

# Federalism and International Trade Policy: The Canadian Provinces in Comparative Perspective

Jörg Broschek and Patricia Goff

## IN BRIEF

International trade agreements increasingly affect the jurisdictions of Canadian provinces, and the federal government cannot enforce implementation in those fields. Since the 1980s, the provinces have assumed a more active role in trade negotiations. However, Canada has no constitutional requirement for their approval of international treaties – as do Switzerland’s cantons. Nor are there formalized intergovernmental institutions such as those in Germany. To provide greater predictability, a framework agreement for ongoing federal-provincial-territorial cooperation in trade policy could be developed. Premiers could also contribute more actively if the Council of the Federation was better resourced and enabled to formulate common positions on international trade issues.

## EN BREF

Les accords commerciaux internationaux ont une incidence grandissante sur des domaines de compétence provinciale, et Ottawa n’a pas le pouvoir d’appliquer les dispositions relatives à ces domaines. Depuis les années 1980, les provinces jouent un rôle plus actif dans les négociations commerciales, mais le Canada n’a pas l’obligation constitutionnelle de leur faire approuver les traités internationaux, contrairement à la Suisse vis-à-vis de ses cantons. Il ne possède pas non plus d’institutions intergouvernementales officielles comme il en existe en Allemagne. Pour plus de prévisibilité, Ottawa gagnerait à établir une entente cadre de coopération fédérale-provinciale-territoriale permanente en matière de politique commerciale. Les premiers ministres pourraient aussi renforcer leur contribution si le Conseil de la fédération était mieux doté en ressources et habilité à formuler des positions communes sur les questions de commerce international.

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## INTRODUCTION

Trade agreement negotiations have been front-page news in Canada for some time. The issue has been top of mind for academics, practitioners and citizens as a result of eleventh-hour threats to scuttle ratification of the Canada-EU Comprehensive Economic and Trade Agreement (CETA), the United States' on-again, off-again relationship with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and renegotiation of the North American Free Trade Agreement (NAFTA), which will be replaced (if ratified) by the new United States-Mexico-Canada Agreement (USMCA).<sup>1</sup>

One phenomenon has been particularly noteworthy for those who study trade governance: the changing role of subfederal governments in trade politics.<sup>2</sup> In most federations, including Canada, international trade policy is an exclusive jurisdiction of the federal government. Several recent developments, however, indicate that subfederal governments have the potential to exert significant influence in this arena. This has important implications for the effectiveness and legitimacy of international trade policy.

The Canadian provinces, in a sense, have been pioneers of this trend. Since the negotiation of the Canada-United States Free Trade Agreement (CUSFTA) in the second half of the 1980s, they have assumed a more active role in trade policy. Other subfederal units, such as the Austrian and German Länder, are just in the process of positioning themselves in this regard. The patterns of subfederal engagement vary significantly, even within individual federations.

Variation in subfederal engagement in international trade policy results from a combination of factors. First, the changing nature of trade policy itself is an important driving force.<sup>3</sup> Trade agreements have become more encompassing, including services, investments and other matters. As a result, governments at different levels face conflicting imperatives. Second, especially in Europe, trade policy has elicited an unprecedented level of social mobilization. Free trade opponents have discovered the subfederal level as a new “political space” where they can influence the direction of trade policy. Finally, subfederal units are increasingly drawing on different institutional resources to assert a role in international trade policy.

<sup>1</sup> This work is supported by our SSHRC Partnership Development Grant, IMPoRT: Investigating Multilevel Politics through Research in Trade 890-2016-0118 (2017-2020). Jörg Broschek also acknowledges support from the Canada Research Chair program. We thank Leslie Seidle and Grace Skogstad for their comments and suggestions. The usual disclaimer applies.

<sup>2</sup> M. Tatham, “Shaping but Also Blocking – The Rise of Regional Influence in the EU, from Soft Policy Lobbying to Hard Vetoing,” *Journal of Common Market Studies* 56, no. 3 (2018): 672-86. By subfederal we refer to constituent units within federations – provinces, states, etc. Unlike regions in unitary states or municipalities in (most) federal systems, constituent units have constitutionally entrenched powers. See R. Watts, *Comparing Federal Systems*, 3rd ed. (Montreal and Kingston: McGill-Queen's University Press, 2008), 9.

<sup>3</sup> P. Goff, *Canadian Trade Negotiations in an Era of Deep Integration*, CIGI Papers No. 88 (Waterloo: Centre for International Governance Innovation, 2016), 5-7.

These observations point to two key questions:

- Why have some subfederal actors recently become more prominent in trade policy and trade agreement negotiations?
- Where subfederal actors have taken on a more active role, what explains the variation in *how* they intervene in trade policy debates?

In order to answer these questions, we focus on differences in federal institutional configurations to understand if and how they influence the manner and degree to which subnational actors intervene in debates about trade. We do not presume that institutional features of federations account for all of the variation in subfederal activity in trade. Nevertheless, as an early step in an unfolding research program aimed at probing subfederal activity in trade policy and agreement negotiation, we take this as a fruitful starting point.

We have selected five cases to examine how institutional variation affects the role of subfederal engagement: Canada, Belgium, Switzerland, Austria and Germany. Although the Canadian provinces, like the Swiss cantons and the Belgian regions and communities, have a comparatively strong institutional foundation that allows them to shape trade policy development in different ways, the Austrian and German Länder represent the other end of the continuum.

The first three sections of this paper outline the most relevant defining features of federal systems, namely the system of intergovernmental relations (IGRs), the allocation of competencies and the second chamber. We review the types of activities that subfederal units have undertaken with respect to trade debates and map them onto federal attributes. We then examine how these three institutional features enable or constrain subfederal actors in trade debates in the five country cases. The fourth and concluding section discusses some implications for the practice of provincial and territorial participation in trade policy in Canada.

## INSTITUTIONAL VARIATION IN FEDERAL SYSTEMS

In most federal states, the federal government has exclusive jurisdiction over trade policy. Despite this, subfederal units such as the Canadian provinces, Swiss cantons and German Länder have become involved in external trade politics.

IGRs encompass how governmental actors in federal systems interact, both vertically (between federal and subfederal actors) and horizontally (between subfederal actors). IGRs differ considerably not only among federations but also across policy sectors within individual federations.<sup>4</sup>

<sup>4</sup> For Canada, see R. Schertzer, A. McDougall, and G. Skogstad, *Collaboration and Unilateral Action: Recent Intergovernmental Relations in Canada*, IRPP Study 62 (Montreal: Institute for Research on Public Policy, 2016). Comparative: J. Poirier, C. Saunders and J. Kincaid, *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (Don Mills: Oxford University Press, 2015).

During the negotiations that led to the CUSFTA, the federal government consulted extensively with provincial governments for the first time. These efforts led to the creation of a more institutionalized intergovernmental framework for federal-provincial consultation on trade-related matters. This included the establishment of the Continuing Committee for Trade Negotiations, which was later replaced by the Federal-Provincial-Territorial Committee on Trade (C-Trade).<sup>5</sup>

Since the negotiation of the CUSFTA in the late 1980s, provinces have become involved in trade policy to varying degrees, a pattern described by Christopher Kukucha as “evolving incremental intergovernmentalism.”<sup>6</sup> CETA had an exceptional level of provincial engagement: direct participation in the negotiation process itself. However, this has not been replicated in subsequent trade negotiations. Teams from the larger provinces were on site at some CPTPP talks, getting briefed by their federal colleagues. Similarly, the larger provinces have sent teams to Washington, DC, to meet with their federal colleagues during NAFTA renegotiations. The lead negotiator for CETA was also the lead for the NAFTA renegotiations, which, according to Christopher Kukucha, has given rise to “ties of trust.”<sup>7</sup> Seven years of work on the Canada-EU negotiations arguably created an understanding between the provinces and federal negotiators about their mutual interests and objectives that can now carry over to talks with the US. Despite the consultation and provincial participation in negotiating the CUSFTA and CETA, however, Canada’s IGR system still exhibits a rather low degree of institutionalization – in trade policy as in many other sectors. For example, the C-Trade committee system primarily serves as a forum for information sharing rather than cooperation.

Moreover, the effectiveness of intergovernmental cooperation in general is highly dependent on the approach adopted by the government of the day. In order to ensure that Canada “speaks with one voice” during NAFTA negotiations, the federal government even sent talking points to its provincial and territorial counterparts.<sup>8</sup> The IGR system, therefore, offers an important avenue for subfederal units’ participation. But their relative strength or weakness also depends on at least two additional institutional resources: the allocation of competencies and the second chamber.

Subfederal units derive their authority from constitutionally assigned competencies. Generally speaking, these are either exclusive or shared. In the former, the main goal is to afford the federal and subfederal levels as much autonomy and

<sup>5</sup> D. Brown, “The Evolving Role of the Provinces in Canadian Trade Policy,” in *Canadian Federalism: Meeting Global Economic Challenges?*, ed. D. Brown and M. Smith (Kingston: Institute of Intergovernmental Relations, 1991); C. Kukucha, *The Provinces and Canadian Foreign Trade Policy* (Vancouver: UBC Press, 2008); G. Skogstad, “International Trade Policy and the Evolution of Canadian Federalism,” in *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 3rd ed., ed. H. Bakvis and G. Skogstad (Don Mills: Oxford University Press, 2012); P. Fafard and P. Leblond, “Canadian Federalism and International Trade: A Small Step While Waiting for the Giant Leap,” in *Canada: The State of the Federation 2011: The Changing Federal Environment*, ed. N. Verelli (Montreal and Kingston: McGill-Queen’s University Press, 2014), 153–68.

<sup>6</sup> C. Kukucha, *Provincial/Territorial Governments and the Negotiation of International Trade Agreements*, IRPP Insight 10 (Montreal: Institute for Research on Public Policy, 2016), 4.

<sup>7</sup> Kukucha, *Provincial/Territorial Governments*, 13.

<sup>8</sup> J. Smith, “Ottawa Wanted All of Canada Speaking with One Voice on NAFTA: Emails,” CBC News, May 4, 2018. Accessed May 5, 2018. <http://www.cbc.ca/news/politics/nafta-emails-verheul-1.4648786>.

**Table 1. Institutional characteristics: An overview**

Country	Intergovernmental relations (IGRs)	Allocation of competencies	Second chamber
Canada	Overall low degree of institutionalization, despite differences across policy domains Frequency of meetings often variable Horizontal peak institution: Council of the Federation (since 2003)	Primarily exclusive allocation between federal and provincial levels	Senate, de facto weak
Belgium	Low degree of institutionalization, often ad hoc No horizontal peak institution	Primarily exclusive allocation among federal level, regions and linguistic communities	Senate, comparatively strong
Switzerland	Extensive, differentiated (policy domains) and institutionalized IGRs (vertical and horizontal) Horizontal peak institution: Conference of Cantonal Governments (KdK, since 1993)	Mix of exclusive jurisdictions for federal level and cantons, and shared jurisdictions Cantons often implement federal legislation	Ständerat (senate model), strong
Austria	Highly differentiated (policy domains) and institutionalized IGRs (vertical and horizontal) Horizontal peak institution: Conference of Land Governors (LHK, since the 1960s)	Most jurisdictions exclusively federal, few exclusive jurisdictions for Länder, few shared jurisdictions Länder often implement federal legislation	Bundesrat, de facto weak (neither council nor senate model)
Germany	Highly differentiated (policy domains) and institutionalized IGRs Horizontal peak institution: Conference of Minister-Presidents (MPK, since 1954), horizontal but has regular meetings with federal chancellor	Länder implement the bulk of federal legislation and have a rather limited number of exclusive jurisdictions	Bundesrat (council model), strong

independence from each other as possible through the concentration of power at each level. Shared competencies create a higher – and intended – degree of institutional interdependence through power-sharing.<sup>9</sup>

<sup>9</sup> Interdependence in federal systems is a matter of degree. Even if competencies are designed primarily as exclusive jurisdictions, policy interdependencies result from, for example, difficulties in determining the boundaries of competencies in practice or negative externalities. In federations such as Germany, however, interdependencies result from institutional entanglement. Consequently, the federal government and subfederal units are forced to collaborate (with no exit option available). In federations like Canada, actors



Canada and Germany illustrate the two differing approaches. When Canada was founded, the *Constitution Act, 1867* assigned most jurisdictions exclusively to either the federal or provincial governments. It provided for only two areas of shared jurisdiction: agriculture and immigration.<sup>10</sup> Despite this, the two orders of government have become interdependent in a number of sectors (e.g., environmental protection). In contrast, under the German constitution, most jurisdictions are de facto shared between the federal level and the Länder. In federations that are organized around exclusive competencies, IGRs tend to display a comparatively low degree of institutionalization, while those with many shared jurisdictions usually feature greater IGR institutionalization.

Federal second chambers enable regional representatives to participate in federal legislation. The literature on comparative federalism distinguishes between two distinct models of second chambers. In the senate model, senators represent the population of the constituent units (states, provinces, etc.). Senators may be elected – either directly by the citizens in constituent units or indirectly by constituent unit legislatures – or appointed. In the council model, by contrast, subfederal executives themselves, or delegations instructed by the executive, represent territorial interests in the federal second chamber. The council model therefore allows constituent units to participate directly in federal decision-making. In practice, senators are more inclined to vote along party lines rather than representing regional interests.<sup>11</sup>

To varying degrees, IGRs, constitutional competencies and the second chamber each afford subfederal units institutional resources to influence trade policy at various stages of the policy process. Table 1 provides an overview of the core institutional features of the five federations examined in this study.

## INTERGOVERNMENTAL RELATIONS

Highly institutionalized IGRs facilitate coordination and cooperation among governments in federal systems and can reduce the risk of unilateral behaviour. IGRs also promote the establishment of norms and principles that guide interactions between subfederal and federal actors. Ideally, this advances shared understandings and responsibilities.<sup>12</sup> In contrast, a low degree of IGR institutionalization can lead to a lack of coordination or even encourage harmful unilateral behaviour. Regarding the role of subfederal units in trade policy, IGRs are particularly important as they offer arenas for consultation and cooperation between the federal and subfederal levels (vertically), as well as among subfederal executives through horizontal peak institutions composed of the heads of government (or the equivalent) – as, for example, the Council of the Federation in Canada and the National Governors Association in the United States.

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have more options available: either they can try to address interdependencies through cooperation or they can revert to unilateral strategies.

<sup>10</sup> On Canadian agriculture policy and international trade, see G. Skogstad, *Internationalization and Canadian Agriculture* (Toronto: University of Toronto Press, 2008).

<sup>11</sup> T. Hueglin and A. Fenna, *Comparative Federalism: A Systematic Inquiry*, 2nd ed. (Toronto: University of Toronto Press, 2015), 55; R. Watts, *Comparing Federal Systems*, 151.

<sup>12</sup> Schertzer, McDougall, and Skogstad, *Collaboration and Unilateral Action*, 6.



Important indicators of the relative degree of IGR institutionalization include regular meetings or conferences among heads of government (vertical and/or horizontal); sectoral conferences of ministers and/or high-level bureaucrats (vertical and/or horizontal); and well-staffed permanent secretariats that provide administrative support. If IGRs are highly institutionalized, intergovernmental agreements are often binding and sometimes even have legal force, rather than just taking the form of communiqués.

Among our cases, Germany's federal system displays the highest degree of IGR institutionalization. IGR structures originated in the nineteenth century and were reinstitutionalized after the Second World War.<sup>13</sup> While the exact number of IGR bodies fluctuates, a comprehensive survey commissioned by the legislature of North Rhine-Westphalia in the 1990s identified around 330 vertical and 140 horizontal bodies active on different executive and administrative levels.<sup>14</sup>

Two important factors have contributed to the emergence and consolidation of this dense web of IGR institutions. First, as in Austria and Switzerland, subfederal units are responsible for implementing federal laws. This "functional" division of labour between the two levels of government inevitably requires closer collaboration than in "dual" federations where each tier assumes legislative, executive and administrative responsibilities for a particular subject matter.

In Germany, the Conference of Minister Presidents (MPK) is an important and long-standing IGR body that facilitates horizontal coordination and cooperation on a range of political issues. Although its main purpose is horizontal exchange, the MPK is formally linked to the Federal Chancellery. Twice a year, MPK meetings are followed immediately by a meeting with the federal chancellor. There are also numerous permanent sectoral bodies at the ministerial and administrative levels. Among these, the Conference of Ministers for Education displays the highest degree of formalization, including a general secretary, commissions and departments, as well as roughly 250 employees.<sup>15</sup>

This dense web of IGR bodies has enabled the German Länder to address the implications of recent trade agreements, most notably the Transatlantic Trade and Investment Partnership (TTIP) and CETA. Through the MPK, they prepared joint statements and resolutions that were later adopted by the Bundesrat (see below). Länder also raised more specific concerns through the Conference of Ministers for European Affairs, the Conference of Ministers for the Environment,<sup>16</sup> the Conference of Ministers for Economic Affairs<sup>17</sup> and the Conference of Ministers for Consumer Protection.<sup>18</sup>

<sup>13</sup> G. Lehmbruch, *Parteienwettbewerb im Bundesstaat*, 3rd ed. (Opladen: Westdeutscher Verlag, 2000), chap. 3.

<sup>14</sup> R. Lhotta and J. von Blumenthal, "Intergovernmental Relations in the Federal Republic of Germany: Complex Co-operation and Party Politics," in *Intergovernmental Relations in Federal Systems. Comparative Structures and Dynamics*, ed. J. Poirier, C. Saunders and J. Kincaid (Don Mills: Oxford University Press, 2015), 212.

<sup>15</sup> S. Kropp, *Kooperativer Föderalismus und Politikverflechtung* (Wiesbaden: VS Springer, 2010), 137.

<sup>16</sup> Umweltministerkonferenz, 82. Umweltministerkonferenz. *Ergebnisprotokoll*, May 9, 2014, Konstanz.

<sup>17</sup> Wirtschaftsministerkonferenz, *Beschlussammlung der Wirtschaftsministerkonferenz am 4./5. Juni 2014 in Berlin*, Berlin.

<sup>18</sup> Verbraucherschutzministerkonferenz, *Ergebnisprotokoll der 10. Verbraucherschutzministerkonferenz am 16. Mai 2014 in Warnemünde*, Schwerin.

IGRs in Austria and Switzerland are similar to the German case. Austrian Land governors, for example, have cultivated horizontal cooperation through the Conference of Land Governors (LHK). Although resolutions passed by the LHK have no binding force, they can have a political impact. The LHK has become particularly important in Austria because IGRs are more hierarchical than in Germany and Switzerland.<sup>19</sup> Regarding trade policy, the LHK gave Land governors an opportunity to discuss their concerns and formulate a common position vis-à-vis the federal government, focusing first on TTIP in 2014, then on CETA in 2016.<sup>20</sup>

In Switzerland, since the 1990s cantonal governments have intensified and formalized horizontal cooperation. The peak horizontal body, the Conference of Cantonal Governments (KdK), was founded in 1994. Its main purpose is to coordinate the interests of the 26 cantons to better position themselves in relation to the federal level. The KdK is a permanent body supported by a secretariat (currently 29 employees), a general secretary and various working groups, committees and delegations. It cooperates closely with the 13 sectoral conferences of cantonal ministers as well as with other intercantonal conferences.<sup>21</sup> Through the KdK, the cantons issue joint opinions on individual trade agreements and occasionally recommend modifications to the federal government's negotiating mandate.

Since 2013, the German and Austrian Länder have exerted greater influence in debates about trade, especially CETA and TTIP. Although they were not at the negotiating table, they passed resolutions and published a series of reports. Few, if any, policy domains prominent in recent trade negotiations are exclusive jurisdictions of the Länder in Germany or Austria. Therefore, they lack the leverage that Canadian provinces and territories have to influence the process by implicitly (or explicitly) threatening not to implement certain provisions of trade agreements. The Länder, therefore, rely significantly on joint statements in which they put pressure on the federal government by speaking with a single voice.

IGRs in Austria and Germany help demonstrate *how* the Länder express their views regarding trade. But they are of limited usefulness in helping us to understand *why* they form these views in the first place. In both countries, two important concerns have motivated their recent activities.

First, the German and Austrian Länder clearly perceive the emergence of new trade agreements as yet another instance of "Europeanization," meaning the ongoing creation and consolidation of supranational governance structures that may induce domestic institutional and policy change. Subfederal units' insistence that their right to regulate must not be constrained through new trade agreements primarily reflects these concerns.

Second, trade policy has sparked an unforeseen level of social mobilization in Europe since about 2013, peaking in 2015 and 2016. For example, Kolko e.V., a German

<sup>19</sup> P. Bußjäger, "Föderalismus durch Macht im Schatten? – Österreich und die Landeshauptmännerkonferenz," in *Jahrbuch des Föderalismus 2003*, ed. Europäisches Zentrum für Föderalismus-Forschung Tübingen (Baden-Baden: Nomos, 2003), 79-99; F. Karlhofer and G. Pallaver, "Strength through Weakness: State Executive Power and Federal Reform in Austria," *Swiss Political Science Review* 19, no. 1 (2013): 41-59.

<sup>20</sup> Opinion VSt-7437/20, May 5, 2014; Resolution VSt-7437/82, November 18, 2014; Resolution VSt-7437/229, May 11, 2016.

<sup>21</sup> Detailed information on the KdK is available in French at <http://www.kdk.ch/fr/>. Accessed May 9, 2018.

organization advocating for human rights in Colombia, organized a broad alliance of humanitarian, environmental and church-based organizations against the EU agreement with Colombia and Peru. In an open letter to the Bundesrat dated April 5, 2013, which was signed by 45 organizations, the signatories called upon the Land governments to reject the ratification of the EU-Colombia/Peru Free Trade Agreement.<sup>22</sup> On October 10, 2015, one of the largest demonstrations in German history took place in Berlin, with at least 150,000 people protesting against TTIP and CETA. Subfederal activism, therefore, also results from growing pressure by civil society organizations and political parties that call upon Land governments to oppose new trade agreements.

Belgium and, to a lesser degree, Canada represent the other end of the IGR spectrum. Federations that allocate most competencies exclusively to one governmental tier or another often lack a high degree of institutionalized intergovernmental cooperation. Consequently, IGRs are less formalized, and the frequency of meetings is more contingent on the willingness of governments to meet rather than institutionalized routines.

The lack of formalized IGR structures in Canada, especially at the top executive level, is well known. Regarding vertical cooperation and exchange, the frequency of First Ministers' Conferences depends on the prime minister's preference.<sup>23</sup> Although horizontal cooperation through the Council of the Federation takes place within a more institutionalized framework than the former annual premiers' conferences, the Council's institutionalization still must be considered low comparatively speaking, because the organization has shown limited capacity to encourage consistent cooperation among provincial and territorial premiers.<sup>24</sup>

On trade politics, as Kukucha has argued, subfederal involvement in Canada remains ad hoc and uneven, often contingent on the willingness of the federal government to include the provinces. From a comparative viewpoint, this is hardly surprising. The overall informality of Canada's IGR system makes it difficult to establish more permanent, institutionalized interactions between and among governments in policy areas such as trade.<sup>25</sup>

As an emerging federation, Belgium is still developing stronger IGR relations to better cope with interdependencies. The core institution within Belgium's system of IGR is the Deliberation Committee, which comprises the federal prime minister, six federal ministers and six ministers who represent the regions and communities. The committee

<sup>22</sup> Kolko e.V., *Offener Brief an die Mitglieder des Deutschen Bundesrates*, April 5, 2013, Berlin. Accessed December 22, 2017. [https://kolko.net/downloads/Offener\\_Brief\\_an\\_die\\_Mitglieder\\_des\\_Deutschen\\_Bundesrats.pdf](https://kolko.net/downloads/Offener_Brief_an_die_Mitglieder_des_Deutschen_Bundesrats.pdf). Although the bill passed by a very slim margin, the government of North-Rhine Westphalia, led by a coalition of the social democratic SPD and the Green Party, pressed the Bundesrat to draft an accompanying resolution. The resolution consists of 14 points detailing the Bundesrat's general concerns about the proliferation of new bilateral free trade agreements in general, and the EU-Colombia/Peru Free Trade Agreement in particular. See *Bundesrat Drucksache* 2013, 259/13.

<sup>23</sup> C. Dunn, *Harper without Jeers, Trudeau without Cheers: Assessing 10 Years of Intergovernmental Relations*, IRPP Insight 8 (Montreal: Institute for Research on Public Policy, 2016).

<sup>24</sup> J. Wesley, *Coordinating Federalism: Intergovernmental Agenda-Setting in Canada and the United States*, IRPP Insight 21 (Montreal: Institute for Research on Public Policy, 2018); J. Simmons, "Canadian Multilateral Intergovernmental Institutions and the Limits of Institutional Innovation," *Regional and Federal Studies* 27, no. 5 (2017): 573-96.

<sup>25</sup> See also Kukucha, *Provincial/Territorial Governments*, 12; S. Paquin, "Fédéralisme et négociations commerciales au Canada: l'ALE, l'AECG et le PTP comparés," *Études internationales* 48, no. 3-4 (2017): 347-69.

is convened upon request; if the chair (the federal prime minister) or a regional minister calls a meeting, a compromise has to be found within 60 days.<sup>26</sup> In addition, interministerial conferences offer a framework for more specialized, high-level deliberations within certain policy sectors. All Belgian governments also conclude so-called cooperation agreements on certain matters that require joint action. This IGR instrument has become particularly relevant for coordinating European and international activities among the various levels of government, including trade policy.<sup>27</sup>

The refusal of the Walloon regional parliament (along with the Brussels regional parliament and the French community) to approve CETA in October 2016 exemplifies this problem. Belgian federalism is still in the making. Regions and communities have assumed responsibilities in various policy domains over the last decades, including trade policy, but parallel efforts to establish more institutionalized frameworks for intergovernmental cooperation have lagged.<sup>28</sup> The former minister-president of Wallonia, Paul Magette, pointed to the lack of intergovernmental coordination when he justified the regional parliament's decision in his famous Namur speech on October 14, 2016:

*The first Belgian coordination meeting took place on July 6, 2016. Between October and July – 10 months – nothing happened. And then all of a sudden in July 2016, they started to say: these Wallonians seem determined, these Wallo-nians seem to know what they want, and they seem to be in it until the end, so we're going to have to start talking with them.*<sup>29</sup>

Had Belgium possessed a more institutionalized IGR system, Wallonia might not have threatened to veto the ratification of CETA. Two weeks of cliff-hanger negotiations in October 2016 in the Belgian federation, and among Belgium, the European Union and Canada, could have been prevented.

To summarize, highly institutionalized IGRs do not empower subfederal units in the same way as do direct or indirect trade-related competencies. But the Länder in Germany and Austria have been able to use the intergovernmental arena to compensate, to some extent, for their lack of competencies, especially through horizontal mechanisms like the MPK or LHK. In Switzerland, the high degree of IGR institutionalization complements and facilitates the cantons' already strong position in international trade.

The low degree of IGR institutionalization in Belgium and Canada can be both a curse and a blessing. On the one hand, it makes intergovernmental interaction less predictable for both sides, and opens the door to unilateralism. On the other hand, loosely organized IGRs offer more flexibility. Regarding the Canadian case, it is noteworthy that the provinces and territories have had more enduring IGR mechanisms available

<sup>26</sup> W. Swenden and M.T. Jans, "Will It Stay or Will It Go?," *West European Politics* 29, no. 5 (2006): 880-86.

<sup>27</sup> K. Van den Brande, *Intergovernmental Cooperation in Belgium: The Case of International Sustainable Development Policy*, Working Paper 24 (Leuven: Institute for International and European Policy, 2011).

<sup>28</sup> Swenden and Jans, "Will It Stay or Will It Go?," 887.

<sup>29</sup> P. Magette, Speech at Walloon Regional Parliament, October 14, 2016, translated English version at <https://www.opendemocracy.net/can-europe-make-it/paul-magette/huge-victory-for-belgiums-ceta-opponents-paul-magettes-speech>. Accessed March 28, 2018.

to them, including the C-Trade committee, along with less formalized channels for communicating their interests to federal negotiating teams. This pathway reveals a trend toward more institutionalized IGRs in trade policy.

A high degree of IGR institutionalization can also become a straitjacket for subfederal units that want to pursue their own trade strategies. In this respect, the comparatively low level of IGR institutionalization in Canada has arguably allowed some of the independent initiatives the provinces have taken to protect their economic interests. For example, in recent years premiers and their teams have travelled to the United States to meet their state-level counterparts. In February 2018, the Ontario premier at the time, Kathleen Wynne, stated that, over the course of NAFTA renegotiations, she had met with 33 governors, as well as with senators and business people.<sup>30</sup> Canadian premiers met with American and Mexican governors to discuss trade issues in Arizona on May 6, 2018.<sup>31</sup> Perhaps even more importantly, Canadian premiers can take legislative action. While Foreign Affairs Minister Chrystia Freeland was seeking to rescue NAFTA in various rounds of negotiations, the Liberal government of Ontario prepared a response to New York and Texas's protectionist "Buy American" provisions by introducing "enabling legislation" in February 2018 – new policy instruments facilitating the adoption of provincial retaliatory measures.<sup>32</sup>

## ALLOCATION OF COMPETENCIES

Subfederal units can have constitutionally entrenched competencies that are directly or indirectly related to trade policy. Although federal constitutions assign subfederal units a large number of exclusive jurisdictions, international trade agreement provisions – and especially those included in new "deep" trade agreements – will affect their competencies. The more decentralized a federation and the more encompassing a trade agreement, the more likely it is that subfederal units will be significantly affected. Almost inevitably, therefore, federal governments in decentralized federations such as Canada, Belgium and Switzerland are compelled to cooperate with subfederal units to formulate trade policy, even if the formal authority for external trade policy lies exclusively with the federal level.

In Canada, a number of rulings by the Judicial Committee of the Privy Council (JCPC) opened the door, over time, to provincial involvement in trade policy. The JCPC limited the scope of section 132 and section 91 (the peace, order and good government clause) of the *Constitution Act, 1867* in the Labour Conventions Reference in 1937. The JCPC also expanded provincial jurisdictions by giving them a wide interpretation, most notably through the property and civil rights clause of the *Constitution Act, 1867* (sec. 92 (13)). These rulings affected provincial involvement in international trade

<sup>30</sup> "Ontario Premier: USTR Aware of Subnational Engagement, Recognizes Common Cause on NAFTA," in *Inside U.S. Trade Online*, February 26, 2018, 3.

<sup>31</sup> Council of the Federation, *Premiers Conclude Successful Summit in Arizona*, press release, Ottawa. Accessed May 7, 2018. [http://www.canadaspremiers.ca/wp-content/uploads/2018/05/COF\\_Summit\\_Wrap-up\\_News\\_Release-Final.pdf](http://www.canadaspremiers.ca/wp-content/uploads/2018/05/COF_Summit_Wrap-up_News_Release-Final.pdf).

<sup>32</sup> *Inside U.S. Trade*, February 26, 2018; see also D. Reevely, "Ontario Will Retaliate against 'Buy American' Rules," *Ottawa Citizen*, February 7, 2018.

issues. Trade agreements increasingly touched upon provincial jurisdictions. This gave provincial governments leverage as the federal government could not enforce sub-federal compliance at the implementation stage.<sup>33</sup>

Unlike in Canada, subfederal units in Belgium and Switzerland have certain competencies directly related to international trade policy. In Belgium, federalism became institutionalized in 1993 after a series of devolution reforms since the 1970s. The Belgian federation has two subfederal tiers: regions and communities. The powers of the regions have a territorial basis, such as agriculture or environmental policy. In contrast, the communities exercise powers related to persons, such as education or health.<sup>34</sup> The constitution directly assigns the regions and communities the power to conduct foreign affairs for those matters that fall within their jurisdiction. This often includes matters related to trade policy.<sup>35</sup>

Even when federal systems feature primarily shared competencies, or a mix of exclusive and shared competencies, subfederal units may under certain circumstances become involved in trade politics. Shared competencies take at least two different forms. In Switzerland, and to some extent in Canada and Belgium, the federal and subfederal levels are both active within specific policy domains. In practice, institutional ambiguity and interdependencies often make it impossible to tailor “watertight compartments,” and thus both levels assume certain responsibilities in policy areas that actually “belong” to one governmental tier or the other.

In Switzerland, Austria and Germany, shared competencies not only are more prevalent but also have additional implications. In all three federations, an important function of subfederal entities is the implementation of federal legislation. The Swiss cantons and the German and Austrian Länder have different degrees of freedom when it comes to the implementation of federal law. Although the federal government in Austria has the authority to keep the Länder on a tight leash for the most part, the German Länder and especially the Swiss cantons enjoy considerable autonomy. This may force the federal level to include subfederal units in trade policy.

A third form of subfederal trade-related competencies can be found in the Belgian and Swiss constitutions. In both cases, the constitution includes a veto right in foreign affairs. The Belgian constitution stipulates that all three governmental levels are equal, excluding the possibility that laws and decisions can be overruled by another level. In practice, this means that all international treaties that affect jurisdictions at more than one level must be approved unanimously by all the territorial units involved.<sup>36</sup> It was this constitutional provision that allowed the two regions and one community to prevent the federal government from ratifying CETA until an agreement was reached on October 28, 2016.

<sup>33</sup> Provided the federal government wants to avoid penalties resulting from provincial noncompliance.

<sup>34</sup> Swenden and Jans, “Will It Stay or Will It Go?”

<sup>35</sup> J. Beyers and P. Bursens, “The European Rescue of the Federal State: How Europeanisation Shapes the Belgian State,” *West European Politics* 29, no. 5 (2006): 1062.

<sup>36</sup> P. Bursens, “Belgian Federalism and CETA,” Centre on Constitutional Change, University of Edinburgh, October 29, 2016. Accessed May 7, 2018. <https://www.centreonconstitutionalchange.ac.uk/blog/belgian-federalism-and-ceta>.



Article 54 (3) of the Swiss constitution stipulates a general requirement to take the interests of cantons into account in the conduct of foreign affairs. In combination with Article 55 (1-3), this creates a strong institutional incentive for power-sharing in foreign policy, including international trade. The cantons, in effect, have the right to participate in preparing the negotiation mandate or, in the event the federal level is unresponsive, to evoke the so-called *Standesinitiative* (cantonal initiative) to request that certain trade policy provisions be included in ongoing trade negotiations.<sup>37</sup>

This analysis suggests that the way federal constitutions assign competencies between governmental tiers affects how subfederal units engage in international trade policy. The strongest institutional foundations are in Switzerland and Belgium. Both constitutions endow subfederal units with the right to participate directly in trade policy. In addition, and like Canada, they hold considerable power in trade politics because they have exclusive competencies in areas that may be affected by trade agreements. The Austrian and German Länder lack such competencies. However, as discussed below, the German Länder's constitutionally protected autonomy in the implementation of federal law may be affected by new trade agreements, which in turn gives them some leverage in the ratification process.

## SECOND CHAMBERS

A third dimension of institutional variance among federal systems is the second chamber. Second chambers offer regional interests an opportunity to participate in federal trade policy-making in the formulation and/or ratification phase. However, profound differences in their composition and strength affect their role as an institutional channel for representing regional interests in trade politics. More often than not, the second chamber plays a limited role in subfederal participation in trade politics.

Several federations follow the senate model, in which regional interests are promoted at the federal level by senators who represent populations in constituent units. Accordingly, subfederal executives themselves have no formal role in federal trade policy-making. Although regional concerns over trade agreements may find their way into the legislative process through committees, in practice they do not appear to play a significant role, even if a second chamber has strong constitutional powers, like the Belgian Senate and the Swiss Ständerat. In most federations, the senate principle has encouraged voting behaviour along partisan lines. Even when senators conceive of their chamber as a site for "sober second thought," they do not usually scrutinize legislation primarily in terms of regional concerns.

This lack of responsiveness to regional concerns is evident in the 2017 report of the Standing Senate Committee on Foreign Affairs and International Trade of the Canadian Senate.

<sup>37</sup> A. Ziegler, "Federalism in Times of Increased Integration: The Participation of Cantons in Swiss Trade Policy," paper prepared for conference "The Multilevel Politics of Trade in North America and Europe: Configurations, Patterns, Dynamics," Balsillie School of International Affairs/Wilfrid Laurier University, Waterloo, Ontario, October 14-15, 2016, 6-7.



The report barely addresses the regional dimension of Canadian trade policy. Provinces and territories are mentioned only in passing – for example, in the recommendation to create a task force including business organizations and provincial and territorial governments to consult with stakeholders about the implementation of free trade agreements.<sup>38</sup>

Although not immune from partisan dynamics, the council model promises to better represent regional interests in federal decision-making because governments of the constituent units directly represent territorial interests. The German Bundesrat is typical of this model of a second chamber in a federal system (one that is quite rare).<sup>39</sup> Accordingly, Land governments themselves – and not elected or appointed senators – participate directly in making federal legislation.

The Bundesrat serves not only as a second chamber but also as an extension of the IGR system. The heads of Land governments, the minister-presidents, usually convene in the Bundesrat Plenum. In addition, the Bundesrat has 16 permanent committees where Land ministers and high-level bureaucrats come together to deliberate on issues within their respective policy domains. Coordinating activities in the MPK (or the sectoral conferences of Land ministers) are the next step, as Land governments negotiate their votes on federal bills in the Bundesrat.

The Bundesrat is also a forum for mandatory consultation with the federal government. This has allowed the Länder to receive information on the progress of trade negotiations and to respond in opinions and resolutions, most notably on the EU-Colombia/Peru Free Trade Agreement in 2013, TTIP in 2013 and 2014, and CETA in 2015.<sup>40</sup> More importantly, the Bundesrat may also wield authority over the ratification of trade policy agreements. Whether the Länder can potentially reject the ratification of a trade agreement depends on how the federal government introduces its ratification bill. The German constitution distinguishes between two types of bills: suspensive bills and veto bills. Only the latter afford the Länder an opportunity to reject a trade agreement ratification bill. The question of whether or not the federal government is required to introduce such ratification bills as veto bills is hotly debated by German legal scholars.

Two recent reports published by the German Bundestag's Research Services clarify the general procedural requirements in pending and future trade agreements.<sup>41</sup> Accordingly, the Länder's role in the ratification of trade agreements needs to be determined for each agreement individually. An obligation for the federal government to introduce a veto bill is subject to two conditions. First, a trade agreement must include provisions related to member state competencies. Second, if this is the case, it

<sup>38</sup> Senate of Canada, Standing Senate Committee on Foreign Affairs and International Trade, *Free Trade Agreements: A Tool for Economic Prosperity* (Ottawa: Senate of Canada, 2017), ix.

<sup>39</sup> Hueglin and Fenna, *Comparative Federalism*, 55.

<sup>40</sup> *Bundesrat Drucksache* 2013, 259/13; *Bundesrat Drucksache* 2013, 464/13; *Bundesrat Drucksache* 2014, 295/14; *Bundesrat Drucksache* 2015, 500/1/15.

<sup>41</sup> Deutscher Bundestag, *Form der Bundesratsbeteiligung bei der Ratifikation des CETA* (Berlin: Wissenschaftliche Dienste, 2016); Deutscher Bundestag, *Bundesratsbeteiligung bei der Ratifikation des CETA und verfassungsgerichtlicher Rechtsschutz* (Berlin: Wissenschaftliche Dienste, 2017).

must be established that one of these provisions triggers an approval requirement in accordance with the constitution.

It is important to note that the constitution does not necessarily stipulate that a ratification bill must take the form of a veto bill if the Länder's legislative competencies are affected. In practice, veto bills are often necessary because a legislative proposal affects the Länder's administrative competencies. Nevertheless, the prospect of veto power helps explain why the German Länder have chosen to make the collective statements they have made, via the highly institutionalized IGR system. The resolutions and published statements are very public signals to the federal government that the Länder may be ready to exercise their veto power. The Bundesrat gives the German Länder considerably more power than their Austrian counterparts, which also belong to a highly institutionalized IGR system but lack the power to veto trade agreements.<sup>42</sup>

Although second chambers are a core element of federal institutional architectures, in practice most of them are not effective bulwarks for territorial interests in federal decision-making, including on trade policy. The German Bundesrat, while certainly not isolated from the pressures of partisan politics, stands out in this respect. Building on a long historical tradition of executive federalism, Land governments carefully balance their own interests as territorial actors in the federal arena with pressures emanating from party politics. Within our group of five federations, the German Bundesrat is the only second chamber that serves as an important forum where subfederal units can shape the direction of trade policy.

## CONCLUSION

Institutional resources are crucial to understand how and – to some extent – why subfederal actors participate in the politics of trade. In this paper, we identified three key elements of federal architecture that shape subfederal units' engagement in trade policy in different ways: the allocation of competencies, the IGR system and the second chamber.

These three institutional resources do not carry the same weight. The strongest institutional foundation results from competencies that are directly or indirectly related to trade policy. The subfederal units with the strongest institutional foundation, namely the Swiss cantons and the Belgian regions and communities, have both: constitutional rights to participate in foreign policy, including trade; and exclusive competencies that may be affected by comprehensive trade agreements. The German case, moreover, indicates that second chambers can also serve as an institutional vehicle for subfederal engagement. However, this is because the Bundesrat conforms to the council

<sup>42</sup> The Austrian Bundesrat is composed of members who are delegated and partially elected by the Land legislatures, the Landtage. However, it is a comparatively weak second chamber with no authority to block ordinary legislation. Although the Bundesrat has attended to trade policy recently, most notably by adopting a unanimous opinion in May 2016 rejecting the provisional application of TTIP and CETA, the IGR system represents a more important institutional channel for Land governors to participate in trade politics.

model of second chambers, which allows for direct representation of subfederal governments in federal decision-making. Because most federal systems have adopted some form of the senate model, we conclude that second chambers are most often of limited use for subfederal actors to assert a role in international trade policy.

By contrast, the lack of direct or indirect competencies, combined with a weak second chamber, explains the lack of influence of the Austrian Länder. Despite their unanimous opposition to recent trade agreements such as TTIP and CETA, they had to rely on the IGR system to raise their concerns and were unable to prevent the federal government from ratifying CETA. Although IGRs do not specifically empower subfederal actors, a well-functioning system can mitigate frictions and enhance predictability. The Swiss case exemplifies how a combination of trade-related competencies and institutionalized cooperation through IGR contributes to legitimacy and effectiveness in the multilevel politics of trade.

What, then, are the implications of this comparative survey for Canada?

First, while the Canadian provinces do not enjoy direct participation rights like their Swiss and Belgian counterparts, free trade agreements increasingly affect a broad array of (often exclusive) provincial jurisdictions. The federal government's dependence on provincial compliance with trade agreement provisions in these areas has been the most important factor leading to different forms of provincial engagement. The extent of provincial involvement, however, varies significantly. It is largely contingent on how much influence the federal government of the day is willing to grant.

Second, it may be tempting to call for institutional change in order to more firmly entrench provincial participation rights, using the Swiss or Belgian case as a template for reform. This, however, is not a feasible scenario for Canada as it would require constitutional change (which, since the late 1980s, has proven impossible to achieve). It is difficult to imagine the federal government agreeing to entrench provincial participation rights in the Constitution. Even less realistic would be a proposal to replace the Senate with a second chamber of the council type, a proposal that was discussed in the late 1970s and early 1980s.<sup>43</sup>

Third, more feasible options for reform should be conceived of as part of Canada's "non-constitutional renewal."<sup>44</sup> Since the late 1990s, federal and provincial governments have tried to overcome the constitutional impasse by negotiating numerous multi- and bilateral intergovernmental agreements in different sectors. In addition, the Council of the Federation was established as a more permanent instrument for provincial-territorial exchange. Although efforts to better institutionalize intergovernmental cooperation do not empower subfederal units in the same way as direct or indirect trade-related competencies, IGRs facilitate regular, more predictable interactions between and among governments. This is important, especially in times of increased

<sup>43</sup> D. Smiley and R. Watts, *Intrastate Federalism in Canada* (Toronto: University of Toronto Press, 1985), 121ff.

<sup>44</sup> H. Lazar (ed.), *Canada: The State of the Federation 1997: Non-Constitutional Renewal* (Montreal and Kingston: McGill-Queen's University Press, 1998); P. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed. (Toronto: University of Toronto Press, 2004), 228ff.

uncertainty when governments are expected to find adequate policy responses to cope with encompassing second-generation agreements that often include “be-hind-border measures,” as in the fields of government procurement or service liberalization, on the one hand, and the resurgence of protectionist measures, on the other.

The comparatively low degree of IGR institutionalization in Canada gives governments at both levels considerable flexibility. But it also comes at a price: interactions are less predictable for both sides. The degree of provincial inclusion in trade politics fluctuates between fuller participation (as in CETA) and a more subordinate role (as in the CPTPP). Provincial governments have nevertheless been quite active in both internal and international trade politics. They addressed internal trade barriers through agreements such as the New West Partnership Trade Agreement (NWPTA), an accord reached by British Columbia, Alberta, Saskatchewan and Manitoba in 2010, or the Canada-wide Canadian Free Trade Agreement (CFTA). The CFTA, which came into effect in July 2017, replaces the Agreement on Internal Trade of 1995 and promises to eliminate trade barriers more effectively than its predecessor.<sup>45</sup> Provincial governments have also responded unilaterally to protectionist measures emanating from the subfederal and federal levels south of the border.

In short, while federal and provincial governments want to preserve the advantages of the current system, improving intergovernmental coordination and cooperation has the potential to mitigate that system’s volatility.

In order to avoid harmful unilateral behaviour and strengthen reliability through more formalized processes for consultation, coordination and cooperation, we propose considering two pathways for reform.

First, horizontal cooperation has become an important feature of IGRs in many federations. The Council of the Federation, established in 2004, is reminiscent of similar efforts in other federations – for example, Switzerland – to institutionalize an intergovernmental forum for subfederal governments to position themselves on important issues or even to engage in national agenda-setting. If provincial governments want to assert a stronger, more durable role in international trade politics, the Council of the Federation should be one important avenue for reform. As Jared Wesley has argued recently, strengthening the Council of the Federation promises to enable provinces to formulate common priorities and positions and develop joint strategies.<sup>46</sup> We concur. Furnishing the Council of the Federation with better resources – most notably an enhanced secretariat with more full-time staff – could help the provinces develop a higher profile in international trade policy.

Second, in order to enhance the potential for vertical cooperation, we suggest learning from the experience of other policy sectors. Compared with federations such as

<sup>45</sup> For the NWPTA, see <http://www.newwestpartnershiptrade.ca/>; for the CFTA, <https://www.cfta-alec.ca/>. Accessed July 11, 2018. On recent internal trade reforms, see C. Kukucha, “Internal Trade Agreements in Canada: Progress, Complexity and Challenges,” *Canadian Journal of Political Science* 48, no. 1 (2015): 195–218.

<sup>46</sup> Wesley, *Coordinating Federalism*.

Germany, Austria and Switzerland, the degree of IGR institutionalization in Canada is rather low. However, as Robert Schertzer, Andrew McDougall and Grace Skogstad have shown, a more fine-grained analysis reveals considerable variation of IGR structures in different policy sectors.<sup>47</sup> A higher degree of IGR institutionalization, as in agriculture and immigration policy, has encouraged a stronger commitment to collaborate and reduced the potential for unilateral action. Policy solutions, then, tend to better reflect pan-Canadian objectives and the needs of the provinces and territories.

Accordingly, another pathway for reform could be the development of a framework agreement on trade in order to foster permanent cooperation in trade politics. There is no guarantee that norms governing joint responsibilities would automatically flow from a new institutional framework. But such an agreement, which could build on the existing C-Trade committee system, can promote workable norms through regular interactions, similar to agriculture or immigration policy.<sup>48</sup> It would be necessary to clarify the roles and responsibilities of the federal government and the provinces and territories at all stages of the trade policy cycle. The agreement would also need to cover the extent of provincial participation, according to the depth and content of trade negotiations. In particular, it should stipulate the requirements for either voluntary or mandatory participation rights in the formulation phase (negotiation mandate) and in the negotiation process itself. The agreement should also include provisions concerning cooperation in trade dispute resolution.

The dramatic change in the direction of US trade policy has highlighted the need to establish a more institutionalized framework for trade policy governance. To be sure, the success of intergovernmental agreements in Canada varies significantly. It is difficult to enforce compliance (such agreements are not justiciable), and their effectiveness relies on the signatories' goodwill. But an intergovernmental agreement has potential because it would provide a more visible, formalized governance framework for trade politics. In light of recent and ongoing developments in the international trade sector and the current federal government's commitment to revive collaborative federalism in Canada, the political timing is advantageous for exploring such reforms.

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<sup>47</sup> Schertzer, McDougall and Skogstad, *Collaboration and Unilateral Action*.

<sup>48</sup> Schertzer, McDougall and Skogstad, *Collaboration and Unilateral Action*, 24.





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