoing use of elite accommodation for international trade following the NAFTA negotiations.

Ongoing Consultation: CTrade

¹⁶ Personal interview, 23 February 1994. The individuals interviewed for this study spoke on the condition of anonymity with the understanding there would be no direct quotations without permission. Future references will cite only the date of these meetings. Locations are excluded given the small number of bureaucrats working in this policy area (to best ensure confidentiality).

¹⁷ Ibid.

¹⁸ Personal interview, 11 February 1994.

¹⁹ Ibid.

²⁰ Personal interview, 21 February 1994.

As federal and provincial officials predicted, the CNAFTN process evolved into what is now known as the CTrade committee system for international trade. The creation of CTrade, however, was not without difficulty. In fact, there were pockets of resistance within the foreign policy bureaucracy regarding further institutionalization of the CNAFTN system. According to one federal bureaucrat, the Department of Foreign Affairs and International Trade (DFAIT), “was suffering from a lack of resources” and was hoping to avoid any growth in this policy area.²¹ Ottawa eventually endorsed the creation of CTrade for pragmatic reasons. For the better part of a decade, Canada was involved in free trade negotiations at the global and regional levels. The new WTO also included areas of provincial jurisdiction that required coordination between Ottawa and the provinces. Bureaucratic survival for both levels of government was also an issue. Previous negotiations forced Ottawa and the provinces to commit greater resources to international economic policy. As a result, there was pressure from members of the bureaucracy to maintain, or expand the institutional infrastructure that already existed.

The current CTrade process involves a series of meetings between Ottawa and the provinces that occur four times annually. These are in person discussions that all provinces attend. In recent years one of the annual CTrade meetings was also scheduled outside of Ottawa. In 2002 federal and provincial trade officials traveled to Iqaluit, Nunavut and in June, 2003 discussions were held in Charlottetown, Prince Edward Island. Although CTrade always focuses on topical trade issues local matters are also included in meetings outside of Ottawa. In Charlottetown, for example, representatives from Atlantic Canada provided an overview of regional trade concerns, including automobile insurance, softwood lumber, shipbuilding, call centers, potatoes, blueberries, mussels, and lobsters. Moreover, Ottawa and the provinces often take advantage of the fact that officials are in one location and other meetings are scheduled around CTrade consultations.

On the surface, CTrade appears to represent a significant commitment to involve the provinces in matters of international trade, but again, this evaluation is not unanimously shared. For some provincial governments, the concern is that CTrade is more a forum of information sharing than a mechanism for consultation. In fact, the majority of CTrade meetings are primarily opportunities for federal officials to update and brief the provinces on current international trade issues, as opposed to engaging in detailed intergovernmental discussions. In the past, provincial trade officials also complained about the late arrival of federal documents and the fact that CTrade agendas were not available until days before the actual meetings, preventing any significant policy planning.²²

Most provincial officials, however, have only minor concerns regarding the CTrade process. Specifically, there was recognition that Ottawa had prioritized the need to provide better access to information for the provinces. In fact, there is now a secure web site and considerable e-mail flows between officials at both levels of government. Draft documents are also made available when Ottawa enters into negotiations in an area of provincial jurisdiction. The provinces are encouraged to provide feedback and guidance on these proposals and federal negotiators are sensitive to the economic interests of participating provinces. It was also pointed out by one provincial official that, “the

²¹ Personal interview, 28 August 2001.

²² Ibid.

CTrade forum is only one avenue of information gathering for the provinces.” There are numerous other sources available and “it is the responsibility of everyone at the provincial level to ensure they have enough information to do the job effectively.”²³

As CTrade evolves, some provinces continue to push for a more formalized role in the policy process. Quebec, for example, has previously cited the example of the European Union (EU), which allows member states to be direct participants on EU negotiating teams. In addition, some Quebec officials have called for the right to intervene directly during negotiations if matters are considered to be important to provincial interests. Alberta also proposed an institutionalized role as part of the Council of the Federation, created in July 2003. Not surprisingly, Ottawa has limited interest in implementing proposals that could reduce federal autonomy in the negotiation of international trade agreements. Therefore, as Grace Skogstad has noted, the federal government has traditionally rejected these requests, “arguing there is no need for formalization since current mechanisms to ensure provincial participation are working well.”²⁴ It would also appear that provincial enthusiasm for a more formalized structure has varying levels of support. In contrast to Quebec and Alberta, both Ontario and British Columbia have expressed a preference for maintaining the informal and flexible structure that currently exists. As one Ontario official suggested the province “has concerns about a consensus based model and, frankly, having to dedicate resources to issues we don’t really care about.”²⁵ As a result, it would appear that substantial alteration to the existing CTrade system, or a formal and expanded role for provincial governments in international institutions and negotiations, is unlikely.

Sub-Federal Consultation in the United States

IGPAC

A different process of federal-state consultation evolved in the United States related to foreign trade policy. The primary conduit for American states in this issue area is IGPAC. This forum was established by the USTR in relation to Section 135(c)(2) of the 1974 Trade Act, the Federal Advisory Committee Act (5 C. Appendix II), and Executive Order No. 11846 (March 27, 1975). In 2006, IGPAC’s membership consisted of 42 members selected from executive and legislative bodies of state, county, and municipal levels of government. The USTR selects IGPAC’s Chair and its members. The forums specific responsibilities are to:

- Advise, consult with, and make recommendations to the US Trade Representative and relevant Cabinet or sub-cabinet members concerning trade matters
- Draw on the expertise and knowledge of its members and on such data and information as is provided by the US Trade Representative.
- Establish such additional sub-committees of its members as may be necessary, subject to the provisions of the Federal Advisory Committee Act and the approval of the US Trade Representative, or the designee.

²³ Personal interview, 9 October 2001. There are other forms of consultation between Ottawa and the provinces in addition to CTrade. Provincial ministries of environment, agriculture, finance, and forestry all have interests related to international trade policy. Ad-hoc sectoral committees related to specific international issues or trade disputes are another form of consultation.

²⁴ Grace Skogstad, “International Trade Policy and Canadian Federalism: A Constructive Tension,” in *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 171.

²⁵ Personal interview, 31 August 2005.

- Report to the Trade Representative, or the designee. The US Trade Representative or the designee will be responsible for prior approval of the agendas for all Committee meetings.²⁶

IGPAC receives the majority of its staff and clerical support from the Office of Intergovernmental Affairs and Public Liaison of the USTR. IGPAC members are not compensated or reimbursed for expenses as part of their service on the committee.

Although the legislation legitimizing the USTR's right to form advisory committees dated back to the 1970s, IGPAC was not formed until 1988 to provide guidance on negotiations for the NAFTA and Uruguay Round of GATT. At the time separate panels were created for each agreement, both chaired by Wisconsin Governor Tommy G. Thompson. The 35 members of NAFTA's IGPAC reported to President George Bush in September 1992 and the GATT IGPAC submitted its report to Bill Clinton and Congress in 1994. At the time, most IGPAC members were governors, supplemented by a small number of state legislators and other local officials. The National Governor's Association (NGA) also had strong linkages with IGPAC. Thompson was co-lead of the NGA's international trade committee and Governor Ann Richards from Texas, the other co-lead was appointed to IGPAC in 1994. Hawaii Governor John Waihee, the co-lead governor for international trade for the Western Governors Association (WGA), was also a member of both the NAFTA and Uruguay Round IGPACs. As Conrad Weiler noted at the time, the "WGA and NGA were among the first state governmental interest groups to be generally concerned with the federalism implications of NAFTA and GATT, and their positions early influenced IGPAC and the terms of the trade pacts."²⁷

Following NAFTA and the creation of the WTO, IGPAC's activity was suspended due to Clinton's inability to secure "fast-track" authorization from Congress. When George W. Bush was granted Trade Promotion Authority (TPA) in 2000 the federal government pursued a series of bilateral trade agreements in response to the stalled Doha Round negotiations. Initially, there was limited interest in resurrecting the IGPAC process, and in the words of one state official the forum "did not really exist during early negotiations with Chile and Singapore."²⁸ Section 2104(e) of the 2002 Trade Act, however, now required IGPAC to report to the President, the USTR, and Congress no later than 30 days after the President advised Congress of a pending international trade agreement.

These developments prompted the USTR to alter the IGPAC process. Originally, elected officials dominated IGPAC membership, with staff from state governments serving on various working groups. With new tight timelines, however, officials with some expertise in trade policy were appointed to IGPAC to ensure that comprehensive reports would be produced within 30 days. Although IGPAC was expanded and non-elected officials became members of the advisory group, the forum still encountered problems. One issue was the need to receive security clearance to review confidential trade documents. Several members of IGPAC were slow to apply and were not able to

²⁶ Intergovernmental Policy Advisory Committee, *The US-Colombia Trade Promotion Agreement (TPA): Report of the Intergovernmental Policy Advisory Committee*, September 15, 2006, 5.

²⁷ Conrad Weiler, "The State of American Federalism, 1993-1994," *Publius* 24, no. 3 (Summer 1994): 115.

²⁸ Personal interview, 6 March 2008.

review relevant documentation. This resulted in a small number of IGPAC members writing the majority of reports. A lack of support from the USTR also placed additional burdens on IGPAC members with clearance. Today, numerous state officials continue to express frustration with the IGPAC process. As one trade representative suggested, it is “not clear these reports actually mean anything.” At times it “seems that USTR simply wants to check a box on a form and say they consulted with states.”²⁹

In response to these concerns, IGPAC produced a memorandum calling for improved federal-state coordination on trade policy in 2004. In the document it was noted that international trade agreements exposed federal and state measures to trade disputes, which placed demands on government resources. As a result, the memorandum noted a “critical need to **broaden and deepen an informed, non-partisan trade policy dialogue** and to **ensure ... a dedicated institutional capacity at all levels of government** in order to support on-going federal-state cooperation related to trade agreements’ negotiation, implementation and dispute settlement.”³⁰ The first recommendation called for the creation of a “Federal-State International Trade/Investment Policy Commission” to provide regular consultation between Washington and state governments. Of specific concern was improved communication related to procurement, agriculture, services and technology, investor-state concerns, trade and investment data collection and dissemination, and trade development collaborations. If this permanent forum was not possible, IGPAC was willing to consider a temporary Federal-State Trade Policy Working Group or Task Force as an interim solution.³¹

The Memorandum also suggested the Commission have bipartisan leadership with equal federal and state co-chairs, supported by a staff with appropriate knowledge of trade policy issues. Other members would be drawn from USTR, IGPAC, relevant federal agencies, Congress, and academic experts. Following the Canadian CTrade model, the new Commission would meet at least four times annually. Linkages would also be created with national associations such as the NGA, Council of State Governments (CSG), National League of Cities, National Association of State Procurement Officials, and the National Association of Regulatory Utility Commissioners. Ties would also be established with non-governmental groups, such as the National Forum on Trade Policy and various Centres for International Business Education and Research (CIBERs).

IGPAC’s recent report on the US-Colombia Trade Promotion Agreement continued to highlight a lack of federal support in this policy area. In fact, it suggested current federal-state relations created a “disincentive for state support of trade liberalization.”³² To rectify these problems IGPAC focused on familiar recommendations regarding a wider dissemination of USTR information within state governments, the need for improved trade data and analysis, further study of the comparative costs and benefits of these agreements, and specific sub-federal concerns related to procurement, agriculture, services, industrial goods, manufactured products,

²⁹ Ibid.

³⁰ Kay Wilkie, *Intergovernmental Policy Advisory Committee Memorandum: Recommendations for Improving Federal-State Trade Policy Coordination*, August 5, 2004, 2. Bold print in original.

³¹ Ibid., 3.

³² Intergovernmental Policy Advisory Committee, *The US-Colombia Trade Promotion Agreement*, 9.

and high technology products, such as biotechnology, nanotechnology, photonics.³³ To date, however, the federal government has not adopted any of these recommendations. IGPAC continues to highlight these deficiencies, and call for the establishment of a formal Commission, in every trade report it releases.

Other Forums – SPOC, Congress, SIDO, DEC, the NGA, and CSG

States not included in IGPAC, must seek other forms of federal representation. One mechanism, created by the USTR for NAFTA and WTO implementation purposes, was the State Single Point of Contact (SPOC) system. In each state the governor selects a representative who interacts with the USTR on matters of international trade. In most cases, SPOC's receive information in the form of USTR press releases, Federal Register notices, and "other pertinent information."³⁴ Unfortunately, not all states are enthusiastic about the SPOC process. In a report released by the Forum on Democracy and Trade, it was noted that "USTR's utilization of the SPOC system has been inconsistent." In most cases, this is due to inadequate information. In 2006, for example a document forwarded to SPOC's on the WTO's General Agreement on Trade in Services (GATS) excluded a number of key sectors under discussion, such as brokering of electricity, bulk storage of fuels, and pipeline transportation of fuels. In other cases, SPOC's, IGPAC, and state oversight committees were also given conflicting and incomplete information. As one trade official suggested, the USTR historically contacted states on procurement issues and regularly discussed "set-asides" for licensing requirements, but "now we just get press releases."³⁵ In another example, a senior trade representative refused to serve as the state's SPOC, instead delegating this responsibility to the Governor's Office of Federal Affairs in Washington DC.³⁶ Not surprisingly, the Forum on Democracy and Trade has criticized this "piecemeal approach" to consultation and recommended "major changes in the way USTR communicates with states."³⁷

In some cases, states also pursue matters of trade policy through Congressional delegations. In Maine for example, Congressional staff members were invited to meet with the Maine Citizen Trade Policy Commission and numerous issues were discussed, including procurement and services. Maine's Governor and trade officials also benefit from strong Senate representation in Congress. Senator Olympia Snowe is a member of the Committee on Finance and its Sub-Committee on International Trade and Global Competitiveness, which plays a central role in authorizing presidential Trade Promotion Authority. In New York, Senator Charles Schumer has also prioritized cross-border commercial access, improvements to the Buffalo Peace Bridge, and less stringent restrictions under the Western Hemisphere Travel Initiative (WHTI).³⁸

³³ Ibid., 9-10.

³⁴ Office of the United States Trade Representative, *How USTR Consults with State and Local Governments*, <http://www.ustr.gov/Benefits_of_Trade/States/How_USTR_consults_with_State_Local_Governments.html> (19 March 2008).

³⁵ Personal interview, 11 March 2008.

³⁶ Personal interview, 6 March 2008. Not all states have liaison offices in Washington. These offices also have broad mandates and are not solely focused on trade policy.

³⁷ Forum on Democracy and Trade, *The Maine Citizen Trade Policy Commission: A Model for State Oversight and Communication on International Trade and Investment Issues*, November 29, 2006, 6.

³⁸ Personal interview, 7 March 2008.

Other states have engaged trade policy issues in “non-traditional” forums. One mechanism is State International Development Organizations (SIDO). SIDO is associated with the CSG and consists of 40 member-states. Its mandate is trade promotion and skill development for state officials. In recent years, however, SIDO has increasingly focused on trade policy. The organization, for example, continues to push Washington for improved state level data on services, exports and imports. SIDO also hosts an annual “Washington Forum,” in conjunction with the White House Office of Intergovernmental Affairs, where state representatives meet directly with senior staff from the Department of Commerce (DOC) and USTR. States such as New York and Maine are also encouraging SIDO to expand its agenda to include discussion of relevant trade policy issues.³⁹

Another trade promotion platform is the United States District Export Council, which consists of regional District Export Councils (DECs). Members of DEC’s are typically from the business community but also include representatives from the public sector. As with SIDO, the National DEC Steering Committee recently expanded its mandate and initiated a series of subcommittees on electronic communications, education/outreach, and legislative affairs. The National DEC also created a subcommittee specifically for trade policy. Despite these changes, several state officials questioned the use of DEC’s for trade policy. The Department of Commerce, for example, has used DEC’s to generate support for international agreements, such as the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA). In fact, during a recent DOC conference call with states discussing media strategies for CAFTA ratification, most participants were DEC members.⁴⁰ One state official, however, candidly suggested that her role was trade promotion, and was not comfortable discussing specific issues of trade policy in this forum.⁴¹

As noted earlier, the NGA previously played a central coordinating agency in this policy area. This ended, however, during the second term of the George W. Bush administration. Current officials at NGA explain this absence on the organization’s need for consensus amongst all member-states. In addition, recent state governors have not expressed a great deal of interest in foreign trade policy beyond initiatives such as the WHTI. The recent WTO Antigua and Barbuda internet gambling case, which targeted New York’s attempts to restrict access to offshore internet gambling sites serves as a case in point. This dispute was raised within the NGA but members could only reach a consensus on one narrow issue, namely that the authority to regulate gambling should remain a state responsibility. State support for federal Trade Adjustment Assistance (TAA) legislation, which transfers funding to states to assist displaced workers in the form of tax credits, health coverage, and other benefits, is the only other international trade issue that NGA members have unanimously endorsed.⁴²

Other state and federal officials, however, blame the NGA’s current lack of interest in international trade policy on the Bush government’s proposed tax cuts in 2001. Although there were disagreements between US states related to the potential impact of

³⁹ State International Development Organizations, *Programs and Resources*, <<http://www.sidoamerica.org/programs.htm>> (19 March 2008).

⁴⁰ Personal interview, 14 March 2008.

⁴¹ Personal interview, 11 March 2008.

⁴² Personal interview, 15 April 2008.

these proposals, the White House made it clear to Republican governors that the legislation was a priority. This became an extremely partisan issue within the NGA, especially with the advocacy role played by Jeb Bush, the president's brother and governor of Florida.⁴³ As one Washington official suggested, the "dispute really broke the NGA." Not only were several staff fired but the organization "clearly lacked the willingness" to engage other partisan issues. For the most part, this ensured a secondary role for international trade policy as it was now "too political for the NGA."⁴⁴

The Council of State Governments, on the other hand, has played a more active role on trade policy issues at the federal level. Traditionally, CSG had three-to-four representatives on IGPAC, although one representative recently stepped down and was not replaced by the USTR. In the post-Clinton era it was CSG, and not NGA, that lobbied USTR to expand IGPAC and include non-elected officials. This was in response to the Singapore and Chile bilateral agreements and the new legislation requiring an IGPAC report within 30 days. In fact, due to the small number of IGPAC members with security clearances, and a lack of trade experts beyond the staffing working group level, the reports for Chile and Singapore were written by one of CSG's IGPAC representatives. SIDO, which is a CSG initiative, is also in the process of building state capacity in trade policy. As governors and legislators become increasingly aware of the "political" ramifications of international procurement, investment, and services issues they are increasingly turning to SIDO representatives for answers. CSG is providing training and information to ensure that SIDO members are better equipped to deal with these questions. CSG has also lobbied USTR to expand information-sharing beyond SPOC's.⁴⁵

In addition, CSG has asked the USTR to authorize and support the creation of sub-federal State Trade Representatives (STRs). The motivation for CSG was anti-outsourcing legislation passed by several states. CSG wanted to ensure there was better dialogue between state governments and the USTR on this issue, which had potential ramifications for international GATS obligations. The organization also perceived STRs as another means of developing state capacity in matters of foreign trade policy. Although the USTR was slow to recognize the need for STRs it did eventually support the CSG initiative. The CSG subsequently attempted to facilitate this process by posting proposed state legislation for bills authorizing STR's. To date, however, only Washington State has appointed a legislatively approved STR. In May 1995, Governor Michael Lowry vetoed an early bill (HB 1123) calling for the creation of an Office of Washington State Trade Representative. Governor Gary Locke, however, appointed a "Special State Trade Representative" as part of the executive branch prior to the Seattle WTO ministerial meeting in 1999. In 2001, however, an STR bill was introduced, which was virtually identical to the proposed CSG legislation, but it died in committee. It was re-introduced in 2003 as HB 1173, and although the bill was partially vetoed by Locke, and was subject to a legislative lawsuit, it was fully enacted in October 2003.⁴⁶

⁴³ Personal interview, 6 March 2008.

⁴⁴ Personal interview, 15 April 2008 (Second Source).

⁴⁵ Ibid.

⁴⁶ Washington State Legislature, *Bill Summary: History of Bill HB 1173*, <<http://dlr.leg.wa.gov/bills/summary/default.aspx?year=2003&bill=1173>> (April 22, 2008).

Regardless, there is some evidence to suggest the USTR is now taking state interests more seriously. In Maine, for example, the USTR recently sent a GATS negotiator to discuss services with its Trade Policy Commission. In that meeting the Commission learned the USTR was dropping “necessity tests” language from its services negotiating text with Malaysia and Korea. This was a long-standing concern of numerous states and there is some recognition that sub-federal pressure influenced the federal negotiating position. At the same time, however, there is nothing to suggest that states have become major sources of influence for US trade policy. As one member of the Maine Commission suggested, “the door ... [might be] open, but the answer is always no.”⁴⁷

Sub-Federal Consultation in the United States and Canada: An Evaluation

There are numerous reasons to explain why sub-federal consultation is better developed in Canada compared to the United States. First, the US is historically not a trade dependent country in the global political economy. Therefore, it has the luxury of allowing domestic interests define its international priorities, which are set by the White House, powerful members of Congress, a select group of negotiators within the USTR, and corporate interests with the resources to engage this process. There is evidence, however, to suggest these trends are changing. In recent years, the US has come to rely more on international imports and exports, especially in key sectors, such as energy. This trend also fluctuates between states, with some sub-federal governments, notably Washington State, becoming increasingly trade dependent. At the same time, however, two points continue to limit the relevance of state governments. First, it is estimated that roughly 50 per cent of US imports are from American overseas subsidiaries. Therefore, much of the American trade deficit is actually tied to intra-firm trade, which is highly profitable and lessens US vulnerability. Further, states such as Washington are statistically trade dependent but much of this is due to imports entering the US through coastal ports, and then being dispersed throughout the American market.

There are also basic constitutional realities that reinforce federal dominance in this policy area. Specifically, central control is constitutionally entrenched in Article I (Regulation of Commerce), and Article VI (Supremacy). Supreme Court decisions such as *Missouri v. Holland* (1920), also clarify that states are not able to violate international treaty obligations (in this case migratory bird protection) if these issues are a “national interest.” At the same time, however, states maintain some international legitimacy. The Tenth Amendment, for example, grants powers not explicitly assigned to Washington to states and the “people.” American states are also primarily responsible for regulations and permits related to economic activity. Recent Supreme Court rulings, such as *New York v. United States* (1992), which sided with US states regarding the disposal of radioactive waste, and *United States v. Lopez* (1995), that challenged a federal statute calling for charges related to the possession of a firearm in a school zone, provide further non-trade related examples of state rights.⁴⁸ While no judicial review of state international activity is pending these realities have motivated Washington to consider state concerns in this policy area. Any involvement in the negotiation and

⁴⁷ Forum on Democracy, *The Maine Citizen Trade Policy Commission*, 7.

⁴⁸ Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada* (Vancouver: UBC Press, 2006), 95.

implementation of foreign trade agreements, however, comes from political *de facto* as opposed to judicial *de jure* considerations.⁴⁹

Further, previous international disputes focusing on sub-federal jurisdiction have consistently sided with US states, either on merit, or procedural grounds. This includes the *Methanex* and *Loewen* NAFTA Chapter 11 decisions, and the WTO Antigua and Barbuda New York internet gambling case. In *Methanex* the NAFTA panel dismissed the companies claim that California's emissions legislation banning MTBE was discriminatory. For *Loewen* a Mississippi court's ruling that the funeral home company violated anti-competition laws was also upheld. Although the WTO gambling panel ruled against the United States, sub-federal considerations were dropped from the case due to technical errors in the complainant's argument. Regardless, these decisions allow Washington to claim that existing language in these agreements effectively protect issues of sub-federal jurisdiction and domestic regulation. There is no guarantee, however, that future panel results will be equally favourable. It is no surprise that international trade became an important issue in Canadian federalism following GATT rulings condemning the actions of provincial liquor boards. Specific sectoral disputes, such as softwood lumber, also contributed to an expansion of provincial bureaucratic capacity and improved federal-provincial consultative mechanisms.

These realities also explain the apparent unwillingness of US states to dedicate greater staff and resources to matters of international trade. At the current time, only three US states have full-time staff dedicated solely to matters of trade policy, New York, Pennsylvania, and Washington State. In other states, these issues fall, on an ad hoc basis, to bureaucratic staff with a trade promotion mandate, or in extreme cases simply to officials with the word "international" in their title. Governors at the state level also rarely engage issues of trade policy, beyond their authority to commit states to the procurement provisions of international agreements. To date 37 states are bound to the WTO's General Procurement Agreement (GPA) but only 8 have signed on to the recent Colombia Trade Promotion Agreement. This is due to concerns regarding timelines for bids and reciprocity language that would allow other sub-federal governments access to state procurement markets. The NGA's recent silence on trade policy issues exacerbates this problem. Put simply, if there is no institutional presence at the sub-federal level pushing for state interests it becomes easy for Washington to ignore these issues. Limited political and economic costs invariably result in the status quo.

Another domestic issue is the content of IGPAC reports for specific trade agreements. The purpose of all USTR advisory groups is to provide very specific line-by-line recommendations regarding the proposed language of trade agreements. IGPAC, however, has historically assumed a confrontational position with the USTR, especially in terms of the need for improved consultation. As one Washington official suggested, however, USTR is not interested in IGPAC's "repetitive reflections on structural problems related to broader issues of federalism." If IGPAC wants to have a greater

⁴⁹ Mathew Schaefer, "Federal States in the Broader World," *Canada-United States Law Journal* 27 (2001): 33-45; Curtis A. Bradley, "The Treaty Power and American Federalism, Part II," *Michigan Law Review* 99, no. 1 (October 2000): 98-133; Swaine, "Negotiating Federalism,"; Bradley and Goldsmith, "The Abiding Relevance of Federalism to U.S. Foreign Relations,"; and Keith Boeckelman, "Federal Systems in the Global Economy: Research Issues," *Publius* 26, no. 1 (Winter 1996): 1-10.

impact, he continued, “it should do a better job of speaking USTR’s language.”⁵⁰ It should be pointed out, however, that in recent reports IGPAC has proposed technical suggestions on services, procurement, and investment. These include opposition to proposals in ongoing GATS negotiations calling for “necessity tests” and domestic regulations that are “no more burdensome than necessary.” IGPAC has also called on the USTR to clarify state vulnerability under GATS related to a wide range of sectors, including gambling, higher education, and licensing of professionals. In addition to procurement concerns noted above, IGPAC has also highlighted a need for tighter expropriation language related to investment.

An additional problem is the “budget cycle” of US states. By law, most state governments are required to balance operating budgets on an annual basis. This creates a political environment where partisan funding debates dominate a significant portion of the legislative agenda. During periods of economic uncertainty, states are also reluctant to extend funding beyond core existing services. According to a federal representative, budget realities ensure that states focus on their primary tasks, “to medicate, educate, and incarcerate.” According to the same official, an absence of linkages between state and federal lobbyists further limits the political will of state governments to fund staffing and programs focusing on trade policy. For the most part, the lobby groups interested in international trade are based in Washington and there is limited interaction with state counterparts, even within the same lobbying firms. “Part of this is a ‘cultural’ problem,” he noted, where the “federal lobbyists look down on states as the JV Team.” State lobbyists also typically “push problems up to federal lobbyists to be fixed,” which exacerbates the problem. Ultimately, the only “way [international trade] will become a priority for states is if it’s framed as a political issue related to state job losses.”⁵¹

Despite these differences, the Canadian and US consultative processes share a number of weaknesses. The closed nature of CTrade and IGPAC (as well as other forums of US consultation) raise concerns regarding the legitimacy of these forums. It is questionable, however, that citizens in either country will mobilize to directly challenge this relative lack of transparency. After all, Ottawa’s use of executive federalism, and the American tendency to marginalize state officials in this policy area does not mark a profound departure from previous models of elite accommodation.⁵² In addition, Canadian and American trade representatives cite a need for improved consultation, information-sharing, and in the US case better statistical data. There is also the fact that individual personalities have a significant impact on the success or failure of federal/state-provincial relations. Provinces, for example, have benefited from the long tenures of bureaucratic officials working in this policy area, whereas US states have virtually no full-time representatives dedicated to trade policy. In some cases personal relationships have contributed to examples of increased provincial cooperation. This is obviously more challenging in terms of cooperation between US states.

Finally, there is evidence to suggest that the form and practice of American federalism has contributed to the limited role of states in this policy area. In fact, this study highlights important distinctions between *interstate* and *intrastate* federalism. Federal *interstate* systems, such as Canada, are typically based on parliamentary models

⁵⁰ Personal interview, 15 April 2008 (Second Source).

⁵¹ Ibid.

⁵² Personal interview, 28 August 2002.

where the upper and lower houses operate in “complete separation from one another.” The prime minister on a provincial basis, for example, appoints Canadian Senators, but representation is directly tied to party as opposed to province. Canada’s Senate also has limited parliamentary power, namely an inability to introduce money bills and a historic practice of not defeating bills introduced by the House of Commons. In Canada, central and sub-federal governments are also “directly and exclusively responsible to their respective legislatures ... [which] precludes any notion of legislative cooperation or coordination.”⁵³ Therefore, joint initiatives between Ottawa and the provinces are almost exclusively achieved through a process of intergovernmental relation, or executive federalism.⁵⁴

In contrast, the US is an example of *intrastate* federalism, where central and state governments are required to work together within existing institutions to pass national legislation. Specifically, the American Senate represents state and regional interests in Congress. The US system also has a tradition of weak party linkages between both levels of government and an absence of robust party discipline, which combined with an executive branch that is typically less powerful than the legislature, creates an environment conducive for lobbying by individuals, firms, and state governments. Although Canadian parties also have difficulty transcending federal and provincial politics, durable traditions of *interstate* federalism, which include party discipline and strong political executives tend to promote a less confrontational form of federalism. As Smiley pointed out, “executive federalism” is a key difference between “cooperative” and “coercive” systems of intergovernmental relations. This study supports these conclusions.

In a broader perspective, the “durability” of federalism in response to the increasing intrusiveness of foreign trade regimes provides insight into the long-term viability of the state in the contemporary international system. Numerous critics of agreements such as the NAFTA and WTO, argue that these commitments erode not only the autonomy of the state but also its sovereignty. Specifically, international pressures tied to economic “globalization” are cited as catalysts for transferring control over citizens and borders to vague global corporate entities that will end the era of the modern Westphalian state. In the case of the United States and Canada, however, the form and function of federalism has remained remarkably consistent in this policy area. In Canada, CTrade and its predecessors have provided a useful means of involving the provinces on matters of international trade without drastically destabilizing previous federal practices. The consultative process in the United States is arguably less efficient but it also reflects a long tradition of *intrastate* federal-state relations. Therefore, the institutions of Canadian and American federalism represent institutional stability not accounted for in much of the globalization literature.

Conclusion

This study highlighted the impact of international trade commitments on federal-state/provincial consultative mechanisms. In Canada, Ottawa and the provinces have

⁵³ Thomas O. Hueglin and Alan Fenna, *Comparative Federalism: A Systemic Inquiry* (Peterborough: Broadview Press, 2006), 222.

⁵⁴ Donald V. Smiley and Ronald L. Watts, *Intrastate Federalism*, vol. 39 Research Studies Prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).

adopted the use of a committee system similar to other practices of “executive federalism” in Canadian politics. In contrast, the American IGPAC process, which is arguably less efficient and more confrontational than the CTrade model, includes varied representation from state, county, and local levels of government. These differences are due to a myriad of factors including, a lack of international trade dependence in the US, constitutional traditions and judicial precedent, limited bureaucratic resources, sub-federal budget cycles, IGPAC’s failure to “speak the USTR’s language,” and an absence of successful international trade disputes focusing on state jurisdiction. Similar shortcomings in both countries, however, do exist in terms of a perceived need for better substantive consultation, information-sharing, and disparities in sub-federal representation. Perhaps most importantly, however, this study demonstrates that traditional Canadian and American practices of *interstate* and *intrastate* federalism have influenced intergovernmental relations in matters of trade policy. This resilience of *federalism* challenges critical arguments linking international trade agreements and the “erosion” of state sovereignty.